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Inside This Issue

Court Dismisses Constitutional Challenge to City Covid-based Laws, but Holds That Service of Routine Rent Demands Does Not Constitute Harassment

BY LEWIS A. LINDENBERG AND SCOTT F. LOFFREDO

On May 26, 2020, the New York City Council passed three local laws intended to combat the economic impact of COVID-19 on residential and commercial tenants as well as personal guarantors of some commercial leases.

The first was an amendment to the City's residential tenant anti-harassment law which amended the definition of "harassment" to now include "threatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived status as an essential employee, status as a person impacted by COVID-19, or receipt of a rent concession or forbearance for any rent owed during the COVID-19 period".

The second was a similar amendment to the City's commercial tenant anti-harassment law, amending the definition of harassment to now include threatening a commercial tenant based on the commercial tenant's status as a person or business impacted by COVID-19, or the commercial tenant's receipt of a rent concession or forbearance for any rent owed during the COVID-19 period.

The third was a brand new law entitled "Personal Liability Provisions in Commercial Leases" or "The Guaranty Law", which bars owners from enforcing personal guaranties

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Attorney Advertising: Prior results do not guarantee a similar outcome.

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executed by individuals for particular types of commercial tenancies between March 7, 2020 and March 31, 2021.

On November 25, 2020, in *Melendez v The City of New York*, Judge Ronnie Abrams of the United States District Court for the Southern District of New York dismissed owners' constitutional challenges to these laws, holding that the City had great deference under its "police powers" to pass legislation responsive to the pandemic notwithstanding the questionable breadth of the Guaranty Law or the substantial impact the law had on private contracts.

The owner plaintiffs had challenged the two anti-harassment laws arguing that both violated free speech by: (i) prohibiting them from sending to their tenants "routine rent demand notices", and (ii) prohibiting them from engaging in discussions with their tenants about the consequences flowing from unpaid rent and efforts to collect rent. Further, the owner plaintiffs argued that the laws were vague about what conduct was prohibited or permitted, and as such violated their due process rights.

The Court held that the text of both of the anti-harassment laws was sufficiently clear to survive a challenge on due process grounds and further held that neither of the laws precluded property owners from making "lawful demands for rent". The Court did note that "This is not to say that a rent demand could never be adjudged a threat…a repeated onslaught [of] demands for rent . . . could rise to the level of harassment…as could rent demands made in a particularly threatening manner." However, the Court found that, generally speaking, for a rent demand to violate the residential anti-harassment law—assuming, *arguendo*, it is adjudged to be "a threat"—the demand must be made for the but-for reason that the tenant has been impacted by COVID-19 in one of the ways recognized by the statute. Put differently, a tenant would need to show that but for the impact of COVID-19 on him/her, the owner would not be making the rent demand or "communicating with them about the consequences flowing from unpaid rent and efforts to collect rent."

The plaintiffs had challenged the constitutionality of the Guaranty Law as a violation of the U.S. Constitution's "Contracts Clause", which precludes State and local governments from passing a law which impairs obligations set forth in the contracts of private parties, unless such a law is found to be reasonable and necessary to satisfy a legitimate public purpose. The Court held that, while the Guaranty Law did do significant harm to property owners, the fact that the Law was intended to address a legitimate public emergency caused the Court to defer to the judgment of the City Council as to whether the law was "reasonable and necessary", rather than to "opine on the wisdom" of what it characterized as the City Council's policy decision.

While the Court's ruling on the constitutionality of the Guaranty Law does create challenges in the context of enforcing commercial guaranties, the decision does give clarity to owners who were previously uncomfortable with serving rent demands in the shadow of the amendments to the anti-harassment laws.

If you need any guidance or advice on how best to pursue either a residential or commercial tenant or guarantor for collection of rent, please feel free to contact BBG.

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Court Limits Shareholder's Demands to Inspect Co-op Books and Records

BY LLOYD F. REISMAN

In a case recently decided in New York County Supreme Court, *Cayne v. 510 Park Avenue Corporation,* a co-op shareholder who was claiming that his attempts to sell his apartment were being frustrated by the co-op's Board of Directors demanded the right, under both statute and common law, to inspect the co-op's "books and records." The shareholder included in its demand "all 'books and records' pertaining to: (a) the Apartment; (b) transfers of shares for the Apartment; (c) transfers of shares for other apartments; (d) subleasing of apartments; and (e) market valuations of apartments."

