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CASE LAW TRACKER
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ACCESS

E. 44TH ST., LLC V. BEAUX ARTS II LLC

2025 NY SLIP OP 32462(U) (SUP. CT. N.Y. CNTY. JULY 8, 2025)

Access Petition Rejected in 44th Street Dispute

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendant

WHAT HAPPENED: The Petitioner was the owner and developer of 303-305 East 44th Street in Manhattan. It sought a license to access the adjacent property at 307 East 44th Street (an historic building) owned by respondent Beaux Arts II LLC (Beaux Art). The petitioner was seeking to "[conduct] a pre-construction survey" for the installation of temporary protections in order to develop a 41-story residential building. When, according to petitioner, Beaux Art would not agree to provide a license, it commenced this proceeding to obtain a temporary license pursuant to §881 of the New York Real Property Actions and Proceedings Law (RPAPL).

Petitioner claimed it had made extensive good faith efforts to negotiate an access agreement with Beaux Arts, including advancing funds for Beaux Arts' professional fees. Beaux Arts opposed the petition and cross-moved for dismissal, arguing that the application was premature and that it had not denied access but had engaged in good faith negotiations. It asserted that petitioner's plans were deficient, lacked necessary Department of Buildings (DOB) approvals, and contemplated permanent encroachments (such as tiebacks or underpinning) on its property. It also asserted that adequate insurance and indemnification provisions were missing as were important provisions, such as the dates access would be required. Beaux Arts also sought attorneys' and engineering fees, as well as sanctions for what it characterized as a frivolous proceeding.

Beaux Art claimed petitioner acted in bad faith in bringing this proceeding— that Beaux Art did not refuse access; it merely asked for more information and protections and that petitioner failed to submit updated drawings or information when requested. For its part, petitioner claims that while Beaux Art may not have refused access outright, it failed to

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Court Backs Condo Over Construction Access Fees

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CO-OP & CONDO CASE LAW TRACKER DIGEST includes cases and squib commentary written by the Tracker's Advisory Panel and contributors, who are New York's leading co-op/condo practitioners. This issue covers court decisions from June 2025. For additional cases, visit https://coopcondocaselawtracker.com.

Publisher: Carol J. Ott
Executive Editor: Heather L. Stone
Creative Director: Pablo Turcios
Librarian: Alyssa Rosen
Database Content Manager: Heather Hess
Director of Operations and Sales: Leslie Strauss
Marketing Director: Peggy Mullaney

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articulate the terms under which it would permit access.

IN COURT: The court denied the petition, holding that the petitioner failed to make out a prima facie case as to the reasonableness and necessity of the access sought. As a procedural matter, the Court found that petitioner did not demonstrate that its plans were approved by DOB at the time of the filing of the petition. While petitioner did receive DOB approval for plans for the initial phase of work, the court refused to consider it as petitioner improperly introduced the plans as part of its reply papers.

The court also denied Beaux Arts' motion for sanctions as it did not demonstrate that petitioner's conduct rose to the level of frivolous conduct. As to professional fees, because it denied the petitioner's request for a license, the court is not authorized to grant fees. The court noted cases which state that where a neighboring property owner defeats a demand for access, no professional fees can be awarded.

TAKEAWAY:

Based on the court's holding, petitioners in RPAPL §881proceedings are cautioned to ensure that it submits approved plans, the reasons access is required and all other details of the requested access in its initial papers. The court refused to consider proof submitted by petitioner in its reply papers as the function of reply is not to introduce new arguments or evidence, but rather to respond to contentions of the respondent.

Moreover, this case reminds us that the basis for awarding legal and other professional fees lies in the language of the statute and that, where a license is not granted, an award of professional fees will not lie.

While Beaux Art may have been successful in defeating the demand for access in this proceeding, it is likely that the parties will be required to revisit the issue either in negotiations or in another court proceeding.

ATTORNEY FEES

215 N 10 PARTNERS LLC V. MCCAREN PARK MEWS CONDO. INC.

522612/2022 (SUP. CT. KINGS CNTY. JULY 2, 2025) NYSCEF NO. 88

Court Backs Condo Over Construction Access Fees

SQUIB BY MICHAEL P. GRAFF, ATTORNEY/MEDIATOR, GRAFF DISPUTE RESOLUTION

OUTCOME: Decided for Defendant Condo

WHAT HAPPENED: In March 2018, the plaintiff purchased a vacant lot at 215 North 10th Street, Brooklyn, New York, to develop a boutique six-story, mixed-use building with retail units, residential condos, and underground parking spaces. The defendant, McCaren Park Mews Condo. Inc. is the owner of the adjacent property. The adjacent property is an L-shaped 120-unit luxury condo complex, directly north of the petitioner's property,

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adjoining the petitioner's north (rear) and west(side) property lines. Pursuant to §881 of the New York Real Property Actions and Proceedings Law ("RPAPL") §881, the plaintiff filed a petition for a license to gain access to the neighboring property of the condo to build on the plaintiff's lot. The plaintiff made two access agreements with the condo. The first license granted the plaintiff access to the condo's property during the time it demolished its existing buildings. The second license grant access to the condo during the construction of the plaintiff's new building and for the protection of the property on the condo. The second access agreement provided for three different fee payments. Two of these were to be paid on sighing and were to continue until the protections installed for the condo were removed after construction, $5,000/month to compensate the condo for the loss of use of common space until the protections were removed, and other amounts to the owner of seven units affected. Also, $500 each for payment for 4 lot line windows blocked by construction. The agreement also provided for other issues, including the following: reimbursement of the condo for attorney fees that the condo incurred during the drafting, review, negotiation and execution of the access agreements, negotiation of amendments, damages to the condo premises and those not timely addressed as required by the agreement, fees to enforce the agreement following a breach, engineering fees, the costs of reviewing protection plans, review of revised plans for the protective work, inspection of each task, damages to the condo premises, review and approval of repair procedure.

