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INDEX

Legislature Modifies HSTPA to Assist Co-ops

By Jeffrey Schwartz and Mark Hakim

Two years ago, on June 14, 2019, New York lawmakers approved, and Governor Cuomo signed into law, the "Housing Stability and Tenant Protection Act of 2019" (the Act), which contained a series of laws affecting all rentals within the State of New York. The Act was intended to provide safeguards and additional protections to tenants in rental properties. As we had previously predicted, among its many sweeping changes, the Act had an unintended and profound impact on the thousands of cooperative corporations located in New York. Boards of directors and their managing agents were also forced to deal with the uncertainty of many of the Act's provisions, often erring on the side of inaction. However, on June 10, 2021, New York's lawmakers approved amendments to the Act, exempting cooperative corporations from some of the most onerous provisions, and clarifying others. Once the new legislation is signed into law by the Governor, it will not only be a huge victory for the thousands of cooperative apartment buildings but also for many potential purchasers who were unable to purchase in those buildings as a result of the Act.

Cooperative corporations, unlike condominiums, rely on a landlord-tenant relationship under a proprietary lease (which governs the occupancy of the apartment). As a result, boards of directors are considered landlords and purchaser-shareholders are considered tenants, though, in each case, not in the traditional sense. Cooperative corporations are also not set up as a for-profit business, rather they are private housing corporations intended generally for occupancy by its shareholders and are governed by a proprietary lease and by-laws which sets forth the rights of each party and terms of governance.

When the Act was signed into law, cooperative corporations and their managing agents, with decades of experience, were forced to pivot and operate contrary to the many years of established law and practice. One such instance was with applications from potential purchasers, who apply to the board of directors seeking its consent to purchase. Among the litany of requested items, and to

continued on page 2

In This Issue

HSTPA

continued from page 1

ensure that each applicant has the financial ability to pay its obligations when due (to the cooperative, a lender and/or otherwise), a board will request detailed financial information regarding the applicant(s). Sometimes, particularly with first time purchasers, the financials are less than stellar, albeit due to poor, little or no credit history, a change in employment, or otherwise. To overcome these issues, as has been common practice, boards looking to approve an otherwise viable candidate would request maintenance in escrow (in some instances as much as two years), as additional security. Under the Act, such security was limited to just one month's maintenance and no board could accept prepaid maintenance either, thus potentially reducing the number of qualified cooperative buyers and contrary of the purpose of the Act. Under the new legislation, additional security (including maintenance escrows) and even prepaid rent is again permitted for purchasers of owner-occupied apartments, thus boards can now approve purchasers whose financials were otherwise borderline and whom otherwise may not have been approved.

Unlike rental buildings, cooperative corporations are not intended to be profit centers. The process of reviewing, vetting and approving purchase applications is not only timely, but can be quite costly. Despite the fact that the costs could easily run in the hundreds of dollars for each application, under the Act cooperative corporations were limited to charging not more than $20.00 for background and credit checks, regardless of the number and type of background and checks needed, and/or the actual costs thereof. In essence, the Act unfairly required the remaining shareholders to pay the difference between the actual cost and that permitted by the Act or dissuade cooperative boards from performing customary diligence on applicants. Now, with the new legislation, cooperative corporations (and their agents) may charge the purchaser the actual cost of any background and credit check. Further, during the application and closing process, managing agents would historically charge closing and application fees, which were generally prohibited under the Act, again requiring another party to pay or absorb the cost. Without delving into whether all transfer and managing agents actually stopped charging these fees, the new legislation now permits transfer and managing agents to charge these customary fees.

Under the Act, notwithstanding what the proprietary lease or bylaws contained, boards of directors were limited in the late fees and interest it could collect (lesser of 5% or $50.00) and were required to provide notice via certified mail to each shareholder at least two weeks ahead of time in the event of any increase in rent (maintenance) of more than 5%. Each of these restrictions ignored the reality of operating and managing a complex building such as a cooperative corporation or what the governing documents contained. Late fees and interest are intended to dissuade residents from paying late, given that the building's operations are reliant on prompt payment by the shareholders. Late fees that are too low, or limits on how or when the board of directors can raise maintenance handcuffs the board and can lead to situations where necessary maintenance and work is being delayed or defrayed, especially disconcerting in a city with an aging housing stock. Now, provided the governing documents explicitly permits, under the new legislation, late fees of up to 8% can be charged (which, for most buildings, will easily exceed the $50.00 cap

continued on page 3

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HSTPA

continued from page 2

imposed by the Act.) Furthermore, under the new legislation, boards of directors do not have that unnecessary restriction on the implementation of maintenance increases and can continue to operate as they had done in the past.

