DECIDED FOR DEFENDANT

Aero Mgmt. v. Moghadasian

Supreme Court, Appellate Term, Second Department, Feb 25 2022

2022 NY SLIP OP 50154(U) | 160 N.Y.S.3D 741, 74 MISC. 3D 132(A) | 2022 N.Y. MISC. LEXIS 710, 2022 WL 599298

JUDGE
Thomas P. Aliotta,
Michelle Weston,
Wavny Toussaint

LOWER COURT JUDGE
Kimon C. Thermos

PLAINTIFF
Aero Management

DEFENDANT
Mansour Moghadasian

TAGS
Martin Act, appeal, cooperative, default, default judgment, eviction, holdover proceeding, non-eviction plan, rent regulated occupants, rentals, sponsor, tenant, tenant rights, unsold shares

Sponsor's Petition Against Holdover Tenant Failed to Allege Tenant's Martin Act Protections

The Second Department Appellate Term upheld the Queens County Civil Court order in a holdover summary proceeding vacating the final judgment of possession, granted on default, and dismissing the petition, where the petition did not allege the tenant's regulatory status,

namely that the tenant was a non-purchasing tenant subject to certain Martin Act protections under General Business Law §352-eeee.

In order to vacate a final judgment pursuant to CPLR §5015(a)(1), the tenant was required to demonstrate both a reasonable excuse for his default and a potentially meritorious defense to the proceeding.

With respect to the tenant's reasonable excuse for default, without discussion, the Appellate Term found that the tenant had established a reasonable excuse for default. The Civil Court had found such reasonable excuse based both on the withdrawal of the tenant's previous counsel and on the tenant's status as a senior citizen who had presented some indicia of an inability to adequately propound a defense or understand the nature of the proceedings.

With respect to the tenant's potentially meritorious defense warranting dismissal of the petition, the Appellate Term affirmed that the petition failed to allege the tenant's "regulatory" status as being subject to Martin Act protections. Specifically, the tenant leased directly from the sponsor, and as the subject building is located in the Second Department, it is governed by *Paikoff v. Harris*, 185 Misc.2d 372 (App. Term 2d Dep't 1999), which affords Martin Act non-purchasing tenant protections to tenants leasing from the sponsor or its affiliates, including prohibiting unconscionable rent increases. The petition's failure to set forth these protections was material and subjected it to dismissal, where, as here, there was no dispute that the tenancy was subject to the Martin Act.

TAKEAWAY: While neither the Civil Court nor Appellate Term specifically discusses the impact of Paikoff, and the split in First and Second Departments, it is worth remembering for both tenants and sponsors, that in the Second Department tenants who lease from the sponsor subsequent to the offering plan being accepted for filing are considered non-purchasing tenants. As non-purchasing tenants they are entitled to lease renewals at fair market value, i.e., unconscionable rent increases are prohibited. As the Civil Court explains: The Martin Act, GBL §352-eeee, protects "non-purchasing tenants from 'unconscionable increases beyond ordinary rentals for comparable apartments during the period of their occupancy,'" thereby prohibiting a sponsor from "effectively 'forcing out' the renting tenant."

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR PLAINTIFF

Bd. of Mgrs. of Honto 88 Condos. v. Red Apple Child Dev. Ctr.

Supreme Court of New York, Appellate Division, First Department, Feb 24 2022

2022 NY SLIP OP 01233 | 159 N.Y.S.3D 844, 202 A.D.3D 615 | 2022 N.Y. APP. DIV. LEXIS 1245, 2022 WL 548488 | DOCKET

JUDGE

Rolando T. Acosta,
Barbara R. Kapnick,
David Friedman,
Anil Christopher Singh,
Bahaati Pitt

LOWER COURT JUDGE

Francis A. Kahn III

TAGS

appeal, condominium, temporary receiver

Delinquency of Commercial Unit Owner Warranted Appointment of Temporary Receiver

The First Department upheld the Supreme Court's appointment of a temporary receiver in this action by a condominium to foreclose on common charge liens on commercial units.

