Exploring Ethics & Hot Topics in Condo & Coop Law

Dennis Greenstein, Esq.
Seyfarth Shaw LLP, New York, NY

EXPLORING ETHICS, CASES & HOT TOPICS IN CONDO & COOP LAW

Dennis H. Greenstein; *Partner, Seyfarth Shaw LLP*

I. Ethical Concerns in Coop/Condo Practice

A. Applicable Rules of Professional Conduct

1. Rule 1.7: Conflict of Interest

a) Rule 1.7(a): Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial business, property or other personal interests.

b) Rule 1.7(b): Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

2. Rule 1.13: Organization as Client

a) Rule 1.13(a): When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

b) Rule 1.13(d): A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization

other than the individual who is to be represented, or by the shareholders.

B. Situations to Consider Regarding Conflicts

1. Representing Condominium Boards in mixed-use buildings

2. Representing Condops

3. Representing Homeowners Associations with Condominium Boards being members

II. Cases

A. New York City Pet Law

Backman v. Kleidman, 27 Misc. 3d 1215(a) (2010)

B. Condominium Rules and Regulations

In the Matter of William M. Olszewski, et al. v. Cannon Point Association, 148 A.D.3d 1306 (2017)

C. Meetings and Elections

Factor v. Golf View Condominium I, 2018 N.Y. Misc. LEXIS 6792 (2018)

D. Attorney/Client Privilege

United States v. Condo. Bd. of the Kips Bay Towers Condo., Inc., 2017 U.S. Dist. LEXIS 221860 (2017)

E. Business Judgment Rule

345 E. 50th St. LLC v. Board of Managers of M at Beekman Condominium, 166 A.D.3d 546 (2018)

F. Party Walls

Ehrenberg v. Regier, 142 A.D.3d 765 (2016)

G. Cooperative Corporation's Escrow Agreement as Security Deposit

930 Fifth Ave. Corp. v. Shearman, 50775/06, NYLJ (2007)

H. License to Access

Matter of New York Pub. Lib. V. Condominium Bd. of the Fifth Ave. Tower, 170 A.D.3d 544 (2019)

I. Air Rights

1. *Brady v. 450 W. 31st St. Owners Corp.*, 2014 N.Y. Misc. LEXIS 3193

III. Hot Topics

A. Smoking Nuisance

1. *Priceman Family LLC v. Kerrigan*, 2018 NYLJ LEXIS 1738 (2018)

2. *Ewen v. Maccherone*, 32 Misc. 3d 12, 927 N.Y.S.2d 274, 2011 N.Y. Misc. LEXIS 2471, 2011 NY Slip Op 21185

3. *Abrams v. Board of Mgrs. Of 25 Beekman Place Condominium*, 2019 N.Y. Misc. LEXIS 1004

B. Representing Purchasers of Cooperatives/Condominiums

C. Reasonable Accommodation for a Disability

1. Form of Application for Reasonable Accommodation

2. Form of Assistance Animal Requests

3. Seyfarth Shaw Memo

Backman v. Kleidman

Civil Court of the City of New York, New York County

April 26, 2010, Decided

L & T 99510/2009

Reporter
27 Misc. 3d 1215(A) *; 910 N.Y.S.2d 760 **; 2010 N.Y. Misc. LEXIS 909 ***; 2010 NY Slip Op 50756(U) ****

[**1]** Tatiana Backman and NORA PINES, As Trustees of CHADO TRUST, Petitioners, against Carl Kleidman, Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

cat, Pet, condominium, lease, summary judgment

Headnotes/Summary

Headnotes

[*1215A] [760]** Condominiums and Cooperatives--Proprietary Lease--No-Pet Provision in Lease--New York City Pet Law.

Counsel: **[***1]** Silversmith & Veraja, LLP, New York City (Robert G. Silversmith of counsel), for petitioners.

Vernon & Ginsburg, LLP, New York City (Steven T. Hasty and Yoram Silagy of counsel), for respondent.

Judges: Gerald Lebovits, J.

Opinion by: Gerald Lebovits

Opinion

Gerald Lebovits, J.

Petitioners are the owners and landlords of Unit PH-C on the penthouse floor of 27 West 72nd Street, a market-rate ***rental*** ***condominium*** in New York County. Respondent, the record tenant, entered into possession under lease made in July 2009. Petitioners served respondent with a cure notice in November 2009 based on respondent's alleged violation of Article 38 of the lease agreement, which provides that respondent "may not keep any pets in the apartment." Petitioners later served respondent with a termination notice based on respondent's alleged failure to comply with the cure notice.

It is undisputed that respondent keeps a cat in his apartment.

Respondent moves for summary judgment on the ground that petitioners waived their right to enforce the no-pet provision of the parties' lease under ***Section 27-2009.1 of the Administrative Code of the City of New York***, called the "Pet Law." The Pet Law provides that a landlord waives its right to object **[***2]** to the existence of a pet if a proceeding is not commenced within three months of the owner's, or an agent's, learning about a pet's existence. Petitioners cross-move for summary judgment. Both motions are consolidated for disposition. Petitioners also move to dismiss respondent's affirmative defenses.

To prevail on a motion for summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law. (*Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]*; *Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]*.) This standard requires that the proponent of the motion for summary judgment make a prima facie showing of **[****2]** entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admission form" to demonstrate the absence of any material issues of fact." (*Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]*.)

In this case, it is undisputed that Benjamin Prado, the on-site building supervisor/superintendent, knew that respondent kept a cat in his dwelling for more than three months before this proceeding began. Petitioners argue, however, that any knowledge by the condominium's superintendent about the existence **[***3]** of a cat belonging to respondent cannot be imputed to petitioners for the purpose of effecting a waiver of the Pet Law. According to petitioners, the superintendent was not employed directly by petitioners but by the condominium board of managers. Accordingly, petitioners argue that the superintendent had no duty to report the existence of the cat to petitioners. Petitioners also claim that the superintendent learned about the cat because he performed work for respondent outside the scope of his employment duties fro the condominium.

Petitioners cite several cases for the proposition that the Pet Law does not apply to condominiums: *Bd. of Managers of the Parkchester N. Condominium v Quiles (234 A.D.2d 130, 651 N.Y.S.2d 36 [1st Dept 1996]*; *Bd. of Managers of Suffolk Homes Condominium v Cheng (21 Misc 3d 1145[A], 875 N.Y.S.2d 818, 2008 NY Slip Op 52500[U], *3 [Sup Ct, NY County 2008])*. But these cases stand for the principle that in the First Department, the Pet Law does not apply if a condominium board is enforcing a no-pet clause against a unit's fee owner. That circumstance is different from the facts here.

Summary judgment is denied for both respondent and petitioners because an issue of fact arises about **[***4]** petitioners' relationship with Prado, the building supervisor/superintendent, and petitioners' relationship with the board of managers, which petitioners claim is Prado's direct employer. This court cannot determine from the parties' papers whether a principal-agent relationship existed between Prado and the petitioners. If that relationship did exist, the Pet Law applies, and petitioners might have waived their right to evict respondent under the parties' lease.

Respondent's four other affirmative defenses are dismissed. Respondent argues that petitioners did not properly serve the petition and notice of petition. According to respondent, the attempts to serve him were made without due diligence and were not served by affixing upon the door and were only received by regular mail. The affidavit of service of Jazmin Patino, a licensed process server, indicates that service was properly effected. A proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient to support a finding of jurisdiction. Where, however, a respondent rebuts an affidavit of service with a sworn denial of service, the petitioner must establish jurisdiction by a preponderance **[***5]** of the evidence at a traverse hearing. (*See e.g. Skyline Agency v. Ambrose Coppotelli, 117 AD2d 135, 502 N.Y.S.2d 479*, xx [2d Dept. 1986].) Because respondent has offered only conclusory allegations and not a specific explanation about how or why service was defective, the claim is rejected. No traverse hearing will be held.

[**3]** Respondent further contends that he is permitted to keep his cat in his unit because the "condominium documents allow pets in the units." This court disagrees with respondent's interpretation of the condominium's Rules and Regulations. Paragraph 12 of the Rules and Regulations provide that permission to keep dogs, caged birds, cats, and fish in a residential unit is a right accorded to the unit owner, such as petitioners. Given the lease between petitioners and respondent, petitioners lawfully chose not to permit respondent to keep the cat in the unit.

Respondent claims that petitioners, through their real estate agent, consented, before respondent moved into the premises, to respondent's harboring a cat. This claim is rejected; it contradicts the terms of the lease agreement executed between petitioners and respondent, Paragraph 3 of which unambiguously provides that "you may not **[***6]** keep any pets in the Apartment."

Respondent also argues that the proceeding should be dismissed due to waiver, laches, and consent because (1) petitioners "accepted rent from respondent with full knowledge that respondent was harboring a cat in his unit," (2) respondent "relied on petitioner's conduct of allowing respondent to keep his cat and in reliance moved into the subject apartment," and (3) respondent purportedly "would be irreparably harmed if petitioner is allowed to reverse its position." This argument is rejected. Respondent offers no fact indicating that petitioners personally knew that respondent was harboring a cat in his unit.

This proceeding is adjourned for trial to May 13, 2010.

This opinion is the court's decision and order.

Dated: April 26, 2010

Matter of Olszewski v Cannon Point Assn., Inc.

Supreme Court of New York, Appellate Division, Third Department

March 9, 2017, Decided ; March 9, 2017, Entered

522683

Reporter
148 A.D.3d 1306 *; 49 N.Y.S.3d 571 **; 2017 N.Y. App. Div. LEXIS 1723 ***; 2017 NY Slip Op 01737 ****; 2017 WL 923125

[**1]** In the Matter of William M. Olszewski et al., Respondents, v Cannon Point Association, Inc., et al., Appellants.

Core Terms

condominium, bylaws, homeowners, board of directors, association's, respondents', restrictions, provisions, amendments, rental, lease, regulations, summary judgment, real property, declarations, properties, citations, convey, ownership, quotation, marks

Case Summary

Overview
HOLDINGS: [1]-In a CPLR art. 78 hybrid matter, the HOA exceeded its authority by adopting rules to the subject bylaws because the rules imposed numerous limitations upon a unit owner's rental of his or her property, and conflicted with the provision of the HOA's bylaws granting a unit owner the right to convey or lease his or her home "free of any restrictions."

Outcome
Appeal dismissed; judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Appellate Review

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **State Declaratory Judgments, Appellate Review**

No appeal as of right lies from a nonfinal order in a CPLR art. 78 proceeding and, in the context of a declaratory judgment action, the right to appeal from a nonfinal order terminates upon the entry of a final judgment.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > Formation

HN2[] **Condominiums, Condominium Associations**

Condominium ownership is a hybrid form of real property ownership, created by statute, Real Property Law art. 9-B, and may be described as a division of a parcel of real property into individual units and common elements in which an owner holds title in fee to his or her individual unit as well as retaining an undivided interest in the common elements of the parcel. Once a condominium is created, the administration of the condominium's affairs is governed principally by its bylaws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements.

Contracts Law > Contract Interpretation > Intent

HN3[] **Contract Interpretation, Intent**

It is axiomatic that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > Parol Evidence

HN4[] **Contract Interpretation, Ambiguities & Contra Proferentem**

A contract must be read as a whole to determine its purpose and intent, and it should be interpreted in a way that reconciles all its provisions, if possible. To that end, a reading of the contract should not render any portion thereof meaningless, and the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose. Finally, a court may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing and, if the contract is clear and complete on its face, extrinsic evidence may not be used to create an ambiguity where one does not otherwise exist.

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

HN5[] **Condominiums, Purchase & Sale**

As a general proposition, because of the manner in which ownership in a condominium is structured, the individual unit owner, in choosing to purchase the unit, must give up certain of the rights and privileges which traditionally attend fee ownership of real property and agree to subordinate them to the group's interest.

Headnotes/Summary

Headnotes

Appeal—Finality of Judgments and Orders—Right to Appeal from Nonfinal Order

Condominiums and Cooperatives—Bylaws—Homeowners' Right to Lease—Conflict with Homeowners' Association Rules

Counsel: **[***1]** Goldberg Segalla, LLP, Albany (William H. Baaki of counsel), for appellants.

Walsh & Walsh, LLP, Saratoga Springs (Jesse P. Schwartz of counsel), for respondents.

Judges: Before: Peters, P.J., McCarthy, Egan Jr., Rose, Mulvey, JJ. Peters, P.J., McCarthy, Rose and Mulvey, JJ., concur.

Opinion by: Egan Jr.

Opinion

[573]** **[*1306]** Egan Jr., J. Appeals (1) from an order of the Supreme Court (Krogmann, J.), entered May 5, 2015 in Warren County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, among other things, denied respondents' motion to dismiss the petition/complaint, and (2) from a judgment of said court, entered January 5, 2016 in Warren County, which granted petitioners' motion for summary judgment.

Cannon Point is a condominium community located in the Town of Lake George, Warren County. The community consists of two, 24-unit condominium associations, respondent Cannon Point Condominium I and respondent Cannon Point Condominium II, and a homeowners' association, respondent Cannon Point Association, Inc. (hereinafter HOA). Each of the three associations is governed by a declaration and set of bylaws[1] and is managed by a board **[****2]** that, in turn, is elected by unit owners and/or members. **[***2]** [2] The community's common **[**574]** areas, including tennis

[1] Amendments to each association's declarations or bylaws requires a vote of a specified percentage of its homeowners/members; if approved, recording of such amendments in the Warren County Clerk's office is required—by either the express terms of those documents or operation of *Real Property Law article 9-B*—in order for the amendments to be effective (*see Real Property Law §§ 339-s*, *339-u*).

[2] Unit owners automatically become members of the HOA by virtue of their ownership of a condominium unit.

and basketball courts, picnic areas, a club house (known as the Manor House), the beach (together with adjacent docks and boat slips) and roadways, are managed by the HOA board of directors.

By letter dated March 25, 2014, the HOA board of directors advised condominium owners—including petitioners—that they had unanimously approved the "Cannon Point House Rules and Regulations" (hereinafter the 2014 rules)—effective April 1, 2014. Insofar as is relevant here, the 2014 rules imposed numerous limitations and restrictions upon condominium owners wishing to lease their properties—including, but not limited to, a requirement that no unit may be rented for a period of less than two weeks and a prohibition barring renters from access **[*1307]** to the Manor House.[3] Lessees who rented a condominium for less than 90 days also were precluded from having guests or pets on the property. Owners who elected to rent their properties were required to pay a rental fee and an administrative fee to the HOA, and owners who failed to comply with the provisions of the 2014 rules were subject to fines and penalties.

Petitioners thereafter commenced this combined **[***3]** CPLR article 78 proceeding and action for declaratory judgment to challenge and enjoin the 2014 rules.[4] Specifically, petitioners argued, among other things, that the rental restrictions imposed by the 2014 rules violated each condominium association's bylaws, which provided, in relevant part, that "[a]ny [h]ome may be conveyed or leased by its . . . [o]wner free of any restrictions"—provided the common charges or HOA expenses assessed against such unit have been paid. Respondents filed a pre-answer motion to dismiss, contending that the petition was time-barred and failed to state a cause of action and that judicial review thereof was precluded by the business judgment rule. By order entered May 5, 2015, Supreme Court denied respondents' motion to dismiss and preliminarily enjoined enforcement of the 2014 rules. Respondents then answered and moved by order to show cause for an order vacating or modifying the preliminary injunction, and petitioners cross-moved for summary judgment seeking, among other things, a declaration that the 2014 rules were null and void. By order entered January 5, 2016, Supreme Court granted petitioners' motion for summary judgment finding, among other things, that the HOA board of directors **[***4]** exceeded its authority by imposing the 2014 rules without amending the relevant bylaws. These appeals by respondents ensued.

Preliminarily, respondents' appeal from Supreme Court's May 2015 order must be dismissed because ***HN1***[] "[n]o appeal as of right lies from a nonfinal order in a CPLR article 78 proceeding" and, in the context of a declaratory judgment action, "the right to appeal from a nonfinal order terminates upon the entry of a final judgment" (*Matter of 1801 Sixth Ave., LLC v **[****3]** Empire Zone Designation Bd., 95 AD3d 1493, 1495, 944 NYS2d 397 [2012]* [internal quotation marks and citations omitted], *lv dismissed 20 NY3d 966, **[*1308]** 982 NE2d 90, 958 NYS2d 327 [2012]*). Additionally, we reject respondents' assertion **[**575]** that this combined CPLR article 78 proceeding and action for declaratory judgment is untimely. As Supreme Court observed and the record reflects, petitioners were notified of the 2014 rules by letter dated March 25, 2014 and commenced this proceeding/action within four months thereof.

Turning to the merits, the present dispute primarily centers upon whether the 2014 rules adopted by the HOA board of directors, which imposed numerous limitations upon a homeowner's rental of his or her property, conflict with the relevant provisions of each condominium association's bylaws—specifically, the provision granting a homeowner the right **[***5]** to convey or lease his or her home "free of any restrictions" (provided the common charges or HOA expenses assessed against each unit have been paid)—and, more to the point, whether the HOA board of directors exceeded its authority by adopting such rules absent an amendment to the subject bylaws. To our analysis, the answer to these questions is yes and, hence, Supreme Court properly granted petitioners' motion for summary judgment.

HN2[] "Condominium ownership is a hybrid form of real property ownership, created by statute" (*Board of Mgrs. of Vil. View Condominium v Forman, 78 AD3d 627, 629, 911 NYS2d 378 [2010]* [citations omitted], *lv denied 17 NY3d 704, 952 NE2d 1090, 929 NYS2d 95 [2011]*; *see* Real Property Law art 9-B), and "may be described as a division of a parcel of real property into individual units and common elements in which an

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[3] As relevant here, the primary distinguishing feature between the 2014 rules and the rules previously adopted by the HOA board of directors in 2004 and 2012 was the minimum rental period; under both the 2004 and 2012 rules, which apparently went unchallenged, one-week rentals were permitted.