If a breach was not cured following a seven-day cure period, the party harmed was entitled to immediately terminate the license granted under it.

The access agreement provided a license for the plaintiff's workers to enter the condo property to ensure the safety of the condo building, including monitoring during construction, erecting fences or sidewalk bridges, weatherproofing the condo's premises, and repairing any "adjacent property work" caused by the plaintiff during its construction. The parties selected a neutral engineer or arbitration to resolve any dispute regarding the scope of the agreement, the protection of the condo's property and any repair work.

IN COURT: Both parties seek an award on the second access agreement or upon what happened when the plaintiff filed a petition to gain access it claimed was wrongly denied by the condo. The condo claimed that the plaintiff owes it $148,764.16 in license fees, including the fees owed to the lot line window unit owners, and it should be awarded attorney fees and engineering fees the plaintiff did not pay when due under the agreement.

The dispute was referred to a referee to hear and determine "whether any prior license fees, attorney and professional fees are due under the second agreement, or costs of $2,000 for the lot line windows."1

There was no dispute that the license fees for the condo for 11 months and for the individual owners was unpaid. The plaintiff stated that the condo breached its agreement by failing to allow access when the time came to remove the protections and thus should not have to pay these license fees. The court held that the condo was not in breach as of a certain date and that the plaintiff should be held responsible for all fees to that date.

The court held that since the agreement provided that the license fee continued until ALL protections are removed, the plaintiff could not avoid payments by claiming some of its protections were removed during the finishing of the project.

Since the agreement required that plans for all work had to be shared with the condo, the plaintiff's failure to share plans for additional work requiring access would be a breach of the agreement. However, if the additional work did not require access from the condo's property, it was not a basis for refusal to grant access for the licensed work.

The licensing agreement entitled the condo to fees incurred to prepare the agreement and review amendment or modifications to plans. However, review of plans associated with RPAPL §881 are associated with the petition and not the licensing agreement. An RPAPL §881 petition requires the petitioner to prove it was refused access to get a court order allowing entry on a neighboring property. The court decided that an access agreement was no longer in force when the condo spent money on an engineer to review the plans made part of the RPAPL §881 petition.

The condo could get an award for attorney fees to recover costs if damages were caused by the plaintiff during construction, and reasonable costs of its attorney fees if the licensee breached the agreement and the condo had to

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enforce it. However, if the condo was not in compliance after a certain time and a court order was required to give access, it would not be entitled to attorney fees incurred after it failed to honor its agreement. If the petition was denied and condo proved that it was entitled to bar reasonable access, it may be entitled to fees when it denied access.

The court found that when the plaintiff petitioned for access to remove protections prior to proving that the condo was in default, it was not entitled to attorney fees from the condo in this case, merely because §881 permitted the court to grant them. Granting attorney fees in a case was within the discretion of the court.

The court denied the plaintiff's request for attorney fees and limited the condo's recovery to $51,755.88 until other issues, such as whether it defaulted and whether the plaintiff breached the agreement, plus the unpaid $2,000 for the obstruction of the lot line windows and other issues relating to license fees.

TAKEAWAY:
RPAPL §881 licenses are in derogation of the common law of trespass and are therefore to be strictly construed. In this case, the license was in extensive detail, as well it should be; in other words, fees were to be paid even though some of the protective work was ended. Agreements typically include indemnities and insurance, security or bonds, fees for attorneys, engineers and other consultants, timing and penalties, inspections, and dispute resolution. If the parties are unable to agree upon its terms and provisions, the remedy is a RPAPL §881 petition during which the court will consider all such reasonable terms, during the pendency of which it may strongly encourage the parties to continue to meet and confer on all such terms.

BYLAWS

SOUTHGATE OWNERS CORP. V. ESPOSITO

2025 NY SLIP OP 32750(U) (SUP. CT. N.Y. CNTY. JULY , 2025)

Timing Is Everything in Shares Issue Dispute

SQUIB BY STEVEN D. SLADKUS, PARTNER, AND MADISON N. KELLEY, ASSOCIATE, SCHWARTZ SLADKUS REICH GREENBERG ATLAS LLP

OUTCOME: Decided for Defendant Co-op Shareholder

WHAT HAPPENED: The plaintiff is a residential cooperative housing corporation. The defendant is a tenant-shareholder of the cooperative. In 1996, the defendant expanded the interior of her apartment into the outdoor terrace space of the apartment. During 2011-2014, the plaintiff inquired with the defendant various times as to whether she would voluntarily accept the allocation of additional shares to her apartment, but the defendant refused.

IN COURT: The plaintiff filed a complaint, seeking a declaratory judgment that it had properly allocated 80 additional shares to the defendant's apartment "as of" 1996, and that the defendant was liable for the full pro-rata share of the additional expenses, plus interest, from 1996 to the present. The defendant filed an answer asserting two counterclaims: one for attorneys' fees pursuant to the proprietary lease and one seeking to annul the decision that allocated 80 additional shares to her apartment. The defendant then filed a motion to dismiss the complaint as time-barred and for summary judgment on her attorneys' fees cause of action. The plaintiff cross-moved for summary judgment in its favor.

The court granted the defendant's motion to dismiss and denied the plaintiff's cross-motion for summary judgment, holding that the plaintiff's complaint was clearly time-barred for two reasons. First, the proprietary lease states that a shareholder can only be obligated to pay rent based off an additional allocation of shares "from and after the date of issuance." The plaintiff's complaint concedes that the additional shares were not issued until 2024 and, therefore, the plaintiff was not permitted to retroactively apply charges before the date of issuance. Second, declaratory judgments are governed by a six-year statute of limitations, which

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period begins to run when there is a bona fide, justifiable controversy between the parties. The court held that the controversy here occurred when the plaintiff attempted to get the defendant to voluntarily accept the additional shares allocated to her apartment from 2011 to 2014 and the defendant refused. Accordingly, the court held that the plaintiff's cause of action accrued no later than 2014 and, thus, was time-barred when plaintiff filed the complaint.

