BRAVERMAN | GREENSPUN

A PROFESSIONAL CORPORATION

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BRAVERMAN GREENSPUN, P.C. FIRM PROFILE

Since Edward Braverman founded the firm in 1968, we have specialized in real estate law, with a focus on providing legal services to cooperatives and condominiums. In 1993 Rob Braverman joined his father at what was then known as "Braverman & Associates," and since that time the firm has grown to fifteen attorneys — all of whom are immersed in guiding Boards in the operation of their buildings. Although Ed passed away in 2011, the zealous, practical and compassionate manner in which he practiced law continue to be the hallmarks of our firm.

Our clients not only benefit from our expertise in cooperative and condominium law, but also from the continuity in the firm's professional and administrative staff. Scott Greenspun joined the firm in 1996, and each of the partners at Braverman Greenspun, and almost every member of our administrative staff, have been with the firm for at least a decade.

We are general counsel to approximately 200 cooperatives and condominiums throughout the New York City metropolitan area. The firm's clients range from four unit to four hundred-unit buildings, new construction condominiums and some of the oldest cooperatives established in New York City, Mitchell Lama and JLWQA cooperatives, and suburban homeowners' associations. Our clients rely on our depth and breadth of experience in litiga-tion, corporate governance and real estate transac-tions to advise and represent them on a broad range of matters.

The firm's litigation practice covers a wide range of disputes including pursuing sponsors for construction defects and improper management by spon-sor-controlled boards, director and officer liability claims, breach of contract claims, Board election disputes, disputes over the use of common areas and limited common elements, actions concerning the proper allocation of common charges between commercial and residential unit owners, contractor defaults, employment and discrimination claims, commercial lease disputes, and defamation claims. As a result of the firm's extensive litigation experi-ence, insurance companies often appoint Braverman Greenspun to handle their most complicated and sensitive claims against cooperatives, condominiums, and Board members. While the firm has the ability to aggressively protect your building in the courts and in arbitrations when required, we have routinely used mediation to achieve settlements, and several of our partners are trained mediators.

The firm also maintains an active transactional and corporate practice that includes creating and revising governing documents, negotiating management agreements, preparing documents in connection with the transfer of unit ownership into trusts, negotiating complex construction contracts, preparing commercial leases, negotiation of access agreements, representing Boards in refinancing underlying cooperative mortgage loans and condominium loans secured by common charges, and the sales and license of com-mon space to unit owners.

The life-blood of any cooperative and condominium is the collection of maintenance or common charges. The firm works closely with Boards and their managing agents to ensure that defaulting shareholders and unit owners satisfy their obligations, including issuing default notices, prosecuting non-payment proceedings, overseeing non-judicial foreclosure sales, filing liens for unpaid common charges and prosecuting lien foreclosure actions.

One of the most difficult tasks faced by cooperative and condominium Boards is navigating disputes between owners or between owners and the Board. Our unprecedented combination of litigation, transactional and general counsel experience allows us to counsel clients on timely, creative and sophisticated methods of dispute resolution.

While our attorneys are fully versed in the laws, regulations, offering plans, proprietary leases, declarations and by-laws that govern building operations, they practice with an understanding and appreciation that Board members are volunteers who are acting for the collective benefit of their neighbors. Regardless of the legal issue involved, our goal is the same: to provide Board members timely, practical, and cost-efficient legal counsel.

PRINCIPALS

Robert J. Braverman
Rob started his career working on complex construction litigation at Bower & Gardner. As the firm's Managing Partner since 2000, Rob has overseen the transformation of the firm from a "father and son" practice to one of the largest and most prominent New York City firms dedicated to cooperative and condominium law. There are few attorneys who can equal the depth of Rob's experience in providing counsel to Boards. In addition to providing many of the firm's clients with day-to-day legal advice, over the past several years, Rob's practice has largely focused on assisting Boards of newly constructed or rehabilitated buildings with sponsor-related construction and governance issues. Rob has spearheaded a number of cases of first impression, and because of his stature in the field, he has authored numerous articles and is routinely quoted on condominium and cooperative issues including *Crains, Habitat and the New York Times*. As an active member of the Association of the Bar of the City of New York Committee on Cooperative and Condominiums, he has moderated several forums on emerging topics affecting cooperatives and condominiums. Rob, an avid skier and sailor, has taught adaptive skiing to disabled veterans and children, and he serves as an honorary member of he Board of STRIDE Adaptive Sports. Rob is also active in raising funds for St. Jude's Research Hospital.

Scott S. Greenspun
After graduating from law school, Scott started his legal career as a commercial litigator at Willkie Farr & Gallagher, and subsequently joined Bower & Gardner where his practice involved commercial litigation, insurance cov-erage disputes and athlete representation. Scott followed Rob to the firm in 1996 and has since spearheaded handling the firm's most complex directors and officers liability and commercial litigations. Scott has also developed an exper-tise in advising Boards on construction proj-ects, co-generation projects, license agreements and access agreements, as well as providing general counsel. Scott has authored numer-ous articles on Board governance, and he is a member of the New York State Bar Association Sections on Real Property Law and Dispute Resolution. Scott is certified as an agent by the NHLPA players association and has represent-ed a number of NHL players over the past 30 years. Scott, a life-long runner, recently ran in Marine Corps Marathon to raise money for Semper K9.

PARTNERS

Jonathan Kolbrener
Jon joined the firm in 2006 after 25 years of litigation experience at a number of well-known firms including Bower & Gardner, and Sheft Wright and Sweeney, as well as an in-house counsel for Travelers Insurance Company, where he gained expertise in handling complex personal injury, construction, medical malpractice and product liability claims. Jon is an experienced trial lawyer, having taken numerous jury and non-jury trials to verdict. In light of Jon's background, he often represents the firm's clients in construction defect disputes and casualty claims. In recognition of his finely- honed trial skills, Jon has served as an instructor for the National Institute of Trial Advocacy's intensive course in trial techniques, which is given to both law students as well as admitted attorneys. Jon has hiked extensively throughout the world. Jon is an active volunteer at Sons of Israel in Briarcliff, New York.

Tracy Peterson
Tracy transitioned into the legal world after working with Serge Sabarsky, Inc. to produce world-wide exhibitions of German and Austrian Expressionist Art. Before coming to the firm, Tracy served as a law clerk for the Hon. Norma L. Shapiro in the Eastern District of Pennsylvania, worked the trial department at McDermott, Will & Emery's New York office, and three and a half years in the Litigation Bureau of the New York State Office of the Attorney General. Since joining the firm in 2007, Tracy has been involved in handling many of the firm's most complicated litigations and appeals, including directors and officers liability and construction related claims. Tracy has served on the Association of the Bar of the City of New York Courts Committee.

Andreas E. Theodosiou
After receiving his J.D. in 1994, and his L.L.M. in 1995, Andy started his career at Cantor, Epstein Bailey & Degenshein, where he first gained exposure to cooperative and condominium law. Andy has been with Braverman Greenspun since 2001, such that his entire legal career has focused almost exclusively on providing legal counsel to Boards. In addition to representing our clients in a wide range of litigation and providing them with general counsel, Andy, has developed an expertise in defending discrimination claims venued in state and federal court, and pending before state, local and federal administrative agencies. Andy, who is fluent in Greek, enjoys world travel and has spent substantial time volunteering at the Children's Resolution and Women's Learning Center, an orphanage in Calcutta, India.

PARTNERS

Manu Davidson
Manu joined the firm in October 2013, after relocating to New York from Florida, where she was a partner at the Miami-based firm of Rumberger, Kirk & Caldwell, P.A. Manu is a seasoned commercial litigator, in both state and in federal court. Manu's practice at the firm focuses on representing Boards and individual directors against claims for breach of contract, breach of fiduciary duty and housing discrimination. In 2010, Manu was listed as a Florida Super Lawyers Rising Star; and she received the Business Leader Mover & Shakers Award for Dedication to Community and Excellence in Leadership in 2012. When Manu is not in the office, she can be found pursuing her passion for gardening.

Kelly Ringston
Kelly is involved in almost every aspect of the practice, as she has experience in both litigation and real estate transactions. Kelly is well-versed in guiding condominiums through the process of enforcing liens for unpaid common charges. Kelly is also responsible for creating and managing the firm's web site, public relations and social media presence. Prior to joining the firm in 2009, Kelly spent four years specializing in condominium and homeowner association law at Marcus, Errico, Emmer & Brooks, the East Coast's largest real estate specialty firm. In 2009, Kelly was named a "Rising Star" in Super Lawyers New England. Kelly is an active volunteer in the Montclair school system, and in her free time is a voracious reader of American history and politics.

COUNSEL

Steven R. Goldstein
Steve has spent more than three decades representing national and regionally based clients in toxic torts, products liability, professional liability, construction, employment practices and high exposure workers' compensation matters. In addition to his active practice in the complex tort area, Steve handles construction defect, directors and officers liability and attorney malpractice cases. Steve is a member of Defense Research Institute and its Toxic Torts Section. As a friend of the Risk and Insurance Management Society, he has been a speaker at its conferences and has lectured and authored articles on self-insurance, employment practices liability insurance and risk management. He has also developed a New York State certified continuing education course on the New York State *Omnibus Workers' Compensation Reform Act*.

Todd Manister
Todd joined the firm in 2020 with wide-ranging commercial litigation and real estate transactional experience gained as a Deputy Nassau County Attorney, as a principal of O'Brien & Manister for twenty-five years, and most recently as counsel to Ficara & Associates, P.C., which merged into Sichenzia Ross Ference LLP. Consistent with broad background, Todd represents the firm's clients in litigations from inception through trial and appeals, provides boards with general counsel, and guides our clients through the process of purchasing and selling co-operative and condominium units. Todd serves as an officer of the Village Lutheran Church in Bronxville, NY and is an active volunteer for the New York Botanical Gardens. In a testament to his resiliency, Todd has been a New York Jets season ticket holder for the past thirty-six years.

Elise Kessler
Elise is an experienced transactional attorney who has represented co-op and condominium boards, real estate developers and investment funds in the sale, acquisition and financing of real property (including office buildings, residential buildings, affordable housing buildings and mixed-use projects). Elise also regularly provides general counsel to our co-op and condominium clients in connection with their transactional needs, and spearheads the firm's rapidly growing commercial leasing and transactional real estate practice. Prior to joining Braverman Greenspun in 2018, Elise was with the firms of Seiden & Schein and Rosenberg & Estis. For more than a decade, Elise served as a Town Board Member and Deputy Town Supervisor for the town of New Castle, where she was involved in overseeing virtually every aspect of the town's operations. Elise is currently a Trustee of the Hudson River Museum, and when she is not working and volunteering, she can be found weightlifting and cooking.

ASSOCIATES

Benjamin Tracy
Following law school, Ben spent four years as Assistant Corporation Counsel in the New York City Law Department, and three years as an Associate at Quinn McCabe LLP. In addition to his litigation experience, Ben has expertise in the negotiation of property access agreements, construction contracts, and agreements between architects and owners. When he is not brooding over his New York Mets, Ben is involved in fundraising for the Henry Viscardi School for children with physical disabilities.

Maria Boboris
Maria joined Braverman Greenspun in 2017, having gained broad commercial litigation experience at Emmet, Marvin, Marvin & Martin, LLP DLA Piper, LLP, and Cahill Gordon & Reindel, LLP. Maria will continue her focus on litigation for the firm's clients. Maria is fluent is Greek and has traveled around the globe. Maria participates in volunteer programs through New York Cares and has served as a guide for disabled athletes through Achilles International.