[4] Petitioners purchased their respective parcels at the end of 2012, and petitioner William M. Olszewski expressly averred that he was unaware of the 2012 rules prior to closing.

owner holds title in fee to his [or her] individual unit as well as retaining an undivided interest in the common elements of the parcel" (*Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1, 5-6, 523 NYS2d 523 [1987]*). "Once a condominium is created, 'the administration of the condominium's affairs is governed principally by its bylaws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's **[***6]** common elements' " (*Glenridge Mews Condominium v Kavi, 90 AD3d 604, 605, 933 NYS2d 730 [2011]*, quoting *Schoninger v Yardarm Beach Homeowners' Assn, 134 AD2d at 6*; *see Board of Mgrs. of Vil. View Condominium v Forman, 78 AD3d at 629*).

The governing documents at issue here, i.e., each condominium association's bylaws and declarations, are contracts, and our review and analysis thereof is governed by principles of contract interpretation that are both familiar and well-settled. As a starting point, ***HN3***[] "[i]t is axiomatic that a contract is to be construed in accordance with the parties' intent, which is **[*1309]** generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Maldonado v DiBre, 140 AD3d 1501, 1506, 35 NYS3d 731 [2016]* [internal quotation marks and citations omitted], *lv denied 28 NY3d 908, 47 NYS3d 223, 69 NE3d 1019 [2016]*; *see Beal Sav. Bank v Sommer, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]*; *Tompkins Fin. Corp. v John M. Floyd & Assoc., Inc., 144 AD3d 1252, 1253, 41 NYS3d 577 [2016]*). Further, ***HN4***[] "the contract must be read as a whole to determine its purpose and intent, and it should be interpreted in a way that reconciles all its provisions, if possible" (*A. Cappione, Inc. v Cappione, 119 AD3d 1121, 1122-1123, 990 NYS2d 297 [2014]* [internal quotation marks, brackets and citations omitted]; **[**576]** *see Beal Sav. Bank v Sommer, 8 NY3d at 324-325*; *Siebel v McGrady, 170 AD2d 906, 907, 566 NYS2d 736 [1991]*, *lv denied 78 NY2d 853, 577 NE2d 1058, 573 NYS2d 466 [1991]*). To that end, "[a] reading of the contract should not render any portion [thereof] meaningless" (*Beal Sav. Bank v Sommer, 8 NY3d at 324*; *see Durrans v Harrison & Burrowes Bridge Constructors, Inc., 128 AD3d 1136, 1138, 8 NYS3d 700 [2015]*; *Siebel v McGrady, 170 AD2d at 907*), "and the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose" (*A. Cappione, Inc. v Cappione, 119 AD3d at 1123* [internal quotation marks and citations omitted]). **[***7]** Finally, a **[****4]** "court[ ] may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475, 807 NE2d 876, 775 NYS2d 765 [2004]* [internal quotation marks and citations omitted]) and, if the contract is clear and complete on its face, extrinsic evidence may not be used to create an ambiguity where one does not otherwise exist (*see South Rd. Assoc., LLC v International Bus. Machs. Corp., 4 NY3d 272, 278, 826 NE2d 806, 793 NYS2d 835 [2005]*; *Matter of Delmar Pediatrics Asthma & Allergy Care, P.C. [Pasternack—Looney], 35 AD3d 987, 988, 828 NYS2d 589 [2006]*).

Initially, we reject respondents' assertion that the relevant declarations and bylaws contain competing contractual provisions that, in turn, create an ambiguity, thereby precluding an award of summary judgment to petitioners. As noted previously, each condominium association's bylaws (as well as the HOA's bylaws) clearly, expressly and unequivocally provide that "[a]ny [h]ome may be conveyed or leased by its . . . [o]wner free of any restrictions"—the sole caveat being that the common charges or HOA expenses assessed against such unit have been paid. Each condominium association's bylaws also contain a provision acknowledging that its board of managers may "make reasonable rules and regulations and . . . amend **[*1310]** the same from time to **[***8]** time, and [that] such rules and regulations and amendments shall be binding upon the [homeowners] when the [b]oard has approved them in writing" and delivered a copy thereof to each home. A similar provision is embodied in the HOA's bylaws, which reflects that the HOA's affairs shall be managed by its board of directors and enumerates the powers granted thereto. In this regard, one of the powers granted to the HOA's board of directors is "[t]o make reasonable rules and regulations and to amend same from time to time. Such rules and regulations and amendments thereto shall be binding upon the [m]embers when the [b]oard has approved them in writing and delivered a copy of such rules and all amendments to each [m]ember. Such rules and regulations may, without limiting the foregoing, include reasonable limitations on the use of the [c]ommon [p]roperties by guests of the [m]embers, as well as reasonable admission and other fees for such use."

Reading these provisions as a whole, as we must, the import of the quoted language is clear—respondents

indeed may adopt reasonable rules and regulations relative to the business and/or property of the condominium associations and/or the HOA *provided* such rules and regulations do not conflict with or purport to **[***9]** impair a right expressly granted to the individual homeowners (such a petitioners) by the relevant bylaws. Here, the 2014 rules impose various requirements/restrictions **[**577]** upon homeowners who wish to lease their properties—requirements and restrictions that do not appear anywhere in the governing bylaws and, more to the point, are in direct conflict with the provisions thereof granting homeowners the right to convey or lease their properties "free of any restrictions."[5] Under these circumstances, the plain and unequivocal provisions of the bylaws relative to the rental of individual homeowner units precludes **[****5]** respondents—specifically, the HOA board of directors—from unilaterally adopting the 2014 rules in the fashion accomplished here.[6] To hold otherwise would render meaningless the provisions permitting homeowners to convey or lease their properties "free of any restrictions."

[*1311] That is not to say that respondents (again, particularly the HOA board of directors) cannot adopt reasonable rules governing, among other things, the rental of individual homeowner units. Indeed, it has been observed that, ***HN5***[] as a general proposition, "[b]ecause of the manner in which ownership in a condominium is structured, **[***10]** the individual unit owner, in choosing to purchase the unit, must give up certain of the rights and privileges which traditionally attend fee ownership of real property and agree to subordinate them to the group's interest" (*Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d at 6*). Here, however, petitioners expressly were granted the right to lease their properties free of any restrictions; hence, to the extent that respondents wish to impose rules in this area, they may do so—but only if the rules so adopted do not in fact conflict with the rights and privileges conveyed to petitioners (and similarly situated homeowners) pursuant to the relevant provisions of the bylaws or, failing that, respondents successfully avail themselves of the procedures set forth in the declarations and bylaws relative to the amendment thereof. If, as respondents assert, the impact of short-term rentals upon the character of the Cannon Point community is so injurious as to warrant adoption of the restrictions imposed by the 2014 rules, then their task is to persuade the required percentage of each association's homeowners/members as to the merit of their position and amend the bylaws accordingly. Absent appropriate amendment to the relevant governing documents, **[***11]** however, the 2014 rules constitute an impermissible exercise of respondents' powers (*see Board of Mgrs. of Vil. View Condominium v Forman, 78 AD3d at 630*). Further, as respondents' actions were unauthorized, their actions were not protected by the business judgment rule (*see Yusin v Saddle Lakes Home Owners Assn., Inc., 73 AD3d 1168, 1171, 902 NYS2d 139 [2010]*; *Strathmore Ridge Homeowners Assn., Inc. v Mendicino, 63 AD3d 1038, 1039, 881 NYS2d 491 [2009]*).

[578]** As we are satisfied that petitioners demonstrated their entitlement to judgment as a matter of law and, further, that respondents failed to raise a triable issue of fact in opposition thereto, Supreme Court properly granted petitioners' motion for summary judgment. In light of this conclusion, respondents' arguments relative to the granting of the preliminary injunction are academic. Respondents' remaining contentions, to the extent not specifically addressed, including their assertion that the rental rules adopted in 2012 should somehow be revived, have been examined and found to be lacking in merit.

[*1312] Peters, P.J., McCarthy, Rose and Mulvey, JJ., concur. Ordered that the appeal from the order is dismissed. Ordered that the judgment is affirmed, with costs.

End of Document

[5] Although we decline to substantively address each provision of the 2014 rules, we note in passing that a further conflict appears between a provision in the rules barring renters access to the Manor House and a provision in the HOA's bylaws that provides, in relevant part, that "[i]n the event that a [m]ember shall lease or permit another to occupy his [or her] [h]ome, the lessee or occupant shall[,] at the option of the [m]ember, be permitted to enjoy the use of the [c]ommon [p]roperties in lieu of and subject to the same restrictions and limitations as said [m]ember."

[6] Contrary to respondents' assertion, the fact that the HOA board of directors previously adopted similar rules in 2004 and 2012 without apparent objection from homeowners is of no moment. If the rules adopted are contrary to the provisions of the relevant bylaws, the rules cannot stand—at least not without amending the subject bylaws.

Factor v Golf View Condominium I

Supreme Court of New York, Richmond County

December 18, 2018, Decided

150256/2018

Reporter
2018 N.Y. Misc. LEXIS 6792 *; 2018 NY Slip Op 33470 (U) **

[1]** HARLENE FACTOR, JASON TRAZOFF and MARLENE FACTOR, ON BEHALF OF THE BOARD OF MANAGERS OF GOLF VIEW CONDOMINIUM 1, Plaintiffs, -against- GOLF VIEW CONDOMINIUM 1, GOLF VIEW HOMEOWNERS ASSOCIATION, INC., and JOHN DOE 1-10 and JANE DOE 1-10, said names being fictitious, Defendants. Index No.: 150256/2018

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

election, Condominium, homeowner, nullity, notice, member of the board, special meeting, Bylaws, annual meeting, fiduciary duty, show cause, unit owner, declaration, first cause, supervised, administered, unauthorized, restrained, themselves, convene, filling, e-mail, enjoin, Plaintiffs', defendants', terminated, appointed, directive, non-Board, suspended

Judges: **[*1]** Hon. Kim Dollard, Acting Supreme Court Justice.

Opinion by: Kim Dollard

Opinion

DECISION AND ORDER

This plaintiffs brought action against the defendants by filing a complaint on or about February 1, 2018, asserting two causes of action. The first cause of action alleges breach of **[**2]** fiduciary duty and the second cause of action seeks a declaration that a meeting and election held on November 1, 2017 was proper.

With the filing of the summons and complaint, the plaintiffs brought an order to show cause to enjoin and/or restrain the defendants from managing Golf View Condominium 1; to enjoin Golf View Condominium 1 from entering into any contracts; to enjoin Golf View Condominium 1 from transferring assets; and to prohibit the Golf View Condominium 1 Board members from representing that they are members of the Board of Managers.

The plaintiffs assert that a special meeting was called and held on November 1, 2017 for the purpose of electing two new members to fill vacancies in the Board of Managers for Golf View Condominium 1, created when the president and vice president resigned. There were five persons present at the special meeting, which resulted in the election of plaintiff, Jason Trazoff as president, and **[*2]** Christine Anagnostos and Marlene Factor as members of the Board of Manager.

The defendants cross-moved to dismiss the first cause of action for breach of fiduciary duty and for a declaration that the meeting held by the plaintiffs on November 1, 2017 was a nullity. In support of its motion for dismissal of the first cause of action, the defendants assert that under New York law, the Condominium does not owe a fiduciary duty to its members or unit owners. The defendants further request a declaration that the November 1, 2017 meeting was a nullity.

The defendants attach affidavits from Lynnette Morello, current president of Golf View Condominium 1, and Lesly Hubert, a member of the current Board of Managers. Both board members attest that the November 1, 2017 special meeting was a nullity because notices were sent to the wrong individuals, notices were sent in the wrong manner and a person not on the Board was permitted to vote. Specifically, defendants established that the notice was sent by e-mail, and not by mail or telegraph pursuant to the bylaws; the e-mail was sent to Board and non-Board members. The notice was sent to Peter Burdzy and

Keith Gladitsch, both of whom were no longer **[*3]** Board members. Furthermore, Keith Gladitsch was permitted to vote, though he had resigned from the Board of Managers.

[3]** The defendants further request in a separate Order to Show Cause, a declaration that a meeting held on August 4, 2018, be declared a nullity; that the plaintiffs and members of a Dissident Group, be restrained from holding themselves out as members of the Golf View 1 Board of Directors and Home Owners Association; and for a directive that Golf View 1 and the Home Owners Association convene for an annual meeting and for an election administered by and supervised by Honest Ballot Association on September 15, 2018 or a subsequent date directed by the Court.

By affidavits from Lynette Morello and Lydia Nepson, the defendants assert that the parties had agreed to hold an independent election administered by Honest Ballot Association, Inc., for the purpose of filling seats on the Golf View 1 Board and Home Owners Association Board which are vacant or which were held by appointed rather than elected board members. Thereafter, the Dissident Group, which includes the plaintiffs, issued unauthorized notices of a special meeting to be held on August 4, 2018. The notices were not **[*4]** sent to all unit owners and were not authorized by the Board of Managers. Thereafter, Counsel for Golf View 1 and the Home Owners Association posted notices that the Special Meeting was not authorized by the Board of Golf View 1 or the Home Owners Association, and that any meeting was not in conformity with the Bylaws and would be a nullity. The notice also stated that an annual meeting and elections were being scheduled for September 14, 2018 with Honest Ballot Association, Inc. However, the Dissident Group continually tore down the notices. The meeting on August 4, 2018 was nevertheless held, after which members of the Dissident Group held themselves out as members of the Boards of Golf View Condominium 1 and the Homeowners Association. Since the unauthorized August 4, 2018 meeting, Carriage House, the managing agent which had been terminated, refused to accept its termination. Further, it appears that the Dissident Group also threatened vendors and interfered with the pool lifeguard and caused other disruption in the business of Golf View Condominium 1 and the Home Owners Association.

This Court was made aware that an annual meeting and election was going to be held and supervised **[*5]** by Honest Election Association on Saturday, September 14, 2018, which if held, would serve to resolve many, if not all of these issues, as well as the dissension and discord facing this condominium complex.

[4]** However, for reasons that are the subject of a separate Order To Show Cause to hold the plaintiffs in contempt, the election did not proceed on September 14, 2018, and the Golf View Condominium 1 and Home Owners Association are still awaiting their annual meeting and election.

To the extent that plaintiffs first cause of action alleges that the Board is liable for breach of fiduciary duty, such claims are dismissed. The Court notes that no opposition was submitted to dismissal of this cause of action. In any event, a corporation does not owe a fiduciary duty to its individual unit owners and shareholders. See *Stalker v Stewart Tenants Corp, 93 AD3d 550, 940 NYS2d 600 [1st Dept 2012]*; *Hyman v NY Stock Exch., Inc., 46 AD3d 335, 848 N.Y.S.2d 51 [1st Dept 2007]*; *Peacock v Herald Sq. Loft Corp., 67 AD3d 442, 889 N.Y.S.2d 22 [1st Dept 2009]*.

As to Plaintiffs' second cause of action, the Special Meetings held on November 1, 2017 and on August 4, 2018 are nullities, since they were not held in accordance with the Bylaws.

In the first instance, plaintiff, Trazoff concedes that he was Secretary of the Board when he called the November 1, 2017 meeting. According to the Bylaws (Article 3, Section 8), a Special Meeting can **[*6]** only be called by the President on three days notice, or by the Secretary only upon the written request of three Board members. This provision was not complied with.

Further, the meeting notice was sent by e-mail, which was an unauthorized means to notify of a meeting. Notwithstanding same, it appears that the notice was also sent to two non-members of the Board, and that a non-Board member was permitted to vote.

Accordingly, the November 1, 2017 meeting was a nullity, and anyone elected to either Board or to any Board position as a result of that meeting is a nullity. That being the case, the August 4, 2018 meeting, which was called by Trazoff and persons not properly elected to the Board of Managers, was similarly a nullity.

Mr. Trazoff was not the president of the Board when the August 4, 2018 meeting was called, and may not even have been a Board Member at the time. There is no proof that this meeting was called in accordance with the Bylaws. Board members, Nepson and Morello,

whose terms expire in 2019, attest that the Board of Managers never convened or authorized this meeting, and that Nepson, as president of the Board, never called for this Special Meeting. **[**5]** Additionally, there **[*7]** was no proof that a petition signed by 25% of the unit owners requested the Special Meeting. Therefore, the August 4, 2018 meeting is likewise a nullity.

Lastly, pursuant to the defendants' request, the Court finds that an annual meeting and election of Board Members to Golf View Condominium 1 and to the Home Owners Association is necessary.

In the Bylaws of Golf View Condominium 1, the Court found no provision limiting voting rights to only those unit owner members who are in good standing or who are not in arrears. Therefore, all unit owners are permitted to vote in the Golf View 1 Condominium election.

With respect to the Bylaws of the Home Owners Association, it is stated that "During any period in which a Member shall be in default in the payment of any assessment levied by the Association, the voting rights, if any, of such Member . . . may be suspended by the Board of Directors until such assessment has been paid" (Article VI, §2). Therefore, unless a home or unit owner has been specifically suspended, in writing, for non-payment of assessments by February 28, 2019, and afforded a thirty day period to cure any default, all unit or home owners shall be permitted to vote in elections for the Home **[*8]** Owners Association.