Finally, the court held that, because the defendant prevailed on her claim, she was entitled to an award of attorneys' fees under the proprietary lease.

TAKEAWAY:

It is of upmost importance that a plaintiff commences a lawsuit within the applicable statute of limitations and that it understands when that statute of limitations accrues, if it wants to avoid dismissal of its complaint. For a declaratory judgment, the statute of limitations accrues when a bona fide, justifiable controversy arises, not when the plaintiff decides to take action. Here, the court held that the justifiable controversy arose in 2014 when the plaintiff asked the defendant to voluntarily accept the additional allocation of shares and the defendant refused, even though the shares had not yet been issued. The plaintiff's failure to recognize that the statute of limitations clock began to run in 2014 resulted in the plaintiff commencing its action at least four years after the statute of limitations expired, which the court held was grounds for dismissal.

It is also imperative for a plaintiff to review any governing contract—here, the proprietary lease—prior to commencing an action, to determine if it governs the issue in controversy. Here, even if the statute of limitations had not already run, the plaintiff's claim was still moot pursuant to the terms of the proprietary lease, warranting dismissal of the complaint.

CONSTRUCTION DEFECTS

THE BD. OF MGRS. OF 252 CONDO. V. WORLD-WIDE HOLDINGS CORP.

2025 NY SLIP OP 32885(U) (SUP. CT. N.Y. CNTY. JULY 25, 2025)

Court Sustains Most of Condo Board's Claims Against Managing Agent

SQUIB BY LLOYD F. REISMAN, PARTNER, BELKIN BURDEN GOLDMAN

OUTCOME: Decided, in part, for Condo Board

WHAT HAPPENED: As previously reported in September 2024, the condominium's board of managers filed a construction defect lawsuit against the sponsor and related individuals and entities, alleging breach of contract and fraud. This decision follows the prior ruling, in which the court held that fraud claims based on disclosures required by the Martin Act could not proceed, but allowed fraud claims related to waterproofing, the air conditioning system, industry standards, and a knowingly false budget—including certain fraud claims against sponsor principals who were personally involved in the alleged misconduct.

IN COURT: In response to the prior decision, the board amended its complaint to include allegations against the condominium's management company and its principal, including claims of breach of contract, fraud, and fraudulent inducement. These were based on alleged manipulation of budgets for repairs and maintenance, and the concealment of internal budget increases from purchasers and the public.

This decision arises from the management company's motion to dismiss the board's amended complaint on two primary grounds: (i) failure to state a claim, because the management company was not a party to the offering plan or any option-purchase agreement; and (ii) time-barred, due to the expiration of any applicable statute of limitations.

The court sustained the board's fraud and fraudulent inducement claims against the management company, largely due to allegedly fraudulent acts by the management company's principal. The allegations included the principal's involvement in the development of the building while simultaneously acting as managing partner of the management company, serving on the board until being replaced by unaffiliated unit owners, and having the management company act

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as the condominium's managing agent throughout the relevant period. The court held that such acts could be imputed to the management company, even if said acts were unauthorized.

Additionally, the court found that the board's complaint adequately alleged that the management company breached its management agreement with the condominium, failed to perform its duties, and caused damages. This latter claim was not time-barred, based on the "continuous wrong doctrine," finding that the claim was based on a series of breaches during the period in which the management company acted as the condominium's managing agent. Thus, the applicable statute of limitations did not begin running until the termination of the management agreement in October 2018.

Notwithstanding the foregoing, the court dismissed the board's claims for breach of contract and contractual indemnification. Despite the board's allegations that the management company had demonstrated some intent to be associated as joint venturers and had contributed to the development, maintenance, and repairs of the building, the board failed to demonstrate that the management company was also subject to losses arising from the development—a necessary element of such claims.

Both the board and the management company have since filed appeals to the extent the relief each of them sought was denied.

TAKEAWAY:

The procedural history (i.e., amending the complaint to include additional facts and allegations) demonstrates the importance of clearly alleging which individuals and entities are responsible for specific misrepresentations or concealment of defects, including specifying who did what, when, and how—and avoiding "group pleading" (which can make it harder to prevail against any specific individual). In addition, this decision is another example of the ever-evolving landscape of construction defect litigation against sponsors and related parties—many of which demonstrate that courts have become increasingly willing to deny motions to dismiss construction defect claims. These denials mean that claims such as this are more likely to proceed to trial, which should give similarly situated condominium boards additional hope that their claims may also be sustained in their search for compensation in the face of mounting repair bills.

FORECLOSURE

LUCIO V. MARVEL

5535479/2024 (SUP. CT. KINGS CNTY. JUNE 11, 2025) NYSCEF NO. 126,

Smoking Dispute Fails to Stop Foreclosure

SQUIB BY STEVEN S. ANDERSON, SHAREHOLDER, BECKER NEW YORK P.C.

OUTCOME: Decided for Defendant Condo

WHAT HAPPENED: In May 2022 Jessica Lucio, the plaintiff, purchased a condominium unit at 70 Washington Street in Brooklyn. The plaintiff claimed various lawyers, real estate agents and the condominium board "misled her to believe the building permitted smoking" in individual units when, in fact, the building did not allow smoking anywhere. She stopped, at some point, paying her common charges. The plaintiff did not live in the unit; her daughter did, and smoked.

In February 2024, the condominium started a foreclosure action against the plaintiff and her daughter (a smoker), resident of the unit (the plaintiff lived in Washington State). The foreclosure action alleged that the condominium possessed a lien for unpaid and delinquent common charges and other charges. In November 2024, the condominium moved for summary judgment of foreclosure.

In December 2024, the plaintiff brought a separate action, contending that she was lied to about smoking being permitted, bringing claims for legal malpractice, negligent misrepresentation, breach of fiduciary duty—the proverbial everything-but-the-kitchen-sink complaint. The plaintiff also sought an order seeking an injunction staying the separate and distinct

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foreclosure action and seeking consolidation of the two lawsuits.