The First Department held that the Supreme Court had "properly determined that defendant Red Apple Child Development Center's significant stake in the condominium, history of arrears and litigation against plaintiff, and failure to make certain undisputed payments while receiving rental income warranted the appointment to prevent financial hardship to the residential unit owners."

The plaintiff condominium had placed liens for charges owed by the defendant owner of 22 commercial units in the condominium for charges totaling over $450,000, plus interest and costs, dating as far back as 2013. The plaintiff commenced this action to foreclose on the liens.

The plaintiff condominium moved, pursuant to CPLR §6401, for a temporary receiver. The Supreme Court recognized that the appointment of a temporary receiver pursuant to CPLR §6401 requires there be a "danger that the property will be removed from the state, or lost, materially injured or destroyed"; the invocation of this equitable power is a "drastic remedy"; and courts must "exercise extreme caution in appointing receivers *pendent lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits" requiring "clear proof" of the specified hazards. (*See Bd. of Mgrs. of Honto 88 Condos. v. Red Apple Child Dev. Ctr.*, 2021 WL 3624932, No. 651890/2020 (Sup. Ct. N.Y. Cnty. Aug. 3, 2021 (Kahn, J.)).

Nevertheless, the Supreme Court was persuaded that, despite the defendant's common charge arrears, it had leased the premises to rent-paying businesses, its defaults in payment have caused the condominium to incur a shortfall of income that has been unfairly borne by the residential unit owners, and this action was not the first lien or action commenced by the condominium against the defendant for delinquent common charges.

The First Department upheld the Supreme Court's decision for the same reasoning.

TAKEAWAY: As we learned in last month's case squib, Cielo Garage Owners Co., LLC v. Bd. of Mgrs. of the Cielo Condo., unlike with cooperatives and in the landlord-tenant setting, there is no use and occupancy interim relief available to condominium boards in actions seeking common charge arrears from unit owners. One option, however, is to seek the appointment of a temporary receiver. While such relief requires a condominium to meet a high threshold, the First Department and lower court agreed such a remedy is appropriate where: (a) the common charge arrears were having a significant adverse effect on the residential unit owners; (b) the defendant was subleasing the space and therefore receiving income; and (c) the defendant had a history of failing to pay common charges.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR DEFENDANT

Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. New York

US District Court, S.D. New York, Sep 14 2021

NO. 19 CIV. 11285 (S.D.N.Y. SEPT. 14, 2021), ECF NO. 101 | 2021 U.S. DIST. LEXIS 174535, 2021 WL 4198332 | 19 CIV. 11285 (KMK), 20 CIV. 634 (KMK) | DOCKET

JUDGE
Kenneth M. Karas

PLAINTIFF
Building and Realty Institute of Westchester and Putnam Counties, Inc., et al.

DEFENDANT
State of New York, et al.

TAGS
Housing Stability & Tenant Protection Act, condominium law, conversion, cooperative, due process claim, motion to dismiss, rent stabilized, rent-stabilized, tenant rights

HSTPA and Its Amendments to Martin Act Don't Violate Property Owners' Constitutional Rights

The court dismissed challenges to the constitutionality of the 2019 Housing Stability and Tenant Protection Act (HSTPA) and dismissed the plaintiffs' claims without prejudice.

A group of plaintiff landlords and organizations alleged that certain HSTPA amendments to the Rent Stabilization Law violate their constitutional rights—specifically, that the HSTPA violates the Fifth (Due Process) and 14th (Equal Protection) Amendments and the Contract

Clause of the U.S. Constitution. The plaintiffs asked the court to strike down the HSTPA as unconstitutional and issue an injunction against its enforcement.