Drew Pakett
Drew joined our firm in 2013, after clerking for the Hon. David B. Katz in Newark, New Jersey. Drew works with the firm's more senior attorneys on litigations and providing general counsel. Drew, who grew up near Philadelphia and is a life-long Phillies fan, shares his love of baseball by volunteering as a coach for Town of Livingston Little League program.

Joseph Goljan
Before joining the firm in 2018, Joseph gained litigation experience as counsel to real estate developers, financial institutions, and insurers in various matters real estate-related matters. Most recently, Joseph was an associate at Rosenberg & Estis, and was selected by Super Lawyers as a "Rising Star" in the New York Real Estate practice from 2015 through 2018. Joseph, who received his undergraduate degree in Theater, continues to perform, as well as pursuing interests in oil painting and furniture building.

Alexandra Pisconere
Alexandra joined Braverman Greenspun in August 2019. Alexsandra has worked as the Director of Investigations at the Westchester County Human Rights Commission, and served as a law clerk in Westchester County Supreme Court. This exeprience will be an asset to her representation of the firm's clients. Alex is fluent in French, co-chair of the International Human Rights Committee of the New York State Bar Association, and her favorite hobby is surfing.

For more information, please review the attached sample of publications and reported representative cases.

REPRESENTATIVE CASES

82 Retail LLC v. Eighty Two Condo., 117 A.D.3d 587 (1st Dep't 2014)
82 Retail LLC v. Eighty Two Condo., 158 A.D.3d 429 (1st Dep't 2018)
85 Fifth Ave. 4th Floor, LLC v. I.A. Selig, LLC, 45 A.D.3d 349 (1st Dep't 2007)
245 Realty Assocs., L.P. v. 105 W. 73rd Owners Corp., 44 A.D.3d 521 (1st Dep't 2007)
636 Apartment Assocs., J.V. v. Fleetridge E. Owners, Inc., 139 A.D.3d 700 (2d Dep't 2016)
Aguero v. Commonwealth Land Title Ins. Co., 253 A.D.2d 834, (2d Dep't 1998)
Akhunov v. 771620 Equities Corp., 78 A.D.3d 870 (2d Dep't 2010)
Azeem v. Murphy, 139 A.D.3d 610 (1st Dep't 2016)
B. Reitman Blacktop, Inc. v. Missirlian, 52 A.D.3d 752 (2d Dep't 2008)
Baker v. 16 Sutton Place Apartment Corp., 110 A.D.3d 479 (1st Dep't 2013)
Bd. of Managers of Europa Condo. v. Orenstein, 281 A.D.2d 354 (1st Dep't 2001)
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Brasseur v. Speranza, 21 A.D.3d 297 (1st Dep't 2005)
Brennan v. Salkow, 101 A.D.3d 781 (1st Dep't 2012)
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Brunswick Corp. v. Hickman, 93 So. 2d 1022 (Fla. 2d DCA 2012)
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Celtic Park Owners, Inc. v. Columbia Fed. Sav. Bank, 258 A.D.2d 551 (2d Dep't 1999)
Chu v. Klatskin, 158 A.D.3d 500 (1st Dep't 2018)
Citibank v. Commonwealth Land Title Ins. Co., 228 A.D.2d 635 (2d Dep't 1996)
Cohen v. Bd. of Managers of 22 Perry St. Condo., 278 A.D.2d 147 (1st Dep't 2000)
Cutone v. Riverside Towers Corp., 171 A.D.3d 476 (1st Dep't 2019)
Dan Klores Assocs., Inc. v. Abramoff, 288 A.D.2d 121 (1st Dep't 2001)
DeBello v. VolumeCocomo Apparel, Inc., 720 Fed.Appx. 37 (2d Cir. 2017)
Demchick v. 90 E. End Ave. Condo., 18 A.D.3d 383 (1st Dep't 2005)
Dome Prop. Mgmt., Inc. v. Barbaria, 47 A.D.3d 870 (2d Dep't 2008)
Fishman v. Charles H. Greenthal Mgmt. Corp., 82 A.D.3d 425 (1st Dep't 2011)
Florida Diversified Films, Inc. v. Simon Roofing & Sheet Metal Corp., 118 So. 3d 240
Galanova v. Safir, 127 A.D.3d 686 (2d Dep't 2015)
Galanova v. Safir, 138 A.D.3d 686 (2d Dep't 2016)
Gordon v. Curtis, 68 A.D.3d 549 (1st Dep't 2009)
Gruppo v. London, 25 A.D.3d 486 (1st Dep't 2006)
Jerrick Waterproofing Co. v. Park Plaza Owners Corp., 251 A.D.2d 628 (2d Dep't 1998)
Johnson v. Levin, 165 A.D.3d 497 (1st Dep't 2018)
Joon Song v. MHM Sponsors Co., 176 A.D.3d 572 (1st Dep't 2019)
Juleah Co., L.P. v. Greenpoint-Goldman Corp., 49 A.D.3d 282 (1st Dep't 2008)
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Levine v. Greene, 57 A.D.3d 627 (2d Dep't 2008)
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Nicosia v. Rios-Nicosia, 303 A.D.2d 390 (2d Dep't 2003)
Parker v. Cox, 306 A.D.2d 55 (1st Dep't 2003)
Pastena v. 61 W. 62 Owners Corp., 169 A.D.3d 600 (2d Dep't 2013)
Piccone v. Chamberlain, 271 A.D.2d 631 (2d Dep't 2000)
Rivera v. Rivera (Nassau County Dept. of Social Services), 255 A.D.2d 517 (2d Dep't 1998)
Rodriguez v. DeStefano, 72 A.D.3d 926 (2d Dep't 2010)
Samu v. Samu, 243 A.D.2d 458 (2d Dep't 1997)
Samu v. Samu, 257 A.D.2d 656 (2d Dep't 1999)
Saul v. 476 Broadway Realty Corp., 290 A.D.2d 254 (1st Dep't 2002)
Stidolph v. 771620 Equities Corp., 103 A.D.3d 705 (2d Dep't 2013)
Susser v. 200 E. 36th Owners Corp., 262 A.D.2d 197 (1st Dep't 1999)
U.S. Bank Natl. Assn. v. Alvarez, 49 A.D.3d 711 (2d Dep't 2008)
Utica Mut. Ins. Co. v. Timms, 289 A.D.2d 223 (2d Dep't 2001)
Weinberg v. Kaminsky, 166 A.D.3d 428 (1st Dep't 2018)
Wo Yee Hing Realty, Corp. v. Stern, 99 A.D.3d 58 (1st Dep't 2012)
Yatter v. Cont'l Owners Corp., 22 A.D.3d 573 (2d Dep't 2005)
Zummo v. Zummo, 237 A.D.2d 436 (2d Dep't 1997)

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Beware of Building Politics

By Frank Lovece

It seems to happen year after year after year: An entrenched board refuses to hold elections or annual meetings.

At one such co-op with the same board members "for almost 20 year," writes a shareholder, a meeting finally was scheduled for the first time in four years. "There was no list of nominees provided," the writer says. "We called management, (who) said they would only tell us who the nominees are at the meeting. Right after the meeting was scheduled, a group of people asked to be nominated for the board. Management is preventing these people from being included on the ballot."

Moreover, the person writes, management will not provide a list of shareholders – even though management itself "has been in contact with many of them and is collecting proxies for their candidates." The shareholder wants to know what his or her options are.

A couple do exist, though neither is easy, notes attorney Rob Braverman, a principal at Braverman Greenspun. Since the co-op is now having a meeting, he says, that wipes out the transgression of not having done so for several years. "While certainly it was not good practice or in compliance with the governing documents not to have a meeting for five years," Braverman says, "it appears [the board has] cured it. They're having a meeting."

How can shareholders force the board to call a meeting? "You present a written petition to the secretary of the corporation, signed by a denominated percentage of shareholders, usually 20 percent," Braverman says. What if the board ignores that, like it has ignored other legal requirements? "Then it becomes a little trickier," the lawyer concedes. "What I would suggest is that there be a grassroots effort to force the board's hand: It's harder for the board to ignore a petition signed by 50 to 60 percent of the shareholders than to ignore one signed by 20 percent."

And shareholders are entitled to fellow shareholders' names in order to attempt this, he confirms: "Under the Business Corporation Law, a shareholder does have a right to review the record of a corporation's existing shareholders – i.e., names and addresses." Though the statute does not address condominium associations, courts have ruled that the same applies in the context of annual elections, he adds.

Braverman says that when he prepares a ballot for an annual election, he leaves blank spaces – so shareholders can write in names, regardless of what the board puts on the ballot.

The attorney is particularly troubled by the idea of a managing agent actively soliciting proxies for anything other than a quorum. "Because now, he says, "they're interjecting themselves into the politics of buildings. Any professional should remain apolitical."

If all else fails, there is always the court option – which, surprisingly, has a silver lining for shareholders.

"You can bring a 'derivative action,' where a group of shareholders is basically standing in the shoes of the corporation, because the board is not doing the right thing," Braverman says. "And this is one of the few instances where you can actually recover attorney's fees. The theory is, you're doing what the board should have done, and if you undertake that obligation you shouldn't have to be out-of-pocket for it."

Real Property Law, Section 339-W

Examining Condo Books and Records

By Robert Braverman

When a unit-owner asks to review a condominium's records the board needs to respond promptly - and make sure the request is being made in good faith.

Over the past couple of years, the rights of condominium unit-owners to inspect and obtain condominium records has changed. Historically, those rights were governed by Section 339-w of the Condominium Act, which requires a condominium to keep records of receipts, expenditures, and vouchers, and also the authorization of their payments. Condominium unit-owners have long held the right to review these documents, which encompass just about any condominium book or record, including monthly financial reports, invoices, minutes of board meetings, contracts, and even redacted legal bills.

But reviewing the material was usually not easy. When a unitowner wanted to examine books and records, he or she would have to make an appointment with the managing agent, indicating the material desired for review. That inspection would then take place in the managing agent's office, and although the unit-owner could review the documents, nothing could be photocopied or taken away from the office.

In 2016, the appellate court that governs Manhattan and the Bronx changed that with the case of Pomerance vs. McGrath, which said that so long as the unit-owner has a good-faith purpose for looking at the documents, he or she has both common-law and statutory rights of review. In addition, the court said that the unit-owner now has a right to create both paper and electronic copies of the documents. But the court also said that when the unitowner makes a request to review the documents, he or she can be required to state the purpose of the request and sign a confidentiality agreement not to disclose or disseminate the documents to anyone.

Why do boards need to be mindful of this? Often these types of requests are made during the election by unit-owners who want to take a deeper dive into what's been going on at the condo and use that information in connection with a campaign for the board. For that reason, once the request to inspect records is made, boards should not delay in responding. Ignoring the request is a mistake that can eventually hurt the board. This could include the embarrassment of having a court find that a legitimate request was ignored, or even an election result being overturned because a candidate for the board wasn't afforded the common-law right to inspect and review records.

In the end, what should a board do when a request for documents is made? Consult with your managing agent and attorney. Discuss whether there's been a good-faith request and decide whether there ought to be a confidentiality agreement. Certain items – Social Security numbers and financial information – arguably do not fall into the orbit of the Pomerance decision. So be careful. A board doesn't want to be in the uncomfortable situation of having to explain why it granted access to documents that it didn't have to grant.

Can I Stop My Neighbor From Building an Intrusive Balcony?

By Ronda Kaysen

Home owners in the city can't just build any size balcony off the side of a building, but shutting down the project may be tricky.