IN COURT: The court decided the plaintiff's application seeking to stay the condominium foreclosure action and for consolidation of the two lawsuits as follows:

First, the court held it was improper in the plaintiff's action to seek to stay a separate foreclosure action.

Second, the court found the plaintiff not living "in the subject premises" reduced her claim to being one about monies and not about losing her residency—a linchpin claim of irreparable injury, which arguably would be a predicate for injunctive relief.

Third, consolidation of lawsuits (that would delay the condominium's foreclosure action) was not warranted as the two cases involved different facts, different legal issues, and differing parties—given all the brokers, lawyers, sued by the plaintiff in her action.

Lastly, the actions were found to be at different procedural postures; the plaintiff "has not explained why she waited so long" to sue.

TAKEAWAY:

The court's decision was thoughtful, based on an objective analysis of procedural issues pursuant to settled case-law and statute. That said, it is hard not to read into the decision, and to take away that courts are influenced—often dispositively—by principles, perceived as such, of equity and fairness. The court's decision could be read as follows: "Plaintiff ignored the Condominium's constituent documents, blames her lawyers, not to mention brokers, among others, doesn't even live in the unit, and wants her daughter to be able to smoke as she wishes in spite of clear constituent document provision."

All said and done, for legal and equitable reasons, the court concluded the plaintiff's attempts to throw a wrench in the wheels of foreclosure, was, and is, without legal basis.

HOUSE RULES

ATTA V. 450 W. 31ST OWNERS CORP.

2025 NY SLIP OP 04042 (1ST DEP'T. JULY 3, 2025)

Appeals Court Revives Commercial Shareholder's Parking Challenge

SQUIB BY THOMAS P. HIGGINS, PARTNER, HIGGINS & TRIPPETT

OUTCOME: Decided, in part, for Petitioners-Appellants

WHAT HAPPENED: A shareholder-tenant operated a commercial art studio in a Manhattan cooperative for many years, and given the location and size of the co-op's property, delivery access and parking were important amenities. The original offering plan warned potential buyers of the risk that there were no available parking spots, but a second amendment to the offering plan assigned a portion of the existing lot to the commercial shareholder-tenant. For years thereafter, the commercial shareholder-tenant's art studio exclusively utilized a portion of the lot for parking, as well as an existing loading dock. In 2023, a new board of directors adopted new house rules in accordance with the proprietary lease. One new house rule banned parking on all portions of the co-op's property, and further stated that the existing loading dock was available for use by all shareholder-tenants. The commercial shareholder-tenant objected, claiming that the house rule negatively impacted her art studio and appropriated a portion of her premises, namely the parking spaces and the loading dock. The shareholder-tenant filed a proceeding against the board and the cooperative, seeking inter alia to annul the house rule, as well as a judgment declaring that the shareholder-tenant had rights to the lot and dock through adverse possession, a prescriptive easement, or easement by necessity.

The cooperative and board of directors moved to dismiss the lawsuit, claiming that the offering plan made clear that no shareholder had a right to park on the premises. The second amendment to the offering plan did not specify any right to park, the co-op argued, so to the

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extent it enlarged the commercial shareholder-tenant's premises, that extension did not provide her with a right to use the lot for parking. Moreover, the house rule adopted by the board that prohibited parking by any shareholder was protected from challenge by the business judgment rule. Finally, the co-op argued that the shareholder-tenant's claims for adverse possession and prescriptive easement could not stand, as her art studio's use of the premises was consensual, and thus was never adverse. The trial judge, after oral argument, ruled in favor of the cooperative, and dismissed the case for the reasons articulated by the co-op. The shareholder-tenant appealed.

IN COURT: The appellate court found that the claims for adverse possession or prescriptive easement were properly dismissed by the trial judge. The touchstone of both claims is that a claimant, by open and continuous use of property in a manner adverse to the true owner of the property, thereby acquires over time the right to continue such usage. Here, the shareholder-tenant's usage of the lot and loading dock was never adverse, having always been undertaken pursuant to the consent of the cooperative-landlord through the proprietary lease.

But the appellate court reversed the trial court and reinstated the shareholder-tenant's claims under the offering plan. A practical interpretation of the second amendment to the offering plan supported the commercial shareholder-tenant's claim that she had a reasonable entitlement to use the premises for parking. Moreover, while the business judgment rule would generally shield the authority of the board in adopting a house rule, the protections of the business judgment rule do not apply if a shareholder is deliberately singled out for harmful treatment. Here, the house rule in question singled out the commercial shareholder-tenant, since she was the only shareholder with a unit that included parking. The case was remitted to the trial court for further proceedings.

TAKEAWAY:
The appellate court's decision, and the trial court's order below, discuss interesting legal issues such as the business judgment rule, the primacy of offering plans and amendments, and the elements of adverse possession. But the overriding practical lesson of this case is that a new house rule which alters the status quo significantly, and negatively changes the way a tenant has lived or conducted business, is sure to be met first with objection, and then with litigation. Faced with losing her ability to park and receive deliveries, the owner of the art studio did what any feisty New York business owner would do: She fought back. She now has the upper hand with a big appellate win, and the litigation continues. It will be interesting to see how—and when—it ends.

INSURANCE

178 SULLIVAN ST. CONDO. V. SENECA INS. CO., INC.,

2025 NY SLIP OP 32514(U) (SUP. CT. N.Y. CNTY. JULY 15, 2025)

Court Grants Summary Judgment Against Insurance Carrier; Denies Motion Against Unit Owner

SQUIB BY HELENE W. HARTIG, ESQ., FOUNDER AND PRINCIPAL OF HARTIG LAW

OUTCOME: Decided, in part, for Plaintiff Condo

WHAT HAPPENED: The plaintiff a condominium board of managers alleged that the defendant, Seneca Ins. Co. Inc. had breached its contract with the plaintiff because it provided minimal coverage after a bathtub overflowed and caused significant damage to the common areas and individual units. According to the insurer, the policy defined water damage as requiring "the breaking apart or cracking of plumbing . . . systems or appliances," which did not occur. Insurer also alleged that a loss resulting from an overflow of water from the bathtub was excluded from coverage where, as here, it was from a drain. Conversely, the plaintiff alleged that

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a bathtub overflow caused when a bathtub was, as here, closed by a stopper, fell squarely within the insurance coverage. Additionally, the plaintiff alleged that the unit owner—who admittedly caused the overflow by turning on the faucet and leaving it running after he fell asleep—was liable for damages to the condominium and to his fellow unit owners.