The reality of life in a cooperative building is that shareholders default and the cooperative corporation often incurs costs and fees, including attorney's fees, which are passed along to the defaulting shareholder, and often recovered in a summary proceeding. Under the Act, the board of directors was required to bring a separate action to recover those fees (instead of being permitted to include those in the same proceeding), which is an unnecessary waste of time and resources, both for the buildings and the courts. Under the new legislation, cooperative corporations are now permitted to demand more than just the rent (maintenance) in a summary proceeding (provided the governing documents permit same), consolidating matters and facilitating resolution of the issues in one venue.

With the passage of the Act, the Governor and legislature sought to protect tenants. However, under the law of unintended consequences and by casting too wide of a proverbially legislative net, the Act adversely affected thousands of cooperative buildings in New York. Once signed by the Governor, the new legislation, thankfully, will essentially "right the wrong" and correct many of these unintended effects, now allowing cooperative buildings to once again focus on its shareholders and the financial health and general wellbeing of the building.

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REAL PROPERTY LAW

License to Enter Neighbor's Property Reversed

Matter of 400 E57 Fee Owner LLC v. 405 East 56th Street LLC

NYLJ 5/3/21, p. 18, col. 3
AppDiv, First Dept.
(memorandum opinion)

In landowner's action seeking a license to enter neighbor's property to facilitate façade work on landowner's building, neighbor appealed from Supreme Court's grant of a license. The Appellate Division reversed and remanded, concluding that Supreme Court had not adequately considered alternative methods of protecting neighbor's property.

Landowner sought a license pursuant to RPAPL 881 to install overhead roof and terrace protections on neighbor's building. The proposed protections would have been placed directly on top of the floors of neighbor's terraces and would prohibit tenants of terraced apartments from using the terraces. Supreme Court nevertheless granted landowner the license, and neighbor appealed.

In reversing, the Appellate Division emphasized that consideration of a license application should balance the interest of the applicant landowner and the neighbor over whose land the license is sought. In this case, the court concluded that Supreme Court had not considered whether there might be less intrusive and equally effective methods of roof protection. The court also indicated that on remand, Supreme Court should also consider the license fees, rent abatement, and award of future prevailing party fees.

Comment

To obtain a license under RPAPL 881 to access adjoining land, a landowner must establish that the license is necessary and that the proposed intrusion is a reasonable method for making repairs or improvements. For example, in Ismael Realty Corp. v. Zervos, *66 Misc. 3d 1211(A) the court denied the petitioners a license to erect sidewalk sheds that would have made the adjoining property's driveway completely inoperable because the work could have been completed with a cantilever system attached to the petitioners' property, rendering the sidewalk sheds unnecessary. . The sheds would have unreasonably burdened the owners by depriving them of the use of their driveway in an area with limited street parking, as well as by eliminating one of two manners of ingress and egress to their property.*

The Appellate Division generally defers to Supreme Court's grants of licenses but will reverse decisions if petitioners have not shown reasonableness and necessity. In In the Matter of Board of Mgrs. of Artisan Lofts Condominium v. Moskowitz, *114 A.D.3d 491, the Appellate Division reversed Supreme Court's grant of a license because petitioners had not provided an adequate showing of reasonableness and necessity with regards to the "swing scaffold" which petitioners would have attached to respondent's property. While both parties agreed that the intrusion was reasonable, the petitioners had failed to meet their burden of proving that the license was necessary.*

When a petitioner establishes that a license is reasonable and necessary, the statute authorizes a court to impose conditions on the grants to ameliorate the burden felt by the adjoining property owners. Conditions imposed have included term limits, license fees to be paid to the adjoining landowner per day, and the requirement that the petitioner take out an insurance policy to cover the adjoining property. In Voron v. Bd. of Managers of the Newswalk Condo., *63 Misc. 3d 1001, the court limited the petitioner's license to complete plumbing work to a period of ten consecutive days and ordered petitioners to pay the adjoining unit owner a*

continued on page 4

Real Property

continued from page 3

license fee of $100.00 per day and to take out an insurance policy of no less than $1,000,000.00 with the unit owners listed as additional insureds.