Accordingly, it is

ORDERED, that the plaintiffs' Order to Show Cause is denied in its entirety; and it is further,

ORDERED, that The defendants' Cross-Motion to dismiss the first cause of action for breach of fiduciary duty and for a declaration that the meeting held by the plaintiffs on November 1, 2017 was a nullity, is granted; and it is further,

ORDERED, that he defendants Order to Show Cause, for a declaration that a meeting held on August 4, 2018, be declared a nullity; that the plaintiffs and members of a Dissident Group, be restrained from holding themselves out as members of the Golf View 1 Board of Directors and Home Owners Association; and for a directive from the Court that Golf View 1 and the Home Owners Association convene for an annual meeting and for an election administered by and supervised by Honest Ballot Association, is granted; and it is further,

[6]** ORDERED, that a Special Meeting and/Annual Meeting and election be held on **April 27, 2019**, for purposes of filling vacancies in the Board of Managers of Golf View Condominium 1 and the Home Owners Association, and for replacing any appointed members with newly elected members, and that said meeting and/or **[*9]** election be held pursuant to the Bylaws and that it be supervised by Honest Election Association, Inc., or any other agreed upon election company; and it is further,

ORDERED, that the Order To Show Cause for Contempt, is held in abeyance and the parties are to appear for a status report concerning same on **May 10, 2019**.

ENTER,

/s/ Kim Dollard

Hon. Kim Dollard

Acting Supreme Court Justice

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United States v. Condo. Bd. of the Kips Bay Towers Condo., Inc.

United States District Court for the Southern District of New York

October 13, 2017, Decided; October 13, 2017, Filed

17cv361 (DLC)

Reporter
2017 U.S. Dist. LEXIS 221860 *

UNITED STATES OF AMERICA, Plaintiff, -v- THE CONDOMINIUM BOARD OF THE KIPS BAY TOWERS CONDOMINIUM, INC., Defendant.

Core Terms

attorney-client, discovery, waived, member of the board, discovery request, communications, asserts, no-pets, advice, make a decision, legal advice, law firm, accommodation, confidential, depositions, submissions, attorney's, privileged, concludes, responded, requests, reasons, courts, responsibilities, predominant, abundantly, circumvent, delegating, scheduling, undisputed

Counsel: **[*1]** For United States of America, Plaintiff: Jennifer Ellen Blain, United States Attorney's Office, SDNY, New York, NY USA; Peter Max Aronoff, United States Attorney's Office for the SDNY, New York, NY USA.

For The Condominium Board of The Kips Bay Towers Condominium, Inc., Defendant: Mitchel H. Ochs, Anderson & Ochs LLP, New York, NY USA; Steven S. Anderson, Anderson & Rottenberg, P.C., New York, NY USA.

Judges: DENISE COTE, United States District Judge.

Opinion by: DENISE COTE

Opinion

ORDER

DENISE COTE, District Judge:

In a September 15 letter to the Court, the Government sought leave to take discovery of the law firm Anderson & Ochs. This discovery dispute was not resolved during a September 15 telephone conference, and the Court issued an Order on September 18 scheduling briefing on the dispute. The defendant (the "Board") submitted an opposition brief to the discovery request on September 29. The Government responded on October 6. The defendant replied on October 12. Having considered the arguments made in the parties' submissions, the Court concludes that discovery of the law firm Anderson & Ochs is proper.

A party invoking the attorney-client privilege must show "(1) a communication between client and counsel that **[*2]** (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007)*. In making the purpose determination, courts consider "whether the predominant purpose of the communication is to render or solicit legal advice." *Id. at 420*. The attorney-client privilege "may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)* (citation omitted). In the instant case, the attorney-client and work product privileges do not extend to the communications between Anderson & Ochs and the defendant or to pertinent documents regarding the creation and administration of the Condominium Board's amended no-pets policy, for three primary reasons.

First, it is undisputed that it is appropriate for the Government to conduct discovery of members the Board regarding the policy. Based on the submissions regarding this dispute, the Court concludes that, with respect to administration of the no-pets policy, Anderson & Ochs attorneys were acting as de facto members of the Board. The defendant cannot circumvent discovery on the policy by delegating its responsibilities to its lawyers.

Second, it is **[*3]** apparent that, despite assertions to the contrary, the Board will have to rely on its

communications with Anderson & Ochs as a defense or as an element of a defense. "Generally, courts have found waiver by implication when a client testifies concerning portions of the attorney-client communication, when a client places the attorney-client relationship directly at issue, and when a client asserts reliance on an attorney's advice as an element of a claim or defense." In re County of Erie, 546 F.3d, 222, 228 (2d Cir. (citation omitted). "The key to a finding of implied waiver in the third instance is some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a claim or defense." Id. (emphasis in original). Given that the Board relied entirely on Anderson & Ochs' analysis, judgment, decisions, and advice in responding to tenants' accommodation requests, the defendant will have to rely on information within the firm's possession in order to defend against the Government's claims.

Finally, the defendant waived the attorney client privilege when Board members represented during their depositions that they relied on Anderson & Ochs to make **[*4]** decisions on their behalf regarding accommodation requests. The defendant also waived attorney work product protection when members of the Board revealed during their depositions that they relied on the written advice of counsel to make decisions with respect to the no-pets policy. "If a party voluntarily discloses a document even in the context of a current litigation, it waives the attorney-client privilege for such document and cannot later seek to keep that document confidential." *Carter v. Rosenberg & Estis, P.C., 95cv10449 (DLC), 1996 U.S. Dist. LEXIS 17798, 1996 WL 695866, at *2 (S.D.N.Y. Dec. 4, 1996)*.

While any of these reasons would be sufficient to grant the Government's discovery request, the weight of all three make it abundantly clear that the discovery request is proper and, thus, is granted. To the extent the Board believes any particular document or communication retains a privilege despite this ruling, the defendant shall confer with and provide a privilege log to the Government.

Dated: New York, New York

October 13, 2017

/s/ Denise Cote

DENISE COTE

United States District Judge

345 E. 50th St. LLC v Board of Mgrs. of M at Beekman Condominium

Supreme Court of New York, Appellate Division, First Department

November 27, 2018, Decided; November 27, 2018, Entered

7721, 154185/15

Reporter
166 A.D.3d 546 *; 89 N.Y.S.3d 130 **; 2018 N.Y. App. Div. LEXIS 8044 ***; 2018 NY Slip Op 08090 ****; 2018 WL 6174771

[**P1]** 345 East 50th Street LLC, et al., Plaintiffs-Appellants, v. The Board of Managers of M at Beekman Condominium, et al., Defendants-Respondents

Core Terms

individual defendant, replace, roof, plaintiffs', business judgment rule, disparate treatment, self-interest, renovations, unavailing, damaged, condominium's, demonstrates, infiltration, unsuccessful, defendants', unanimously, themselves, consulted, discovery, engineers, fiduciary, proximate, breached, measures, singled, inform, costs

Counsel: **[***1]** Seyfarth Shaw LLP, New York (Jeremy A. Cohen of counsel), for appellants.

Gartner & Bloom PC, New York (William M. Brophy of counsel), for respondents.

Judges: Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

Opinion

[131]** **[*546]** Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 20, 2017, which, inter alia, granted the individual defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The court properly dismissed the complaint as against the individual defendants based on the business judgment rule (*see generally* *Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537-538, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990]*). The record demonstrates that the roof was replaced to further the condominium's interest, even if plaintiffs may have been damaged as a result, and there was no evidence of bad faith (*see* *20 Pine St. Homeowners Assn. v 20 Pine St. LLC, 109 AD3d 733, 735-736, 971 N.Y.S.2d 289 [1st Dept 2013]*).

Plaintiffs argue that the individual defendants were not protected by the business judgment rule because they were **[*547]** singled out for disparate treatment, and the individual defendants acted out of self-interest. However, the disparate treatment cited by plaintiffs occurred after the board's determination to replace the roof, which was a proximate cause of plaintiffs' damages. Plaintiffs also failed to provide evidence that the individual **[***2]** defendants were motivated by their self-interest, or obtained any individual benefit from the decision to replace the roof.

Plaintiffs argument that the individual defendants breached their fiduciary duty by failing to inform themselves about the status of plaintiffs' renovations to their unit before considering the roof replacement, is unavailing. The record shows that the board consulted with engineers and building management concerning the necessity to replace the roof and alternative actions to remedy the water infiltration, and that more limited measures were unsuccessful. The status of plaintiffs' renovations was not relevant to the board's interest in maintaining the integrity of the building (*see* *Messner v 112 E. 83rd St Tenants Corp., 42 AD3d 356, 357, 840 N.Y.S.2d 45 [1st Dept 2007]*, *lv dismissed 9 N.Y.3d 976, 878 N.E.2d 597, 848 N.Y.S.2d 14 [2007]*).

We have considered plaintiffs' remaining contentions, including that the motion should have been denied because discovery was not complete, and find them

unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 27, 2018

Ehrenberg v Regier

Supreme Court of New York, Appellate Division, First Department

September 1, 2016; September 1, 2016, Filed

111964/07, 1208A, 590315/12, 1208

Reporter
142 A.D.3d 765 *; 37 N.Y.S.3d 10 **; 2016 N.Y. App. Div. LEXIS 5818 ***; 2016 NY Slip Op 05938 ****

[**1]** Roger Ehrenberg et al., Appellants, v Hilda M. Regier, Respondent. (And a Third-Party Action.)

Prior History: *Ehrenberg v. Regier, 2014 N.Y. Misc. LEXIS 6078 (N.Y. Sup. Ct., Dec. 17, 2014)*

Core Terms

party wall, damages, alterations, plaintiffs'

Case Summary

Overview
HOLDINGS: [1]-Homeowners, who shared a party wall with a neighbor, were not entitled to summary judgment on the neighbor's counterclaims because there were issues of fact as to whether and to what extent the party wall between the parties' houses was weakened in its support of the neighbor's house by the work undertaken by the homeowners.

Outcome
Order affirmed; appeal dismissed.

LexisNexis® Headnotes

Torts > Vicarious Liability > Independent Contractors > Nondelegable Duties

HN1[] **Independent Contractors, Nondelegable Duties**

While one who hires an independent contractor generally will not be liable for the contractor's negligence, an exception exists where the employer has a nondelegable duty to ensure the work is safely performed.

Real Property Law > Encumbrances > Adjoining Landowners > Party Walls

HN2[] **Adjoining Landowners, Party Walls**

With regard to two owners whose properties abut the same party wall, each owns so much of the wall as stands upon his or her own lot, both having an easement in the other strip for purposes of the support of his own building. Although the land covered by a party wall remains the several property of the owner of each half, the title of each owner is qualified by the easement to which the other is entitled. Neither owner may subject a party wall to a use for the benefit of its own property that renders the wall unavailable for similar use for the benefit of the other property.

Real Property Law > Encumbrances > Adjoining Landowners > Party Walls

HN3[] **Adjoining Landowners, Party Walls**

Liability may also be imposed on a property owner where, during renovation, the party wall is altered to the detriment of the adjoining property owner.

Real Property Law > Encumbrances > Adjoining Landowners > Party Walls

HN4[] **Adjoining Landowners, Party Walls**

While authority exists for the proposition that alterations to premises on one side of a party wall, if performed properly, will not result in a property owner's liability for

incidental damages to the adjoining side, where it is asserted that the damage complained of was to the structural aspect of the party wall, the property owner could be liable for weakening the party wall, regardless of any care in performing the work. Additionally, the property owner causing the alterations may be liable for trespass where the party wall is penetrated.

Real Property Law > Encumbrances > Adjoining Landowners > Party Walls

HN5[] **Adjoining Landowners, Party Walls**

While an owner altering a party wall will not be absolutely liable for an uncontrollable accident or a third party's negligence, the owner must ensure that the wall will not pose a danger or nuisance to the adjoining landowner.

Headnotes/Summary

Headnotes

Party Walls—Liability of Adjoining Owners—Danger or Nuisance to Adjoining Landowner

Counsel: **[***1]** Cuomo LLC, New York (Konstantinos Kapatos of counsel), for appellants.

George S. Locker, P.C., New York (George S. Locker of counsel), for respondent.

Judges: Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

Opinion

[*765] **[**11]** Order, Supreme Court, New York County (Debra A. James, J.), entered December 22, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment dismissing the counterclaims, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 2, **[**12]** 2015, which upon renewal and reargument of defendant's cross motion, adhered to its original determination denying the cross motion, unanimously dismissed, without costs.

Plaintiffs Roger Ehrenberg and Carin Levine-Ehrenberg purchased a four-story townhouse on West 22nd Street in Manhattan in 2005 with the intention of converting it into a single family home. The home shares a brick party wall with the adjacent four-story townhouse owned by defendant Hilda Regier. Both homes date to the 1840s. The party wall in question is 12 inches thick, consisting of three wythes, or layers, of "un-reinforced 163 year old common brick," interconnected to work as a single unit. After purchase **[***2]** and inspection it was discovered that there was a "bulge" in a section of the party wall where defendant Regier's chimney was located. Renovations to the Ehrenbergs' home included removing and rebuilding a staircase against the wall and rebuilding the party wall. After the party wall was removed, it was discovered that it had been supporting the bulging wall, and shoring was placed where the staircase had been. Where the Ehrenbergs' side of the party wall was damaged, two wythes of bricks were **[*766]** replaced with steel I-beams as shoring. The interconnection between the new and existing portions of the wall was apparently lost. It was submitted by Regier that an I-beam was inserted too deeply and penetrated through Regier's side of the wall, causing movement of her wall.

After discovering damage to the party wall, the Ehrenbergs commenced this action, alleging that Regier's negligent maintenance had caused damage to their side of the party wall. Regier counterclaimed for damages and injunctive relief, alleging that reconstruction of, and repairs to, the party wall undertaken by the Ehrenbergs had damaged her side of the party wall and house. Regier also commenced a third-party action against **[***3]** the architect, engineer, and contractor hired by the Ehrenbergs to do the work.

The Ehrenbergs moved for summary judgment dismissing the counterclaims against them. Regier cross-moved for a declaration that the Ehrenbergs have a nondelegable duty to maintain the structural integrity of the party wall. By order entered December 22, 2014, Supreme Court denied the Ehrenbergs' motion and Regier's cross motion.

Supreme Court correctly denied plaintiffs' motion for summary judgment on the counterclaims, because there are issues of fact as to whether and to what extent the party wall between plaintiffs' and defendant's houses was weakened in its support of defendant's house by the work undertaken by plaintiffs.

HN1[] While one who hires an independent contractor generally will not be liable for the contractor's negligence, an exception exists where the employer has a nondelegable duty to ensure the work is safely

performed (*Kleeman v Rheingold, 81 NY2d 270, 273-274, 614 NE2d 712, 598 NYS2d 149 [1993]*). ***HN2***[⬆] With regard to two owners whose properties abut the same party wall, each owns so much of the wall as stands upon his or her own lot, both "having an easement in the other strip for purposes of the support of his own building" (*Sakele Bros. v Safdie, 302 AD2d 20, 25, 752 NYS2d 626 [1st Dept 2002]*). "Although the land covered by a party wall remains **[***4]** the several property of the owner of each half, . . . the title of each owner is qualified by the easement to which the other is entitled" (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp., 16 Misc 2d 49, 52, 183 NYS2d 605 [Sup Ct, NY County 1959]*, *affd 13 AD2d 764, 217 NYS2d 1017 [1st Dept 1961])*. "[N]either owner may subject a party wall to a use for the benefit of **[**13]** its own property that renders the wall unavailable for similar use for the benefit of the other property" (*Sakele Bros. v Safdie, 302 AD2d at 26*).

HN3[⬆] Liability may also be imposed on a property owner where, during renovation, the party wall is altered to the detriment of **[*767]** the adjoining property owner (*Schneider v 44-84 Realty Corp., 169 Misc 249, 7 NYS2d 305 [Sup Ct, Bronx County 1938]*, *affd 257 App Div 932, 12 NYS2d 1022 [1st Dept 1939])*. In *Schneider*, the court explained that the defendant who tore down its house on one side of the party wall "could not withdraw the wall or change its condition to the injury of plaintiffs or plaintiffs' property without being liable in damages for any injury that might accrue to the plaintiffs thereby" (*id. at 252*). Moreover, "[e]ven if the defendant proceeded with all skill and diligence it is still liable to the plaintiffs for any injuries sustained in consequence of the intended alterations to the wall and to the support which the building on defendant's premises gave to the plaintiffs' property" (*id. at 253*).

HN4[⬆] While authority exists for the proposition that alterations to premises on one side of a party wall, if performed **[***5]** properly, will not result in a property owner's liability for incidental damages to the adjoining side (*see Alberti v Emigrant Indus. Sav. Bank, 179 Misc 1021, 1022, 43 NYS2d 310 [Sup Ct, Bronx County 1942]*, *affd 265 App Div 1046, 40 NYS2d 333 [1st Dept 1943]*; *Bicak v Runde, 78 Misc 358, 360-361, 138 NYS 413 [App Term, 1st Dept 1912])*, where, as in this case, it is asserted that the damage complained of was to the structural aspect of the party wall, the property owner could be liable for weakening the party wall, "regardless of any care in performing the work" (*Bicak, 78 Misc at 360*; *accord Alberti, 179 Misc at 1022*). Additionally, the property owner causing the alterations may be liable for trespass where, as here, the party wall is penetrated (*Bicak, 78 Misc at 360*).

The Ehrenbergs' argument that as the performance of the work was not dangerous or extraordinary, the remedy for any resulting damages from negligence would lie only as to the contractor, is without merit. ***HN5***[⬆] While an owner altering a party wall will not be absolutely liable for an uncontrollable accident or a third party's negligence, the owner must ensure that the wall will not pose a danger or nuisance to the adjoining landowner (*Negus v Becker, 143 NY 303, 308, 38 NE 290 [1894]*).