The court summarized the plaintiffs' legal claims as allegations that the HSTPA: (1) effects a taking of property in violation of the Fifth Amendment, and the 14th Amendment as applied to the states; (2) deprives property owners of substantive due process in violation of the 14th Amendment; and (3) violates the Contract Clause, because the HSTPA locks in existing preferential rents for the duration of the current tenancy and impairs the existing lease contract agreements.

Takings Under the 14th and Fifth Amendments. With respect to a "physical taking" the plaintiffs challenged the HSTPA amendments to the Martin Act, whereby the threshold for a conversion of an occupied rental building to a cooperative or condominium was amended to require that in order to declare a plan effective tenants in occupancy in 51 percent of units must purchase, where previously a plan could be declared effective upon the sale of 15 percent of the units to any purchasers who in good faith intend to occupy a unit. The plaintiffs claimed that this amendment gave tenants in occupancy a collective veto right to conversions and the ability to block conversions altogether.

Here, the court found no physical taking where the "HSTPA merely changes the percentage required to convert buildings into condominiums or cooperatives from 15% of tenants to 51%." The court referenced the amendment to the Martin Act in the 1970s where the state previously adjusted the tenant-approval threshold for cooperative and condominium conversions under General Business Law §352-eeee from 35 percent to 15 percent.

Interestingly, it seems the court did not consider that the prior adjustment allowed for increased conversions, instead of limiting them. Moreover, the practical impact of effectively eliminating conversions (to date) since passage of the HSTPA was not specifically considered. Instead, the court simply found that "while the HSTPA may have added certain hurdles to the conversion of rental properties, the HSTPA does not on its face require . . . Plaintiffs to rent their properties; that was a choice of their own making, thus defeating their Takings Claim."

With respect to a regulatory taking, the court restated the long-standing principle that a diminution in value does not constitute a taking, stating that "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."

The court found, in any event, that the plaintiffs' claims are not ripe for judicial review because the property owners have not tried to take advantage of available hardship exemptions and have not applied for waivers allowed by law, namely a hardship exemption if their rental incomes do not exceed their expenses by at least a statutorily defined percentage [N.Y.C. Admin. Code §26-511(c)(6)]. The plaintiffs also complained of not being able to convert buildings to condominiums or cooperatives, but the court found that these allegations also suffer from the same ripeness defect, as none of the plaintiffs have tried to obtain the requisite tenant agreements for conversions to condominiums or cooperative buildings.

Substantive Due Process Under the 14th Amendment. The court concluded that the due process claims fail under rational basis review, as the New York State Legislature had a rational basis to pass the HSTPA to achieve its goals related to the state's housing crisis and the HSTPA also addressed the issues of housing instability and tenant hardship, both of which are recognized as a legitimate state goal.

Contracts Clause. The plaintiffs challenged the HSTPA's change to preferential rent rules as a violation of the Contract Clause, and claimed that the HSTPA has impaired existing contractual relationships based on other provisions aside from preferential rents, which include limits on rent increases for major capital improvements and individual apartment improvements that were already under contract.

The court found, however, with respect to as-applied contracts, that the plaintiffs did not plausibly state a Contract Clause violation, because their claims are based on future, rather than existing, contracts.

The more general challenge to the Contracts Clause also failed. The court found that the plaintiffs did not demonstrate that the impairment by the HSTPA is substantial, because no reasonable expectations regarding rent-stabilized housing have been disrupted. The court considered that the plaintiffs are "involved in a heavily-regulated industry—rental of residential property in New York City—and cannot claim surprise that [their contractual] relationships with certain tenants are affected by governmental action."