The statute only permits a court to grant licenses for temporary access to repair or improve. In Broadway Enterprises, Inc. v. Lum, *16 A.D.3d 413 (N.Y. App. Div. 2005), the Appellate Division affirmed the Supreme Court's denial of an RPAPL 881 license to engage in "underpinning" (a process that involves pouring concrete) on the adjoining property. The court held that underpinning would be a permanent encroachment on the respondent's property and that such an occupation fell outside the scope of RPAPL 881.*

Partnership Lacked Authority To Convey Property

Deckoff v. W. Manning Family Limited Partnership
NYLJ 4/16/21, p. 22, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In an action for specific performance of a partnership's contract to sell real estate, contract vendee appealed from Supreme Court's grant of summary judgment to the partnership. The Appellate Division affirmed, holding that the partnership did not have authority to convey the property.

Wilbur and Colette Manning acquired the subject property in 1997. When the parties divorced, they became tenants in common. Colette conveyed all of her "undivided 50% interest in and to the undivided 50% interest of Wilbur … in and to" the subject property. Colette died in 2009, and the following year, Wilbur, by quitclaim deed, conveyed his interest in the property to the family limited partnership of which he was the general partner. In 2014, the partnership contracted to sell the property to contract vendee. Wilbur dies shortly thereafter, When contract vendee brought this action for specific performance, the five children of Wilbur and Colette intervened and moved for summary judgment, contending that the partnership did not have an ownership interest in the subject property. Supreme Court granted the summary judgment motion and contract vendee appealed.

In affirming, the Appellate Division concluded that Colette's 1997 deed conveyed only whatever interest she had in Wilbur's 50% of the property, not an interest in her own 50% of the property. As a result, Wilbur could convey only his own 50% to the partnership. Because the partnership held title only to 50% of the property, contract vendee was not entitled to specific performance.

Questions of Fact About Whether Easement Extinguished By Adverse Possession

Kopp v. Rhino Room, Inc.
192 A.D.3d 1690
AppDiv, Fourth Dept.
(memorandum opinion)

In an action by easement holder to quiet title to the easement, servient owner appealed from Supreme Court's grant of summary judgment to the easement holder. The Appellate Division modified to deny both summary judgment motions, holding that questions of fact remained about whether the easement had been extinguished by adverse possession.

The parties own adjacent parcels of land, and a recorded easement benefits the easement holder's property. When easement holder brought this quiet title action contending that servient owner has been obstructing use of the easement, servient owner claimed that the easement had been extinguished by adverse possession. Both parties moved for summary judgment, and Supreme Court granted easement holder's motion. Servient owner appealed.

In modifying, the Appellate Division first concluded that Supreme Court had properly denied servient owner's summary judgment motion. The court noted that although servient owner sought to tack his adverse possession period to that of his predecessor, servient owner submitted no evidence detailing predecessor's use of the easement. The court then concluded that servient owner failed to meet its initial burden of establishing that it had extinguished the easement by adverse passion between 2000 and the end of the statutory period in 2010. Because an adverse possession claim beginning in 2000 would not have vested before the effective date of the 2008 amendments to the adverse possession statute, servient owner would have to establish that it had a reasonable basis for the belief that the property belonged to it alone, free from the burden of an easement. The servient owner had made no such showing. The court then concluded, however, that the easement holder was not entitled to summary judgment because easement holder had not established, as a matter of law, that servient owner's occupation for 10 years was not under a claim of right.

Purchaser Acquired Deed By False Pretenses

Reid v. Wells Fargo, N.A.
NYLJ 6/4/21, p. 30, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In purchaser's action to quiet title, purchaser appealed from Supreme Court's grant of summary judgment dismissing the complaint. The Appellate Division affirmed, holding that purchaser's testimony about the facts underlying the purchase transaction established that she had obtained her deed by false pretenses.