Finally, since we find that plaintiffs are not aggrieved by the order that granted defendant's motion for renewal and reargument, we dismiss the appeal therefrom (*see CPLR 5511*). Concur—Tom, J.P., Saxe, Richter, Gische and Webber, JJ. **[Prior Case History: *2014 NY Slip Op 33656(U)*.]**
[*6]**

End of Document

930 Fifth Ave. Corp. v. Shearman

Civil Court of New York, New York County

October 31, 2007, Decided; November 28, 2007, Published

50775/06

Reporter
2007 NYLJ LEXIS 1708 *

930 FIFTH AVENUE CORP. v. SHEARMAN, 50775/06

(930 FIFTH AVENUE CORP. v. SHEARMAN, 50775/06, NYLJ, Nov. 28, 2007 at p. 32, col. 1)

Core Terms

rent, tenant, escrow agreement, escrow account, landlord, Apartment, respondents', security deposit, heat, escrow fund, funds, abatement, replenish, lease, cooperative, compliance, escrow, proprietary lease, deposit, additional rent, funds held, counterclaim, nonpayment, equitable, parties

Judges: [*1] Judge Gerald Lebovits

Opinion

Decision of Interest

930 FIFTH AVENUE CORP. v. SHEARMAN, 50775/06, Decided 10/31/07 -

For petitioner: Kossoff & Unger

Sally Unger of counsel

New York City

For respondent: Gallet Dreyer & Berkey, LLP,

Merrill Berkowitz of counsel

New York City

In this nonpayment proceeding, petitioner, a ***cooperative corporation***, seeks a judgment for possession and money against Martha Anne Shearman and John Betts, the respondent-***shareholders*** of two ***cooperative*** apartments, Apartments 3-C and 3-D, which have been combined in their Fifth Avenue building.

Petitioner seeks $30,267 to replenish an escrow account, while respondents counterclaim for the return of that money. Petitioner also seeks, in maintenance, or rent, $13,504.84 for Apartment 3-C and $10,028.70 for Apartment 3-D.

This proceeding raises two issues. The first issue, which has remained sub judice since the close of petitioner's prima facie case, is whether petitioner may secure a possessory judgment against respondents to replenish the escrow account. That issue consumed only a small fraction of trial time but is the only issue worthy of extended discussion. The second issue is the validity of respondents' warranty-of-habitability **[*2]** defense and abatement counterclaim, which respondents raise against the arrears they owe. This second issue consumed greater than 95 percent of the trial, which was held over nine days, but it requires only a brief discussion.

I. The Escrow Agreement

A. The Facts

On December 3, 2001, respondent Shearman entered into an escrow agreement with petitioner ***cooperative corporation*** "as a guaranty to the Apartment Corporation of full compliance with the terms of the Lease and House Rules." (Escrow Agreement at 1.) Shearman agreed, under the escrow agreement, to deposit $30,267 and to maintain a balance in that amount. The escrow agreement also provided that petitioner would return to Shearman any balance remaining in the escrow account when she would sell the apartment so long as she "fulfilled all of her obligations under the lease and this [escrow] agreement." (Escrow Agreement at 2.) The escrow agreement further provided that any amount that

Shearman was required to replenish into the escrow account would be considered "additional rent." (Escrow Agreement at 3.)

Paragraph 1 of the escrow agreement notes that the agreement's overall goal is to guarantee Shearman's full compliance with the proprietary **[*3]** lease and house rules. Full compliance under the escrow agreement means that Shearman would fulfill all maintenance obligations and pay all assessments, rent, and additional rent.

In compliance with the escrow agreement, Shearman deposited $30,267 to guarantee full compliance with the proprietary lease and house rules. When respondents stopped paying rent, petitioner, with respondents' consent by virtue of a letter dated April 2003 from Shearman, used the escrow money for rent. The entire escrow account now having been entirely drawn down, petitioner seeks an order requiring respondents to replenish it, and respondents seek an order for their return.

B. The Law

An escrow account is a security deposit. If money deposited with a landlord serves as a quasi-insurance policy to ensure compliance with the terms of the lease, the money represents a security deposit, not rent. Even though petitioner and Shearman agreed that the money in the escrow fund would be deemed "additional rent," the escrow account is a security deposit, and therefore is not rent.

As two authors have explained, "[a] 'security deposit' is consideration advanced on a lease or license agreement and is held by the lessor or **[*4]** licensor to ensure an occupant's full performance of the terms and conditions of the underlying contract." (Daniel Finkelstein and Lucas A. Ferrara, Landlord and Tenant Practice in New York _ 7:2, at 7:4 [2006 ed.].) GOL _ ***7-103*** (1) provides that a security deposit made by a tenant at a landlord's request continues to be the tenant's property and shall be held in trust without being commingled with the landlord's personal assets. Thus, in *Peterson v. Oklahoma City Hous. Auth. (545 F2d 1270, 1274 [10th Cir 1976])*, the court found that "if the deposit is security for the performance by each tenant of the conditions of his lease, kept with other such deposits in a separate account, and is returnable to him on termination of the tenancy if the conditions of the lease have been fulfilled, it is a security deposit."

The escrow fund is a security deposit because, under the escrow agreement, the cooperative would use the funds to ensure compliance with the terms of the proprietary lease, would keep the funds in a separate account, and would return them if they are still in the escrow account when Shearman sells her shares allocated to the cooperative apartment. Collectively, this evidences that the escrow account is a security deposit.

Civil Court does not have jurisdiction **[*5]** over security deposits. Courts have found under *RPAPL 711 (2)* that "[s]ecurity deposits are not rent, and they cannot be recovered in a nonpayment proceeding." (*225 Holding Co., LLC v. Beal, 2006 NY Slip Op 51269[U], *1, 2006 WL 1843973, at *1, 2006 N.Y. Misc. LEXIS 1724, at *1* [App Term 2d Dept 9th & 10th Jud Dists, June 28, 2006, mem] [citation omitted]; accord *Park Holding Co. v. Johnson, 106 Misc 2d 834, 837 [Hous Part, Civ Ct, NY County 1980]*.) Secondary sources also consider a security deposit not to be rent: "Since the proceeds are not 'rent,' they may not be recovered by way of a nonpayment proceeding." (Finkelstein and Ferrara, supra, _ 7:4, at 7:5.) The escrow funds are not additional rent despite the litigants' agreement to the contrary.

Litigants may not confer jurisdiction on the court to rule on an escrow account simply by calling the funds "additional rent." Despite Dolan's writing in Rasch's New York Landlord and Tenant Practice in New York that "rent will not be deemed to include any other payments which the tenant has covenanted to make, unless the parties expressly provide that such other payments shall constitute rent" (1 Robert F. Dolan, Rasch's Landlord and Tenant - Summary Proceedings _ 12:3, at 524-526 [4th ed 1998]), the Second Department has ruled to the contrary. *The Court in Ross Realty v. V & A Fabricators, Inc. (42 AD3d 246, 250 [2d Dept 2007])*, found that "accelerated rent" is not "rent due" and is therefore outside the jurisdiction of Civil Court, a "local **[*6]** court for the purposes of summary proceedings" (id.), despite what the parties call the amount due. The Second Department explained that "accelerated rent" is "contractual damages not recoverable in a summary proceeding." (Id.)

Nor does this court possess the equitable jurisdiction to order respondents to replenish the escrow account. As many courts have found, "except for proceedings for the enforcement of housing standards and applications for certain provisional remedies, the New York City Civil Court may not grant injunctive relief." (*Broome Realty Assocs. v. Sek Wing, 182 Misc 2d 917, 918 [App Term 1st Dept 1999, per curiam]*; accord World Realty Corp.

v. Consumer Sales, 9 Misc 3d 136(A), 2005 NY Slip Op 51696[U], *2, 2005 WL 2683595, at *2, 2005 N.Y. Misc. LEXIS 2288, at *2 [App Term 2d Dept 9th & 10th Jud Dists, Oct. 20, 2005]; 7 Highland Mgt. Corp. v. McCray, 9 Misc 3d 129[A], 2005 NY Slip Op 51530[U], *2, 2005 WL 2347662, at * 2, 2005 NY Misc LEXIS 2074, at *2 [App Term 2d Dept 9th & 10th Jud Dists, Sept. 23, 2005, mem]; Topaz Realty Corp. v. Morales, 9 Misc 3d 27, 28-29 [App Term, 2d Dept 9th & 10th Jud Dists, July 21, 2005, mem].)

In Topaz Realty, the parties agreed to a stipulation by which the landlord promised to give to the tenant funds held in escrow when the tenant vacated the premises. The tenant was unable to return the key to the landlord because the landlord refused to give him a receipt in return. Civil Court ordered the landlord's attorney to hand over to the tenant the funds held in escrow. On appeal, the Appellate Term, Second Department, found that Civil Court's order directing **[*7]** the landlord's attorney to release the funds "was injunctive and equitable in nature and not within the jurisdiction of the Civil Court." (Topaz, 9 Misc 3d at 28.)

In World Realty Corp., the Appellate Term, Second Department, refused to extend equitable jurisdiction to the Suffolk County District Court, whose jurisdiction may not exceed the New York City Civil Court's jurisdiction. (2005 NY Slip Op 51696[U], *2, 2005 WL 2683595, at *2, 2005 N.Y. Misc. LEXIS, at *2.) The parties agreed to settle a commercial nonpayment proceeding through a so-ordered stipulation. The stipulation called for the landlord's attorney to return to the tenant funds held in escrow when the premises were surrendered. The District Court found that the tenant's failure sufficiently to clean the apartment materially breached the stipulation and awarded the escrow funds to the landlord. The tenant appealed, claiming that the cleanliness of the apartment was, at most, a de minimis breach and that the landlord breached the settlement stipulation. On appeal, the Appellate Term, Second Department, found that "the tenant is limited to seeking to enforce the stipulation in a court that has equitable jurisdiction or seeking money damages for breach of stipulation." (Id.)

The First and Second Departments are split on whether **[*8]** Civil Court has the jurisdiction to release funds held in escrow. (See One York Property LLC v. Vista Media Group Inc., 12 Misc 3d 1155[A], 2006 NY Slip Op 50899[U], *5, 2006 WL 1358464, at *5, 2006 NY Misc LEXIS 1186, *5 [Civ Ct NY County, May 17, 2006] [discussing split between departments].) The Appellate Term for the First Department held in Future 40th St. Realty, LLC v. Mirage Night Club, Inc., that Civil Court properly directed the release to the tenant of funds held in escrow after the tenant complied with the terms of a settlement stipulation in a nonpayment proceeding. (See 2002 NY Slip Op 50243[U], *1, 2002 WL 1448861, at *1, 2002 NY Misc LEXIS 739, at *3 [App Term, 1st Dept 2002, per curiam].)

Although the First and Second Departments are split, they are split in regard to the issue of releasing funds already held in an escrow account. The issue here is whether Civil Court should order the replenishment of funds to an escrow account. Civil Court's jurisdiction does not extend that far.

Even if this court did have jurisdiction over the escrow account - and it does not - the funds would be considered future rent according to paragraph 3 of the escrow agreement. But under this court's limited jurisdiction, "no suit can be brought for future rent." (Maflo Holding Corp. v. S.J. Blume, Inc., 308 NY 570, 575 [1955].) Civil Court is "without authority to provide for the disposition of future rent." (Notre Dame Leasing Corp. v. Sirico, NYLJ, Apr. 2, 1992, at 26, col 2 [App Term 2d Dept 2d & 11th Jud Dists, mem].) In Notre Dame Leasing, Civil **[*9]** Court awarded the tenant an abatement of $700 for previous months' rent and a future abatement of rent for $600 to enable the tenant to purchase a refrigerator. The Appellate Term, Second Department, modified the decision, striking the order regarding the award of future rent. The Appellate Term, Second Department, explained that Civil Court does not have the jurisdiction to abate future rent.

Petitioner has remedies. Petitioner could, were it so advised, bring a holdover proceeding, arguing that in failing to maintain the escrow balance, respondents breached a material term of their proprietary lease and a substantial obligation of the tenancy. (See e.g. Markowitz v. Landau, 171 AD 2d 564, 565 [1st Dept 1991].) Petitioner could also bring a plenary action in Supreme Court, which has the equitable jurisdiction to direct respondent to replenish the escrow funds.

Conversely, the court may not grant respondents' counterclaim directing petitioner to return the $30,267 in escrow funds that petitioner has long drawn down. The court does not have the jurisdiction to direct that relief. Also, respondents, having agreed in writing in April 2003 to allow petitioner to use the funds for rent, may not now withdrawn their consent. Respondents argue that **[*10]** petitioner was not authorized to draw down the escrow funds without their prior notice and permission, but

Shearman's April 2003 letter obviated the need for notice and provided the required permission.

II. The Abatement Claim

The second issue concerns respondents' warranty-of-habitability and abatement defense and counterclaims. The court finds respondents' arguments over heat, mice and roaches, and asbestos in their basement storage area frivolous and disagrees with them in full.

As to the alleged problem with heat since 2002, respondents come forward only with a vague log itself contradicted by a dozen unsubstantiated heat complaints to the Department of Housing Preservation and Development. If there were problems with heat, they were caused by one non-functioning heating unit that, under 18 (a) of the proprietary lease, was respondents' obligation to repair or replace. The court rejects as wholly unsupported by the credible evidence respondents' shifting contentions that any heating problem was the ***cooperative corporation***'s responsibility because (1) if the problem came from the heating unit, respondents used the cooperative's plumbers to repair the unit; or (2) if the problem did **[*11]** not come from the heating unit, heat was absent because the building riser did not send heat to the unit.

As to the problem with roaches and mice since 2000, respondents have only themselves to blame, because they did not provide reasonable access to exterminate. In 2005, for example, the building exterminator was unable to gain access to respondents' combined apartments for 48 days. Moreover, according to the credible testimony of Patrick Burke, the superintendent, respondents refused for seven years to remove temporarily respondents' radiator covers to allow proper extermination.

Finally, as to the asbestos contamination in the basement storage area, respondents claim that they suffered injury because of "property damage from asbestos powder covering their property; their inability to use or retrieve any of their personal property stored there, and the incomplete cleanup effected by petitioner." (Respondents' Post-Trial Memorandum of Law, Oct. 30, 2007, at 12.) But respondents may not recover for property damage in this summary proceeding seeking an abatement; the trial evidence does not show how and to what extent respondents could not use their storage property; and the evidence **[*12]** proves that respondents cured the asbestos violation immediately after they learned about it. It is speculation contradicted by the evidence that petitioner's cleanup was incomplete. Additionally, petitioner argues without contradiction that respondents neither lived in nor were charged or paid rent for their storage area (Petitioner's Post-Trial Memorandum of Law, Oct. 30, 2007, at 7.) Thus, respondents may not recover for a violation of their residential warranty of habitability even if they had sought that relief.

III. Judgment and Further Proceedings

Final judgment for money and possession in petitioner's favor for $13,504.84 for Apartment 3-C and $10,028.70 for Apartment 3-D, for a total of $23,533.54, for rent through October 2007. The warrant of eviction may issue forthwith. Execution stayed for five days.

Both petitioner and respondent seek reimbursement for their reasonable attorney fees and costs under Article 28 of the proprietary lease, but only petitioner is the prevailing party entitled to attorney fees and costs. Neither side prevailed on the issue of the escrow funds: Petitioner may not compel respondents to replenish the escrow fund, and respondents may not obtain the **[*13]** return of funds already withdrawn. The prevailing party is determined, therefore, on the issue over which the parties spent more than 95 percent of their litigation: that petitioner obtained a judgment for all the rent it sought and that petitioner defeated respondents' defense and counterclaim for a rent abatement. This proceeding is adjourned for an attorney-fee hearing to Tuesday, November 27, 2007, at 2:00 p.m. By November 23, 2007, petitioner shall serve on respondents billing records for any legal-fee amount for which it seeks reimbursement.

Petitioner's application to adjourn for a hearing to ascertain whether to impose costs on respondents for their nonappearance in January 2007 is denied as academic in light of the court's determination that petitioner is entitled to reasonable attorney fees and costs for the entire proceeding.

This opinion is the court's decision and order.

New York Law Journal

Matter of New York Pub. Lib. v Condominium Bd. of the Fifth Ave. Tower

Supreme Court of New York, Appellate Division, First Department

March 19, 2019, Decided; March 19, 2019, Entered

8749, 157703/17

Reporter
170 A.D.3d 544 *; 95 N.Y.S.3d 200 **; 2019 N.Y. App. Div. LEXIS 2136 ***; 2019 NY Slip Op 02045

In re New York Public Library, et al., Petitioners-Respondents, v Condominium Board of the Fifth Avenue Tower, Respondent-Appellant.

Core Terms

license fee, license, exercise of discretion, Plaza, contemporaneous, inconvenienced, discretionary, inconvenience, improvident, providently, unanimously, enjoyment, reduction, remanding, erecting, feasible, hardship, injuries, modified, premises, purposes, warrants, rental, resale, slight, costs

Counsel: **[***1]** Boyd Richards Parker & Colonnelli, New York (Gary Ehrlich of counsel), for appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Maryann C. Stallone and Amanda M. Leone of counsel), for respondents.

Judges: Sweeny, J.P., Webber, Gesmer, Singh, JJ.

Opinion

[*544] **[**201]** Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered December 14, 2017, in this proceeding pursuant to *RPAPL 881*, granting petitioners New York Public Library, Astor Lenox and Tilden Foundations (collectively, NYPL) a license to access and/or enter the premises of respondent Condominium Board of the Fifth Avenue Tower (the Condo) for purposes of erecting certain protective work in the Condo's plaza from the date of judgment through December 31, 2019, and denying the Condo's request for license fees, unanimously modified, on the facts and in the exercise of discretion, to the extent of granting the Condo's request for a license fee and remanding for a hearing to **[*545]** determine a reasonable license fee, and otherwise affirmed, without costs.