As this case, and the litany of others challenging the constitutionality of the HSTPA move through the courts, practitioners, landlords, and tenants affected by these decisions, along with the New York State Legislature, are sure to continue to follow along attentively.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR PLAINTIFF

Cabgram Developer LLC v. Gramercy Square 103 LLC

Supreme Court, New York County, Sep 30 2021

NO. 654176/2020 (N.Y. SUP. CT. N.Y. CNTY. SEPT. 30, 2021) NYSCEF NO. 16 | 2021 WL 4707350 | 654176/2020 | DOCKET

JUDGE
Laurence L. Love

PLAINTIFF
Cabgram Developer LLC

DEFENDANT
Gramercy Square 103 LLC, Gerstein Strauss & Rinaldi LLP

TAGS
breach of contract, condominium, condominium law, contracts, default, default judgment, deposit, down payment, escrow, sales, sponsor

Purchaser Who Doesn't Close on Time Loses Down Payment

The court granted the plaintiff's motion for a default judgment awarding the plaintiff-seller the down payment where the defendant-purchaser defaulted under the purchase contract for the sale of a condominium unit.

The plaintiff is the sponsor of the new construction Gramercy Square Condominium. The sponsor entered into a purchase agreement with the defendant purchaser for the sale of a unit, and the purchaser failed to close on the scheduled closing date, thereby defaulting under the terms of the purchase agreement. The sponsor notified the purchaser of the

default, and the purchaser failed to cure within the requisite 30 days, resulting in the cancelation of the purchase agreement and the sponsor exercising its right to retain the deposit.

However, the purchaser objected to the release of the deposit to the sponsor, which resulted in the sponsor being forced to bring an action naming both the purchaser and the escrow agent, seeking an order that the sponsor be awarded the deposit and that the escrow agent (the sponsor's offering plan counsel) be ordered to release same, which is precisely what the court ordered.

TAKEAWAY: Even where default and the retention of the security deposit seem straightforward, if the purchaser objects to the release of the down payment, the offering plan counsel serving as escrow agent is wise to refuse to release the deposit until ordered to by the court.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR PLAINTIFF

Cielo Garage Owners Co., LLC v. Bd. of Mgrs. of the Cielo Condo.

Supreme Court, New York County, Dec 23 2021

NO. 651150/2019 (N.Y. SUP. CT. N.Y. CNTY. DEC. 28, 2021) NYSCEF NO. 202 | 2021 WL 6128603 | DOCKET

JUDGE
Debra A. James

PLAINTIFF
Cielo Garage Owners Company, LLC

DEFENDANT
Board of Managers of the Cielo Condominium, Arthur Ascher, Individually and in His Capacity as Board Member, and FirstService Residential New York, Inc.

TAGS
commercial unit, common charge lien, common charges, condominium, fees, garage, governing documents, preliminary injunction, use and occupancy

Condo Not Entitled to Common Charges During Unit Owner's Case Against It

The defendant condominium's motion for "interim common charges" was denied because, unlike a cooperative or rental landlord-tenant relationship, there is no bylaw, statutory, or common law interim relief for use and occupancy available to a condominium board from a unit owner.

The plaintiff commenced the action seeking declaratory relief, breach of fiduciary duty, and breach of the condominium bylaws (and a prior settlement agreement) against the

condominium, its managing agent, and individual board members. (The individual board members were dismissed, as were most claims as against the managing agent, and the declaratory judgment claims). The defendant condominium asserted counterclaims for outstanding common charges and to foreclose on its common charge lien.

The defendant condominium sought interim relief in the form of "interim common charges." In a case of first impression, the court denied interim relief for common charges, finding that unlike a cooperative or rental, there is no lease or landlord-tenant relationship, and as a result the court determined that there is no "statutory, bylaw provisions or common law authority that gives this court the power to grant the interim relief in the form of interim common charges, akin to use and occupancy… No use and occupancy is available as there is no landlord/tenant relationship between the parties." The court, instead, referred to Real Property Law §§339-aa and 339-z as setting forth the procedure for a condominium to obtain a lien for unpaid common charges (which it had already done in this case).

The court also considered whether interim common charges were appropriate preliminary injunctive relief, but found that because the condominium sought only monetary relief of common charges it cannot demonstrate the irreparable harm as required for preliminary injunctive relief.