IN COURT: The court agreed with the condominium to the extent that it held that a stoppered bathtub drain (as opposed to a clogged or obstructed drain) qualified for full coverage. In reaching its conclusion, the court observed that the language in the disputed policy was "too vague and/or too ambiguous to provide a policy holder with a reasonable understanding that an overflow of water from a vessel made to hold water for bathing, such as a bathtub, would be excluded from coverage .... ." Further, inasmuch as the insurer requested guidance from its own legal counsel to interpret its own policy or its application, and no case law was submitted to support its position, coverage should not have been excluded for an "unforeseeable event". The unit owner's claim that he fell asleep while ill and forgot to turn off a running faucet could also be seen as an unforeseeable medical event that serves as a non-negligent explanation for an accident.

TAKEAWAY:

The court will not accept an insurer's narrow reading of its "exclusions" to an insurance policy to justify a denial of coverage. Language in an insurance policy that a court, following analysis, regards as too vague or ambiguous for a condominium or other policy holder to easily interpret or understand can result in also result in a finding of full coverage. Accordingly, condominiums that disagree with an insurance carrier's denial of coverage should consult with counsel and commence litigation when appropriate. However, even in instances in which an individual admits fault in causing an accident, if an accident is not caused deliberately or maliciously, there will be no automatic finding of liability as a matter of law.

LABOR LAW

ADAMAN V. PARK 65TH ASSOCS.

2025 NY SLIP OP 32711(U) (SUP. CT. N.Y. CNTY. JULY 17, 2025)

Court OKs Condo Indemnification, Limits Labor Law Liability

SQUIB BY STEWART E. WURTZEL PRINCIPAL, TANE WATERMAN WURTZEL

OUTCOME: Decided for Defendant Condo

IN COURT: In a personal injury action commenced by a worker against the condominium where work was being performed, the condominium sought dismissal of the plaintiff's labor law claims and also sought summary judgment on its claim for contractual indemnification against the worker's employer pursuant to an agreement between the parties. The condominium sought dismissal of the labor law claims on the grounds that it did not control or supervise the worksite, it did not create any dangerous condition nor was it aware of one and that all safety issues were left to plaintiff's employer. There were regular site meetings which were attended by the cooperative's managing agent. The plaintiff's employer sought dismissal of the contractual indemnification claim arguing that there was no proof that it was negligent in performing the work which would trigger the contractual indemnification provision.

The court held that Labor Law §240 imposes a non-delegable duty on owners and contractors "to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work." The condominium's motion for summary judgment dismissing that claim was denied because issues of fact existed as to whether the plaintiff was the sole proximate cause of his injuries. If he was sole proximate cause, that would be grounds for dismissing the claim.

The claim under Labor Law §200 was dismissed because liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control

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over the work. The court noted that general supervisory authority is insufficient to constitute such control; it must be demonstrated that the condominium controlled the manner in which the plaintiff performed the work, i.e., how the injury-producing work was performed. Mere presence of an owner at the work site, even if indicative of a general right of inspection, does not create an inference of supervisory control.

Summary judgment was granted in favor of the condominium on its indemnification claim because in contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant. Since there was no evidence of negligence on the condominium's part, it was entitled to be indemnified by the contractor.

TAKEAWAY:
The importance of a well-crafted indemnification provision in construction contracts cannot be overstated. The case also highlights the fine line that should be followed by buildings in supervising construction work. While it is certainly fine and desirable to be present, inspect and be involved, liability can be imposed where too much direction is given and control exercised. Care should be taken to ensure that as the property owner, you do not indicate the manner in which work proceeds and leave it to the professional contractors to determine how to best do their job.

LICENSES

551 W. 21ST ST. OWNER LLC V. THE BD. OF MGRS. OF THE 551 W. 21ST ST. CONDO.

655014/2021 (SUP. CT. N.Y. CNTY. JULY 7, 2025) NYSCEF NO. 51

Court Declines to Compel Condo Board to Execute Parking Licences Owned by Sponsor

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided for Condo Defendants

WHAT HAPPENED: A condominium's board of managers refused to sign licenses to parking spaces owned by the condominium's sponsor, which prevented the sponsor from transferring the licenses to certain purchasers of residential units and non-resident members of the public. The sponsor sued the board for a permanent injunction compelling the board to sign the licenses and for damages for the value of the parking spaces, which the sponsor quantified to be "at least $2.5 million, the market value of the [licenses]." The sponsor then moved for partial summary judgment on its claim for injunctive relief, arguing that it was likely to succeed on the merits because the condominium's governing documents required the board to sign the licenses and that the sponsor had shown it would be irreparably harmed absent an injunction because the board's refusal "undermin[ed]" the licenses' "value." The board opposed the motion, arguing, among other things, that (i) the board was not required to sign the licenses because the sponsor had unilaterally altered the licenses from the original form of license in the condominium's offering plan by changing the dimensions of the parking spaces, and (ii) the sponsor could not show irreparable harm because the Sponsor's complaint admitted its harm could be redressed with money damages.

IN COURT: The court denied the sponsor's summary judgment motion. The court found that it was "undisputed that the licenses have been altered, thereby establishing a question of fact with respect to [the Board's] obligations." In addition, the court held that, "[b]ecause [the sponsor's] damages can be redressed with a monetary judgment, a permanent injunction is not appropriate."