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Under New York State Business Corporation Law ("BCL") §624 ("Books and records; right of inspection; prima facie evidence"), it is well established that a shareholder has the right to examine (a) the minutes of shareholder or board meetings; (b) a shareholder roster (including names, addresses and numbers of shares); and (c) the corporation's financial statements; provided that the exercise of such right is for a purpose in the interest of the corporation. A shareholder's common law right to inspect corporate "books and records," on the other hand, is broader in scope but requires the shareholder to establish that the request is being made in good faith and is for a proper purpose. Where a shareholder refuses or fails to satisfy the applicable "purpose" requirement (whether under BCL §624 or common law), a corporation may refuse the request.

In the instant case, the Court rejected both aspects of the shareholder's demands, noting that it was "overly broad and not supported by section 624 of the Business Corporation Law" and that it was not based on a proper purpose--holding that the Board's rejection of proposed purchasers (which is a decision protected by the business judgment rule) alone does not justify a shareholder's right to inspect broadly the co-op's books and records. The Court held that the shareholder's request was motivated by personal reasons, not the legitimate corporate purposes required by statute and common law.

In response to this case, shareholders would be well served to limit the scope of any demands for corporate "books and records" to information and records required for real corporate reasons, and Boards would likewise be well served to consider refusing overly broad requests. At a minimum, Boards are now empowered to take stronger positions in opposition to such demands.

While the instant case addressed such rights in a co-op, condominium unit owners and Board members would also do well to heed these lessons as Courts have heretofore increasingly recognized similar rights to inspect the "books and records" of condominiums, whether statutory or under common law.

Apartment owners and Boards should consult their counsel with regard to any such demand issues.

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With Virtual Trials Becoming the Norm, Parties Are Being Pushed to Proceed in Virtual Courtrooms

BY JOSHUA ZUKOFSKY

The Covid-19 pandemic has made it clear that virtual trials, hearings and conferences are here to stay in City, State and Federal Courts. While once reluctant to do so, Courts are becoming increasingly willing to conduct trials in which witnesses, attorneys and parties appear virtually. As recently as November 23, 2020, New York State Chief Judge Janet DiFiore announced that there will be a dramatic increase in the number of virtual trials throughout the New York State Court system.

Virtual hearings are now necessary, as all businesses, including the legal profession, are required to adapt to life during a global pandemic. New York City Housing Courts have found that, in most situations, virtual hearings and trials are appropriate during the pandemic for most types of proceedings. The Courts have relied heavily upon Judiciary Law §2-b(3), which allows a Court to "devise and make new processes and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed" by the Court. The Courts have found almost universally that the pandemic provides an "exceptional circumstance" permitting virtual testimony, even over a party's objection.

The major issue facing litigants is the absence of safeguards provided by the judiciary with regards to the virtual testimony of witnesses. Under Federal Rule of Civil Procedure ("FRCP") 43, a witness must appear in person unless there is "good cause and compelling circumstances and with appropriate safeguards" that allow for virtual testimony. That Rule acknowledges that safeguards must be put in place before a witness can appear virtually; however, New York Courts have not taken such a strict approach. For example, even though City Criminal Courts conducted over 25,000 arraignments from March through

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September, and as more Civil Court trials proceed virtually, New York Courts have not instituted any safeguards.

Without proper safeguards in place there are many risks associated with virtual hearings that are not present when parties appear in person.

When a witness appears before a judge in a courtroom, it is easy for all those present to observe the documents the witness is referencing, and whether the witness is doing anything not permitted while under oath, such as communicating with anyone in the courtroom. However, when a witness appears virtually, it becomes far more difficult to ensure that the witness is only looking at documents that are proper; it is almost impossible to ensure that the witness is not having improper communications with a party, an attorney, or any other individual. Thus, it becomes incumbent upon the Courts to establish regulations and guidelines that will allow the parties to have a fair virtual trial so as to ensure that due process is served.

As more trials proceed virtually, there will be more litigation over whether such trials are proper and afford all parties their due process rights. Before the Courts implement a requirement allowing all cases to proceed virtually, the Courts should present guidelines to the various Bar groups for comment and approval. This will allow for a set of uniform procedures to be vetted and discussed thoroughly, so as to maximize the chances that trials and proceedings will be conducted in the fairest manner possible.