The court providently exercised its discretion in granting NYPL a license pursuant to *RPAPL 881*, because the inconvenience to the Condo is relatively slight compared to the hardship to **[***2]** NYPL if the license were not granted, and NYPL showed that it was prepared to do all that was feasible to avoid injuries resulting from its entry to the Condo (*see Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz, 114 AD3d 491, 492, 979 N.Y.S.2d 811 [1st Dept 2014]*; *Mindel v Phoenix Owners Corp., 210 AD2d 167, 167, 620 N.Y.S.2d 359 [1st Dept 1994]*, *lv denied 85 N.Y.2d 811, 655 N.E.2d 400, 631 N.Y.S.2d 287 [1995]*).

Although the determination of whether to award a license fee is discretionary, the grant of a license pursuant to *RPAPL 881* often warrants the award of contemporaneous license fees, because an "owner compelled to grant access should not have to bear any costs resulting from the access" (*Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp., 149 AD3d 518, 519, 52 N.Y.S.3d 316 [1st Dept 2017]*). Here, the Condo showed that it had previously been inconvenienced for over six years by NYPL's use of the Plaza pursuant to a license, and that the grant of a license would entail interference with the residents' use and enjoyment of the Condo, as well as a reduction in the resale and rental value of the Condo's units. In light of this showing, it was an

improvident exercise of discretion to deny a license fee (*see id.*; *DDG Warren LLC v Assouline* ***[**202]*** *Ritz 1, LLC, 138 AD3d 539, 539-540, 30 N.Y.S.3d 52 [1st Dept 2016]*).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

ENTERED: MARCH 19, 2019

Brady v 450 West 31st Owners Corp.

Supreme Court of New York, New York County

July 2, 2008, Decided; July 7, 2008, Filed

Index No.: 603741/07

Reporter
2008 N.Y. Misc. LEXIS 9943 *; 2008 NY Slip Op 31894(U) **

[2]** JAMES BRADY and JANE BRADY, Plaintiffs, - against - 450 WEST 31ST OWNERS CORP., et al., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

Subsequent History: Reargument granted by, Adhered to *Brady v. 450 West 31st Owners Corp., 2009 N.Y. Misc. LEXIS 4590 (N.Y. Sup. Ct., Mar. 13, 2009)*

Appeal dismissed by *Brady v. 450 W. 31st Owners Corp., 70 A.D.3d 469, 894 N.Y.S.2d 416, 2010 N.Y. App. Div. LEXIS 1284 (N.Y. App. Div. 1st Dep't, 2010)*

Related proceeding at *Brady v. 450 W. 31st St. Owners Corp., 2014 N.Y. Misc. LEXIS 3193 (N.Y. Sup. Ct., July 15, 2014)*

Related proceeding at *Brady v. Schneiderman, 2016 U.S. Dist. LEXIS 91654 (S.D.N.Y., July 13, 2016)*

Related proceeding at *Brady v. Goldman, 2016 U.S. Dist. LEXIS 168653 (S.D.N.Y., Dec. 5, 2016)*

Core Terms

roof, cause of action, sales contract, air rights, plaintiffs', rights, structures, Cooperative, injunction, convey, Floor, construct, enjoining

Judges: **[*1]** PRESENT: Hon. Marcy S. Friedman, J.S.C.

Opinion by: Marcy S. Friedman

Opinion

DECISION/ORDER

This is an action for injunctive and declaratory relief. Plaintiffs James and Jane Brady, the owners of the shares of stock allocated to a commercial unit on the 12th floor and roof of a cooperatively owned premises, seek to enjoin defendant 450 West 31st Owners Corp. ("Owners Corp."), the cooperative corporation, from selling transferable development rights ("TDRs") (or, as more commonly known, "air rights") to defendants Extcll Development Company, Hudson Yards, LLC and Extell 31/10 LLC ("Extell"), the developer of an adjoining premises. Owners Corp. and Extell each move for summary judgment dismissing the amended complaint. Plaintiffs cross-move for partial summary judgment on the first through third causes of action of the complaint. This court denied plaintiffs' prior motion for a preliminary injunction by decision and order dated November 29, 2007, which was affirmed by the Appellate Division, First Department, by order dated December 20, 2007.

Owners Corp. and Extell 31/10 LLC entered into a Sale and Purchase Agreement, dated August 23, 2007 ("contract of sale"), for the sale by Owners Corp. to Extell of Owners **[*2]** Corp.'s **[**3]** "excess development rights." It is undisputed that such excess development rights include the air rights or TDRs above plaintiffs' unit. The contract of sale has not yet closed.

The first cause of action of plaintiffs' amended complaint seeks an injunction enjoining defendants from consummating the contract of sale. The second cause of action seeks a judgment declaring that the contract of sale is null and void. The third cause of action seeks a judgment declaring that "the rights purportedly conveyed by the Contract of Sale belong solely to the 12th Floor * * * and that the Cooperative Corporation cannot without the consent of the owner of the 12th Floor sell or transfer any portion of these rights." (Amended Complaint, P 79.) The fourth cause of action alleges that the conveyance made by the contract of sale would

unjustly enrich Extell, and seeks imposition of a constructive trust upon the conveyance. The fifth cause of action alleges that consummation of the contract of sale would wrongfully take possession of plaintiffs' space, and seeks a judgment ejecting defendants from possession of such space. The sixth cause of action seeks an injunction enjoining Owners Corp. from **[*3]** breaching its fiduciary duty to plaintiffs. The seventh and final cause of action alleges that plaintiffs have the right, under an agreement with Owners Corp., to construct or extend structures on or above the roof, and seeks an injunction enjoining Extell from interfering with this agreement.

In seeking to enjoin the transfer of the TDRs, plaintiffs rely on paragraph 7 of the second amendment to Offering Plan which provides in full: "The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law." The threshold issue on these motions is therefore whether this paragraph should be construed as conferring air rights upon plaintiffs.

[4]** It is well settled that the determination of whether a contract is ambiguous is one of law to be resolved by the court. (*Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548, 658 N.E.2d 715, 634 N.Y.S.2d 669 [1995]*; *W.W.W. Assocs., Inc. v Giancontieri, 77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]*.) Moreover, the court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (*Chimart Assocs. v Paul, 66 NY2d 570, 573, 489 N.E.2d 231, 498 N.Y.S.2d 344 [1986]*.) **[*4]** "[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." (*Id. at 572-573* [internal citation and quotation marks omitted].) "[W]hen parties set down their agreement in a clear, complete document, their writing should * * * be enforced according to its terms." (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475, 807 N.E.2d 876, 775 N.Y.S.2d 765 [2004]* [internal quotation marks and citations omitted].) This rule is of "special import" in real property transactions "where commercial certainty is a paramount concern, and where * * * the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length. In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." (*Id.* [internal quotation marks and citations omitted].)

Applying these principles, the court finds that paragraph 7 is not ambiguous, and that it gives plaintiffs the right to build structures on or above the roof but does not convey air rights to plaintiffs. It is undisputed that air rights existed and were well **[*5]** known in the real estate community in 1980 when the Offering Plan was amended to add paragraph 7. Had the parties, who were sophisticated business people, intended to convey or reserve air rights to the 12th floor and roof units, they could easily have expressly so provided. Indeed, plaintiffs themselves do not take the position that they are the owners of the air rights. They clarify that they "do not **[**5]** contend that the 12th Floor and Roof Unit can sell or transfer these [TDR] rights to adjoining landowners, but * * * do contend that the Cooperative Corporation cannot sell or transfer these rights to anyone without [plaintiffs'] consent." (Brady Aff. In Support of Cross-Motion ["Brady Aff."], P 51.) While plaintiffs thus do not dispute that the Cooperative Corporation is the owner of the TDRs, they contend that they "control" the development rights by virtue of paragraph 7 of the amended Offering Plan. (*Id.,* P 52.) However, paragraph 7 is plainly not susceptible to the construction, advanced by plaintiffs, that they have the right to extend their existing penthouse structure by an additional 190,000 square feet (*id.,* P 89), the square footage of the air rights that were acquired by **[*6]** the Cooperative Corporation as a result of a change in the zoning resolution approximately 25 years after plaintiffs' predecessor acquired the right to erect structures on the roof pursuant to paragraph 7 of the amended Offering Plan.

The court accordingly holds as a matter of law that Owners Corp. is the owner of the TDRs that were conveyed by the contract of sale to Extell, and that paragraph 7 of the second amendment to the Offering Plan does not convey or reserve the TDRs to plaintiffs. The first, second, and third causes of action of plaintiffs' amended complaint, all of which seek to invalidate the contract of sale, are therefore dismissed. The fourth and fifth causes of action for a constructive trust and judgment of ejectment are not maintainable on the facts alleged. The sixth cause of action against Owners Corp. for breach of fiduciary duty and the seventh cause of action against Extell for an injunction also fail to state cognizable claims on the facts alleged.

In so holding, the court does not reach the issue of whether the right which has been conveyed to plaintiffs - namely, "to construct or extend structures upon the roof or above the same to the extent that may from time **[*7]** to time be permitted under applicable law" - has

been or **[**6]** may be impaired by Extell's proposed development. Taking the position that they are entitled to the broad declaration that they control all the air rights, plaintiffs do not, in the alternative, seek a more limited declaration as to whether specifically identified structures may be erected on the roof. Nor on this record would there be a basis for such relief, as plaintiffs do not provide any factual details as to the particular structures they plan to erect on the roof. (*Compare 40-56 Tenth Ave. LLC v 450 W. 14th St. Corp., 22 AD3d 416, 803 N.Y.S.2d 56 [1st Dept 2005]*.)

The branch of plaintiffs' motion to dismiss defendants' counterclaims is held in abeyance pending hearing of plaintiffs' separately noticed motion to dismiss such counterclaims as moot.

This constitutes the decision and order of the court.

Dated: New York, New York

July 2, 2008

/s/ Marcy Friedman

MARCY FRIEDMAN, J.S.C.

Priceman Family Llc v. Kerrigan

Civil Court of the City of New York, Kings County

May 7, 2018, Decided; May 23, 2018, Published

061738/2017

Reporter
2018 NYLJ LEXIS 1738 *

Priceman Family LLC v. Kerrigan

(Priceman Family LLC v. Kerrigan, NYLJ, May. 23, 2018 at 31)

Core Terms

apartment, nuisance, smoking, tenant, notice, lease, predicate, rent, stabilized, unabated, floor, cigarette smoke, inside, common area, disabled, emanate, guests, smoke a cigarette, summary judgment, common hallway, matter of law, rule rule rule, terminated, invitees, tenancy, argues, continues, neighbor, bedroom, PAPERS

Judges: [*1] Judge: Judge Marcia Sikowitz

Opinion

Landlord sought possession of the rent-stabilized apartment in this nuisance holdover proceeding with the predicate notice indicating the tenancy was being terminated as tenants committed or allowed a nuisance in the apartment, that was unabated, in that excessive cigarette smoke flowed through gaps in the baseboards, floors and the front door into the adjacent apartment. Tenants moved for summary judgment noting there was no allegation in the predicate notice they smoked in common areas, noting the notice was based only on nuisance, not a lease violation. Tenants resided in the premises for 46 years and the lease did not prohibit smoking inside apartments, claiming smoking inside a rent-stabilized apartment was not a nuisance. Landlord's agent's affidavit included assertions of abusive and other nuisance behavior not alleged in the predicate notice that could not be amended, thus, could not be considered. The court ruled as there was no house rule or lease provision prohibiting smoking in apartments, and no evidence tenants smoked in common areas, the smoking did not constitute a nuisance, granting tenants summary judgment.

Full Case Digest Text

RECITATION, **[*2]** AS REQUIRED BY *CPLR SECTION 2219(A)*, OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS NUMBERED

NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED 1

ANSWERING AFFIRMATION AND AFFIDAVITS AND EXHIBITS ANNEXED 2

DECISION/ORDER

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS: Petitioner commenced this nuisance holdover proceeding seeking possession of the subject rent stabilized apartment, 4-C, at 9411 Shore Road, Brooklyn, NY 11209, based on the claims in the predicate Notice to Tenant of Termination of Tenancy and Intention to Recover Possession.

The predicate notice states in part,

... rent stabilized tenancy if being terminated pursuant to *Section 2524.3(b)* of the Rent Stabilization Code, being that you have committed or permitted a nuisance in the subject apartment and referenced housing accommodation and maliciously, or by reason of gross negligence, substantially damaged the subject apartment and referenced housing accommodation and continue to do so.

... tenancy at the premises is hereby terminated effective November 15, 2016, upon the grounds that you have violated *Section 2524.3(b)* of the Rent Stabilization

Code.

... Owner and Landlord, Shore Ridge Associates, ("Landlord") reasonably **[*3]** believes that the facts necessary to establish the existence of such grounds of termination pursuant to *Section 2524.3(b)* of the Rent Stabilization Code include, but are not limited to the following:

1. In violation of Rent Stabilization Code *Section 2524.3(b)* you have now committed or permitted a nuisance to occur emanating from apartment 4C since in or about July 2016, which continues unabated to this date, to wit: that since in or about July 2016, you and/or guests, invitees, or occupants of apartment 4C, allow excessive cigarette smoke flow through gaps in and around the base boards, floors, closets, wall sockets, and front door of the Premises and into apartment 4D which condition you have allowed to exist unabated to this date.

2. In violation of Rent Stabilization Code *Section 2524.3(b)* you have now committed or permitted a nuisance emanating from apartment 4C since in or about July 2016, which continues unabated to this date, to wit: that since in or about July 2016, on numerous occasions you and/or guests, invitees, or occupants of apartment 4C, from cigarette smoke that has been exhausted out of open windows of apartment 4C that has penetrated into apartment 4D through open bedroom, bathroom, and kitchen windows causing the **[*4]** tenant in apartment 4D to keep the windows closed at all times and also resulting in their inability to enjoy fresh air and/or use their balcony outside of apartment 4D which condition you have allowed to exist unabated to this date.

3. In violation of RSC *Section 2524.3(b)* you have now committed or permitted a nuisance to occur emanating from apartment 4C since in or about July 2016, which continues unabated to this date, to wit: that since in or about July 2016, you and/or guests, invitees, or occupants of apartment 4C, have allowed excessive amounts of cigarette smoke to infiltrate the 4th floor common hallway of the subject apartment building causing an offensive and malodorous condition to exits in the 4th floor common hallway resulting in the physical discomfort of the other tenants residing on the 4th floor of the subject apartment building which condition you have allowed to exist unabated to this date.

4. ....that since in or about July 2016, which continues unabated to this date, to wit: that since in or about July 2016, you and/or guests, invitees, or occupants of apartment 4C, have allowed excessive amounts of cigarette smoke to emanate from apartment 4C that has resulted in a befouling of **[*5]** the air outside of the apartment and the 4th floor common hallway that has invaded apartment 4D requiring the tenants in apartment 4D to purchase, install and operate: (I) three high-end air purifiers on a 24/7 basis; (ii) a filter on the inside bottom of the front door, (iii) sealing of the baseboards along the bedroom and living room walls; (iv) covering unused portions of electrical outlets in the bedroom and living room; (v) taping over gaps between, above, and below the panels of the sectional mirror that forms the 4D entryway wall; (vi) taping over gaps in the walls and floor in the entryway and bedroom closets; (vii) and setting up multiple air fresheners and charcoal filters around the apartment which conditions you have allowed to exist unabated to this date.

5. ....that since in or about July 2016, you and/or guests, invitees, or occupants of apartment 4C, have allowed excessive cigarette smoke to emanate from apartment 4C into the common hallway of the 4th floor and to penetrate apartment 4D to such an extent that it has aggravated the asthma condition to one of the tenants of apartment 4D which condition you have allowed to exist unabated to this date.

6. ....you have allowed **[*6]** excessive cigarette smoke to emanate into the 4th floor common hallway and into apartment 4D that it has interfered with the quiet enjoyment of the tenants apartment 4D to such an extent that they have threatened to break their lease causing economic harm the Landlord which condition you have allowed to exist unabated to this date.

Respondent filed an answer, and a demand for a bill of particulars. Respondent moves by notice of motion, for an order pursuant to *CPLR 3212*, granting summary judgment in respondent's favor and an award of attorneys' fees. Petitioner opposes the motion. The predicate notice alleges that respondent(s) smoke cigarettes inside their apartment. There is no allegation in the predicate notice that respondent smokes in the common areas, public hallways, or anywhere outside of their apartment. The predicate notice is based solely on nuisance pursuant to RSC 2524.3(b), (*9 NYCRR 2524.3(b)*, and it is not based on a lease violation.

Respondent states in support of his motion that he has resided in the subject apartment for forty six years since 1972. Smoking has not been prohibited inside the apartments since he moved in September 1972. He

states that neither he, his wife, nor any of their guests **[*7]** have ever smoked in the common areas or the public hallways. Petitioner does not dispute these facts.

Respondent argues since it is undisputed that respondents only smoke within the confines of the subject apartment, there is no lease violation alleged, smoking within an apartment is not prohibited by the parties' lease, that, therefore, smoking within a rent stabilized apartment is not a nuisance as a matter of law. Respondent relies on the holding in Jovic v. Blue, 56 Misc3d 136[A](App Term, 2nd & 11th Jud Dist, 2017) to support his motion for summary judgment.