TAKEAWAY: The attempt to seek the equivalent of use and occupancy in a condominium common charge dispute was creative lawyering with little downside—either the condominium's motion would be granted and it would receive common charges during the pendency of the action, or it would lose (which it did) and it is in the same position it was in prior to the motion. Without an appellate decision on this issue, condominium practitioners may consider seeking such interim relief, particularly, where, as here, there has been extensive motion practice and likely will be in the future, and ultimate relief in the action is likely years away.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR DEFENDANT

Dawidowska v. Avanzato

Supreme Court, Kings County, Dec 10 2021

NO. 511471/2021 (N.Y. SUP. CT. KINGS CNTY. DEC. 10, 2021) NYSCEF NO. 37 | 2021 WL 6297427 | DOCKET

JUDGE
Peter P. Sweeney

PLAINTIFF
Anna Dawidowska

DEFENDANT
Joseph Avanzato, Jr.

TAGS
breach of contract, cooperative, default, deposit, down payment, purchase, purchase agreement, sale, summary judgment

Co-op Seller Didn't Vacate Apartment Before Closing

The plaintiff's motion for summary judgment was denied where the defendant failed to appear and had not filed an answer, but motion for summary judgment was premature because the issue had not been joined.

The action involves a plaintiff purchaser and defendant seller entering into a contract of sale for the shares to defendant seller's cooperative apartment. The plaintiff provided the deposit as called for in the contract, secured financing, and ultimately noticed a time-of-the-essence closing. On the day prior to closing, the plaintiff arrived at the apartment to conduct a walk-

through only to find the apartment occupied by the defendant and his belongings (and not vacant and in broom clean condition as required by the contract of sale). The plaintiff attended the scheduled closing with a stenographer to transcribe the events, and proffered a check reflecting that the plaintiff was ready, willing, and able to close.

The plaintiff commenced the action seeking specific performance and injunctive relief to compel the sale and damages, and immediately thereafter filed an Order to Show Cause seeking summary judgment. The defendant did not appear and did not file an answer. The court denied the plaintiff's motion, as summary judgment is not appropriate relief where a defendant has not answered and the issue has not been joined. The court also declined to convert the motion to a default motion (the appropriate motion the plaintiff should have made) because the order to show cause had been filed prior to the expiration of the defendant's time to answer.

TAKEAWAY: As frustrating as the process for a default judgment can be at times, including the possibility of the defendant popping up at the last minute, seeking adjournments and filing opposition, and thereby limiting the likelihood of success, where a defendant does not appear and does not file a timely answer, in order to secure a judgment, there is no getting around filing a default motion.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR DEFENDANT

Ember v. Denizard

Supreme Court, New York County, Feb 28 2022

2022 NY SLIP OP 30647(U) | **2022 N.Y. MISC. LEXIS 1017, 2022 WL 617000** | **DOCKET**

JUDGE
Lewis J. Lubell

PLAINTIFF
Max Ember

DEFENDANT
Charlene Denizard, Danielle Birkenfeld Roger Brown, Michael Howard Saul, 65 West 95th Owners Corp., Fenwick Keats Management, Inc., and R.J. Panda

TAGS
breach of warranty, cooperative, discontinuance, doctrine of res judicata, personal injury, summary judgment

CASE HISTORY
Ember v. Denizard (Apr 19, 2018)

Shareholder's Claims Survived Motion to Dismiss, But Were Ultimately Barred by *Res Judicata*

The plaintiff shareholder's claims against the cooperative board and managing agent relating to injuries suffered as a result of an alleged non-working heating system were dismissed as barred by the doctrine of *res judicata* where the plaintiff and defendants had, years earlier,

stipulated to a discontinuance with prejudice of a prior action where the plaintiff's claims were based on the alleged non-working heating system.

The only material difference between the allegations in the initial Supreme Court action brought by the plaintiff, which the plaintiff stipulated to dismiss with prejudice, and the subsequent action brought years later, was the assertion of an allegation that the same underlying condition (non-working heating system) caused irreparable damage to the plaintiff's lungs.