Q: We recently purchased a co-op in an Upper West Side brownstone with a large living room window overlooking our building's garden. Now the owners of the abutting apartment in the neighboring brownstone are building a glass balcony off their master bedroom that will obstruct our view and dim our light. Worse, anyone standing on the balcony could peer directly into our living room. The owner claims to have the proper permits. Is there anything we can legally do to stop or alter these plans?

A: Homeowners can't just build any size balcony off the side of a building. They must follow the city's building and zoning codes, which set guidelines for the size and location of balconies in residential areas, as well as rights to light and air. If the balcony in question complies with city rules, you'll have to live with it. But you won't know unless you check.

Hire an architect to determine if the structure violates your access to light and air. The architect could also pull the permits, applications and possibly the design plans from the Department of Buildings to check for other violations.

If the architect finds that the balcony's design encroaches on your building's property, poses a safety hazard or affects the habitability of your apartment by diminishing your access to light and air, your co-op board should address the issue on your behalf, according to Scott S. Greenspun, a real estate lawyer and a principal at the Manhattan law firm Braverman Greenspun.

If the balcony does not compromise the co-op in some way, you will have to contest the project on your own, assuming you find other code violations.

"If it's not affecting the health and safety of the building's residents, then it's on you to deal with it," Mr. Greenspun said.

Approach the neighbor with your findings and insist that they amend their design to comply with city rules. If they refuse to make modifications, you could bring the grievance to the city by calling 311 or the Buildings Department. You may also be able to pursue remedies with the city's Board of Standards and Appeals.

If the city does not side with you, and you've exhausted all your avenues of complaint, you could appeal the decision in New York State Supreme Court.

The New York Times

Reversal of Second Hand Smoke Ruling Offers Landlords and Co-op Boards a Huge Sigh of Relief

By Robert J. Braverman

The reversal of a 2016 ruling with respect to a liability for second hand smoke has prompted a huge sigh of relief from building owners and co-op boards. The Appellate Division, First Department, which has Jurisdiction over Manhattan and the Bronx, on May 4, 2017 reversed a finding in which Connaught Tower Corporation, a co-op on East 54th Street, was found liable for breach of it's proprietary lease with the plaintiff, Susan Reinhard due to the presence of second hand smoke that was allegedly infiltrating her apartment.

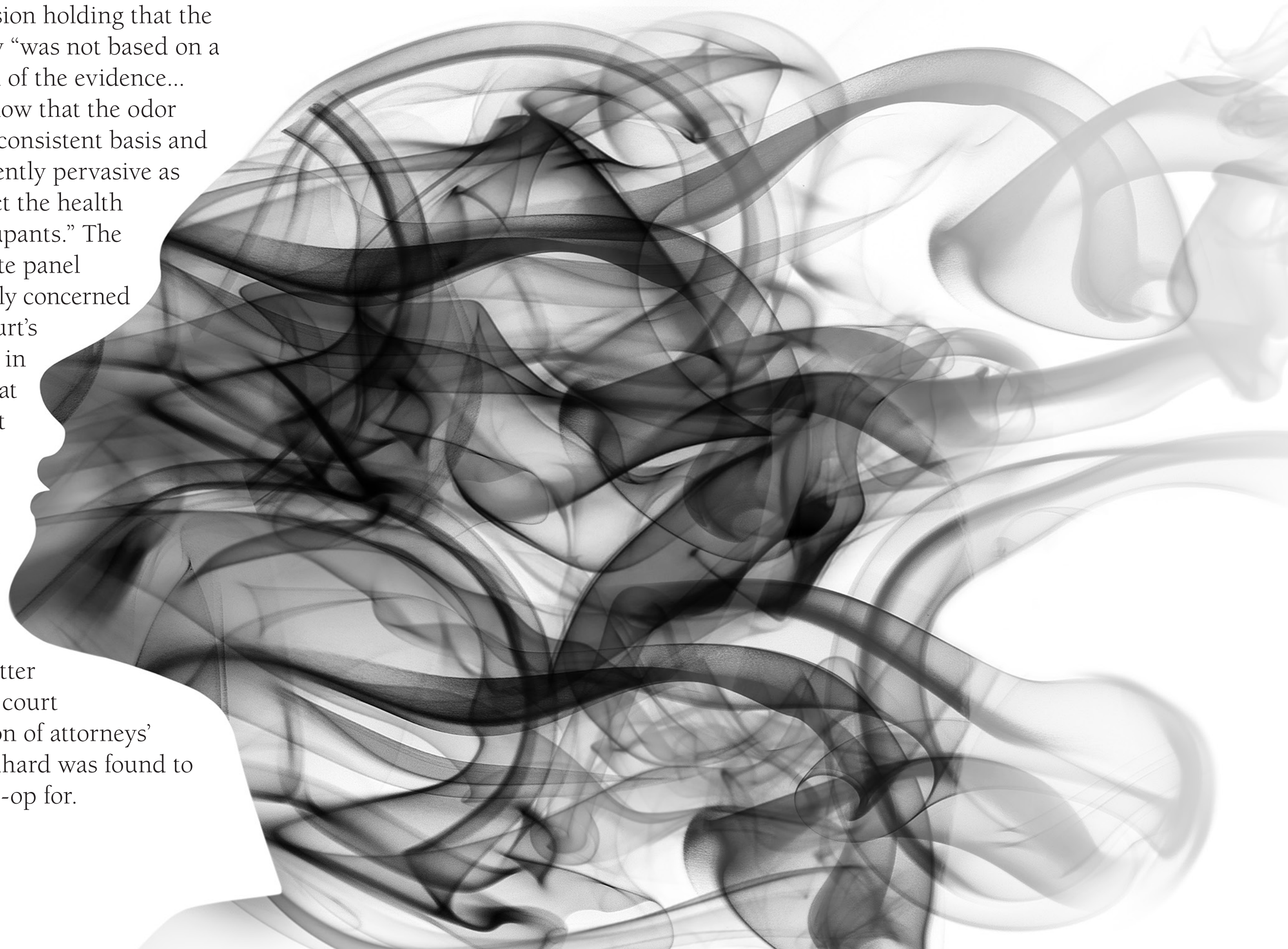
The sweeping language in the original 2016 decision by Justice Arthur Engoron sent shock waves through the residential real estate industry. Justice Engoron found that the co-op breached the statutory warranty of habitability owed to Ms. Reinhard and that Ms. Reinhard had been constructively evicted from her apartment.

Justice Engoron further held that building owners "must either provide a smoke-free apartment...by excluding smokers from their buildings, which might decrease...the rents they could charge; or must smoke-proof their buildings, which...could be mind-bogglingly expensive; or must completely forgo rent payments."

In finding for Ms. Reinhard, the lower court awarded her full maintenance abatement from June 2007 through may 2015 in the amount of over 120,000; interest at the annual rate of 9% on that amount and the amount of her attorneys' fees.

On appeal, the Appellate Division reversed the decision holding that the finding of liability "was not based on a fair interpretation of the evidence... which failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants." The five judge appellate panel seemed particularly concerned with the lower court's finding of liability in view of the fact that the plaintiff didn't even live in the apartment, but rather, resided in Connecticut. As a result, the Court dismissed the complaint and remanded the matter back to the lower court for a determination of attorneys' fees that Ms. Reinhard was found to be liable to the co-op for.

While the negative health effects created by second hand smoke ought to be taken very seriously and building owners and condominium boards ought to be free to ban or restrict smoking in their building, the finding of liability under the facts of the Reinhard case seemed overly draconian and, if affirmed, would have potentially opened a flood gate of litigation. With hopefully healthy lungs, landlords and co-op boards should be able to breath a huge sigh of relief with respect to their potential liability for second hand smoke.



Big Deal | The Sheffield Leaves Chaos Behind

By Sarah Kershaw

Sometimes things that happen in the world of New York City real estate, even in just one building, are so bizarre that one might wonder: Is this a hallucination?

A meeting between developers of one of the most expensive and contentious condominium conversions in city history grew so heated that one partner hurled a metal ice bucket at the other.

The developer hit by the bucket once hired a marching band, with trumpets and tubas drowning out renters who were protesting eviction.

The bucket-thrower sued the band-hirer, accusing him of using $50 million in condo construction funds for personal and other pursuits.

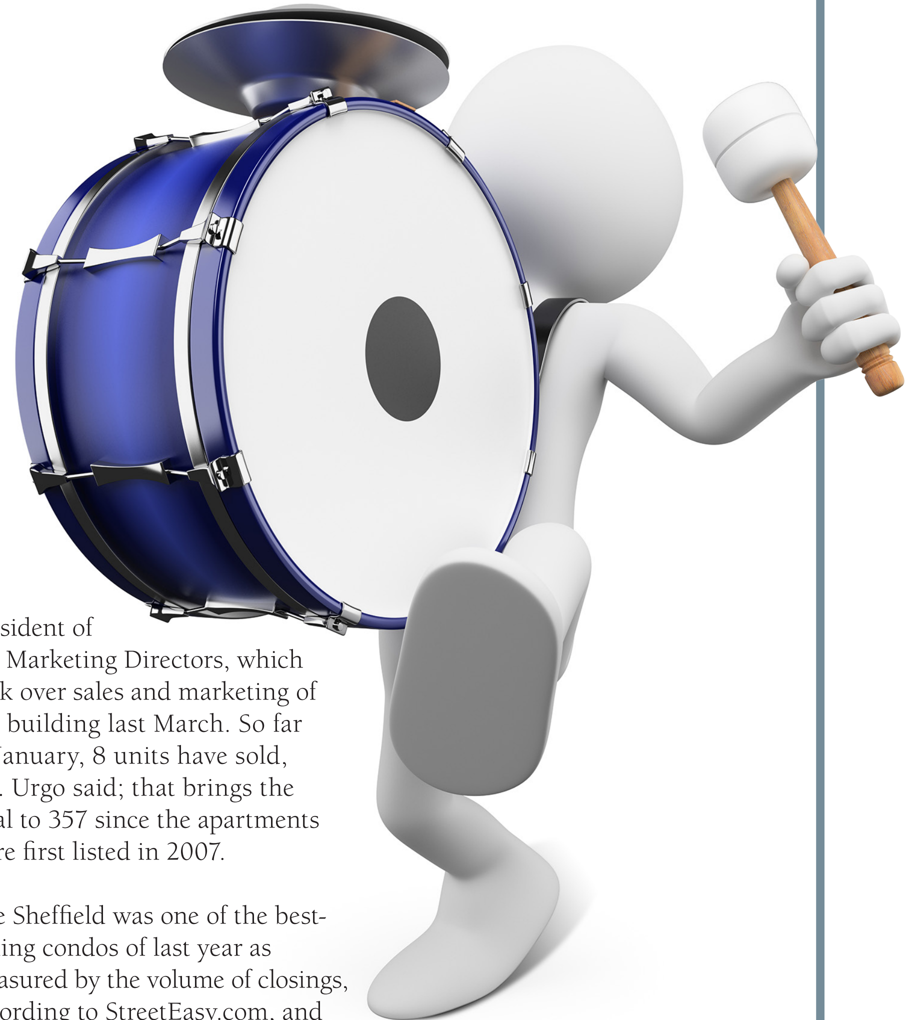
Welcome to the Sheffield.

But in truth, today's Sheffield is not the Sheffield of the ice-bucket-throwing-and-marching-band days of a few years ago. Then called the Sheffield57, the project was plagued by lawsuits, a mountain of debt, defaulted loans, liens on apartments, leaky pipes, unpaid vendors refusing to complete renovations, electrical and elevator problems, and, at one point, the possibility that no oil would be delivered because the heating bills were unpaid.