TAKEAWAY:
Condominium boards should carefully review licenses and other documents that a sponsor requests they execute to ensure that they do, in fact, have an

(**Takeaway** *continued on p. 12)*

obligation to execute such documents. Also, defendants should scrutinize complaints for contradictions that undermine a plaintiff's claims, such as allegations quantifying the plaintiff's damages while simultaneously claiming that the harm to the plaintiff is irreparable.

NUISANCE

310 APT. CORP. V. MERLINO

150637/2025 (SUP. CT. N.Y. CNTY. JULY 9, 2025) NYSCEF NO. 26

Tenant's Nuisance Claim Survives in Co-Op Dispute

SQUIB BY DAVID S. FITZHENRY, MORITT HOCK & HAMROFF LLP

OUTCOME: Decided, In Part, For Defendants

WHAT HAPPENED: Plaintiff, a cooperative apartment corporation, brought an action against a tenant-shareholder and the other occupants of his unit, seeking monetary damages and injunctive relief, with such claims stemming out of the defendant allegedly causing a gas leak at the building during an alteration project that he was performing in his apartment. Specifically, the co-op board claimed that the defendants performed unauthorized work in the apartment in violation of the terms of the proprietary lease, and that such work was done without proper insurance and without a licensed contractor.

The event in question took place on December 4, 2023, where plaintiff alleged that one of the defendants reported the existence of the leak to the building staff shortly after moving cabinetry equipment into his apartment, and in doing so he urged the staff to immediately shut off the gas to the building. Plaintiff claimed that the defendant admitted to piercing a gas line while using an electric power drill to penetrate the apartment's wall. Fortunately, the staff was able to turn off the gas without further incident, however the building was without gas service for approximately one year after the incident. Over the course of that year, the apartment corporation was forced to incur significant expenses in remedying the problem. As a result, the board sought to recover the cost of such expenses from the defendants, as well as an order prohibiting the defendants from performing any future alteration work in the apartment without the board's prior approval.

The defendant-shareholder brought several counterclaims against the apartment corporation, alleging breach of contract, nuisance, breach of the implied warrant of habitability, breach of the covenant of quiet enjoyment, and breach of fiduciary duty. The defendants claimed that the building had previously allowed an apartment to be subdivided into two separate apartments (one of which was the defendant's apartment), and that the work performed in connection for this division was inadequate and unlawful, with only a thin layer of drywall dividing the two apartments. Defendants asserted that the board was aware of the unsuitable subdivision work, and that such led to unsafe conditions affecting his unit, including improper plumbing and a dangerous mold condition that jeopardized the stability of his kitchen cabinets, a rust condition. In addition, defendants argues that the defective subdivision work also resulted in excessive noise within the apartment. As evidence of such prior knowledge, defendants alleged that the co-op board president had discussed these safety concerns with one of the defendants, and that the board president verbally indicated that the board's prior approval would not be needed for the work in question, provided that such defendant performed the work himself (i.e., without a contractor).

Defendants claimed that they were not negligent in performing the work, and that the superintendent had given direction as to how certain work should be performed prior to the commencement of their work. Further, defendants claimed that the gas line was struck only because of the apartment walls

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had been damaged from a history of extensive water leaks within the walls, to which the board had prior knowledge. Accordingly, the defendants alleged that the apartment corporation, through its board of directors, had breached the terms of the proprietary lease. Defendants also claimed that the board allowed the unsafe conditions in the apartment to continue, and in doing so, it not only allowed a nuisance to exist, but it also breached the warrant of habitability and covenant of quiet enjoyment.

IN COURT: The co-op board brought a motion to dismiss the defendants' counterclaims, arguing that the terms apartment corporation's proprietary lease unequivocally required the defendant shareholder to obtain the board's prior written approval with respect to alterations within the apartment, and that the terms thereof expressly require an alteration agreement to be in place before any such work is commenced. In addition, the board noted that it did not create any unsafe work with respect to the unit, and that all of the subdivision work in question was undeniably performed by the prior tenant-shareholder that sold the apartment to the defendant. Further, in attacking the defendants' counterclaims, plaintiff argued that such causes of action were pled without any required level of specificity. For example, the breach of contract claim did not provide any detailed allegations as to how the board's actions amounted to a breach, but rather simply made reference to numbered sections of the proprietary lease.

The court did not dismiss the defendants' breach of contract claim, finding that the defendants' mere references to certain sections of the proprietary lease was sufficient to plead the cause of action. The court also allowed the defendants' private nuisance claim to survive, noting that the defendants would merely need to show that the board committed an intentional action or inaction that substantially and unreasonably interfered with defendants' use and enjoyment of the apartment. Thus, the court found that the defendants' allegations with respect to the alleged actions or inactions of the board pertaining to the inadequate drywall and defective plumbing were satisfactory to move forward with the nuisance claim. Similarly, the allegations of excessive noise and water leaks in the unit were enough to establish a claim for a breach of the warrant of habitability, and thus the court denied the dismissal of this claim too.

The court did dismiss two of the defendants' causes of actions. The first, the breach of the covenant of quiet enjoyment, was dismissed because the defendants never abandoned the apartment, which is a required element of such claim. The second, the breach of fiduciary duty claim, was dismissed because it was duplicative of the breach of contract claim.

TAKEAWAY:

Co-op and condo boards alike should be wary of this decision, as it leaves the door open to a board being liable for the actions of a negligent owner performing alterations in its unit. In this case, it was undisputed that all of the allegedly defective work had been performed by a previous owner, however the new owner brought claims against the board related to such defects, claiming that the board was aware of the dangerous conditions and refused to properly address them. Further, the court found that the owner's nuisance claim against the board to be a viable one because the alleged excessive noise and water leaks affecting the unit were a direct result of the aforementioned defective work. While many co-op and condo boards are diligent about securing a proper alteration agreement before allowing any work, this case highlights the importance of such an agreement, and the importance of requiring that future owners assume the continued obligations of the owner under such alteration agreement.