Naturally, the defendants moved to dismiss based on *res judicata* as the new action arises from the same facts and circumstances as the initial action, which was dismissed without prejudice. However, in a surprising twist, the First Department reversed, finding that it was inappropriate to dismiss the case based on *res judicata* at the motion-to-dismiss stage, holding that fact-finding was necessary as to whether the lung condition could have been asserted in the prior action.

Thereafter, the parties engaged in discovery, and upon completion of discovery, the defendants filed a motion for summary judgment, again based on *res judicata*. The Supreme Court granted this motion, as evidence, including the plaintiff's testimony at deposition, established that the plaintiff was allegedly ill due to lack of heat prior to the commencing of the initial action. As a result, the Supreme Court found that the alleged lung condition arose from the same facts and circumstances as the previously disposed of action, and therefore was barred by *res judicata*, and that the plaintiff knew at that time that he had suffered some injury allegedly as a result of the non-working heating system.

TAKEAWAY: The surprising aspect of this case is that the First Department, in its decision Ember v. Denizard, 160 A.D.3d 537 (1st Dep't 2018), reversed the Supreme Court's initial holding dismissing the action based on *res judicata* at the motion-to-dismiss stage. Less surprising is the ultimate conclusion (albeit delayed from motion-to-dismiss stage to summary judgment) that, after discovery, the evidence presented made clear that the "new" injury alleged arose from the same allegations that were dismissed with prejudice.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR PLAINTIFF AND DEFENDANT

Gibb v. Dozortsev

Supreme Court, New York County, Dec 30 2021

2021 NY SLIP OP 32821(U) | **2021 N.Y. MISC. LEXIS 6791, 2021 WL 6145468** | **DOCKET**

JUDGE
Louis L. Nock

PLAINTIFF
Serena Gibb and Thomas Gibb

DEFENDANT
Eugene Dozortsev and Alexandra Mayzler

TAGS
bad faith, breach of contract, condominium, deposit, disclosure, discovery, document demand, down payment, mortgage, purchase, purchase agreement, sale, subpoena

Did Condo Buyers Try to Get Out of Purchase Due to Pandemic?

The defendants' motion to quash subpoenas on a bank loan officer and real estate broker were denied in part and granted in part.

The plaintiff seller of a condominium unit seeks release of the escrowed down payment in a breach of contract action. The plaintiff alleges that the defendant buyer's attempt to get out of the contract by invoking the mortgage contingency provision in the contract was in bad faith, alleging that the defendant buyer did not in good faith seek a mortgage and conspired with the bank, with whom the defendant buyer had a long-standing business relationship, to decline the loan.

The timing of the contract of sale–February 2020–and the declining of the loan on March 20, 2020, would lead any reasonable seller to suspect nefarious conduct on the part of the buyer to attempt to get out of the purchase contract, as the world as we know it had shifted dramatically during that short time period and, at that time, there was pervasive uncertainty as to the impact on the economy generally, and real estate in particular, in the very early days of the pandemic.

With respect to the defendants' motion to quash the subpoenas on the bank loan officer and real estate broker, the defendants moved to quash the subpoenas insofar as they seek any information unrelated to "income," as opposed to overall assets and financial status, given the fact that insufficient "income" was the sole ground upon which the mortgage loan application of the defendant buyer was declined. The court, however, found that because the plaintiff alleges an overarching theory that a conspiracy existed between the defendants and First Republic Bank which accounted for the ultimate decision by the bank to issue a declination letter, the plaintiffs are entitled to probe whether all the circumstances underlying the loan are indicative of the scheme alleged, particularly in light of CPLR Article 45's broad pre-trial discovery rules.

The court granted the defendants' motion with respect to items already in the plaintiff's possession and granted the defendants' request for a protective order to label all documents produced for attorneys' eyes only.