In opposition, petitioner's agent, Penny Priceman, states in her affidavit acts of alleged "nuisance" behavior that are not contained in the predicate notice. Petitioner's agent attempts to distinguish the holding in Jovic by arguing that the respondents are not disabled, they can afford to relocate and they will not be homeless if evicted from this rent stabilized apartment. Ms. Priceman also includes her opinion of the neighbor, who she describes as "a respected attorney" from the building who wrote a letter of complaint about respondents. Petitioner's agent argues that the holding in Jovic does not shield respondent's other abusive behavior. There is **[*8]** no "abusive behavior' alleged in the predicate notice other than smoking within the subject apartment.

Petitioner attaches an affidavit from a complaining tenant, Ann Cohen, who resides in apartment 4D. It appears that Ms. Cohen's complaints form the basis for the predicate notice. Her affidavit contains additional nuisance activities that are not included in the predicate notice.

Petitioner argues that Jovic should be restricted to its facts, i.e., including that the respondent was disabled. Petitioner agrees that Jovic held that in the absence of a house rule, or lease provision prohibiting smoking in an apartment, no evidence that respondent smoked in a common area, that smoking within a rent stabilized apartment does not constitute a nuisance as a matter of law. Petitioner argues that Jovic does not apply in the instant case, because the tenant in Jovic was disabled. Petitioner fails to address the equity interest of the respondents in their forty six (46) year rent regulated tenancy, just as the tenant in Jovic presented a compelling equitable argument.

Discussion

"While the evidence at trial showed that tenant smoked inside her apartment, there was no house rule or provision in the **[*9]** lease which prohibited such conduct. There was also no evidence establishing that tenant smoked in the common areas. Under the circumstances presented, as a matter of law, tenant's smoking did not constitute a nuisance. (Citations omitted)" Jovic v. Blue, 56 Misc3d 136[A], (App Term, 2nd Dept, 2017) Although the plaintiffs in Ewen interposed a cause of action for private nuisance against a neighbor, the Appellate Term, 1st Dept, relied on the same factors as the court in *Jovic. Ewen v. Maccherone, et al, 32 Misc3d 12, 14, (App Term, 1st Dept. 2011)* The court in Ewen held that there was no cause of action for nuisance where the defendants smoked in the privacy of their own apartment, they were not prohibited from smoking inside their apartment by any existing statute, lease, rule or by law, and there was no lease, or rule imposing on defendants an obligation to ensure that their cigarette smoke did not drift into other residences. *Ewen at 15, Feinstein v. Rickman, 136 AD3d 863, 864-5, (AD 2nd Dept. 2016)*

Petitioner argues that Jovic should be distinguished because the respondent was disabled, and Jovic should be limited to its facts. In Jovic, the issue of the tenant's severely disabled daughter was raised in response to petitioner's nuisance claims based on a "stream of traffic" of caregivers into the apartment. The mental disability of the respondent in Jovic, **[*10]** who lived in the apartment all her life, was raised in response to nuisance claims based on putting garbage in the wrong place, and not in response to smoking within the apartment. Respondent's daughter's disability did not enter into the court's analysis in holding that smoking cigarettes within a rent regulated apartment, in the absence of a lease violation or prohibition, and no evidence of smoking in a common area, does not constitute a nuisance as a matter of law. Respondents herein have resided in the rent regulated apartment for forty six years, and the only allegation of nuisance behavior is smoking cigarettes inside the subject apartment. There is no claim of a lease violation, or a lease prohibition for smoking cigarettes.

The complaining neighbors have remedies including a claim for breach of the warranty of habitability. *Poyck v. Bryant et al, 13 Misc3d 699 (Civ Ct, NY Cty, 2006)* (holding that second hand smoke qualifies as a condition that invokes the protections of *Real Property Law 235-b*). Upper East Lease Associates, LLC v. Cannon, 37 Misc3d 136[A](App Term, 2nd Dept. 9th & 10th Jud Dists, 2012)

Petitioner, its agent, and the complaining neighbors raise various other examples of nuisance behavior by respondents in their supporting papers. None of these allegations are in the predicate notice, and therefore, **[*11]** cannot be considered. A predicate notice, although annexed to a pleading, is not itself a pleading. It is an act which must be completed before the pleadings are served, and it is therefore, not subject to amendment. *Chinatown Apartments, Inc v. Chu Cho Lam, 51 NY2d 786, 787 (1980)*, Predicate Notices Required for Statutory Eviction Proceedings Under *RPAPL 711*, 2015, Hon. Peter M. Wendt.

The facts are not in dispute. The legal issue to be resolved is whether a claim, pursuant to RSC 2524.3(b) for nuisance behavior, is valid based on a rent stabilized tenant smoking cigarettes within his apartment, in the absence of any evidence or claim that there is smoking in a public area, and in the absence of a lease violation, or smoking prohibition in the lease or rules. Based on the undisputed facts, and the holding in Jovic v. Blue, as a matter of law, this behavior does not constitute a nuisance. Therefore, respondent's motion for summary judgment in his favor is granted. The petition is dismissed with prejudice. This constitutes the decision and order of the court.

DATED: May 7, 2018

New York Law Journal

Ewen v Maccherone

Supreme Court of New York, Appellate Term, First Department

May 26, 2011, Decided

570457/10.

Reporter
32 Misc. 3d 12 *; 927 N.Y.S.2d 274 **; 2011 N.Y. Misc. LEXIS 2471 ***; 2011 NY Slip Op 21185 ****

[**1]** Christian Ewen et al., Respondents, v. Federico Maccherone et al., Appellants.

Prior History: **[***1]** Appeal from an order of the Civil Court of the City of New York, New York County (Anil C. Singh, J.), dated December 1, 2009. The order denied defendants' motion to dismiss the complaint.

Core Terms

smoking, ***condominium***, apartment, cause of action, plaintiffs', neighbor, private nuisance, secondhand, odor, rule rule rule, defendants', annoyance, inside, building-wide, circumstances, allegations, ventilation, migration, nuisance, bylaws, dwelling, injuries, resident, damages, rights, seeped

Case Summary

Overview

Condominium unit owners (CUOs) filed suit against their neighbors, seeking damages for negligence and private nuisance due to "excessive smoking" that seeped through the walls into the CUOs' premises. The neighbors' dismissal motion under CPLR 3211(a)(1), (7), and (10) was denied. On appeal, the court found that dismissal was warranted. There was no prohibition in the ***condominium*** documents regarding smoking, such that no private nuisance existed. Moreover, as the neighbors had no duty to, inter alia, refrain from smoking in their unit, the negligence claim failed.

Outcome
Denial of dismissal motion reversed.

LexisNexis® Headnotes

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN1[] **Elements**

Although there are significant similarities between nuisance and negligence claims, they constitute separate causes of action. The elements of a cause of action for a private nuisance are: (1) an interference substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a person's property right to use and enjoy land; (5) caused by another's conduct in acting or failure to act. However, not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. If one lives in the city he or she must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life. The relevant question is whether a defendant's use of his or her property constitutes an unreasonable and continuous invasion of the plaintiff's property rights.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Failure to State Claim**

A court must accept plaintiffs' allegations as true and accord them the benefit of every favorable inference on

a motion to dismiss pursuant to *CPLR 3211(a)(7)*.

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN3 **Private Nuisances**

Since there cannot be a substantially unreasonable interference by smoking inside an apartment, there cannot be a private nuisance, even if plaintiffs were to show that they had suffered some damage, annoyance, and injury. To the extent odors emanating from a smoker's apartment may generally be considered annoying and uncomfortable to reasonable or ordinary persons, they are but one of the annoyances one must endure in a multiple dwelling building, especially one which does not prohibit smoking building-wide.

Real Property Law > Common Interest Communities > ***Condominiums*** > Management

HN4 **Management**

A board of managers of a ***condominium*** is specifically authorized to make determinations regarding the operation, care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners. *Real Property Law § 339-j*.

Torts > ... > Proof > Evidence > Burdens of Proof

Torts > Negligence > Elements

Torts > Premises & Property Liability > General Premises Liability > General Overview

HN5 **Burdens of Proof**

To make out a prima facie case of property owner negligence, plaintiffs must show that an owner owed a duty to plaintiffs, the owner breached such duty, and plaintiffs' injuries resulted from the owner's breach. In the absence of any duty, the negligence claim must fail.

Headnotes/Summary

Headnotes

Torts -- Nuisance -- Private Nuisance -- Smoking by Adjoining *Condominium* Owner

1. Plaintiff ***condominium*** owners failed to state a cause of action against defendants, their adjoining neighbors, for private nuisance based on damages incurred by defendants' "excessive ***smoking***," as defendants' conduct in ***smoking*** in the ***privacy*** of their own apartment was not so unreasonable as to justify the imposition of tort liability against them. Not every intrusion on a person's right to use and enjoy land will constitute a nuisance; in particular, persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. Here, defendants were not prohibited from smoking inside their apartment by any existing statute, ***condominium*** rule or bylaw. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences.

Negligence -- Duty -- Smoking by Adjoining *Condominium* Owner

2. Plaintiff ***condominium*** owners failed to state a cause of action against defendants, their adjoining neighbors, for negligence based on damages incurred by smoke from defendants' "excessive smoking" seeping into their apartment. In the absence of any duty, a negligence claim must fail. Here, defendants had no duty to refrain from smoking inside their apartment or to avoid exposing their neighbors to the secondhand smoke that unintentionally seeped into plaintiffs' apartment.

Counsel: *Shaw & Associates*, New York City (*Martin Shaw* of counsel), for appellants. *Ira Daniel Tokayer*, New York City, for respondents.

Judges: PRESENT: Shulman, J.P., Hunter, Jr., JJ.

Opinion

[275]** **[*13]** Per Curiam.

Order, dated December 1, 2009, reversed, with $ 10 costs, motion granted and complaint dismissed. The Clerk is directed to enter judgment accordingly.

Since 2007, plaintiffs have been the owners and residents of a luxury ***condominium*** unit located at 200 Chambers Street in Manhattan, New York. Their

condominium unit immediately adjoins the unit owned and occupied by their neighbors, the individual and corporate defendants. In 2009, plaintiffs commenced the instant action to recover damages for negligence and private nuisance against defendants, alleging that secondhand smoke from defendants' "excessive smoking" "seeped in" through the walls into plaintiffs' apartment, which condition was "exacerbated" by a building-wide ventilation or "odor migration" construction design problem. In fact, the complaint expressly stated that "[w]hile a smoking neighbor may be a mere annoyance under normal circumstances, due to the odor migration problem, **[***2]** secondhand smoke fills [plaintiffs'] kitchen, bedroom and living room, causing them to vacate their unit often at night" and resulting in personal injuries.

Prior to answering, defendants moved to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), (7) and (10), on the grounds that the complaint failed to state a cause of action upon which relief could be granted, that the "documentary evidence shows that plaintiffs were prohibited from maintaining **[*14]** the action" because the ***condominium***'s declaration and bylaws do not prohibit smoking in the individual apartments, and that they failed to join the ***condominium*** as a necessary party to the action. Defendants also alleged that plaintiffs' allegations of an "odor migration" problem in the building caused by a construction design defect failed to state **[**276]** claims for private nuisance or negligence against an individual unit owner.

Plaintiff opposed the dismissal motion, arguing, inter alia, that smoking was not expressly permitted in individual units under the ***condominium*** rules, and that, even if it was determined **[****2]** that smoking was permitted, causes of action for nuisance and negligence were sufficiently pleaded. Civil Court agreed with plaintiffs, **[***3]** and denied the motion to dismiss in its entirety. We now reverse.

HN1[↑] Although there are significant similarities between nuisance and negligence claims, they constitute separate causes of action (*see* Nussbaum v Lacopo, 27 NY2d 311, 315, 265 NE2d 762, 317 NYS2d 347 [1970]). The elements of a cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570, 362 NE2d 968, 394 NYS2d 169 [1977]; *see* 61 W. 62 Owners Corp. v CGM EMP LLC, 77 AD3d 330, 334, 906 NYS2d 549 [2010], *affd as mod* 16 N.Y.3d 822, 946 NE2d 172, 921 NYS2d 184 [2011]). However, "not every intrusion will constitute a nuisance. 'Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other … If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life'" (Nussbaum v Lacopo, 27 NY2d at 315, quoting Campbell v Seaman, 63 NY 568, 577 [1876]). The relevant question is whether a defendant's use of his or her property constitutes an unreasonable **[***4]** and "continuous invasion of [the plaintiff's property] rights" (Domen Holding Co. v Aranovich, 1 NY3d 117, 124, 802 NE2d 135, 769 NYS2d 785 [2003]; *see Golub v Simon, 28 AD3d 359, 360, 814 NYS2d 61 [2006]*; Rodriguez-Nunci v Clinton Hous. & Dev. Co., 241 AD2d 339, 340, 660 NYS2d 16 [1997]).

HN2[↑] **[1]** Accepting plaintiffs' allegations as true, and according them the benefit of every favorable inference, as we must do on a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see* Zumpano v Quinn, 6 NY3d 666, 681, 849 NE2d 926, 816 NYS2d 703 [2006]; Leon v Martinez, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]), we conclude that plaintiffs have failed to state a cause of action for private nuisance against their neighboring defendants. Defendants' conduct in ***smoking*** in the ***privacy*** of **[*15]** their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them (*see* Rodriguez-Nunci v Clinton Hous. & Dev. Co., 241 AD2d at 340). Critically, defendants were not prohibited from smoking inside their apartment by any existing statute, ***condominium*** rule or bylaw. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences.

Indeed, the law of private nuisance would be stretched **[***5]** beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building. ***HN3***[↑] Since there cannot be a substantially unreasonable interference by smoking inside the apartment, there could not be a private nuisance, even if plaintiffs were to show that they had suffered some damage, annoyance and injury (*see* McCarty v Natural Carbonic Gas Co., 189 NY 40, 46-47, 81 NE 549 [1907]; Newgold v Childs Co., 148 AD 153, 132 NYS 366 [1911]). **[**277]** To the extent odors emanating from a smoker's apartment may generally be

considered annoying and uncomfortable to reasonable or ordinary persons, they are but one of the annoyances one must endure in a multiple dwelling building (*see generally* Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537, 553 NE2d 1317, 554 NYS2d 807 [1990]; Poyck v Bryant, 13 Misc 3d 699, 700, 820 NYS2d 774 [2006]), especially one which does not prohibit smoking building-wide (*cf. Upper E. Lease Assoc., LLC v Cannon, 30 Misc 3d 1213[A], 924 NYS2d 312, 2011 NY Slip Op 50054[U] [2011]*).

While we recognize the significant health hazards to nonsmokers inherent in exposure to secondhand smoke (*see* Poyck v Bryant, 13 Misc 3d at 701-702;Duntley v Barr, 10 Misc 3d 206, 207, 805 NYS2d 503 [2005]; **[***6]** Ezra, *"Get Your Ashes Out of My Living Room!": Controlling Tobacco Smoke in* **[****3]** *Multi-Unit Residential Housing*, 54 Rutgers L Rev 135, 147-151 [2001]), in the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militate against a private cause of action under these factual circumstances for secondhand smoke infiltration (*see e.g. Golub v Simon, 28 AD3d at 360* [no private cause of action for blocking view]; Herbert Paul, CPA, P.C. v 370 Lex, L.L.C., 7 Misc 3d 747, 751, 794 NYS2d 869 [2005] [no private cause of action under Public Health Law article 13-E for smoking in public areas]; Public Health Law § 1399-q [1]; § 1399-w; *cf.* Duntley v Barr, 10 Misc 3d at 208-209).

In this regard, HN4[↑] the board of managers of the subject ***condominium*** is specifically authorized to make determinations **[*16]** regarding the operation, care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners (*see* Real Property Law § 339-i; Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d at 536; Pelton v 77 Park Ave. ***Condominium***, 38 AD3d 1, 5, 825 NYS2d 28 [2006]; **[***7]** Board of Mgrs. of Stewart Place ***Condominium*** v Bragato, 15 AD3d 601, 602, 789 NYS2d 907 [2005]). Incongruously, despite plaintiffs' repeated allegations in the complaint of the building-wide ventilation problem known to the ***condominium*** board, plaintiffs failed to fully pursue their ventilation complaints with the board, or to name the board as a necessary party to this action (*see* CPLR 1001 [a]; 3211 [a] [10]; Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals, 5 NY3d 452, 839 NE2d 878, 805 NYS2d 525 [2005]).

[2] For similar reasons, plaintiffs' negligence claim should have also been dismissed. HN5[↑] "To make out a prima facie case of property owner negligence, plaintiffs must show that defendant owner[s] owed a duty to plaintiff[s], defendant[s] breached such duty, and plaintiff[s'] injuries resulted from defendant[s'] breach" (Savage v Desantis, 56 AD3d 1013, 1014, 868 NYS2d 787 [2008], *lv denied 12 NY3d 709, 908 NE2d 927, 881 NYS2d 19 [2009]*; *see* Akins v Glens Falls City School Dist., 53 NY2d 325, 333, 424 NE2d 531, 441 NYS2d 644 [1981]). In the absence of any duty, the negligence claim must fail (*see* Darby v Compagnie Natl. Air France, 96 NY2d 343, 347, 753 NE2d 160, 728 NYS2d 731 [2001]). Here, since defendants did not have a duty to refrain from smoking inside their apartment or to avoid exposing their neighbor **[***8]** to secondhand smoke that unintentionally seeped into the neighbor's apartment, plaintiffs' negligence claim must fail.

[278]** In accordance with the foregoing, defendants' motion to dismiss the complaint should have been granted, since plaintiffs have not established any basis to impose tort liability upon the neighboring defendants.

We have considered and rejected defendants' remaining contentions as unavailing.

Shulman, J.P. and Hunter, Jr., JJ. concur.