BBG will continue to provide updates regarding changes in the law and practice relating to virtual Court proceedings.

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The Pandemic and Owner Remedies Other Than Eviction to Collect Payments Due from Tenants

BY MARTIN MELTZER

Since the start of the Covid-19 pandemic, there have been (as of this writing) 85 Executive Orders issued by Governor Cuomo, many Administrative Orders issued by the Courts, and an Order issued by the Federal Centers for Disease Control, many of which, among other things, affect an owner's constitutional right to enforce contractual obligations of tenants by collecting money due and obtaining possessory rights under leases. The abrogation of rights by Federal, State and City governments is unprecedented and presents challenges never encountered by City property owners.

Notably, an owner's rights to seek rent or obtain possession of residential and commercial properties, or even to seek money from individual guarantors of commercial tenants' obligations, have been eviscerated. For all intents and purposes, as of this writing, an owner cannot anticipate any reasonable timeframe within which it can expect to recover possession of properties. This begs the question, whether an owner has *any* viable remedy against a residential or commercial tenant or a guarantor to enforce its contract rights. The answer is yes.

An owner can choose to sue tenants in civil court for money owed (not for possession). Of course, this is not a catch-all remedy with regard to all tenants, but should be carefully considered based on the facts of each tenancy and the owner's financial condition. Often, the mere commencement of such a lawsuit triggers some positive results.

Owners with tenants that owe money, with rent roll arrears that are mounting, who have been unable to get tenants to even have a dialogue about payment, should contact counsel to discuss available options, including suing for amounts due.

Martin Meltzer is a partner at BBG and heads the Firm's nonpayment practice. He has successfully worked with numerous clients and has resolved many rent claims since the start of the pandemic. Marty can be contacted at ***mmeltzer@bbgllp.com*** *or (212) 867-4466 (ext 313).*

Return of a Tenant's Security Deposit Under the HSTPA

BY BRIAN CLARK HABERLY

Among the most problematic parts for landlords of the Housing Stability and Tenant Protection Act of 2019 (the "HSTPA") are the changes the HSTPA made governing return of a tenant's security deposit.

To deal with the return of security deposits, the HSTPA added New York State General Obligations Law §7-108 1-a(e), which provides: "Within fourteen days after the tenant has vacated the premises, the landlord shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant. If a landlord fails to provide the tenant with the statement and deposit within fourteen days, the landlord shall forfeit any right to retain any portion of the deposit".

The reason this section is so problematic for landlords is the extremely tight deadline of fourteen days imposed by the statute. On a practical level, it is difficult for a landlord to get a check for the return of the security deposit issued and sent to a former tenant within fourteen days.

Moreover, if the landlord wants to retain either the entire security deposit (or a portion thereof) to cover unpaid rent or damage to the apartment, this fourteen day deadline becomes even more challenging to comply with.

Fourteen days is very little time for a landlord to inspect the apartment and document any damage, while also possibly going through the rent records and the lease to see if there are any outstanding charges that the landlord will be seeking to withhold from the security deposit. Unfortunately for landlords, the penalty for failing to comply with the fourteen day deadline is quite severe. If the landlord fails to provide the itemized statement within the fourteen days, the landlord loses any right under the lease to keep all or part of the security deposit if the tenant owed back rent or damaged the apartment beyond normal wear and tear.

If a landlord seeks to retain any portion of a tenant's security deposit, the landlord will need to provide to the tenant within fourteen days an "itemized statement indicating the basis for the amount of the deposit retained". The statute is silent as to what exactly this statement must consist of. However, a reasonable reading is that the landlord needs to provide a writing to the tenant which lists: (i) the amount of the security deposit; (ii) the amount being withheld from the security; (iii) a description of what the retained amount is for; and (iv) the amount of security being returned (if any).

One of the mistakes that we have noticed landlords making while attempting to comply with this new statute is that landlords are waiting too long to provide the itemized statement to tenants, in trying to provide as much detail as they can about the amounts being withheld from security deposits. Ideally, if a landlord has a long or detailed explanation as to what the retention is for, the landlord should provide that information with the statement. However, it is far more important that the landlord comply with the fourteen day deadline to provide a compliant statement, rather than risk missing the deadline by compiling and presenting more detail about the amount being withheld from the security deposit.