TAKEAWAY: Discovery is broad. The requests made in the subpoenas fit within the overarching theory of the case and, as such, must be produced.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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HABITAT

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DECIDED FOR PLAINTIFF

Matter of Etheridge

Supreme Court of New York, Appellate Division, First Department, Nov 4 2021

2021 NY SLIP OP 06046 | 200 A.D.3D 53 | 2021 N.Y. APP. DIV. LEXIS 6088 | 2021-03135

JUDGE
Rolando T. Acosta,
Anil Christopher Singh,
Tanya R. Kennedy,
Manuel J. Mendez,
John Higgitt

PLAINTIFF
Attorney Grievance Committee for the First Judicial Department

DEFENDANT
Derek Etheridge

TAGS
attorney discipline, attorney-client, conversion, cooperative, deposit, disqualification, escrow, malpractice

Attorney Suspended for Misappropriation of Client Funds

Respondent attorney Derek Etheridge was suspended from the practice of law indefinitely for escrow-related misconduct, including failure to timely release to his client the proceeds of the sale of her cooperative apartment.

The former Windels Marx Lane & Mittendorf, LLP associate, who had been a solo practitioner since he left the firm nearly a decade ago, admitted in deposition testimony that he made

well over 70 withdrawals amounting to over $50,000 to pay personal expenses from an IOLA account in which down payment and sale proceeds of his client's cooperative apartment had been deposited. Etheridge then released only a portion of the sales proceeds to his client and misrepresented that he was retaining the remainder of the proceeds pending confirmation that tax liens related to the sale had been paid. Despite the closing taking place on Oct. 4, 2019, Etheridge had not released the majority of the proceeds by September 2020, at which point his justification to the client was that he was retaining funds while investigating capital gains tax liability. Thereafter, Etheridge borrowed funds from friends, and only by March 2021 had he paid the amounts due his client.

Etheridge's defense to the admitted escrow-related misconduct and misrepresentations to his client was merely that he had no real estate transactional experience, had no experience with an IOLA account, and is no longer in private practice, working as a contract attorney for the NYC Department of Education. He also explained that this is his first disciplinary matter, he had personal issues at that time, and there is no public danger because there is minimal likelihood of reoccurrence.

However, the court noted that while payments were ultimately made to the client, this is insufficient to avoid suspension, and his lack of experience regarding rules related to maintenance of client funds does not excuse his failure to familiarize himself with such rules.

The Appellate Division First Department held that the attorney's repeated misappropriation and conversion of client funds, without permission, for his own personal purposes warrants immediate suspension from the practice of law.

TAKEAWAY: There is a simple lesson here: Don't misappropriate escrowed client funds for personal use.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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HABITAT

DECIDED FOR DEFENDANT

Pu v. Bd. of Mgrs. of Trafalgar House Condo.

Supreme Court, New York County, Dec 6 2021

2021 NY SLIP OP 32577(U) | **2021 N.Y. MISC. LEXIS 6275, 2021 WL 5770947** | **DOCKET**

JUDGE
James Edward d'Auguste

PLAINTIFF
Richard Pu

DEFENDANT
Board of Managers of Trafalgar House Condominium, and Akam Living Services, Inc.

TAGS
condominium, expert testimony, water leaks

Unit Owner's Leak Claims Against Condo Fail in the Face of Expert Testimony

The plaintiff condominium unit owner sued the board of managers and its managing agent for water damage to his unit's floorboards caused by a leaking kitchen radiator. The plaintiff asserted claims for negligence, breach of fiduciary duty, and breach of contract. The court granted the defendants' motion for summary judgment and dismissed the case.

The court held that the plaintiff did not submit evidence rebutting the defendants' evidence that there was no damage to the unit. The defendants' architect's affidavit averred that he inspected the unit and there was no damage to the floors. The plaintiff did not submit an expert report countering the defendants' expert; instead, the plaintiff submitted only his own

affidavit alleging that the floors were initially warped, but conceded in a deposition that the floors have since flattened out and do not need repair.