End of Document

Abrams v Board of Mgrs. of 25 Beekman Place Condominium

Supreme Court of New York, New York County

March 8, 2019, Decided

154144/2018

Reporter
2019 N.Y. Misc. LEXIS 1004 *; 2019 NY Slip Op 30587(U) **

[1]** SAMUEL J. ABRAMS and RACHAEL A. WAGNER, Plaintiffs, -against- BOARD OF MANAGERS OF 25 BEEKMAN PLACE CONDOMINIUM and MAXWELL-KATES INC., Defendants. Index No. 154144/2018

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

nuisance, cause of action, Plaintiffs', Condominium, odors, motion to dismiss, leaks, common element, repair, roof, cooking, injunction, By-Laws, preliminary injunction, fiduciary duty, allegations, offensive, breached, noise, restraining, citations, breach of contract, matter of law, first cause, act act act, continuity, vibrations, trespass, grounds, objectionable conduct

Judges: **[*1]** Robert D. Kalish, J.S.C.

Opinion by: Robert D. Kalish

Opinion

KALISH, J.:

In motion sequence number 001, Defendants Board of Managers of 25 Beekman Place Condominium (Board) and Maxwell-Kates Inc. (MKI) (Defendants), move pursuant to *CPLR 3211 (a) (1)* and *(7)* to dismiss portions of the complaint of Plaintiffs Samuel J. Abrams and Rachael A. Wagner, filed May 3, 2018 (Complaint) (NYSCEF Doc. No. 2). Plaintiffs oppose Defendants' motion and cross-move for a preliminary injunction directing the Board to take all necessary steps to eliminate certain noise allegedly affecting Plaintiffs.

BACKGROUND

Plaintiffs own and reside in the penthouse unit (Unit) of the building located at 25 Beekman Place, in the County, City and State of New York (Building) (Complaint ¶¶ 1 and 18). As reflected in its By-Laws (*id.* exhibit B), the Building, including the Unit, comprises the 25 Beekman Place Condominium (Condominium). The Condominium By-Laws set forth the Board's duties and obligations with respect to the Condominium and the Building (*id.* ¶ 4).

The Board and defendant MKI entered into a condominium management agreement (Agreement) (*id.* exhibit C) under which MKI agreed to act as the Condominium's managing **[**2]** agent, attend to the day-to-day operations **[*2]** of the Building, and keep its common elements (Common Elements)[1] in good repair (*id.* ¶ 6).

Plaintiffs allege that, shortly after they bought the Unit in December 2016, they experienced excessive and unreasonable noises, vibrations, and offensive cooking odors in the Unit about which they immediately notified the Building' superintendent (*id.* ¶¶ 18-20). Plaintiffs also assert that, after they moved in, they learned that water from the roof of the Building was leaking into their Unit because of a roof membrane that had exceeded its useful life (*see id.* ¶¶ 39).

Plaintiffs maintain that they also notified Defendants about these problems shortly after they arose and

[1] The "Common Elements" are defined to "include, but are not limited to, those rooms, areas, corridors, spaces and other parts of the Building and all facilities therein for the common use of the Units and the Unit Owners or which are necessary or convenient for the existence, maintenance or safety of the Building" (*id.* ¶ 7).

repeatedly requested that Defendants have them fixed. Plaintiffs allege that Defendants made "half-hearted efforts" to reduce the excessive noises and vibrations in their Unit (*id.* ¶ 35) and attempted a temporary repair of the roof (*id.* ¶ 40) but were unsuccessful with respect to each of these issues (*id.* ¶¶ 36-38, 41-46). Plaintiffs also assert that they repeatedly complained to the superintendent and Defendants about offensive odors but that they took no action to fix that problem (*id.* ¶ 44).

Plaintiffs assert four causes of **[*3]** action sounding in: (1) nuisance; (2) breach of contract; (3) breach of fiduciary duty; and (4) negligence.

In their first cause of action, Plaintiffs allege that the failure of the Board and MKI to maintain and repair the Building, including its pumps, fans, pipes, roof and other facilities, has caused excessive noises and vibrations in the Unit (*id.* ¶ 48). Plaintiffs further allege that, by **[**3]** failing to repair the Building, including its fans, airducts and other facilities, the Board has permitted offensive, obnoxious odors to enter the Unit (*id.* ¶ 49). Plaintiffs further allege that, by failing to replace the worn-out roof membrane, the Board and MKI have allowed continuing, damaging leaks to enter Plaintiffs' Unit (*id.* ¶ 50). Plaintiffs seek an injunction directing Defendants to take all necessary steps to abate these nuisances (*id.* ¶ 51).

In their second cause of action, Plaintiffs allege that the Condominium By-Laws are a contract between the Board and unit owners, like them, which the Board breached by, among other things, failing to maintain and repair the Common Elements of the Building and permitting several nuisances to continue unabated (*id.* ¶ 53-54).

In their third cause of **[*4]** action, Plaintiffs allege that, as owners of the Unit, the Board owes them a fiduciary duty to safeguard their use and enjoyment of the Building and Unit and to preserve their values (*id.* ¶ 57). Plaintiffs allege the Board has breached this duty by failing to maintain and repair the Building and by failing to protect the Unit from the continuing nuisances described, which have lessened the values of the Unit and the Building.

In their fourth cause of action, Plaintiffs allege that the Board and MKI owe them a duty of care to maintain and repair the Building and its Common Elements in accordance with "standards of quality, service and appearance appropriate to a luxury condominium" (*id.* ¶ 61). Plaintiffs assert that Defendants acted negligently by failing to maintain and repair the Building and its Common Elements in such a manner as to maintain its luxury standard and by failing to abate the nuisances (*id.* ¶ 62). Plaintiffs seek compensatory damages on the second, third, and fourth causes of action (*id.* 755, 58-59, 64).

Defendants now move to dismiss portions of Plaintiffs' first cause of action, for nuisance. Specifically, Defendants move for dismissal of Plaintiffs' claim for nuisance caused by offensive **[*5]** **[**4]** cooking odors, which is asserted against the Board, only. Defendants further move to dismiss the part of Plaintiffs' claim for nuisance premised on roof leaks, which is asserted against both the Board and MKI. Defendants do not seek dismissal of the branches of Plaintiffs' first cause of action regarding excessive noise and vibration.

Defendants also move to dismiss the second and third causes of action, for breach of contract and breach of fiduciary duty, respectively, which are asserted against the Board, only, and the fourth cause of action for negligence, which is asserted against both Defendants.

Plaintiffs oppose Defendants' motion and cross-move for a preliminary injunction directing Defendants to eliminate the alleged excessive noises and vibrations produced by pumps located in the cellar of the Building and by fan units located on its roof.

DISCUSSION

"In the context of a motion to dismiss pursuant to *CPLR 3211*, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]* [citation omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus **[*6]** in determining a motion to dismiss" (*id.*).

"Under *CPLR 3211 (a) (1)*, a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez, 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]* [citation omitted]).

Under *CPLR 3211 (a) (7)*, the court addresses the face of the pleading, to decide whether the pleader's allegations fit any cognizable legal theory (*id.*, *84 NY2d at 87-88*). "Accordingly, a motion to dismiss for failure to state a cause of action pursuant to *CPLR 3211* is available only where the dispute pertains to law, not facts" (*Khalil v State, 17 Misc3d 777, 781, 847 N.Y.S.2d*

390 [Sup Ct, NY County 2007] [citation omitted]).

[5]** On a motion pursuant to CPLR 3211 (a) (7), the Court "may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one" (Chanko v American Broadcasting Co., 27 NY3d 46, 52, 29 N.Y.S.3d 879, 49 N.E.3d 1171 [2016] [citation omitted]). Nevertheless, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (Matter of Sud v Sud, 211 AD2d 423, 424, 621 N.Y.S.2d 37 [1st Dept 1995] [citations omitted]).

I. Plaintiffs' First Cause of Action—Nuisance Based on Odors and Leaks

A. Odors

Defendants argue that Plaintiffs have failed to state a cause of action for nuisance **[*7]** caused by excessive odors because the Complaint does not allege that the nuisance is intentional or that Defendants caused it. Defendants further argue that the Complaint does not allege that the odors were substantial, unreasonable, or interfering with Plaintiffs' right to use and enjoy the Unit. Defendants further argue that, as a matter of law, the Board cannot be held liable in nuisance for cooking odors caused by a third party.

"The elements of a common-law claim for a private nuisance are:

> "(1) an interference substantial in nature,
> "(2) intentional in origin,
> "(3) unreasonable in character,
> "(4) with a person's property right to use and enjoy land, caused by another's conduct in acting or failure to act.

"Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct" (Berenger v 261 West LLC, 93 AD3d 175, 182, 940 N.Y.S.2d 4 [1st Dept 2012] [citations and internal quotation marks omitted]). Defendants' argument, citing *Berenger*, that any nuisance must be intentional to be actionable, is misplaced. The Court of Appeals has held that a party may be subject to liability for private nuisance arising out of its negligent or reckless misconduct (*see* , **[**6]** Copart Indus., Inc. v Consolidated Edison Co., 41 NY2d 564, 569, 362 NE2d 968, 394 NYS2d 169 [1977]). Here, Plaintiffs allege that they **[*8]** have complained to Defendants about offensive cooking odors in their Unit multiple times to little avail (Complaint ¶ 44).

The Court finds that this allegation satisfies the elements of nuisance and is sufficient to withstand Defendants' CPLR 3211 (a) (7) motion to dismiss. While Defendants fault Plaintiffs for not strictly adhering to *Berenger's* definition of nuisance, insofar as they do not allege the odors at issue are "substantial," "unreasonable," or interfered with Plaintiffs' rights, Plaintiffs do complain of an "ongoing, recurring presence of an unacceptable level of odor" (Zipper v Haroldon Ct. Condominium, 39 AD3d 325, 326, 835 N.Y.S.2d 43 [1st Dept 2007], *citing* Domen Holding Co. v Aranovich, 1 NY3d 117, 123-24, 802 N.E.2d 135, 769 N.Y.S.2d 785 [2003]). Defendants' argument regarding the elements under *Berenger* goes to whether Plaintiffs' cause of action is artfully stated, not whether they have one.

Defendants argue in the alternative that the Board cannot be held liable for nuisance caused by offensive cooking odors because it did not cause or create them. Plaintiffs argue that Defendants' definition of causation is too narrow, and the Court agrees. Plaintiffs allege that the offensive odors in their Unit, specifically, are caused not only by third parties cooking in the Building's other units but also by ventilation problems caused and created by improper kitchen **[*9]** renovations that the Board permitted in other units, including the unit owned by the president of the Board. Plaintiffs allege that the faulty renovations both intensify the odors and discharge them into the Unit (affidavit of Samuel J. Abrams, sworn to July 30, 2018 [Abrams aff] ¶¶ 6-14; *see also* Complaint 11 43-44). As such, the Court rejects this alternative argument and accepts as true for the purposes of the instant motion that the Board's failure and refusal to maintain and repair the Building's ventilation system has caused substantial, unreasonable and continuing offensive and obnoxious odors to enter the Unit (*see* Copart Indus., Inc., 41 NY2d at 566 **[**7]** [nuisance claim based not on defendant's creation of pollutants at its steam and electricity plant, but on its improper discharge of "noxious emissions" from smokestacks, which damaged exteriors of automobiles plaintiff stored on adjoining property]).

Finally, Defendants argue that the first cause of action should be dismissed because the cooking odors

Plaintiffs complain about are merely common annoyances incidental to urban life, which are unavoidable in multiple-dwelling buildings. In effect, Defendants argue that cooking odors cannot constitute a nuisance as **[*10]** a matter of law.

A cause of action for nuisance rests on two factors: first, how offensive the nuisance is (*see* Berenger, 93 AD3d at 182 [whether the interference with plaintiffs' rights is "substantial in nature. . . [and] unreasonable in character"]); and, second, whether such interference involves "a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co., 1 NY3d at 139* [citation and internal quotation marks omitted]).

> "The law relating to private nuisances is a law of degree and usually turns on the question of fact whether the use is reasonable or not under all the circumstances. No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another"

(*McCarty v National Carbonic Gas Co., 189 NY 40, 46, 81 N.E. 549 [1907]*).

Plaintiffs describe the cooking odors entering the Unit as "direct, frequent and potent" (Abrams aff ¶ 7). These allegations satisfy the pleading requirement that an alleged nuisance be substantial, unreasonable and recurring (*see* *Berenger, 93 AD3d at 182* and *Domen Holding Co., 1 NY3d at 139*).

Rather than addressing these factors, Defendants conclude that "the 'annoying' smell of cooking odors," generally, is "merely an annoyance" of city life "that one must endure," and cannot constitute actionable nuisance (Defendants' memorandum **[*11]** in support, at 8, citing *Ewen v Maccherone, 32 Misc3d 12, 927 N.Y.S.2d 274 [1st Dept 2011]*).

[8]** The *Ewen* decision does not support the conclusion that, as a matter of law, cooking odors can never constitute an actionable nuisance. *Ewen* merely states that "not *every* intrusion will constitute a nuisance" and that city residents "must suffer *some* damage, annoyance and inconvenience from each other" (*32 Misc3d at 14* [emphases added]). It may well be that the odors in the Unit will prove to be insubstantial or reasonable, or will be shown to recur infrequently, under the *Berenger* and *Domen Holding Co.* standards. Nevertheless, in this motion to dismiss, the Court finds that Plaintiffs have a cause of action sounding in nuisance with respect to these odors. As such, Defendants' motion on that facet of Plaintiffs' nuisance cause of action on the aforementioned grounds is denied.

B. Nuisance Caused by Leaks

In *Berenger*, the plaintiff alleged, among other things, that the defendant condominium sponsor committed a trespass by allowing glycol leaking from a cooling tower to enter plaintiff's penthouse condominium (*93 AD3d at 181*).

> "Trespass is the invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land. . .. Unlike trespass, which arises **[*12]** from the exclusiveness of possession and requires a physical entry onto the property, a claim of private nuisance arises from an interest in the use and enjoyment of property. . . [and is] characterized by a pattern of continuity or recurrence of objectionable conduct"

(*id. at 181-182* [citations omitted]).

Berenger demonstrates that trespass is a proper action to assert where a party is aggrieved by the invasion of its real property by a liquid (*id. at 181*, *citing* *Crown Assocs. v Zot, LLC, 83 AD3d 765, 921 NYS2d 268 [2d Dept 2009]* [water] and *Duane Reade v Reva Holding Corp., 30 AD3d 229, 818 N.Y.S.2d 9 [1st Dept 2006]* [debris and water]).

In *Duane Reade*, the Appellate Division, First Department held that the plaintiff commercial tenant had sufficiently alleged claims for nuisance and trespass (*30 AD3d at 236-237*). **[**9]** Duane Reade had leased a store in Brooklyn from defendant landlord Reva. Reva then hired defendant contractor F&S to add a second story to the building. Plaintiff alleged that F&S did not perform in a workmanlike manner, causing injury to property (*id.*, *30 AD3d at 230*). Specifically, plaintiff alleged that F&S opened exploratory holes in the building's roof that it failed to cover and seal properly, resulting in water leaking from the roof into plaintiff's store and, on at least two occasions, causing water pipes to freeze and burst (*id.*).

The Appellate Division, First Department **[*13]** determined that the motion court erred in dismissing Duane Reade's nuisance claim and that Duane Reade had sufficiently alleged a "'recurrence of objectionable conduct" on the part of Reva and F&S, respectively (*id.*,

30 AD3d at 236-237 [citations and internal quotation marks omitted]). The court also found that Duane Reade had sufficiently alleged that Reva and F&S had "committed a trespass upon the demised premises by causing water and debris to be deposited therein, without any right to do so" (*id.*, *30 AD3d at 237* [citations omitted]).

Here, under the *Duane Reade* standard, Plaintiffs have sufficiently alleged a recurrence of objectionable conduct. As such, Defendants' motion to dismiss that part of Plaintiffs' nuisance cause of action relating to water leaks in the roof on the aforementioned grounds is denied.

II. Plaintiffs' Second Cause of Action—Breach of Contract based on Leaks

In their second cause of action, Plaintiffs allege that the Board breached the Condominium By-Laws by permitting leaks from the roof to exist and to interfere with Plaintiffs' use and enjoyment of the Unit. Defendants move to dismiss this cause of action pursuant to *CPLR 3211 (a) (1)* and *(7)* as to the alleged leaks. Defendants allege that, under section 2.13.2 of the Condominium **[*14]** By-Laws, the Board cannot be held liable for water leaks that emanate from Common Elements. Section 2.13.2 states, in pertinent part:

> **[**10]** "Neither the Board nor any member thereof shall be liable for. . . (ii) any injury, loss or damage to any individual or property, occurring in or upon either a Unit or any Common Element and is either: (a) caused by the elements, by any Unit Owner or by any other individual, (b) resulting from electricity, water snow or ice that may leak or flow from a Unit or any portion of any Common Element, or (c) arising out of theft or otherwise; except when caused by the acts of bad faith or willful misconduct of the Board or any member thereof."

Plaintiffs argue that Defendants' interpretation of the By-Laws is incorrect and that it contains limitation of liability solely as to personal injuries and injuries to personal property and contend that this provision has no application to any damage caused by the Board to the Unit.

Plaintiffs further argue that Section 6.6.3 of the By-Laws holds the Board responsible for water leaks caused by the disrepair of Common Elements. Plaintiffs maintain that, under Section 6.6.3, the Board is obligated to keep "Common Elements" of the Building in "first class condition" **[*15]** and that this requires the Board to "promptly make or perform, or cause to be made or perform, all maintenance work, repairs, and replacements necessary in connection herewith."