Purchaser obtained her deed from Shepard in 2006. In 2014, Wells Fargo obtained a deed from

continued on page 5

Real Property

continued from page 4

Shepard in connection with the settlement of a prior foreclosure action by Wells Fargo against Shepard, purchaser, and others. Before the settlement of that foreclosure action, Supreme Court had concluded that mortgage brokers had committed a fraud against Shepard. At a criminal trial of the mortgage brokers, purchaser had testified that she never made any mortgage payment or down payment on the property, that her signature on the contract of sale was a forgery, and that she had simply agreed to receive a $10,000 fee for holding the property in in her name for up to one year as part of a plan to help Shepard refinance her home to avoid foreclosure. When purchaser brought the current action in 2015 seeking to quiet title based on the 2006 deed, Supreme Court granted summary judgment to Wells Fargo based on purchaser's testimony in the criminal trial.

In affirming, the Appellate Division held that a deed obtained by false pretenses is void ab initio, and then concluded that purchaser's testimony at the criminal trial established that she obtained the 2006 deed by false pretenses. The court noted that Reid had failed to explain her prior admissions or to raise a triable issue of fact about the fraudulent nature of the 2006 deed.

Broker Failed to Establish Agreement To Pay Commission

Commercial Realty Services of Long Island, Inc. v. Mehran Enterprises, Ltd.
NYLJ 5/28/21, p. 22, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In broker's action to recover a commission, sellers and buyers appealed from Supreme Court's judgment, after nonjury trial, awarding broker $331,942. The Appellate Division reversed and dismissed the complaint, holding that broker had not established an agreement to pay a commission.

The owner of a school met with broker to discuss the school's possible relocation and developed an understanding that if the broker found a suitable rental space, the school's new landlord would pay a brokerage commission. Broker discovered an online listing which broker showed to a party interested in buying the school. The school's owner then told the broker that the school had decided to renew its current lease, but subsequently informed broker that it had decided to relocate to the premises broker had proposed. When broker contacted the owner of the proposed premises, the owner denied knowledge that the school had a broker. Owner of the premises then leased to an entity owned by family members, and then sublet the premises to a potential purchaser of the school. Potential purchaser then bought the school and assigned the sublease to a corporate entity of which the purchaser was the sole shareholder. Broker then brought this action against owner of the premises, the school, the prior and current owners of the school, and the corporate assignee of the sublease. After a nonjury trial, Supreme Court awarded summary judgment to the broker against all of the defendants.

In reversing, the Appellate Division emphasized that, at trial, there was no testimony that the school, either of the owners, or the corporate assignee were parties to be charged with payment of the commission. The court then noted that the broker had testified at trial that it had no agreement with the owner of the leased premises that a brokerage commission would be paid. As a result, the breach of contract claims should have been dismissed. The court also dismissed the broker's quasi-contract claim, noting that broker had not met its burden of establishing that owner accepted services with the knowledge that broker expected to be compensated for those services.

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DEVELOPMENT

ZBA Did Not Have To Act Unanimously

Carl Myers Enterprises, Inc. v. Town of Conesus Zoning Board of Appeals (ZBA)
2921 WL 1826920
AppDiv, Fourth Dept.
(memorandum opinion)

In landowner's article 78 proceeding to annul the ZBA's denial of a conditional use permit, neighbors and the ZBA appealed from Supreme Court's grant of the petition. The Appellate Division modified, overturning Supreme Court's conclusion that the ZBA had to act unanimously, but remanded to the ZBA to consider landowner's other grounds for overturning the denial.

Landowner had obtained approval from the ZBA to build a somewhat different commercial project on the subject parcel. When landowner began construction of the current project, allegedly without obtaining the requisite approvals, Supreme Court, in a separate proceeding, ordered the ZBA to revisit the zoning application. The ZBA then determined by a 3-2 vote to deny the special use permit the landowner sought. Landowner then brought this article 78 proceeding, contending that the ZBA's review of the proposal constituted a rehearing, and, under Town Law section 267-a[12], a decision to reverse or modify a previous decision upon rehearing requires a unanimous vote of all ZBA members present. (Landowner also raised other grounds for annulling the ZBA decision). Supreme Court annulled

continued on page 6

Development

continued from page 5

the determination based on section 267-a. The ZBA and the neighbors appealed.