The plaintiff's claim for diminution in value of the apartment was also without factual support. His only support was, once again, from his own affidavit, but he was not qualified to make such an assessment as he admitted in his deposition that he does not "do real estate work" and his estimate was based solely on his "general understanding about real estate values."

As a result, the court found that "[a]part from failing to establish that there was any discernable physical damage to his floor, plaintiff's self-serving estimate of his pecuniary loss is insufficient to meet his burden to establish damages." The court held that damages cannot be awarded based on an estimate that is no more than conjecture or guesswork. Competent expert testimony must be submitted. The plaintiff did not incur any repair costs, and his damage claim was based on a "speculative loss in a hypothetical future sale due to his unit's alleged, unsubstantiated diminution in value." Not surprisingly, the court concluded: "Such damages are not recoverable."

The court also briefly noted that the plaintiff failed to establish that the defendants caused the flooding, as their expert's testimony was unrebutted by any plaintiff expert.

TAKEAWAY: While the plaintiff's failure to include any expert testimony in support of his case and to rebut the defendants' expert testimony made this an easy case for the court to toss, it serves as a reminder that, in leak and construction defect cases, retaining a qualified expert is imperative.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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DECIDED FOR DEFENDANT

Wood v. Mut. Redevelopment Houses

US District Court, S.D. New York, Sep 17 2021

NO. 19 CIV. 9563 (S.D.N.Y. SEPT. 17, 2021) ECF NO. 85 | 2021 U.S. DIST. LEXIS 177565, 2021 WL 4255054 | 19 CIV. 9563 (AT) | DOCKET

JUDGE
Analisa Torres

PLAINTIFF
Tzvee Wood and Andrea Malester

DEFENDANT
Mutual Redevelopment Houses, Inc.

TAGS
board rejection, cooperative, cooperative housing development, discrimination, low-income housing, motion to dismiss

Court Dismisses Discrimination Claim by Co-op Applicants Who Didn't Submit Income Proof

The defendants' motion to dismiss the complaint, in the long-standing dispute between the parties, brought by *pro se* plaintiffs regarding the denial of their application to purchase an income-limited apartment, was granted, and the case was dismissed.

This decision ended the fourth proceeding brought by the plaintiffs, who alleged discrimination in the denial of their 2012 application to purchase an income-limited cooperative apartment.

After a briefing schedule was entered into, and the defendants filed their motion to dismiss in February 2021, the plaintiffs sought and received five extensions to put in opposition papers, and were clearly warned that on their final two requests that the deadline would "not be extended . . . without specific and extraordinary cause" and "[i]f Plaintiffs fail to meet this final deadline, this Court will deem Defendants' motions to dismiss to be unopposed." When the final deadline was not met, the court treated the motion as unopposed.

The plaintiffs did not submit income tax returns, proof of employment or income, or information for a credit check. Instead, they made (unsupported) claims that they were qualified based on income. As a result, the court found that the plaintiffs' allegations didn't support the inference that they qualified for an apartment and no discriminatory acts (based on an undisclosed disability) were alleged.

Not only did the court dismiss the plaintiffs' claims, but it also denied leave to amend, despite the general rule that leave to amend is liberally given to *pro se* plaintiffs, because their claims were futile. The court also noted that the plaintiffs were serial litigants, initiating eight other cases, and as a result were not entitled to the high degree of leniency usually afforded *pro se* plaintiffs.

TAKEAWAY: This case serves as a reminder to practitioners that when opposing *pro se* plaintiffs, while courts will provide such plaintiffs significant leeway, including numerous opportunities to meet deadlines, ultimately courts do have a breaking point. Parties being sued by *pro se* plaintiffs would be advised to exercise patience as final relief from such claims, even where unsupported, may be a long time coming.

- Squib by: Richard Shore, Counsel, Nixon Peabody

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