The Court finds that these provisions of the Condominium By-Laws are ambiguous enough to bar dismissal of Plaintiffs' breach of contract claim pursuant to *CPLR 3211 (a) (1)* (*see Wright v Evanston Ins. Co., 14 AD3d 505, 505, 788 N.Y.S.2d 416 [2d Dept 2005]* [affirming denial of *3211 [a] [1]* dismissal where insurance contract on which movant relied, that contained "ambiguous and conflicting" provisions, "failed to resolve all factual issues and conclusively dispose of plaintiff's claims as a matter of law"]). Further, the Court finds that Plaintiffs have a cause of action for breach of contract as to the leaks based upon these sections. As such, the branch of the Defendants' motion that is to dismiss the second cause of action is denied.

III. Plaintiffs' Third Cause of Action—Breach of Fiduciary Duty

In their third cause of action, Plaintiffs allege that the Board breached its fiduciary duty by not repairing the Building and not abating the nuisances. Defendants argue that this cause of **[**11]** action must be dismissed because a condominium board does not owe a fiduciary duty to unit owners as a matter of law. The **[*16]** Appellate Division, First Department has held otherwise (*see Tsui v Chou, 135 AD3d 597, 597-598, 24 N.Y.S.3d 44 [1st Dept 2016]* [condominium board's decision not to investigate claims that board members improperly extended their terms on board, beyond period by-laws permitted, in breach of their fiduciary duties, held arbitrary and therefore not protected by business judgment rule]; *Odell v 704 Broadway Condo., 284 AD2d 52, 59, 728 NYS2d 464 [1st Dept 2001]* [condominium's board owes fiduciary duties to owner upon unit's purchase]). The Court declines to adopt Defendants' broad proposed restriction on a unit owner's private right of action as to a condominium board under any circumstances. Whether the acts of the Board were arbitrary or should be protected by the business judgment rule is not an appropriate inquiry for a court on a motion to dismiss. As such, Defendants' motion to dismiss Plaintiffs' third cause of action for breach of fiduciary duty is denied.

IV. Plaintiffs' Fourth Cause of Action—Negligence

Defendants assert, correctly, that Plaintiffs' negligence claims are based on the same allegations as the breach of contract claims. From this, Defendants argue that Plaintiffs cannot maintain their negligence cause of action because they fail to identify a "legal duty independent of the contract itself [which] has been **[*17]** violated" (*Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]*). In *Clark-Fitzgerald*, the Court of Appeals found that the plaintiff failed to allege a violation of a legal duty independent of the contract, because each of its allegations were "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract" (*70 NY2d at 390*).

Plaintiffs allege that the Board and MKI breached their duty of care, which required them to maintain and repair the Common Elements of the Building "in such a manner that standards of **[**12]** quality, service and appearance appropriate to a luxury condominium are maintained" (Complaint ¶¶ 61-62). These allegations repeat, verbatim, Plaintiffs' description of the Board's duties under the Condominium By-Laws (*id.* ¶ 5), which form the basis of their cause of action for breach of contract (*see id.* ¶¶ 52-55).

Plaintiffs nevertheless argue that Defendants owe them a duty of care separate and apart from their contractual obligations based on the Multiple Dwelling Law (MDL) and New York City's Housing Maintenance Code. For the purposes of withstanding this motion to dismiss, the Court agrees as to the MDL, and that is sufficient for the fourth cause of **[*18]** action to withstand this motion to dismiss on these grounds. Liability under the MDL may arise from injury caused by a defective or dangerous condition where a property owner's common-law duty under *Multiple Dwelling Law § 78* to maintain premises in a reasonably safe condition has been breached, and where such breach was a proximate cause of the injury (*see Juarez by Juarez v Wavecrest Mgt. Team Ltd., 88 NY2d 628, 643, 672 NE2d 135, 649 NYS2d 115 [1996]*; *Rivera v Nelson Realty, LLC, 20 AD3d 316, 799 N.Y.S.2d 198 [1st Dept 2005]*). Plaintiffs have a cognizable negligence cause of action independent of and severable from their breach of contract cause of action. As such, Defendants' motion to dismiss Plaintiffs' fourth cause of action for negligence on these grounds is denied.

V. Dismissal of All Causes of Action as Against MKI

Aside from the grounds discussed above, Defendants argue in the alternative that all causes of action asserted against MKI must be dismissed because, as an agent acting solely on behalf of its disclosed principal, it may not be held liable to third parties. The court agrees.

As an agent for the Board, which is its disclosed principal, MKI cannot be held liable to third parties, such as Plaintiffs, "'for nonfeasance but only for affirmative acts of negligence or other wrong'" (*Pelton v 77 Park Ave. Condominium, 38 AD3d 1, 11, 825 N.Y.S.2d 28 [1st Dept 2006]*, *overruled on other grounds by* , **[**13]** *Fletcher v Dakota, Inc., 99 AD3d 43, 948 NYS2d 263 [1st Dept 2012]*, *quoting Greco v Levy, 257 App Div 209, 211, 12 N.Y.S.2d 470 [1st Dept]*, *affd 282 NY 575, 24 N.E.2d 989 [1939]*.

> "The reason **[*19]** is clear. 'Unless the agent has assumed authority and responsibility, as if he were acting on his own account, then the duty which the agent fails to perform is a duty owing only to his principal and not to the third party to whom he has assumed no obligation'"

(*Pelton, 38 AD3d at 11*, *quoting Jones v Archibald, 45 AD2d 532, 535, 360 N.Y.S.2d 119 [1974]*).

Plaintiffs have failed to show for the purposes of the instant motion that MKI, as the Board's managing agent, owed them an independent duty or that MKI was affirmatively negligent in its conduct toward them. All the duties MKI is alleged to have breached were breached by nonfeasance. As such, the first and fourth causes of action asserted against MKI, sounding in nuisance and negligence, respectively, are dismissed.

VI. Plaintiffs' Cross-Motion for Preliminary Injunctive Relief

Plaintiffs cross-move for a preliminary injunction enjoining and directing the Board "immediately to take all necessary steps to eliminate the noise produced from the pumps located in the cellar of the [Building]" and "from the fan units and cooling tower located on the Building roof' (affirmation of Michelle P. Quinn, Esq., executed July 30, 2018 [Quinn aff], ¶ 2.a). Defendants oppose.

"The party seeking a preliminary injunction must demonstrate **[*20]** a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu*

Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840, 833 N.E.2d 191, 800 N.Y.S.2d 48 [2005], citing *CPLR 6301*). "A preliminary injunction is a drastic remedy, which should not be granted unless the movant demonstrates "a clear right" to such relief' (*22 Irving Place Corp. v 30 Irving LLC, 57 Misc3d 253, 255, 60 N.Y.S.3d 640 [Sup Ct, NY County 2017]*, quoting *City of New York v 330 Continental, LLC, 60 AD3d 226, 873 N.Y.S.2d 9 [1st Dept 2009])*.

[14]** "It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC, 162 AD3d 615, 616, 81 N.Y.S.3d 5 [1st Dept 2018]*, citing *Moltisanti v East Riv. Hous. Corp., 149 AD3d 530, 531, 52 N.Y.S.3d 333 [1st Dept 2017])*.

CPLR 6301 provides that:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction **[*21]** where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

The CPLR allows for a preliminary injunction in two situations: (1) to restrain a defendant who is threatening to do, or is doing, an act in violation of plaintiff's rights with respect to the subject of the action that would tend to render judgment ineffectual; or (2) in an action where plaintiff is demanding, and would be entitled to, a judgment which permanently restrains defendant from committing or continuing an act, which if committed or continued while the action is pending, would injure plaintiff (*see* Siegel, NY Prac § 327 [6th ed.]).

Rather than seeking to restrain Defendants, Plaintiffs seek an injunction to compel Defendants to engage in specific conduct. Although *CPLR 6301*

> "speaks only in terms of 'restraining' the commission or continuance of acts, a preliminary mandatory injunction may be granted where the plaintiff presents a case showing or tending to show that affirmative action of a temporary character on the part of the defendant is necessary to preserve or restore the status quo of the parties"

(*67A NY Jur 2d Injunctions § 42* [2d ed.], citing *Bachman v Harrington, 184 NY 458, 77 N.E. 657, 37 Civ. Proc. R. 56 [1906]* and *Pizer v Trade Union Serv., 276 App Div 1071, 96 N.Y.S.2d 377 [1st Dept 1950])*.

[15]** Plaintiffs' **[*22]** cross-motion must be denied because, even if they make out their prima facie showing for preliminary injunctive relief (*see Nobu Next Door, LLC)*, the Court finds that they fail to show that the affirmative actions that they want Defendants ordered to perform are in any way necessary to preserve the status quo between them and Defendants (*see Pizer, 276 App Div at 1071* [grant of "mandatory injunction *pendente lite* [is an] extraordinary action [] justified only where the situation is unusual and where the granting of the relief is essential to maintain the *status quo* pending trial of the action"] [citations omitted]).

The Court finds further that Plaintiffs have not sufficiently shown extraordinary circumstances for the purposes of the instant cross-motion. To the contrary, the injunction sought would not only disturb the status quo but would also grant Plaintiffs the ultimate relief sought, which they now seek at the outset of the litigation, with respect to their allegations of noise and vibration nuisances under their first cause of action (*St. Paul Fire & Mar. Ins. Co. v York Claims Serv., 308 AD2d 347, 349, 765 N.Y.S.2d 573 [1st Dept 2003]* [citations omitted]).

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted to the extent that Plaintiffs' first and fourth causes of action **[*23]** against MKI for nuisance and negligence are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Plaintiffs' cross-motion for preliminary injunctive relief is denied; and it is further

[16]** ORDERED that the action shall bear the following caption:

SAMUEL J. ABRAMS and RACHAEL A. WAGNER, Plaintiffs, - against - BOARD OF MANAGERS OF 25 BEEKMAN PLACE CONDOMINIUM, Defendant.
Index No.: 154144/2018

And it is further

ORDERED that movants and cross-movant shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry upon all parties and upon the county clerk (Room 1418) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption herein; and it is further

ORDERED that the remaining parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, March 19, 2019, for a preliminary conference.

The foregoing constitutes the decision and order of the court.

Dated: March 8, 2019

Enter: /s/ Robert D. Kalish

J.S.C.

FORM A: <u>APPLICATION FOR REASONABLE ACCOMMODATION</u>

COMPLETE THIS FORM IF YOU HAVE A DISABILITY AND WOULD LIKE TO REQUEST AN ACCOMMODATION.

SHAREHOLDER NAME: _____

ADDRESS: _____ TELEPHONE#: _____

PERSON REQUESTING ACCOMMODATION: _____

(IF DIFFERENT FROM SHAREHOLDER)
RELATIONSHIP TO SHAREHOLDER: _____

---

1. Please describe the reasonable accommodation you are requesting:

2. Please explain why this reasonable accommodation is needed. You need not provide detailed information about the nature or severity of the disability.

3. If you are requesting permission to have an assistance animal in your apartment, please complete the following:

   (a) Is it readily apparent that the assistance animal is a trained service animal (for example, an animal trained to assist you with a visual impairment or similar disability)?

   _____ YES _____ NO

   (b) If your answer to 3(a) above was NO, please complete the following:

      i. Type of animal: _____

      ii. Is the animal required because of a disability? ____ Yes _____ No

      iii. Does the animal perform work or do tasks for you because of your disability? _____ Yes _____ No

IF THE ANIMAL PERFORMS WORK OR TASKS FOR YOU, PLEASE PROVIDE THE FOLLOWING:

(1) A statement from a health or social service professional indicating that you have a disability (*i.e.,* you have a physical or mental impairment that substantially limits one or more major life activities). You may use, but are not required to use, Form B.

(2) An explanation of how the animal has been trained to do work or perform tasks that ameliorate one or more symptoms or effects of your disability or, if the animal lacks individual training, how the animal is able to do work or perform tasks that ameliorate one or more symptoms or effects of your disability.

(3) Please submit a photograph of the animal after you have selected an animal.

IF THE ANIMAL DOES NOT PERFORM WORK OR DO TASKS FOR YOU, BUT PROVIDES EMOTIONAL SUPPORT OR AMELIORATES ONE OR MORE EFFECTS OF YOUR DISABILITY, PLEASE PROVIDE THE FOLLOWING:

(1) A statement from a health or social service professional indicating: (a) that you have a disability; (b) the animal would provide emotional support or other assistance that would ameliorate one or more symptoms or effects of your disability; and (c) how the animal ameliorates the symptoms or effect(s). You may use, but are not required to use, Form B.

(2) Please submit a photograph of the animal after you have selected an animal.

4. If the assistance animal is a dog or a cat, please provide copies of the rabies tag or certificate that is required by New York law. If you have not selected an animal at the time you complete this application, [INSERT HOUSING PROVIDER] may approve the application with the condition that, if you select a dog or a cat, you must submit copies of the rabies tag or certificate that is required by New York law, before the selected animal moves in.

5. If you are requesting a different modification or accommodation, please describe it here:

_____ Date: _____

Signature

FORM B: Assistance Animal Requests: Health Care Professional Form

SHAREHOLDER NAME: _____

ADDRESS: _____ TELEPHONE#: _____

I, _____ (applicant name) intend to request that [INSERT HOUSING PROVIDER] permit me to keep an assistance animal as a reasonable accommodation for my disability. In connection with that application, I am requesting that you complete this form regarding my disability.

_____ Date: _____
Applicant Signature

NAME OF APPLICANT: _____

RELATIONSHIP TO SHAREHOLDER: _____

TO BE COMPLETED BY HEALTH CARE PROFESSIONAL

NAME: _____

ADDRESS: _____

TELEPHONE NUMBER: _____

1. Does the individual identified above have a disability?

2. Does or would an assistance animal provide disability-related assistance to the individual? One example of assistance is alleviating one or more of the symptoms or effects of the disability.

3. For animals who do not perform work or do tasks for the individual, how would the animal ameliorate one or more of the symptoms or effects of the disability?

4. If you would like to submit additional supporting materials, please provide them with this form.

NAME: _____

SIGNATURE: _____

TITLE: _____

DATE: _____

SEYFARTH SHAW

Management Alert

New York City Human Rights Law Imposes Stringent Accommodation Requirements for Businesses

By John W. Egan, Dennis Greenstein, and Samuel Sverdlov

Seyfarth Synopsis: *On January 19, 2018, the New York City passed a law requiring that businesses engage in "cooperative dialogue" with individuals with disabilities and in other protected categories in the context of employment, housing and public accommodations.*

The New York City Council recently amended the New York City Human Rights Law to expressly require that a broad cross section of businesses dialogue with individuals with disabilities and others regarding their accommodation needs. Specifically, housing providers, employers, and public accommodations must comply with a specific protocol for evaluating requests for accommodations by individuals with disabilities. While generally consistent with the requirement that employers engage in the "interactive process" under Title I of the Americans with Disabilities Act ("ADA"), the scope of the new law, which will take effect on October 15, 2018, is broader than existing federal requirements.

The "Cooperative Dialogue" Obligation

Here are the key components of the amendments:

- The new law applies to "covered entities," which include housing providers (i.e. owners, landlords, and cooperative and condominium boards), employers, and places of public accommodation (i.e. retailers and other public-facing businesses).
- The amendment makes it an "unlawful discriminatory practice" for a covered entity to fail to engage in the "cooperative dialogue," which refers to a written or oral dialogue concerning an individual's accommodation needs, the individual's requested accommodation and potential alternatives, and difficulties that potential accommodations may pose for the business.
- The cooperative dialogue requirement is not only triggered by requests for accommodation, but also when the covered entity is considered on notice of an individual's need for an accommodation.
- The determination must be made within a "reasonable time" (the statute does not provide any definition or other guidance as to what qualifies as "reasonable").
- **Significantly, employers and housing providers (not public accommodations) must provide a written final determination identifying any accommodation granted or denied.**

What The Amendment Means For Businesses

Housing Providers

Housing providers must engage in the cooperative dialogue with unit owners, co-op shareholders, tenants, and other residents with disabilities, and issue a written decision. Although it is a best practice to memorialize these communications, some housing providers may not be accustomed to issuing written determinations in every case. These issues arise, for example, when residents have service or emotional support animals in "no pet" multi-family buildings, or where residents with mobility disabilities request alteration of common areas. The requirement of a timely written determination, and issues concerning when a housing provider is on "notice" of the need for a potential accommodation, are additional reasons why housing providers should confer with experienced counsel in addressing these issues.

Employers

Under the amendment, employers are required to engage in the cooperative dialogue with individuals seeking disability-related accommodations, religious accommodations, pregnancy-related accommodations, and accommodations for victims of domestic violence, sex offenses, or stalking. The amendment underscores the need to train managerial and human resource employees to respond appropriately to accommodation requests, including by identifying potential accommodations, interfacing effectively with employees, and memorializing the determination.

Places of Public Accommodation

This category consists of public-facing businesses, including, for example, retailers, hotels, theaters, restaurants, and educational institutions. The ADA already requires that businesses make "reasonable modifications" to their policies, practices and procedures to facilitate access for patrons with disabilities. Moreover, for certain specific accommodations (such as allowing individuals with service animals to enter premises that prohibit animals), federal regulations and regulatory guidance set forth specific protocols for businesses to evaluate these requests. The interplay between the new law and existing federal requirements under Title III of the ADA is not entirely clear at this early stage.

Conclusion

This is an opportune time for businesses to revisit their policies, practices, and procedures, as well as employee training programs, to ensure that they have a sufficient process in place for evaluating accommodation requests.

If you would like further information regarding the amendments to the NYCHRL, please contact John W. Egan at jegan@seyfarth.com, Dennis Greenstein at dgreenstein@seyfarth.com, or Samuel Sverdlov at ssverdlov@seyfarth.com.