In modifying, the Appellate Division held that a rehearing within the meaning of section 267-a occurs only when a member of the board makes a motion to review a prior determination. In this case, the challenged determination was not made upon motion by a member of the board, but rather pursuant to a judicial order. The court made it clear that section 267-1(12) does not operate when a board acts on a new or revised application or where it revisits a prior ruling at the direction of a court. Because Supreme Court had not considered landowner's other grounds for annulling the ZBA's determination, the court remanded for considering those grounds.

Activist Not Entitled To Nullification of Cover Letter Community Board Included With Its Recommendations

Boyd v. Liburd
NYLJ 4/30/21, p. 25, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In a hybrid article 78 proceeding and declaratory judgment action brought by a community activist against a community board, its members, the Department of City Planning, and the City Planning Commission challenging a determination by the board, the activist appealed from Supreme Court's dismissal of the activist's cause of action. The Appellate Division affirmed, holding that the activist had received much of the relief she sought, and that she was not entitled to nullification of a cover letter the board included with its recommendations.

On Aug. 11, 2017, Brooklyn Community Board 9 voted to disapprove a plan for redevelopment of the Bedford Union Armory site, but inaccurately reported its recommendation as "Disapprove with Modifications/Conditions." On Sept. 21, 2017, the board issued a revised recommendation accurately conveying its disapproval. The board also included a cover letter listing detailed recommendations for future development of the site. The activist brought this proceeding contending that the August 11 recommendation was inaccurate and that the cover letter had the effect of revering the recommendation to "Disapprove with Modifications/Conditions." Activist also sought removal of individual board members. Supreme Court dismissed activist's causes of action.

In affirming, the Appellate Division concluded that the September 21 recommendation effectively gave activist the relief she sought with respect to the inaccurate August 11 recommendation. The court concluded that the cover letter had no effect on the board's revised recommendation, and that the board had the authority to provide additional material describing reasons for its vote. The court then noted that the New York City charter provided a mechanism for removal of board members and the activist had not complied with the charter provisions in seeking removal.

DOB's Approval of Homeless Shelter Upheld

Matter of West 58th Street Coalition, Inc. v. City of New York
NYLJ 5/28/21, p. 18, col. 5
Court of Appeals
(memorandum opinion)

In an article 78 proceeding brought by neighbors of a proposed homeless shelter, both the neighbors and the city appealed from the Appellate Division's remand to Supreme Court to conduct a hearing on whether the building's use is consistent with general safety and welfare standards. The Court of Appeals modified to vacate the remand order, holding that because the Department of Buildings' (DOB) approval of the city's applications was rational, the court were obligated to uphold that determination.

The city proposed to open a homeless shelter for 150 men in an existing West Side building that had been operated first as a single room occupancy tenement and then as a hotel. DOB approved two applications to make renovations for use as Group R-2 pursuant to the city building code's use and occupancy classification scheme. Neighbors brought this article 78 proceeding, arguing that the shelter had been improperly classified as R-2 rather than R-1, and they contended that the building would become a safety hazard if operated as a homeless shelter. Supreme Court dismissed the proceeding, but the Appellate Division modified, conceding that DOB's determination was rational, but remanding to Supreme Court for a determination about the building's safety.

In modifying, the Court of Appeals agreed with the courts below that the R-2 classification was rational based on evidence that residents would occupy their units, on average, for at least 30 days given the programs offered there. The court held, however, that the Appellate Division had improperly remanded because once a court concludes that an agency has applied the proper legal standard and made a rational determination, the court cannot second guess that determination.

Area Variance Upheld

Matter of Abramowitz v. Zoning Board of Appeals
NYLJ 5/14/21, p. 24, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In neighbor's article 78 proceeding challenging grant of an area variance, Supreme Court transferred the proceeding to the Appellate Division. Although the Appellate Division determined that the transfer was improper, the court resolved the issue on the merits and upheld the variance, concluding that the zoning board of appeals (ZBA) had considered the

continued on page 7

Development

continued from page 6

relevant statutory factors and made a rational determination.