After a tumultuous history that began in 2005, when three developers riding the wave of the real estate boom bought it for $418 million, one of the highest prices ever paid for a Manhattan residential building, the Sheffield this month marked a milestone that once seemed unthinkable to many: slightly more than 50 percent of its 597 apartments have sold. (Of the 597, 85 are rent-regulated.)

Both sales and average sale prices picked up sharply in 2010 in the 58-story building, at 322 West 57th Street near Eighth Avenue, after a dismal 2009 in which only 11 units sold. One reason for that was a sales freeze ordered by Attorney General Andrew M. Cuomoin May 2009, because the condo offering plan had expired.

The apartments went back on the market last March, and between then and the end of 2010, 78 units sold. Prices in the last quarter averaged $1.57 million, close to or surpassing average prices of the precrash days, according to Jacqueline Urgo, the president of the Marketing Directors, which took over sales and marketing of the building last March. So far in January, 8 units have sold, Ms. Urgo said; that brings the total to 357 since the apartments were first listed in 2007.



The Sheffield was one of the best-selling condos of last year as measured by the volume of closings, according to StreetEasy.com, and The Real Deal magazine called it the "best back-from-the-dead residential project" of 2010.

continued on next page

Average prices range from $700,000, for studios, to $7.5 million for four-bedroom apartments; the new marketing team reduced asking prices by as much as 25 percent.

The team has also added a new amenity, matching buyers with stylists from Saks Fifth Avenue, who can conduct couture and closet consultations, catalog shoes and “develop lifelong relationships” with residents.

The pace of sales in 2010 was much slower than before the fall of Lehman Brothers, according to data from StreetEasy, which showed 81 sales in the first quarter of 2008 alone.

But to people like Larry Wagner, who bought a two-bedroom in 2007 — drawn to the building because the two top floors were to contain many amenities, including a gym and spas for both people and pets — it is stunning that the Sheffield’s odyssey now looks anything like a resurrection.

“It was a complete disaster,” said Mr. Wagner, a financial consultant. “It could have really gone south.”
The Sheffield was certainly not alone in its troubles in the wake of the housing crisis. A raft of new developments and conversions faced major financing troubles and slack — or halted — sales.

The Sheffield’s developers, including Kent M. Swig, a scion of theSan Francisco real estate family (and the target of the ice bucket) and Yair Levy (who pleaded guilty in the ice-bucket attack and served two days of community service) had unveiled ambitious plans in 2005 to convert the 853-unit rental building, built in 1978, into luxury condos.

(A third developer, Serge Hoyda, later joined Mr. Levy in suing Mr. Swig over the $50 million in construction funds.)

In the spring of 2009 Mr. Swig defaulted on the project’s $400 million mortgage and on an additional $240 million in mezzanine debt. A few months later the Fortress Investment Group, the only bidder on the building at a foreclosure auction, took control of the Sheffield.

“The relationship with Fortress could not be any more different than it was with Swig,” said Robert J. Braverman, a lawyer for the condominium association. “Fortress has worked with the unit owners to address the problems left behind — huge, multimillion-dollar shortfalls in the reserve fund, an entirely inadequate plan to build out the amenity space, millions in debt owed to condo owners and really shoddy management.”

All the bills and debts are paid, Mr. Braverman said, and construction is to begin soon on the spa and gym.

Mr. Swig, whose real estate empire has been in jeopardy, negotiated a revenue-sharing arrangement with Fortress.

Fortress declined to comment.

In a written statement, Mr. Swig’s company, Swig Equities, said: “We take great pride that the market continues to positively respond to Swig Equities’ original vision for the property and to the superb design and construction of the Sheffield residences. With over $500 million of apartments sales completed, $400 million of which were completed under Swig Equities’ efforts, we look forward to sharing in the financial success of the Sheffield with Fortress.”

The New York Times

Possible Mold in the Walls and an Unresponsive Board

By Ronda Kaysen

Q: I live in a co-op in Midtown West. My living room wall abuts the wall of a new building. My wall was damaged during its construction, and mold keeps growing on it. Because of a licensing agreement between my co-op board and the new development, the developer's contractors have cleaned the mold and replaced the dry wall three times in two years. But, they do not share the mold test results with me, nor have they provided me with remediation paperwork; they say that verbal confirmation is enough. My co-op board and managing agent are not helping me get the paperwork either, ignoring my written requests. What can I do?

A: Mold is serious and needs to be taken care of. Although black mold is toxic, common molds can be harmful to your health, too. If you are allergic to mold, it could cause a reaction or exacerbate asthma, and if your immune system is compromised from an illness like HIV or AIDS, such exposure could pose a serious health threat, said Dr. Louis DePalo, a pulmonology professor at the Icahn School of Medicine at Mount Sinai.

Even if the mold does not bother you now, you should still insist on removing it because "if you continue to live in that space, you might develop an allergy" to mold eventually, Dr. DePalo said. So how do you make sure the mold is really gone? You need the board to step up because fixing this is the board's responsibility. The licensing agreement is between the board and the developer, and the board is responsible for problems within the walls, according to Robert J. Braverman, a real estate lawyer. "It is the board, not you, that is in a position to enforce the terms of the agreement" with the developer, Mr. Braverman said.

Because mold was discovered in your walls, there is a good chance that reports exist identifying the type of mold and the extent of the problem. Keep pressing the board to get hold of those reports, and any remediation reports, too, reminding the board that this is its responsibility.

If you cannot make any progress, you may want to hire an environmental consultant to test your apartment for hazardous levels of mold. If your consultant finds that the damage has not been adequately addressed, then the board must fix the problem on your behalf, Mr. Braverman said, and then go after the developer for compensation.

The New York Times

Is Your Building Ready for Its Closeup?

By Frank Lovece

A shareholder in a co-op was contacted by a location scout who wanted to rent out his apartment for a film shoot. But the board president told the scout that almost all filming in the building was done in a first-floor apartment – and he gave the scout that apartment owner's contact info. Was this equitable?

If the proprietary lease, bylaws, and applicable law don't forbid filming in apartments or require board consent for it, then the board president – or for that matter, the entire board – cannot block the shareholder from renting out his apartment for a film, says attorney Scott Greenspun, a principal at Braverman Greenspun. In fact, Greenspun adds, even if board consent were required, a rule that permitted only certain designated apartments to be used for film locations might violate the New York State Business Corporation Law, which requires that all shares in a co-op be treated equally.

Greenspun cautions there is little case law in the context of having film/TV shoots in co-op apartments. But attorney Marc Landis, a managing partner at Phillips Nizer, notes: "I don't see any basis for saying one apartment is allowed and another isn't. If the president, on behalf of the board, is going to make those kinds of determinations, [he or she] would need a rationale within the confines of the Business Judgment Rule, or it's subject to legal challenge. There's no reason for an upstairs apartment shareholder to be deprived of the same opportunity the downstairs shareholder might have."

Short of a legal challenge, what's a shareholder's recourse? Both attorneys suggest taking the question to the other board members first. "Since it shouldn't be at the board president's sole discretion, it would make sense for the shareholder to approach other board members, asking if this is a board policy," says Landis. "If the board member says yes, then the shareholder can take it up with whole board. If no, then it's a different issue; the president is acting without authority."

"If there are board members other than the president who are more approachable, [the shareholder] could approach [them]," Greenspun adds. "The shareholder could also try contacting the managing agent for information. While not necessarily less confrontational, the shareholder could make a demand on the managing agent for review of all documents relating to the rules and policies concerning film shoots in apartments."

This controversy could have been avoided. One thing boards should do, says Landis, is write up and adopt a formal agreement, similar to an alteration agreement, that covers the renting of space in the building for TV, film and commercial shoots. Only then will the building be ready for its closeup

Ask the Attorney By Robert Braverman

Mixed Up About Mixed Use

We live in a mixed-use condominium. We are trying to determine the allocation of common expenses (the aggregate sum of a condo minium's common charges – the amount of its annual operating budget) paid by residential and commercial unit-owners. How do we do that successfully?

Generally, a condominium's common expenses are allocated among unit-owners pro rata based upon their percentage of ownership in the condo's common elements. In other words, if Unit 5J has 1 percent of the condo's common interest allocated to it, the owner of that unit is responsible for paying 1 percent of the condo's common expenses. However, this simple formula is quickly abandoned – and things potentially get much more complicated – where commercial units come into play.

Because commercial units frequently do not utilize various parts of a building's common elements and/or building services, the Condominium Act, New York's statutory scheme that governs the structure of condominiums, permits a sponsor to vest the board of managers with the power to create "special allocations" of common expenses between residential and commercial units.

A Case in Point

For example, let's take a 20-story, 100-unit condo with five ground-floor commercial units that opened in 2009. The sponsor has just relinquished control of the board to the residential unit-owners, and, to their surprise, when looking at the association's budgets over the years, they learn that despite collectively owning 5 percent of the condo's common interests, they are only paying 1 percent of the common expenses. How can this be? Is it legal, and, if so, is it fair? And, if it's not fair, what can be done about it?

For starters, it's legal so long as the right of the board to create "special allocations" is: (i) contained in the condo's bylaws; and (ii) disclosed as a "special risk" in the condo's offering plan. If proper disclosure was not made – particularly if there is no provision for the creation of "special allocations" in the bylaws – then the default formula of everyone paying their pro rata share would apply.

In this property, the right of the board to "specially allocate" was adequately disclosed and, as such, is permissible. But is it fair? Upon closer examination of earlier budgets, the newly elected board members were surprised to learn that the commercial unit-owners did not pay for any portion of the salaries or benefits of the building's staff, no part of the managing agent's fee, and no part of the costs associated with maintaining the building's elevator or its amenity spaces (i.e., a gym and a playroom).

When confronted with this seeming inequity, the commercial-unit representative on the board took the position that the previous budgets were perfectly appropriate because the commercial units have their own entrances and cannot be accessed from the "residential section" of the building; they do not use the services of the staff or managing agent; and they do not avail themselves of the condo's amenities. Why, therefore, should they have to pay for any of these budgetary line items, especially where the existence of the "special allocations" was disclosed throughout the condo's offering plan, including in the first year's operating budget, and was mirrored in all subsequent budgets?

Fair Payments

This sounds like, and often is, a recipe for conflict. However, when digging a bit further into the issues and analyzing both sides' positions, it is possible to arrive at an amicable resolution to this type of problem.

continued on next page

Some of the easier items to address in our hypothetical would be whether the commercial unit-owners ought to be required to pay for those common expenses attributable to operating, maintaining, and repairing the condo's gym and playroom. Whereas it is exceedingly unlikely that the commercial unit-owners would ever use these facilities, which were undoubtedly intended for the benefit of the residential unit-owners, a "special allocation budget" that contemplated a "zero allocation" to the commercial unit-owners for these line items would not be unreasonable.

Likewise, the salary and benefits of a doorman who works solely in the "residential section" of the building should not be borne by the commercial unit-owners. Accordingly, it would be appropriate to carve out the cost of the salaries and benefits attributable to this building's doorman from the commercial units' allocation of common expenses.

By contrast, it would be difficult for the commercial unit-owners to argue that they receive no benefit from the services provided by the condo's managing agent, residential manager, and porters. However – and this is where things can get a little tricky – should the commercial unit-owners be required to pay their "full share" of these items?