This new fourteen day deadline imposed on landlords is just one more challenging pitfall for landlords created by the HSTPA. Landlords should consult with counsel on all issues involving security deposits specifically, and the HSTPA in general.

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What to Consider When Deciding if Conversion of Stoves from Gas to Electric (or Vice Versa) is Right for your Rent Stabilized Building

BY LOGAN O'CONNOR

Gas stoves are often considered a luxurious appliance by residential tenants. As a result, many owners of rent stabilized buildings assume that they must keep gas stoves in their rental apartments, despite the many issues that are frequently associated with gas stoves, including the potentially disastrous possibility of gas leaks and explosions.

Gas leaks typically require a complete shutdown of gas service to the entire line, or even the entire building. Gas service cannot be restored until the building passes a pressure test. Owners must then deal with the herculean task of scheduling access to several apartments in the same line, scheduling of numerous gas company inspections, hiring and monitoring of plumbers to perform repairs, and other significant obstacles. If the building gas service is shut down, it could take months to restore, leaving tenants without the ability to cook during that prolonged period. Such a gas shutdown in a building containing rent regulated tenants could result in a building-wide service order and a rent reduction/freeze.

Owners often presume that tenants will challenge and prevent any attempt by the owner to convert a rent stabilized building's cooking facilities from gas to electric. However, conversion of gas stoves to electric stoves may not be as arduous a process as previously imagined.

Rent Stabilization Code ("RSC") §2520.6 (r) obligates owners of rent stabilized multiple dwellings to maintain certain "space and services which the owner was maintaining or was required to maintain." Typical building services such as light, heat and hot water fall squarely within this RSC requirement.

However, owners may file an application to modify or substitute a required service, with no change in the legal regulated rent, if such modification or substitution complies with the Rent Stabilization Law and RSC (RSC §2522.4(e) (3)). A modification of services shall not be deemed a "reduction" in services where an adequate substitution of services has been provided.

When determining whether or not the conversion of a gas stove to an electric stove complies with the RSC, the Division of Housing and Community Renewal ("DHCR") breaks the service down into two separate parts: (i) the physical cooking facility, and (ii) the fuel to power the cooking facility.

Replacement of gas cooking facilities with electric cooking facilities has been found to be an adequate substitution of a required service in rent stabilized apartments, despite the commonly held misconception that gas cooking stoves are "better" than electric cooking stoves.

With regard to the fuel issue, if an owner has always paid for the fuel to power the cooking facility, then the owner will be required to continue to cover the cost of power – whether it be gas or electricity. Where an owner has been paying for the cost of gas and is deciding whether or not to convert the building's stoves from gas to electric, the owner must factor in the cost of electricity consumption for the stoves into the owner's calculations, which may also include the installation of electric submeters, where necessary.

If, after considering both aspects of such a potential change, conversion makes sense for an owner, BBG can assist in preparing and filing with DHCR an application for modification of services.

Logan O'Connor is an associate in BBG's Administrative Law Department, and can be reached at ***loconnor@bbgllp.com****, or 212-867-4466 ext. 365.*

BBG In The News

Founding partner **Sherwin Belkin** was quoted in *The Real Deal* on September 28 and September 29, decrying the impact on owners of the extension of the eviction moratorium, first through December 31, and then without end date: **Read articles here and here**, and on October 9, on the resumption of evictions on October 12: **Read article here**. **Mr. Belkin** was also quoted in *The Real Deal* on December 26, and in *The Real Estate Daily Beat* on December 28, criticizing the impending new bill barring evictions through next May 1 and the effect it is likely to have on owners: **Read articles here and here**.

Litigation Department head **Jeffrey L. Goldman** and fellow Litigation partner **Scott F. Loffredo** were referenced in an article in the September edition of *Real Estate Solutions* discussing a Court victory obtained on behalf of an affiliate of Firm client The Moinian Group, defeating a commercial tenant's reliance on Executive Orders banning gatherings as excusing the tenant's performance under its lease: **Read article here**. **Mr. Goldman** also was a panelist on a November 19 webinar presented by Marcus & Millichap entitled "Post-Election & Mid-Pandemic: What Now?", discussing the current state of New York City real estate issues .