Landowner sought variances to permit conversion of a three car garage into an indoor squash court. The ZBA deemed the application one for an area variance, and granted the variance. Neighbor then brought this article 78 proceeding contending that the application was actually one for a use variance, and that the ZBA had not applied the proper standard. Supreme Court transferred the proceeding to the Appellate Division.

The Appellate Division first concluded that the transfer was an error because the ZBA determination was not made after a trial-type hearing at which evidence was presented. But the court concluded that in the interest of judicial economy it should nevertheless determine the appeal. The court then determined that the ZBA had properly concluded that the application was one for an area variance because it related to an "area" of the property — here the garage — and was not a nonconforming use under the code. Because ZBAs have broad discretion in considering area variance applications, so long as they appropriately weigh the statutory factors, the court upheld the ZBA's grant of the variance.

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LANDLORD & TENANT LAW

Rent Act of 2015 Did Not Re-Regulate Deregulated Apartments

Matter of B.G.R. Realty, LLC v. Stein

NYLJ 6/1/21, p. 18, col. 6
AppDiv, First Dept.
(memorandum opinion)

In landlord's summary holdover proceeding, tenant appealed from the Appellate Term's affirmance of Civil court's denial of tenant's motion for summary judgment dismissing the petition. The Appellate Division affirmed, holding that the Rent Act of 2015 did not re-regulate apartments that had been properly deregulated under the 2011 Rent Act.

The prior tenant vacated the subject apartment in August 2011. That tenant enjoyed a preferential rent. Under the vacancy and guidelines increases permitted under the Rent Act of 2011, the apartment had reached the high rent vacancy deregulation threshold of $2,500. The Rent Act of 2015 provided that an apartment for which a preferential rent was charged would become subject to deregulation when the legal rent reached $2,500 prior to vacancy for any apartment that "becomes vacant after the effective date of the rent act of 2011 but prior to the effective date of the rent act of 2015." Tenant argued that this statute was applicable to his apartment. Civil Court and the Appellate Term rejected that conclusion, and tenant appealed.

In affirming, the Appellate Division concluded that the 2015 statute did not re-regulate apartments that had been deregulated before its enactment. The court held that the statute was designed to apply only to apartments that were vacated during the effective period of the 2011 statute, but were not relet until after the 2015 statute took effect.

Tenant Waiver of Claims For Lost Profits Upheld

Penny Port, LLC v. Metropolitan Transportation Authority

NYLJ 6/3/21, p. 20, col. 6
AppDiv, First Dept.
(memorandum opinion)

In restaurant tenant's action for damages suffered as a result of construction work in and around Grand Central Terminal, tenant appealed from Supreme Court's grant of summary judgment to landlord, the MTA. The Appellate Division affirmed, holding that the lease's waiver clause was enforceable against tenant.

Tenant operated Michael Jordan Steakhouse in Grand Central Terminal. Tenant alleges that it suffered business losses as a result of the MTA's leak remediation project, which involved placing barricades on Vanderbilt Avenue. The lease agreement, however provided that MTA might renovate portions of Grand Central Terminal, and that construction work in and about the building might result in noise and disruption to tenant's business. The lease went on to provide expressly that landlord would not be liable for, and tenant released landlord from claims arising out of loss, injury, or other damage including lost profits arising out of landlord's construction work.

The Appellate Division held that the lease provision unambiguously barred claims for lost profits, and held that clauses such as this one are enforceable unless unconscionable. As a result, Supreme Court properly granted summary judgment to the MTA.