For example, while the porter shoveling snow from the condo's sidewalks benefits both the commercial and residential unit-owners, most of the porter's other responsibilities – i.e., cleaning

the lobby, residential hallways, dealing with "residential" trash (by law, the commercial unit-owners are required to separately contract for their trash removal), and making routine repairs in residential apartments – only benefit the residential unit-owners.

What may be appropriate, then, is that a portion of the porter's salary and benefits be attributed to the commercial unit-owners' common expense allocation; i.e., 40 percent of 5 percent (or a total of 2 percent of that budgetary line item). Inasmuch as the managing agent and resident manager oversee the operation of the entire property, but are largely focused on "residential issues," it would seem reasonable to attribute an amount closer or equal to their full common interest allocation for these items.

As for items such as the elevator maintenance contract, it would appear that a ground-floor commercial unit with its own entrance should not have to bear any part of this expense. However, the commercial units have mechanical equipment located on the roof of the building and service contractors use the elevators to repair and maintain the equipment. Under such a scenario, it may be appropriate for there to be a small allocation of this item for that.

Everything Adds Up

While some of these examples may seem trivial and not involve "big dollars," they can and do add up, and, in the event of disproportionate allocations, can affect the values of both the commercial and residential units.

In addition, I have only provided examples of issues dealing with special allocations of the cost of services. It is important to note that similar issues arise with respect to the cost of capital repairs and improvements (i.e., Local Law 11 work, roof replacements, and other capital projects). A condominium's governing documents will often treat cost allocation provisions differently for repairs than they do for services, creating even more complexity in the budget formation process.

In the building discussed here, the commercial unit-owners were benefitting from an overly generous allocation of common expenses contained in the association's first-year budget that was created by a sponsor who probably planned to keep the commercial units. He probably hoped to market them as having a very favorable allocation of common expenses and concomitantly low monthly common charges. That said, some of the "commercial unit exemptions" (i.e., the amenity expenses) were appropriate, while others probably needed a rejiggering to reflect actual usage by the commercial unit-owners.

In other words, both sides needed to give a bit to avoid an unpleasant and expensive dispute that could have long-lasting negative effects on the relationship between the commercial and residential unit-owners. And while many condo bylaws have arbitration provisions relating to these types of disputes, reasonable board members, exercising their business judgment (with the help of their managing agent and attorney), should be able to hash out an allocation of common expenses that is fairly and reasonably tied to the actual use and benefit derived from the budgetary item in question. That will be in the best interests of every unit-owner, both commercial and residential.

When an owner sues. . .

Make Peace Not War

By Scott Greenspun

One of the thorniest issues faced by a condominium is unit-owners' lawsuits against the board. In most instances, there will be some insurance coverage for these claims, but such lawsuits are nevertheless a tremendous drain on the resources and time of the board members, the condominium's managing agent, and, sometimes, the building staff. As Justice Sheila Abdus-Salaam once observed, suits between unit-owners and the board members are worse than divorce cases, because at the end of the lawsuit, everyone still has to live under the same roof.

We have experienced a significant success rate in resolving unit-owner claims through mediation. However, mediation usually occurs only after a lawsuit has commenced, because it is rare to find a mediation clause in a condominium's original bylaws or declaration. In many instances, mediation will take place when the parties experience "litigation fatigue" after years of battling in court.

Many boards are now considering implementing a bylaw provision that affords the board a unilateral right to require a unit-owner to mediate a dispute before he or she is allowed to initiate litigation. If a mediation provision is in the bylaws, it may be possible for the board to avoid litigation and all of its negative consequences. It should be noted, however, that not every claim or dispute is going to be appropriate for pre-litigation mediation. The board, together with its counsel, has to determine when a matter is ripe for mediation and when a dispute needs to proceed to litigation before the parties are in a posture where mediation can be successful.

When considering adopting a mediation clause in the bylaws, there are a few things that boards should keep in mind. The first is cost. Mediation can be expensive, as a mediator's fees can exceed $500 an hour. Some boards have dealt with this issue by dividing the cost between the unit-owners and the board, and if the mediation is not successful and the case is litigated, then the prevailing party can recover its portion of the mediation costs.

Another issue that has to be given careful attention is how the mediator is selected. Both parties should have input in choosing the mediator. Mediation is often successful because it presents a forum for the unit-owner to personally present his or her side of the story to someone that the unit-owner deems to be competent and impartial. Under those circumstances, the unit-owner tends to be more receptive to criticism of his or her view of the matter in dispute, which enhances the likelihood of a successful settlement without having to resort to litigation.

Neighbors are demanding 'ransom' from adjacent developments

By Joe Anuta

When David Amirian was making plans to build a pair of luxury condo buildings on East 13th Street, he budgeted around $75,000 to compensate neighbors for the inconvenience of construction, including installing safety devices on their properties. He ended up spending half a million dollars.

"They went berserk and started asking for fees, lost rent and insurance," Amirian said. "All neighbors see are dollar signs when they hear the word development."

His East Village project, like nearly all in New York City, triggered a set of rules in the building code that requires firms to safeguard the properties of neighbors during construction or renovations. That can range from installing simple vibration sensors to erecting more invasive protections, including scaffolding, plywood and netting, around the building. Access is often also needed for activities like staging construction equipment. However, virtually none of it can be done without permission from the adjacent owner. And that permission is often granted only for a price.

Before a precedent-setting legal decision last year, developers and neighbors would normally resolve disputes on their own. An agreement would be reached that allowed a project to move forward and the adjacent property owner to be compensated for granting access to a building.

But in April 2016 an appellate court gave adjacent owners more bargaining power. That has introduced uncertainty into the development process as neighbors ask for higher payments and developers take them to court at an increasing rate.

Licensing fees

The origins of these agreements date back to at least 1968, when the administration of then-Gov. Nelson Rockefeller realized that property owners who did not want construction next door were holding up projects indefinitely by not granting access to their land to workers or for required safety protections. As a result Section 881 of the Real Property Actions and Proceedings Law was created, allowing developers to file lawsuits against intransigent neighbors.

Because judges were likely to grant access, simply the threat of litigation was under most circumstances enough to induce agreements out of court. But last year a decision was handed down in one of the cases that went to trial. It outlined for the first time what neighbors were entitled to: money to hire architects or engineers to look at the building plans and lawyers to draw up an agreement, along with a general payment called a licensing fee for the inconvenience of having to endure construction-related annoyances.

Developers concede that safety precautions are necessary but say the decision has helped embolden landlords and condo boards to ask for unreasonable amounts of cash, which is why an increasing number of builders are pushing back through the courts.

“There are landlords that use this as an opportunity to hold developers up for a ransom payment,” said Jared Epstein, vice president and principal of Aurora Capital Associates, which is constructing a mixed-use project in the Meatpacking District. “We have experienced this previously, and, instead of being extorted, we use the court system to secure the right to protect our neighbors’ properties.”

According to Dani Schwartz, a partner at Wachtel Missry, the number of 881 lawsuits has risen dramatically, likely buoyed by both the 2016 ruling and the burst of construction while the city recovered from the Great Recession.

“Over the last several years, it’s become challenging to even keep track of all the decisions,” he said.

Robert Braverman, a partner at Braverman Greenspun who represents owners abutting development sites, says his clients are not acting unreasonably. “The owners of adjoining properties don’t want to be inconvenienced by construction and don’t want the attendant debris and noise,” he said. “It is true that the landscape has changed a bit in terms of payments, but I wouldn’t say that anyone is being taken to the cleaners.”

> “There are landlords that use this as an opportunity to hold developers up for a ransom payment.”

In addition to fees for lawyers and architects, Braverman says he typically helps neighbors negotiate a cash payment of around a few hundred to a few thousand dollars a month, depending on the scope of the access required and the length of the project.

Amirian’s East Village project was forced to take a much costlier approach. To construct the twin buildings he had planned, he needed to create permanent physical supports, called underpinnings, on his neighbors’ foundations. But because 881 lawsuits typically apply only to the installation of temporary safety

measures, he could not easily use the statute to pressure them.

That left Amirian without any good legal options. In theory he could have attempted an 881 suit or argued that the city’s building codes required him to do the work, something he said he hadn’t wanted to do because of the time and money involved. But invoking building codes is a largely untested body of law, making a suit a risky proposition as well.

He would like to see the city or state take a more active role in regulating these types of agreements, much like Rockefeller did in 1968. His one chance to move the project forward was at the negotiating table. And it cost him.

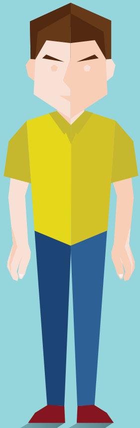
BOARD BUSINESS EXPOSED

BY SCOTT GREENSPUN

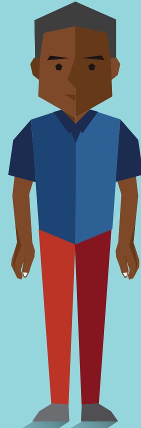
A cautionary e-mail tale. *The e-mails you are about to read are works of fiction drawn from my experiences as an attorney specializing in co-op and condo law. The story they tell is a dramatization – but I have seen real-life versions of similar exchanges. And if you're not careful, it could happen to you.*

THE PLAYERS

THE BOARD PRESIDENT AND MEMBERS



John Drake
jdrakeno.6@village.com



Jack Baur
baur@ctu.org

Becky Boone
mingo@oxford.com

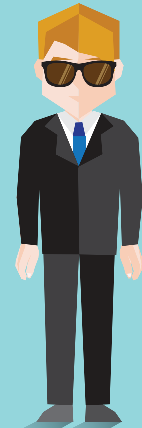
THE MANAGER

Jim Bowie
jbowie@lincoinmgt.com

THE SHAREHOLDER

Bob Green
bgreen@earthlink.com

THE ATTORNEY



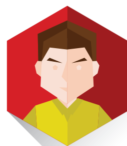
Clinton Judd
judddavenportburger@lawfirm.com

SHAREHOLDER TO BOARD

From: *Bob Green<bgreen@earthlink.net>*
Date: *Saturday, January 16, 2016*
To: *John Drake<jdrakeno.6@village.com>*
Cc: *88 River Road House Board*
Subject: *My apartment renovations*

Hi, John. I'd like to confirm with you and the board that we're good to go on my apartment alteration. I've completed my alteration agreement and am sending it back to you as an attachment to this e-mail. Don't forget: I want to move the gas line and I'll need the board's approval to do so. My contractor's ready to go. If the board would just give me the green light, I could get the job done! Tick-tock!

BOARD CHATTER



From: *John Drake<jdrakeno.6@village.com>*
Date: *Wednesday, January 27, 2016*
To: *88 River Road House Board*
Subject: *A Jackass Brays*

Bob Green is a braying jackass. That guy makes my blood boil. He has lived in the building for 30 years and has not lifted a finger to help the co-op and does nothing but complain about the board's decision-making. We do not work for Bob and we should not be bullied by him

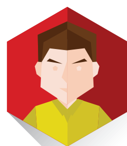
From: *Jack Baur<baur@ctu.org>*
Date: *Thursday, January 28, 2016*
To: *88 River Road House Board*
Subject: *To Hell With Him*

I think we should agree, as a board, that hell will freeze over before we allow Bob Green to move his gas line.

From: *Becky Boone<mingo@oxford.com>*
Date: *Friday, January 29, 2016*
To: *88 River Road House Board*
Subject: *To Hell With Him*

Dealing with the arrogant Mr. Green is as much fun as a trip to the dentist. Let's not forget that he sued us. This is our chance to repay the favor, fellow board members!