Martin Heistein, co-head of the Firm's Administrative Law Department, was quoted in *The City* on October 29 in an article discussing a class action lawsuit brought against owners, challenging the manner in which rent concessions have been granted: **Read article here**.

Transactional Department partner **Stephen M. Tretola** and law assistant awaiting admission **Joshua A. Sycoff** represented the seller of a mixed-use housing complex in Norwalk, Connecticut in a $53 million transaction, which was reported in *The Real Deal* on December 17: **Read article here**.

Litigation Department partner **Christina Simanca-Proctor** was included as one of *Crain's New York* "**Notable Women in the Law 2021**".

The Firm congratulates the following attorneys, who have been named Super Lawyers™ for 2020:

Daniel T. Altman

William E. Baney

Sherwin Belkin

Jeffrey L. Goldman

Martin J. Heistein

Scott F. Loffredo

Ron Mandel

Noelle I. Picone

Craig L. Price

Michael J. Shampan

Aaron Shmulewitz

Co-Op | Condo Corner

BY AARON SHMULEWITZ

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466, extension 390, or (ashmulewitz@bbgllp.com).

HOA BOARD MEMBERS FROM NON-RESIDENTIAL CONDO COMPONENT CAN VOTE ON ALL HOA MATTERS

Board of Managers of Half Moon Bay Marina Condominium v. Board of Directors of Half Moon Bay Homeowners Association, Inc.
Appellate Division, 2d Dept.

COMMENT | Such a set-up is common in multi-building developments outside of Manhattan. The Court examined the HOA's bylaws, and also considered fairness and logic.

CO-OP SHAREHOLDER NOT ENTITLED TO BROAD REVIEW OF CO-OP'S BOOKS AND RECORDS

Cayne v. 510 Park Avenue Corporation
Supreme Court, New York County

COMMENT | The Court found that the documents review request was to further the shareholder's private goals, not for legitimate corporate purposes. This is a rare limiting ruling on apartment owners' records review rights. (BBG is counsel to this cooperative, but was not involved in this litigation.)

CO-OP COULD BE SUBJECT TO CIVIL CONTEMPT FOR NOT RESPONDING TO SHAREHOLDER'S SUBPOENA

Ling v. Sans Souci Owners Corp.
Appellate Division, 2d Dept.

COMMENT | The subpoena sought a video relating to altercations with building doormen, an increasingly frequent occurrence.

SPONSOR DEFECT CLAIMS AGAINST A POST-BANKRUPTCY SPONSOR SUCCESSOR DISMISSED, SINCE THE SUCCESSOR DID NOT ASSUME LIABILITY FOR SUCH CLAIMS THAT AROSE PRE-BANKRUPTCY

Board of Managers of The Bayard Views Condominium v. FPG Bayard, LLC
Appellate Division, 2d Dept.

COMMENT | Claims against the principals of the sponsor successor were also dismissed.

CONDO MORTGAGE FORECLOSURE SALE VACATED—SUCCESSFUL BIDDER WAS BORROWER'S FORMER ATTORNEY

Wells Fargo Bank v. Pickett
Appellate Division, 2d Dept.

COMMENT | This was the second foreclosure sale in this eight-year old litigation. The attorney's bid was 20% lower than the successful bid at the first sale. The Court implied that the attorney acted improperly.

SUCCESSFUL BIDDER AT CO-OP FORECLOSURE SALE HAS NO STANDING TO ENFORCE PROPRIETARY LEASE AGAINST CO-OP

Plotch v. 435 East 85th Street Tenants Corp.
Appellate Division, 1st Dept.

COMMENT | The Court held that the foreclosing bank had no duty to seek to compel the co-op to approve the purchaser, a frequent bidder at such sales.

SPONSOR'S FAILURE TO OBTAIN FINAL C OF O WITHIN TIME PRESCRIBED BY OFFERING PLAN, AND CONSTRUCTION DEFECTS, CONSTITUTE BREACHES OF SPONSOR'S OBLIGATIONS, ENTITLING CONDO BOARD TO DAMAGES

Board of Managers of BE@William Condominium v. 90 William St. Development Group LLC
Appellate Division, 1st Dept.