Comment

Courts routinely enforce exculpatory clauses that bar claims for lost profits. In Chaitman v. Moezinia, *178 A.D.3d 642, the Appellate Division affirmed the Supreme Court's grant of summary judgment dismissing a claim for lost profits, rejecting the argument that General Obligations Law §5-321 precluded enforcement of an exculpatory provision in a lease that bars lost profits claims The tenant, a veterinary clinic, sued for lost profits, alleging that the renovations in-progress in the building caused water damage and other quality of life issues that prevented new clients from using the clinic, forcing the clinic to limit its business to existing clients with whom the clinic had an established relationship. Although General Obligations Law § 5-321 bars any agreement that would relieve a landlord of liability for injuries to persons or property caused by the landlord's negligence the court held that business losses were distinct from the*

continued on page 8

Landlord & Tenant

continued from page 7

type of property damage referred to in the statute, and that the statute did not void the provision.

The Chaitman *court cited to three other cases to emphasis judicial willingness to enforce exculpatory clauses that bar claims for lost profits. In* After Midnight Co. LLC v. MIP 145 E. 57th St., *146 A.D.3d 446, the tenant alleged that its business had been disrupted by negligent construction activities which resulted in water leaks, excessive noise, and loss of electricity. In* Bowlmor Times Square LLC v. AI 229 W. 43rd St. Prop. Owner, LLC, *106 A.D.3d 646, the tenant alleged that the landlord had failed to keep the premises in a reasonable safe and adequate condition of repair and free of threats to the safety of employees and customers. In* Duane Reade v. 405 Lexington, LLC, *22 A.D.3d 108, the tenant alleged that renovations had been done in a negligent manner such that customers had been driven away by the erection of scaffolding, instances of falling glass, and water leaks. In all three cases the court dismissed the claims and enforced the exculpatory clauses that existed in each lease agreements.*

Landlord Not Liable for Tenant on Tenant Harassment

Edstrom v. St. Nick's Alliance Corp.

NYLJ 5/17/21, p. 18, col. 4
AppDiv, First Dept.
(memorandum opinion)

In tenant's action for breach of the implied warranty of habitability and for violations of the Fair Housing Act and the New York State Human Rights Law, tenant appealed from Supreme Court's grant of summary judgment to landlord. The Appellate Division modified to deny summary judgment on the habitability claim, but otherwise affirmed, holding that landlord was not liable for failure to respond to reports of sexual-orientation and race-based harassment by a fellow tenant.

Tenant routinely complained to landlord about rodent infestation in the apartment, and the Department of Health and Mental Hygiene ultimately intervened. On those facts, the Appellate Division indicated that Supreme Court should not have dismissed the claim for breach of the implied warranty. The court remanded to determine the duration of the uninhabitable condition, and the damages suffered, measured by the difference between fair market value of the premises as warranted and fair value during the period of the breach.

Tenant also complained to landlord about harassment by a fellow tenant. On that issue, the Appellate Division upheld Supreme Court's dismissal of the complaint, relying on the Second Circuit's recent opinion in *Francis v. Kings Park Manor*, 992 F.3d 67, holding that the typical landlord does not have sufficient control over the behavior of tenants to warrant liability for failure to take action against harassment.

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CO-OPS AND CONDOMINIUMS

Bylaw Provision Authorized Award of Fees Against Unit Owner

Board of Managers of the Peregrine Tower Condominium v. Salcetti

NYLJ 5/6/21, p. 18, col. 4
AppDiv, First Dept.
(memorandum opinion)

On the condominium board's motion for attorney's fees against a unit owner, unit owner appealed from Supreme Court's confirmation of the referee's report awarding the fees. The Appellate Division affirmed, holding that the bylaw provision authorized the award of fees.

Unit owner had permitted the unit to be occupied as a time share with no natural person in permanent occupancy. That use of the unit violated the condominium's prohibition on transient occupancy. The board brought an earlier action to address the violation, and the New York City Environmental Control Board (ECB) determined that the use was a violation. The board had not, however, sought attorney's fees in that earlier action. Subsequently, the board moved for attorney's fees pursuant to a provision in the condominium's bylaws, and Supreme Court confirmed a referee's report awarding the fees. Unit owner appealed.

In affirming, the Appellate Division conceded that in general, attorney's fees are not chargeable to a unit owner as common charges before there has been a judicial determination of a violation, but the court concluded that in this case, the ECB squarely determined the occupancy issue in the prior action. The court went on to note that better practice would have been to seek fees in the action predicated on the violation, but the court held that Supreme Court was within its authority to deem the fees within the board's common charge lien.

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