PREZ TO SHAREHOLDER AND BACK AGAIN



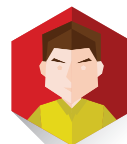
From: *John Drake<jdrakeno.6@village.com>*
Date: *Saturday, January 30, 2016*
To: *Bob Green<bgreen@earthlink.net>*
Cc: *88 River Road House Board,*
Jim Bowie<jbowie@lincolnmgt.com>
Subject: *My apartment renovations*

Hi, Bob: I'm sorry to have to say this, but Mr. Bowie, our managing agent, and Mr. Kennedy, our consulting engineer, have both recommended that the board deny your request to move your gas line due to the risk of a gas leak and a related shutdown of the gas service to an entire line of apartments in the building. My apologies for the delay in getting back to you. If you have any additional questions, please feel free to contact me.

From: Bob Green<bgreen@earthlink.net>
Date: Saturday, January 30, 2016
To: John Drake<jdrakeno.6@village.com>
Cc: 88 River Road House Board,
Jim Bowie<jbowie@lincolnmgt.com>
Subject: My apartment renovations

You don't give a rat's ass about the dangers of moving the pipe. I haven't forgotten Mrs. Gale's repairs of a few years ago, when the board gave her permission to move a gas line in a similar situation. So, let's have a reality check, shall we? The board denied my request to move the gas line because of the lawsuit I commenced against the co-op four years ago over the water damage you refused to repair in my apartment. Your latest action is vindictive, pure and simple. See you in court. Again.

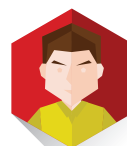
PREZ TO BOARD



From: John Drake<jdrakeno.6@village.com>
Date: Tuesday, February 9, 2016
To: 88 River Road House Board,
Jim Bowie<jbowie@lincolnmgt.com>
Subject: Piece of Sh*t

That piece of sh*t Green has sued the co-op AGAIN, this time over the gas-line issue! I just got served! We should counter sue him for harassment! I'll contact our attorney tomorrow morning as soon as I get to work.

PREZ TO ATTORNEY



From: *John Drake<jdrakeno.6@village.com>*
Date: *Wednesday, February 10, 2016*
To: *Clinton Judd*
<judddavenportburger@lawfirm.com>
Subject: *Let's sue the bastard*

I learned late yesterday afternoon that that prick Bob Green is suing us. I wanted to shoot you an e-mail ASAP, so I'm writing to you from the office. Green has been a pain in the ass for as long as I can remember. Becky's right, dealing with him is worse than a trip to the dentist. I want to stick it to him. Can we counter sue?

ATTORNEY TO BOARD

From: *Clinton Judd*
<judddavenportburger@lawfirm.com>
Date: *Tuesday, February 16, 2016*
To: *88 River House Board,*
John Drake<jdrakeno.6@village.com>
Subject: *The State of the Green Lawsuit*

As I expressed to John on the phone last week, I strongly suggest that all board members refrain from further communications with Mr. Green, and that you permit us, as your attorneys, to handle matters.

Here's what you can expect as a defendant in the action. You will be served with a discovery request that will require you to produce any documents that you may have concerning the following: Mr. Green's request to move his gas line; other shareholder requests to perform similar renovations; and the prior water-damage dispute with Mr. Green.

As I told John, not all communications with this office are privileged. The attorney-client privilege attaches only to communications that are seeking or giving legal advice. The attorney-client privilege can be waived if you voluntarily disclose a confidential communication to a third-party.

From: *Clinton Judd*
<judddavenportburger@lawfirm.com>
Date: *Tuesday, March 1, 2016*
To: *John Drake<jdrakeno.6@village.com>,*
88 River House Board,
Subject: *Feb. 10 e-mail*

A new concern has arisen, John. Your Feb. 10 e-mail to this office – which was sent from your work account – would typically be privileged, but because of an agreement you signed with your employer, World Travel, you seem to have waived privilege. Your agreement with World Travel provided that: (i) any personal use of the company's e-mail system is prohibited, (ii) the company's e-mail system is the property of the company, and (iii) the company's e-mail system is monitored by the company. As a result, any e-mails exchanged between you and the co-op's general counsel sent from your job at World Travel will have to be shown to Mr. Green. The fact that your work-generated e-mails are the company's property and can be monitored by the company means you have waived attorney-client privilege.

From: *Clinton Judd <judddavenportburger@lawfirm.com>*
Date: *Thursday, March 3, 2016*
To: *John Drake<jdrakeno.6@village.com>, 88 River Road House Board*
Subject: *Bad news*

I'm bound to tell you that matters do not look promising for avoiding a costly full-blown trial. Mr. Green was not favorably inclined to a settlement to begin with, and your unfortunate Feb. 10 e-mail, which he unearthed in discovery, inflamed the situation even further.

Shareholder litigations against cooperative boards tend to be emotional confrontations. Until that Feb. 10 e-mail was revealed, my office was hoping to arrive at a possible settlement with opposing counsel. And the co-op's Directors and Officers liability carrier, The Thrush Group, which is providing a defense against Mr. Green's claims, had indicated a willingness to offer some money to Mr. Green to get the case settled.

Your proprietary lease includes a typical provision requiring a shareholder to obtain board consent before performing any renovations, but such consent may not be "unreasonably withheld." A common misconception is that the board's decision to deny a renovation request is protected by the Business Judgment Rule. It is not. Rather, a denial of an alteration request is reviewed under a "reasonableness" standard, i.e., "legitimately related to the welfare of the cooperative." No one will consider it reasonable when you've called a fellow shareholder "a prick" and stated that you want to "stick it to him."

Because of this e-mail, we doubt that any pre-trial settlement can be reached. This e-mail has emboldened Mr. Green to vigorously prosecute his claims because it seems to confirm his opinion that the board was acting out of personal animus.

MANAGER TO BOARD

From: *Jim Bowie <jbowie@lincolnmgt.com>*
Date: *Monday, May 16, 2016*
To: *John Drake<jdrakeno.6@village.com>, Ron Grainer<rongrainer@taraking.net>, Paul Mason<pm@acd.com>, Jack Baur<baur@ctu.org>, Becky Boone<mingo@oxford.com>*
Subject: *Re-election*

As you all know, board elections are coming up in a month, and Bob Green is part of a very vocal group of shareholders running for office. Mr. Green has placed a solicitation under the door of every shareholder, which includes a copy of John's rather blunt e-mail that he obtained in discovery. In light of the recent lawsuit, I'd like to offer some advice that might help you in the future:

- Do not use e-mails between your fellow board members as a vehicle to express your frustrations about other shareholders.
- If you need to vent about a fellow shareholder, make a telephone call. Think twice before you hit the send button on an e-mail expressing personal views. Keep in mind that text messages are also discoverable.
- Boards should consider creating dedicated e-mails and group e-mails (such as Google Groups). Using those e-mail tools will ensure that all e-mails involving board business will be in one location and it will be much easier to find documents. Using a group e-mail will ensure that e-mails involving board business will be sent to all members.
- Please keep in mind that not every communication with the building's attorney is privileged. The attorney-client privilege extends only to communications seeking or giving legal advice.
- Also be careful about who is "cc'd" on e-mails to counsel. Copying other board members and the managing agent will not affect the privilege, but adding former board members, other shareholders, the superintendent, or your spouse could raise issues as to whether the privilege has been waived.
- NEVER send a sensitive e-mail from your workplace.

NEW PREZ TO EX-BOARD

From: *Bob Green<bgreen@earthlink.net>*
Date: *Thursday, June 16, 2016*
To: *John Drake<jdrakeno.6@village.com>, Ron Grainer<rongrainer@taraking.net>, Paul Mason<pm@acd.com>, Jack Baur<baur@ctu.org>, Becky Boone<mingo@oxford.com>*
Subject: *Board transitions*

Still calling me a "braying jackass," Johnny boy? Well, who's got the last laugh now, mighty ex-board members? Don't think I – or any other members of the new board – will ever make the same mistakes you whiz kids made. And guess who's getting ready to move a gas line!

Condos, Brand-New Yet Not So Perfect

By Christine Haughney

When dozens of buyers put down payments on apartments in the glassy new condominium tower called the Link at 310 West 52nd Street, they were looking forward to living with features like floor-to-ceiling windows and a meditation garden. But six months after they started moving in, they are still living in a construction site with an unfinished lobby, uncarpeted hallways and no access to the garden that was supposed to help them escape from the city's stresses.

The Link is one of many new condos in New York City whose owners complain that developers have been slow to deliver what they promised. "People are spending a lot of money and have high expectations," said Robert Braverman, a real estate lawyer hired by buyers at the Link.

Anger toward developers is coming to a head as a record number of units are nearing completion. Manhattan will have 6,444 new condominiums completed this year, compared with 1,614 in 2005, according to Halstead Development Marketing. In Brooklyn, 3,768 units should be finished this year, compared with 480 in 2005.

About 40 owners at the Link became so frustrated with the developer, El Ad Properties, which is also renovating the Plaza Hotel, that they hired Mr. Braverman in an effort to get an executive at El Ad to meet with them.

Lloyd Kaplan, the company's spokesman, said that El Ad's head of construction would meet with owners as long as they didn't bring their lawyer.

Mr. Kaplan said that the company had tried to address all of the individual owners' problems and that the builder expected to complete everything by Nov. 15, nine months after the first residents' arrival.

Mr. Braverman says he was hired because El Ad didn't meet buyers' expectations of moving into a finished or nearly finished apartment building. He said a block of unit owners were also hiring an engineer to make sure that buildingwide systems like heating, cooling and plumbing met the quality standards promised in the offering plan and were installed as the plan had indicated they would be.

But Mr. Braverman has told buyers that their recourse is limited. Developers have to deliver only what they outline in the offering plan — the book that buyers receive after putting down a deposit, allowing them to review all of a building's fixtures and features. He said that beyond this, developers are not obliged to deliver on any promise. "The sponsor can say, 'We're building the Taj Mahal.' "

This means that buyers who are preparing to move into these condos are finding they have little power to get their units finished when they expect them or in the shape they anticipated.

Carl G. Chernoff, who in February moved into a $1.2 million two-bedroom apartment in the Link, said that for the first month, he and his wife, Rosalind, were unable to take a hot shower or bath. "You shouldn't have to go through these agonies," he said.

When the Chernoffs moved in, they called and wrote e-mail messages about several problems, from a chipped shower tile to an ill-fitting bathtub stopper. But they were most upset about not being able to bathe in hot water (they had hot water in one sink). Ms. Chernoff has cancer and did not want to have to shower at the nearby Gold's Gym where they had memberships.

"Every new building has problems," Mr. Chernoff said. "She was ill, and they knew it. They knew that all she wanted to do was to come home from chemotherapy and take a warm bath."

Tim Wright, a 28-year-old stockbroker at Olympia Asset Management, said he was so frustrated with the continued construction at the Link that he sold his one-bedroom apartment for $975,000 four months after he moved in. (He had bought the apartment more than a year earlier for $795,000.)

Mr. Wright said he complained repeatedly to management about construction workers who smoked near his apartment and was frustrated that the building hadn't installed a vanity mirror in the master bathroom for his girlfriend to use.

"I'm not really the kind of person who complained a lot," he said. "I was sick and tired of walking in and out of a construction site."

For some condo buyers, the main difficulty is finding out when they can move into their buildings. Cory FitzGerald, a 25-year-old lighting programmer for productions like the Christmas show at Radio City, thought he would be able to move into his two-bedroom apartment at 606 West 148th Street in Hamilton Heights late last year.