PERSONAL INJURY

OCTOBRE V. SOIEFER

2025 NY SLIP OP 04013 (2ND DEP'T. JULY 2, 2025)

"No Good Deed" Case: Court Dismisses Injury Suit

SQUIB BY MICHELLE P. QUINN, ESQ., GALLET DREYER & BERKEY

OUTCOME: Decided for Condo Defendants

WHAT HAPPENED: In an effort to be neighborly, a worker from an adjacent property was asked to remove a bird that was stuck in a vent in a neighboring condominium building. The worker used a ladder that was already set up on the condominium property, but while descending, he fell from the ladder and suffered injuries. The ladder did not belong to the condominium but was owned by the tenant of the adjacent property.

IN COURT: The injured worker sought to recover for his personal injuries from the condominium and its management company, as well as from the tenant that owned the ladder, based on common-law negligence. The tenant moved to dismiss the complaint on the grounds that it owed no duty to the worker and had no actual or constructive notice of any danger. The condominium defendants also moved to dismiss the action because they did not own the ladder and did not provide it to him to use. The trial court granted both motions and the worker appealed.

The law requires a property owner to maintain the property in a reasonably safe condition, and is liable for injuries if the owner either created a dangerous or defective condition, or had actual or constructive notice of it. The appellate court agreed with the trial court in dismissing the action against the condominium defendants because they had not supplied the latter from which the worker fell, nor did they request that he use it. The appellate court similarly upheld dismissal of the action against the tenant since it did not own or use the property where the incident occurred, and it did not create or have constructive notice of the alleged defective condition of the ladder.

TAKEAWAY:
Regrettably, it sometimes happens that "no good deed goes unpunished." Workers should take caution that going onto the property of another and using someone else's equipment could result in no one being held liable for possible injuries that occur on that property or with that equipment. In order to succeed on a negligence claim, the injured party must show duty and control. No liability will be found if one or the other is lacking.

REPRESENTATION

YEN V. FIRST REALTY CO.,

LLC, 156821/2024 (SUP. CT. N.Y. CNTY. JUNE 26, 2025) NYSCEF NO. 53,

Court Says No to Damages for Lack of UV Protection in Glass Condo

SQUIB BY WILLIAM D. MCCRACKEN, PARTNER, MORITT HOCK & HAMROFF

OUTCOME: Decided for Condo Defendants

WHAT HAPPENED: The plaintiffs lived in a brand-new luxury condominium on the East Side of Manhattan, with floor-to-ceiling glass on all of the exterior walls of the apartment. This posed a problem for the plaintiffs, in that one of them had survived melanoma and was under doctor's orders to avoid direct sunlight. When purchasing the apartment, the plaintiffs alleged that they had repeatedly sought assurances that the exterior glass has sufficient UV radiation protec-

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tion, and that the defendants' representatives "continually and falsely stated that all of the windows in the Unit provided 100% protection from UV radiation." After moving in, the plaintiffs began noticing that the carpeting and artworks in their apartment were fading, telltale signs of UV exposure. When they tested the unit, they found evidence of significant UV radiation exposure from the external windows. Accordingly, the plaintiffs filed a lawsuit against the condominium's board of managers, the sponsor, the sponsor's principal, and the management company for $1 million, asserting breach of contract and warranty claims, as well as tort claims like fraud and intentional infliction of emotional distress.

The defendants moved to dismiss. The defendants pointed out that the plaintiffs' complaint does not once mention the parties' purchase and sale agreement (PSA), and the reason for that is that the PSA contains a lengthy "no representations" provision that bars the plaintiffs' reliance on any written or oral statements that are not expressly incorporated into the PSA itself. None of the alleged statements about UV filtering included in the plaintiffs' complaint were actually in the PSA, so as a matter of law, the plaintiffs were not entitled to rely on those alleged statements in deciding to buy the apartment. The defendants also noted that the plaintiffs had had the opportunity to inspect the apartment and do UV testing before they moved in, and did not do so.

IN COURT: The court agreed with the defendants and dismissed the complaint. The "no representations" clause was seen as a complete defense to the plaintiffs' contract claims. In addition, the court dismissed the plaintiffs' fraud and negligence claims, which it viewed as an attempt to "circumvent contractual provisions by recasting them as torts." In dismissing the complaint, however, the court did not award the defendants their attorneys' fees, because the PSA's attorneys' provision only permitted the recovery of fees when the sponsor had to enforce its rights under the agreement, not when it (and other parties) had to defend a lawsuit like this one.

TAKEAWAY:
Buyer beware! The typical purchase and sale agreement is going to contain provisions that prevent buyers from relying on any statements or representations that are not contained in the contract itself. If you, as a purchaser, are particularly interested in a specific aspect of an apartment's design or characteristics (such as the amount of UV protection in your floor-to-ceiling windows), you have to either make sure that the contract has specific representations and warranties in the document, or else do you own inspection and due diligence to assure yourself that the apartment has what you need. In this case, the buyers were allegedly concerned about being exposed to UV radiation, but did not get negotiated for any specific contractual protections or do their own testing before closing.

RPAPL 881

MADISON AVE OWNER LLC V. THE BD. OF MGRS. OF THE 25-83 CONDO.

2025 NY SLIP OP 32463(U) (SUP. CT. N.Y. CNTY. JULY 8, 2025)

Court Grants Access License, Lowers Neighbor's Fee Demands

SQUIB BY TRACY PETERSON, BRAVERMAN GREENSPUN

OUTCOME: Decided, in part, for Defendant Condo Board

WHAT HAPPENED: In connection with its planned construction of an 18-story building on the Upper East Side of Manhattan, the petitioner needed access to a neighboring building to install protections required by New York City Building Code (Building Code) and which were to remain in place for 30 months. The petitioner and its neighbor were unable to reach an agreement on the terms of a license agreement for such purpose, and to avoid further delays, the petitioner commenced a proceeding against the neighbor pursuant to §881 of the New York Real Property Actions and Proceedings Law ("RPAPL"). The neighbor opposed the peti-

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tion and sought its dismissal.