COMMENT | In this unusually pro-condo decision, the sponsor was also found to have conducted fraudulent conveyances for transfers of funds to co-defendants. On the other hand, this case has been litigated for nearly 10 years.

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CO-OP SHAREHOLDER LIABLE FOR TRESPASS ON NEIGHBOR'S PORTION OF SHARED ROOF TERRACE

Theroux v. Resnicow Appellate Division, 1st Dept.

COMMENT | In finding the offering plan delineation to be ambiguous, the Court considered extrinsic evidence that supported the "trespassee's" contentions.

CONDO BOARD CORRECTLY ASSESSED GARAGE UNIT OWNER FOR ITS SHARE OF COSTS TO REPAIR GENERAL COMMON ELEMENTS

Board of Managers of The Apthorp Condominium v. Apthorp Garage LLC Appellate Division, 1st Dept.

COMMENT | The Court ruled that the Board's decision to make these repairs was protected by the business judgment rule, and that the imposition of the assessment on the garage unit owner complied with the bylaws. BBG represented the victorious condo.

FORMER CO-OP DIRECTOR NOT ENTITLED TO REIMBURSEMENT FROM CO-OP OF LEGAL FEES INCURRED IN PRIOR LITIGATION AGAINST CO-OP

Platt v. Windsor Owners Corp. Supreme Court, New York County

COMMENT | The prior litigation involved the director's unauthorized disclosure of confidential information to all shareholders of the co-op, in her effort to get re-elected to the Board. Not a sympathetic case.

SHAREHOLDER NOT ENTITLED TO RECOUP LEGAL FEES FROM CO-OP INCURRED IN PRIOR LITIGATION OVER HOLDER OF UNSOLD SHARES STATUS

Bellstell 7 Park Avenue LLC v. The Seven Park Avenue Corp.
Supreme Court, New York County

COMMENT | The proprietary lease permitted such recoupment only in cases of default by the co-op.

CONDO CORRECTLY ASSESSED COMMON CHARGES ON GARAGE UNIT

189 Schermerhorn Owners Company, LLC v. Board of Managers of The BE@Schermerhorn Condominium
Appellate Division, 2d Dept.

COMMENT | The garage unit owner had challenged the common charge allocation after the first year of operation, a not-uncommon occurrence.

CONDO CANNOT RECOVER INSURANCE PROCEEDS FOR WATER LEAK DAMAGES

Regency Condominium v. Dongbu Insurance Co., Ltd.
Appellate Division, 2d Dept.

COMMENT | The condo had discarded the broken plumbing fixture at issue, thus violating its insurance policy requirement and giving the carrier a basis to disclaim coverage.

CONDO CAN COMPEL UNIT OWNER TO PERMANENTLY REMOVE BALCONY ENCLOSURE, EVEN IF MANAGEMENT HAD APPROVED ITS INSTALLATION IN 1979 AS UNIT OWNER CLAIMED

Board of Managers of Village Mall at Hillcrest Condominium v. Banerjee Appellate Division, 2d Dept.

COMMENT | The Court held that the Board's decision was protected by the business judgment rule, since removal was required for Local Law 11 work. The bylaws also permitted the Board to revoke consents previously granted.

CONDO FREE TO PERFORM LOCAL LAW 11 REPAIR WORK IN THE MANNER IT CHOOSES

Barbiere v. The Board of Managers of 175 West 12th Street Condominium Supreme Court, New York County

COMMENT | The Court ruled that the Board had not yet reached a final decision as to the methodology of the work, so there were no grounds for the injunction sought by the shareholder, and that any final decision would be protected by the business judgment rule.

CO-OP CAN COLLECT UNPAID RENT FROM COMMERCIAL TENANT; COVID PANDEMIC NOT AN EXCUSE

35 East 75th Street Corporation v. Christian Louboutin LLC
Supreme Court, New York County

COMMENT | In granting the co-op's summary judgment motion, the Court rejected the tenant's claims of frustration of purpose and impossibility of performance, holding that Covid had not forced the closure of the store and the tenant still had the opportunity to conduct its business there, albeit less lucratively. Given the soaring number of business closures in the aftermath of Covid, and the likelihood of tenants asserting similar defenses to those raised here, this is an incredibly important ruling for owners. BBG represented the victorious co-op.

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