In anticipation, he moved out of his rental last November, had his mail sent to his parents' address in California, and went off to work on concert tours around the country and in Japan, South Korea and Hong Kong. During that time, he lived out of two suitcases and kept his belongings in storage.

But the completion date kept being delayed. He said that the most frustrating part was not knowing what caused the delays. He searched the city's Buildings Department Web site for clues.

He considered walking away from the deal because he had included a "drop dead" clause in his contract that allowed him to pull out by March 31 if the developers hadn't received the temporary certificate of occupancy. But by then, he said, he couldn't find a similar two-bedroom for the $596,000 he had paid. He was finally able to move in in July, about eight months later than he had expected.

"Until I moved in, there was no end in sight," he said. "It was like a shot in the dark, and nobody had any information to share."

Greg Baron, one of the project's developers, said he did not feel comfortable explaining reasons for delays to buyers who did not have construction backgrounds and therefore would not understand the project's complexity. But he later told a reporter that the project involved constructing two buildings on one of the steepest hills in Manhattan.

Linda Rubin, the Prudential Douglas Elliman broker handling sales for the building, who is also Mr. Baron's wife, said she did not want buyers to worry about construction.

Still, she said that developers may have to provide more information in the future — for example, setting up a Web site to explain what is delaying

the project. “It’s just not the standard procedure for the developer to give updates,” she said. “But times are changing.”

Some buyers have had to become relentless nags to get problems fixed after moving in. Ethan Henerey and Kate Eales, who moved into a $645,000 three-bedroom condominium in Kensington, Brooklyn, on July 15, have been able to get a lot of problems in their apartment repaired, but still have more that have not been addressed. They had water damage in one bathroom and a leaky skylight, and they still have standing water on their roof deck.

Since they moved in, Ms. Eales and Mr. Henerey, both film editors, worked in shifts to get problems fixed. She devoted a week of vacation to repairs, and Mr. Henerey, who works at night and is at home during the day, can give workers access to the apartment.

“I feel a little bit trapped because many days I’m sitting here waiting to find out if the roofer is going to show up or if the contractors are going to come in,” Mr. Henerey said.

Eddie Hidary, an owner of Gracie Developers, which built the condos, said repairs were delayed because he had trouble getting his contractors to respond as quickly as necessary to all of the units that were closing at the same time.

Mr. Hidary said it took several weeks to figure out the source of the leak, but a new roof has now been installed. He said that his company was eager to fix these problems, especially because this is its first residential project.

Mr. Henerey and Ms. Eales confirmed that the roof no longer leaks and said that Mr. Hidary had been responsive to their complaints. He is still trying to replace a wall damaged by the skylight leak, and the couple have a list of smaller problems that Mr. Hidary has said he would fix, like installing smoke detectors and repairing the air-conditioning in the master bedroom.

“We’re trying to establish a name in the industry,” Mr. Hidary said. “If it costs a few dollars, it costs a few dollars.”

Some buyers, frustrated when they cannot get questions answered, pull out of deals before they move in. Tannaz Simyar, a 29-year-old real estate lawyer, was interested in buying a one-bedroom apartment at 184 Thompson Street, a new condo conversion. But she had read negative blog postings about the building that worried her.

Ms. Simyar had a number of questions that she said the building’s sales representative could not answer when she visited the sales office with her agent, Ben Morales of Barak Realty.

As she described the chain of events, she visited the office several times over about 10 days trying to get answers. After her third visit, she put down a $250 deposit on a $750,000 apartment. But Ms. Simyar said she would not make the $75,000 down payment until the sales representative confirmed that the ceiling height in a section of loft space was six feet, that it could be used as a bedroom and that it would have hardwood floors.

Ms. Simyar said she even had her broker call in advance of that third visit to arrange for a ladder so she could measure the loft herself. But when she arrived, the sales office provided a ladder that was too short.

Several days after her third visit, she heard from the sales representative that the ceiling in the loft space was only five feet high and that the floor would be carpeted. So she asked for her $250 deposit back. She got it only after threatening to complain to the attorney general’s office, she said.

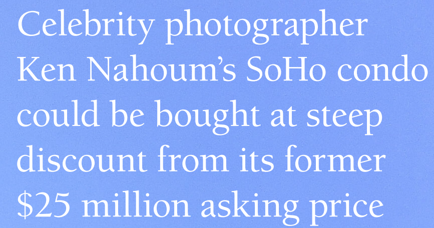
“My gut instinct was that something wasn’t right,” Ms. Simyar said.

Sarah Burke, the vice president for sales and marketing at the Developers Group, which represents 184 Thompson, said that staff members had tried to respond to Ms. Simyar’s questions and to quickly return her deposit.

Hy Chalme, the building’s developer, said in a statement, “We’ve sold 90 percent of the homes in record time to buyers who were extremely happy with the service of our sales team and the quality of the units.”

But not Ms. Simyar. She later put down a deposit for an $860,000 one-bedroom at the District at 151 William Street, where she said the sales agent, Nikki Martin, was quite responsive.

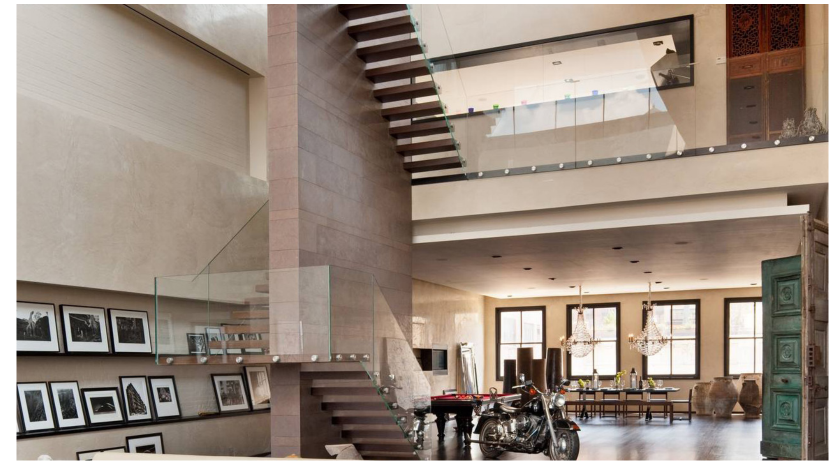
“She answers all of your questions before you even ask them,” she said.



Celebrity photographer Ken Nahoum's SoHo condo could be bought at steep discount from its former $25 million asking price

Palatial Manhattan Penthouse Hits Auction Block as the Market Slumps

By Josh Barbanel



Young hedge-fund managers and tech-company millionaires paraded in one after the other during an open house last month, marveling at the soaring grand salon, an 80-foot-long room with huge glass windows protruding above the roof of a cast iron building in the heart of Manhattan's SoHo neighborhood.

They were pondering a chance to purchase an unusually palatial downtown condominium at what could be a steep discount through a bankruptcy court auction scheduled for next week.

The penthouse condo at 95 Greene St. is in flux after more than a decade of litigation in various courts involving celebrity photographer Ken Nahoum who built it, his former partner and the condo board.

Once listed for $25 million, the property's minimum bid was set at $13.25 million in U.S. Bankruptcy Court in Manhattan.

Prospective buyers must qualify and put down 10% of the minimum bid by Monday. The auction is set for April 13 in bankruptcy court.

The auction is a test of the strength of the downtown market during a period of falling asking prices in the ultra-luxury segment and softness in the market overall. Sales of Manhattan apartments fell during the first quarter by 10% compared with same quarter in 2017 to the slowest pace in five years, according to the analysis by The Wall Street Journal. Sellers of expensive apartments, notably those listed for more than $10 million, have been sharply cutting asking prices to compete, brokers said.

Mr. Nahoum, the photographer and filmmaker who assembled the current penthouse from three separate apartments during the course of a decade and then built two stories above the roof, said the residence has a "wow factor."

"I feel proud that I was able to create a space that dynamic," he said. "I am a bit sad to leave it."

The grand salon is three stories with 26-foot-high windows. It has a huge marble fireplace, a floating staircase that wraps around a limestone wall to a terrace with chef's kitchen designed by Philippe Starck. To enter the room a visitor passes through a doorway with nine-foot-high antique doors from France.

The apartment has four bedrooms and four baths, with about 7,500 square feet of indoor space and 3,500 square feet of outdoor space on six terraces. The views extend from nearby wooden water towers to the Empire State Building and one World Trade Center.

Ariel Cohen, a broker at Douglas Elliman who is listing the penthouse, said most of the pre-auction tours have been with tech executives, including one who sold his company to Google, as well as hedge-fund managers looking for one-of-a-kind spaces. After the buyer spends $2 million or $3 million in renovations the space will be worth double the minimum bid price and be one of the best downtown apartments, Mr. Cohen said.

He is listing the property along with Matthew Bordwin of Keen-Summit Capital Partners LLC and Joseph Ash of Luxury Property Group.

Sandy Mattingly, a Corcoran Broker and a blogger known as the Manhattan Loft Guy, said there haven't been many buyers in SoHo for apartments listed for $10 million or more.

"The market has gotten killed for that kind of space," he added.

At that price level brokers are looking for "people with money to burn who have to live in the best loft of anybody they know," Mr. Mattingly said. "This is an ego thing. Nobody needs this much space."

Mr. Nahoum rented an apartment at 95 Greene St. in the 1980s before purchasing his first residence on the top floor of the six story building for $740,000 in 1993. He and his partner, Basia Milewicz, a model born in Poland, combined three units during the next decade, paying about $6.7 million for them. In 2002, they got permission from the condo board to combine them and expand upward through the roof.

Mr. Nahoum said his vision was to use the grand salon, while his family, which eventually included three children, lived in a separate wing, with its own open living room and a second kitchen.

But by 2003, Mr Nahoum was locked in litigation with the condo board, which wanted to rescind permission for the rooftop expansion. This lawsuit eventually was settled, though court records show there were at least five other suits between Mr. Nahoum and the board. After they separated in 2012, Mr. Nahoum and Ms. Milewicz fought in court over ownership of the penthouse. They reached a settlement last year.

During one dispute in 2011, the board turned off Mr. Nahoum's elevator key fob, forcing him to use the stairs and posted in the lobby a photo of him and Ms. Milewicz in costumes at a fashion Halloween party, asking them to pay common charges the building said he owed. Mr Nahoum said he was overcharged, and was owed money for damages from roof leaks caused by the building.

Kelly Ringston, a lawyer for the board, said the building already has received most of the money it was owed, and that it is prepared to work with the purchaser as it would with any other owner. "All this litigation is not indicative of anything other than the board being diligent and making sure common charges are paid," she said.

Does a Co-op Penthouse Owner Have Exclusive Use of Roof Over Apartment?

By Tracy Peterson

The distinction between the roof over a penthouse apartment and the roof over the other apartments below the penthouse level may be physically clear, but it is not always equally clear whether a penthouse apartment owner has exclusive use of both areas.

A standard form proprietary lease for a cooperative apartment in New York City defines the "Demised Premises" – i.e., the premises leased to the shareholder – as "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof or portion thereof outside said partitioned rooms, which are allocated exclusively to the occupant of the apartment." In an ideal scenario, there is an offering plan for the cooperative, and in the Schedule A contained therein or in floor plans, there will be a clear statement as to whether any apartment in the building has a terrace, balcony, roof or portion of a roof allocated exclusively to it. In some cases, however, there is no such clarity.