IN COURT: At the outset, the court reiterated that "[t]he purpose of Section 881 is to allow a license to an owner of real property who seeks access to an adjoining property for the purpose of making improvements or repairs on its own property," and determined that RPAPL §881 applied here. Next, citing a 2017 Second Department decision, the court recited the factors to be considered when determining whether to grant a license, including: (a) "the nature and extent of the requested access;" (b) "the duration of the access;" (c) "the protections to the adjoining property that are needed;" (d) "the lack of an alternative means to perform the work;" (e) "the public interest in the completion of the project;" and (f) "the measures in place to ensure the financial compensation of the [adjoining] property owner for any damages or inconvenience resulting from the intrusion."

The court found for the petitioner. The court determined that the factors weighed in favor of granting the license, noting that the protections to the neighboring property are required by Building Code, and had been supported by drawings prepared by petitioner's engineer. The neighbor-respondent did not contest this necessity. Rather, the neighbor opposed the petition and the license on the ground that it was owed money and repairs by the petitioner in connection with a prior access agreement between the parties, which argument the court rejected, holding that such dispute should be resolved in a separate proceeding. While the neighbor-respondent wanted a $10,000/month license fee, escalating to $13,500/month once roof protections were installed, plus an additional $2,000/month for March-October as well as the posting of a bond, the court awarded a monthly license fee of $5,000, escalating to $7,500 once roof protections are in place, and declined to require a bond. The neighbor-respondent also asked for reimbursement of legal and engineering fees, which the court determined was "necessary" so that the impacted neighbor does not go out-of-pocket on such fees simply because the petitioner needed access to the property to construct its building. A hearing was ordered to determine "reasonable" professional fees to be reimbursed.

TAKEAWAY:
It is preferable for neighbors to work out the terms of an access agreement without resort to litigation. Once in litigation, each side risks being saddled with an undesirable term or terms—in this instance, for the neighbor providing access, a lower monthly license fee than asked for, without a bond or escrow in place. If, however, you are constrained to pursue a license pursuant to RPAPL §881, make sure to have "all your ducks in row," by providing the court with the protection plans, demonstration of the need for the requested access, and the other enumerated factors that weigh in favor of granting the requested license.

SALES

OMANSKY V. 300-302 E. 119 ST. HDFC

2025 NY SLIP OP 32422(U) (SUP. CT. N.Y. CNTY. JULY 3, 2025)

Co-op Board Prevails in Shareholder Dispute Over Failed Sale

SQUIB BY SCOTT J. PASHMAN, MEMBER, COZEN O'CONNOR

OUTCOME: Decided for Co-op Defendants

WHAT HAPPENED: The plaintiff is the owner of 250 shares of stock appurtenant to Unit 1C in the cooperative building located at 302 East 119th Street, New York, New York. In December 2022, she provided a proposed contract of sale to a prospective buyer to sell Unit 1C for $250,000. As part of due diligence prior to the execution of the contract, the prospective buyer requested copies of the cooperative's tax returns for 2020 and 2021, financials for 2019 through 2021, board minutes, an alteration agreement, pet policy, certificate of insurance, and bylaws. According to the plaintiff, despite numerous requests, the defendants refused to produce the requested in a timely

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fashion. Moreover, the defendants allegedly "intentionally and maliciously" refused to turn over board meeting minutes unless the prospective buyer completed an application and paid a fee, resulting in the prospective buyer pulling out of the deal in mid-January 2023.

IN COURT: The plaintiff sued the cooperative, the board of directors, the managing agent, and the individual property manager claiming that the defendants were responsible for the transaction's failure. The plaintiff alleged that she is entitled to the $250,000 she would have received from the sale, as well as additional expenses incurred on the unit after the potential buyer walked away, and punitive damages of $5,000,000. The plaintiff asserted causes of action for breach of contract, tortious interference with prospective business relations, and conspiracy to commit fraud. The parties cross-moved for summary judgment.

The court granted summary judgment in favor of the defendants and dismissed the plaintiff's claims. On the claim for breach of contract, the court said that the plaintiff had not presented evidence that the co-op had violated the bylaws or the proprietary lease by failing to comply with any book and record keeping requirements or that the co-op had failed to make any requested records available within a reasonable time. In addition, the court found no evidence that the board had improperly conditioned disclosure of board meeting minutes on the receipt of a purchase application and fee. Conversely, the defendants established that the plaintiff never presented a prospective buyer that met the income requirements for purchase in an HDFC under the Private Housing Finance Law. In addition, the management defendants were not parties to the bylaws or signatories to the proprietary lease.

On the plaintiff's claim for tortious interference with prospective business relations, the court said that the defendants were entitled to summary judgment in the absence of any evidence that the defendants acted for the sole purpose of harming the plaintiff or that they used any wrongful means. The court also said that conspiracy is not an independent cause of action in New York, and the plaintiff's claim for fraud could not stand because the correspondence on which the plaintiff relied did not say that an application or a fee of several hundred dollars was required as a precondition to receipt of board minutes.

TAKEAWAY:

When sales are pending, it is important for cooperative and condominium boards and their managing agents to respond to requests for information and documents within a reasonable time and as set forth in the bylaws. If the board or management drags its feet in communicating with brokers or counsel, or in providing requested information, a prospective buyer could get cold feet and walk away from the transaction. If that happens, the selling shareholder or unit owner might sue the board and the managing agent. While the case under consideration was fundamentally weak given that the prospective purchaser never signed a purchase agreement and never submitted an application, the board and the managing agent still wound up embroiled in years of litigation that remains ongoing. Whether the prospective buyer had other reasons for walking away, the broker's email stated that he was "pulling out of the deal" because of "the radio silence from the management/board and lack of meeting minutes."