Without this clarity, the language contained in paragraph 7 of a standard form proprietary lease can be murky for a penthouse owner, particularly when it comes to whether such owner has exclusive use of the roof over the penthouse apartment, as distinguished from the roof of the building, located immediately outside the penthouse apartment. This lease paragraph states, in pertinent part, that "[i]f the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to [certain limitations] . . . ."

The answer to the question of what roof space "adjoins" or is "appurtenant to" a penthouse had been suggested in case law, but only became definitive this past summer. In the June 20, 2018 decision issued by the Supreme Court of the State of New York, New York County in Rushmore v. Park Regis Apt. Corp., 2018 WL 3126499 (N.Y. Sup. Ct., N.Y. Co. June 20, 2018), the Court made a distinction between the roof space "adjoining and appurtenant to the penthouse unit " – determining such roof space to be "that portion of the roof of the building which is on the same level as the floor of the penthouse unit" – and the roof over the penthouse unit. The Rushmore Court held that while the penthouse owner had exclusive use of the former, the owner did not have exclusive use of the roof over the penthouse. The Court reasoned that "the exclusive use of the penthouse roof by the owner of the penthouse unit is not necessary to give that owner usable enjoyment of the unit, just as the use of the roof of the building is not necessary to give the owner of the apartment units immediately thereunder usable enjoyment of those apartments."

Prospective purchasers of cooperative penthouse apartments are well-advised to ensure at the outset to what space they are purchasing the exclusive right to use. It may be that the ability to construct a sun terrace on the roof over the penthouse is not an amenity included in the bargain.

Like a Good Neighbor, Stay Over There

By Kelly A. Ringston

Every New Yorker is familiar with the ubiquitous sidewalk shed. For condominium and cooperative boards and owners, the metal and plywood eyesore designed to keep pedestrians safe from falling debris and construction material is a dreaded, but necessary, part of making repairs or improvements to their building. But what if it the sidewalk shed preparing to darken the door of your residence isn't because of construction at your building, but at your neighbors? Or worse, what if that neighbor advises that it must erect scaffolding on your outdoor terrace... in June?

In New York City, where space is valued at a premium, buildings are often built right up to adjacent property lines. This maximizes the useable space of each lot of land, but can make it nearly impossible to undertake construction at one property without accessing a neighboring property. Moreover, Department of Building regulations require building owners to adequately protect neighboring buildings from damage or injury during construction or demolition work, and the associated building protections (such as sidewalk sheds, debris netting, roof protections and vibration monitoring) must often be installed on the properties that they are intended to protect. Add in the City's mandatory Façade Inspection Safety Program, which requires all buildings with six or more stories to have their exterior walls and appurtenances inspected periodically, and it becomes likely that all condominium and cooperative boards will be faced with a request for access from a neighboring building at least once.

The bad news for boards is that they can be compelled by the court to provide access to their properties if a neighboring landowner cannot perform repairs or improvements to its own property without entering onto their adjacent property. Section 881 of the Real Property Actions and Proceedings Law provides that:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

In order to meet its burden of proof, a neighbor seeking a court ordered license for temporary access under RPAPL 881 must establish that entry upon an adjacent property is truly necessary (rather than more convenient) and must specify the dates, or timeframe, for which access is sought.

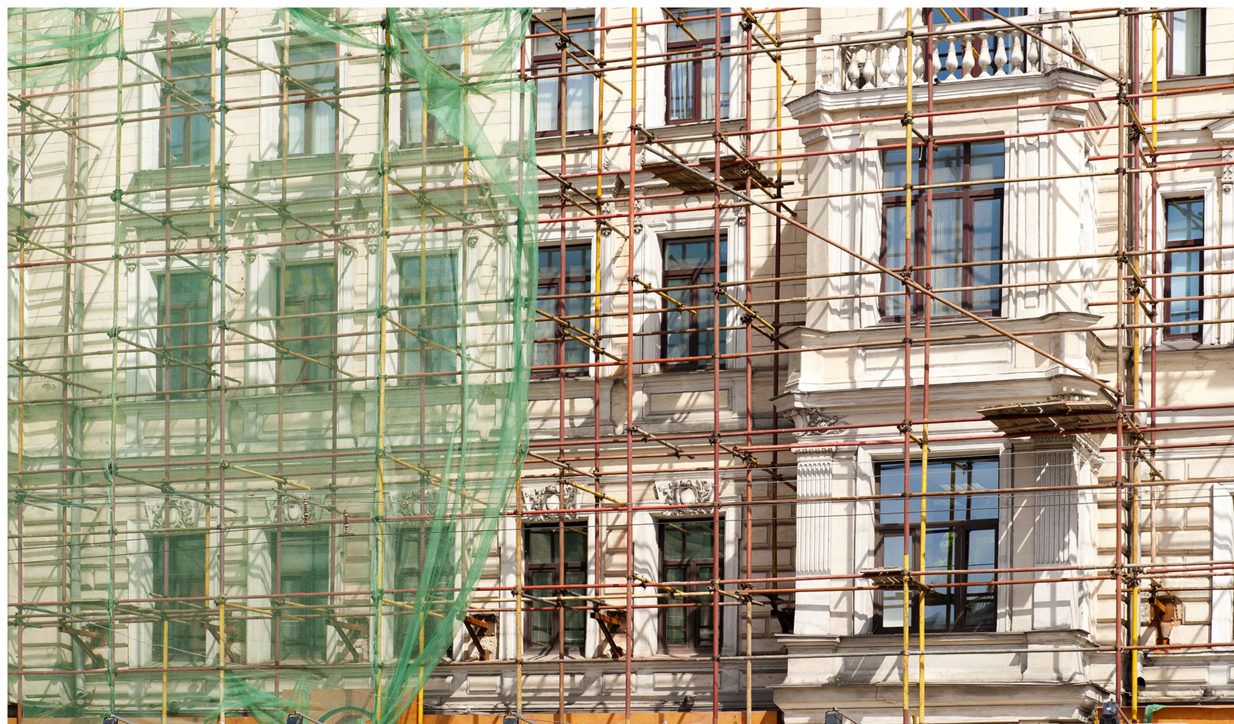
The good news for boards is that a temporary license, if granted, will not be unconditional. 881 provides, at a minimum, that the entering owner is liable for any actual damages which result from its entry onto a neighboring property. In addition, it is not uncommon for courts to conclude that "justice requires" a license to: (i) provide for

certain safeguards to ensure against damage the adjacent property (such as insurance, bonds, and/or the establishment of an escrow fund); (ii) reimburse neighboring buildings for costs resulting from access (including engineering fees incurred in reviewing a neighbor's drawings, plans and permits and attorneys' fees incurred in negotiating access); and (iii) compensate owners for any loss of use of their property during the access period through a license fee.

Nonetheless, judges can, and do, have differing opinions on what protections should be put in place, what costs should be reimbursed and what level of compensation is appropriate. Accordingly, condominium and cooperative boards are well served by attempting to negotiate a voluntary license agreement with their neighbors rather than waiting for the commencement of a lawsuit by their neighbor, incurring the cost and aggravation of litigation and hoping for a favorable outcome.

The first step of such a negotiation is usually for boards to request, if it has not already been provided, a copy of the neighboring building's plans, drawings, and/or permits for review by the condominium or cooperative's own architect, engineer or construction professional, so that the full scope of access can be understood and any potential concerns can be identified. A well drafted license agreement will address any concerns that boards have related to access and secure more comprehensive protections for their buildings than may be awarded by the Court. By way of example, while a court ordered license should include a requirement that a neighbor must obtain and maintain an appropriate insurance policy naming the adjacent properties as additional insureds, a voluntary license agreement can dictate the required insurance policy limits, exclusions and endorsements, require that insurance be obtained from a highly rated carrier, require that the policy cannot be canceled without advance notice to the additional insureds, and provide the condominium or cooperative's insurance broker an opportunity to review and approve the resulting certificates of insurance.

It is also commonplace for access agreements to provide for the reimbursement of professional fees incurred by condominium or cooperatives in connection with a neighbor's request for access. Typically, this includes the cost to have an engineer or other professional review the relevant drawings, plans and permits, and the cost to have an attorney negotiate and draft an access agreement. If access will



require the continuing involvement of these professionals, the agreement can provide for the reimbursement of future expenses as well. Lastly, to the extent that a neighbor's need for access will result in the loss of the use and enjoyment of any portion of the condominium or cooperative property (such as the loss of the use of a terrace in June), a monthly license fee to compensate the board or impacted owner can be negotiated as well.

Although the goal of any negotiation should be to reach a satisfactory agreement, it should be noted that there can be real value in simply attempting to negotiate an access agreement, even if those efforts are ultimately unsuccessful. Given that judges in RPAPL 881 actions have wide discretion to determine what terms are required by "justice" to be included in a court ordered license, Boards who have acted in good faith to negotiate an access agreement with their neighbors will be much better situated than those who refused, or who have demanded the inclusion of terms and compensation far outside of what is reasonable and customary.

So, while condominium and cooperative boards cannot deny a neighbor access to their property when access is necessary to make repairs or improvements, they can take comfort knowing that they are entitled to a variety of protections intended to prevent damage to their property and economic loss. And although they may curse RPAPL 881 each time they pass under their neighbor's sidewalk shed on their way into their building, boards will certainly find themselves grateful for it when they need to make repairs to their own façade.

Condo Conversion Problems By Robert Braverman

New condos look shiny and bright, but they often come with challenges. How does a board separate building challenges from individual unit-owner challenges?

Unit-owner challenges are typically punch-list related items, like problems with the interior moldings, appliances, and bathroom fixtures, which boards shouldn't get involved in. That list is usually generated pre-closing between the unit-owner and sponsor, so any problems have to be worked out between them.

And when would a board get involved?

Typically, when there's a building wide problem. I represent a condo, a conversion in a rehabilitated building, where the initial offering plan said it was completely asbestos-free. During the marketing process, but after a lot of closings had already taken place, it was discovered that there was in fact contained, encapsulated asbestos under the floors. The sponsor did the right thing and disclosed that condition in an amendment to the offering plan.

But what about those people who bought in before the problem was discovered. Weren't they alarmed? What did they do?

In this case, the asbestos wasn't airborne, and there was never a health risk, but needless to say there was widespread concern among the unit-owners. By this point the sponsor had relinquished control of the board, so the owner-controlled board had to decide whether the unit-owners should have to deal with this on their own. There was no problem with respect to the common elements, since the condition existed under the floors only within some of the units. So every dime that the board would spend on the problem would have to come from non-affected owners as well as affected ones.

What did the board decide?

Ultimately, they chose to try to negotiate a resolution with the sponsor rather than have the unit-owners bring individual lawsuits or file complaints with the attorney general's office. In other words, they really stepped up.

Was there a happy ending?

After months and months of negotiations, we wound up with a menu of options for affected unit-owners. One was a buy-back, where the sponsor offered to buy back any affected apartment for the original sale price plus the transactional costs. A lot of people took advantage of that, since there was a little softening of the market at the time, and there was money to be made.

What else was on the menu?

The second option was a cash payment, based on the square footage of the apartment together with what abatement expenses would be, in exchange for a release. The third, which I thought was the most interesting one, was a bigger cash payment in exchange for a release, but it would be deferred until the unit-owner or their successor did an alteration that would require the removal of the floor.

So for other boards, in condo conversions in particular, what would your advice be?

The takeaway is that if you have a sponsor who has acknowledged that something didn't go the way it was supposed to go, you can avoid having multiple lawsuits — and a whole lot of bad press that comes with that — by exploring the possibility of a global settlement. It's a win/win.