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WHO HOLDS UNSOLD SHARES

In *Sassi-Lehner v. Charlton Tenants Corp.*, Christina Sassi Lehner wanted a court to declare her the holder of unsold shares in a cooperative corporation and could "assign, sell or transfer the shares without board approval."

Charlton Tenants Corp. owned a six-story residential apartment building. In 1982, when the cooperative was formed, the non-purchasing, rent-controlled tenants living in apartment 4C declined to purchase their unit and the shares attributable to the apartment took on "unsold" status and were retained by the sponsor. Three years later, Mark Greenbaum acquired the shares (as reflected in amendments to the cooperative's offering plan). He later defaulted on his mortgage, and the shares were sold by the Federal National Mortgage Association ("Fannie Mae") to Michael and Christina Sassi.

In 2001, when Michael died, the shares were transferred to his daughters, Christina Sassi-Lehner and Gabriella Sassi-Hill. However, after Greenbaum, none of the subsequent shareholders were identified in any amendments to the cooperative's offering plan.

When the tenants of 4C stopped paying rent and surrendered possession, the Sassis sought to sell the unit, but Charlton Tenants Corp. wouldn't permit the sale unless the Sassi sisters complied with the co-op's rules governing such transfers.

Since they were never officially designated "holders of unsold shares," the New York County Supreme Court concluded the ladies couldn't claim such status. On appeal, the duo contended that the offering plan wasn't controlling and the certificate of incorporation, the bylaws, and proprietary lease were of critical importance. They argued that, according to the lease, "the person owning the shares has all the rights of a holder of unsold shares until such time as he or she occupies the apartment or the shares are owned by a purchaser who occupies the apartment." Because the Sassis never lived in the unit, they claimed to be owners of "unsold shares."

Since who was a "holder of the unsold shares" was determined by the offering plan (and its amendments), and Greenbaum was the last person cited in those documents, the Appellate Division, First Department, found the sisters weren't exempt from complying with the co-op's procedures.

Now, wasn't that sassy?

WHY PAY RENT?

In *2246 Holding Corp. v. Nolasco,* 2246 Holding brought a holdover proceeding against Maria Nolasco, a 30-year tenant in its building, due to a pattern of late rent payments. While the parties agreed Maria would pay back rent and the landlord's legal fees by the next month, since the Human Resources Administration (HRA) was paying part of the tenant's arrears, a 10-day delay was contemplated to allow HRA to cut a check.

More than a month later, when Maria remitted her share of the rent, 2246 refused to accept it. Maria got several stays of a warrant of eviction's execution on the grounds HRA had failed to fork over its share. Some five months later, when the agency finally made payment, 2246 claimed the tender was untimely and asked for the eviction to proceed.

The New York County Civil Court found the tardiness attributable to HRA and excused the lapses. After 2246 appealed, the Appellate Term, First Department, reversed, finding Maria's repeated failure to adhere to the "time of the essence" requirements of the parties' agreement justified an eviction.

On appeal, the Appellate Division, First Department, ended up siding with the Civil Court and found "[t]he policies underlying the rent stabilization laws are generally better served by holding out to a tenant the opportunity usually afforded in a nonpayment proceeding to cure the breach of his rent obligations." It believed Maria shouldn't be penalized since she was a long-term "indigent tenant" who made good-faith efforts to comply with the stipulation "only to be stymied by events beyond her control."

Actually, wasn't 2246 the one stymied by that outcome?

WHO LET HIM IN?

In *Schuster v. Five G. Associates,* Tanja Schuster was attacked in a building owned by Five G. Associates but her Bronx County Supreme Court case was dismissed due to Schuster's failure to demonstrate the owner's responsibility for the incident.

On appeal, the Appellate Division, First Department, thought Schuster hadn't shown her assailant gained access to the building as a result of the owner's negligence. Five G. established the building's door locks were working on the day of the assault. And, in the absence of evidence the assailant was an intruder or prior criminal acts which would have placed Five G. on notice of a potential incident, Schuster couldn't withstand (yet another, regrettable) attack.

There went Five G's.

TENANT GETS SWEPT OUT

In *377 Broome St. Corp. v. McManamon,* Kathleen McManamon appealed from an order of the New York County Civil Court which denied her request to stop an eviction which had been triggered by late rent payments. The Appellate Term, First Department, found McManamon repeatedly breached the terms of a settlement which delineated the payment deadlines as "time is of the essence." Since such court ordered agreements or stipulations are "strictly enforced," the AT1 refused to further delay or set aside the eviction.

Guess you could say the AT1 gave McManamon the broom.

THERE'S GOLD IN THEM CLAUSES

In *216 Jamaica Avenue, LLC v. S & R Playhouse Realty Co.,* the parties disputed the enforceability of a lease's "gold clause."

The 1912 agreement's original term was for 99 years, with an option to renew until the year 2110, and the annual rent was to be "paid in gold coin of the United States of the present standard of weight and fineness." (A custom and practice of the time.)

In the 1930's, as part of President Roosevelt's "overhaul of American monetary policy," Congress withdrew gold coins from circulation, banned their private ownership and use, and, made monetary obligations -- like lease payments -- payable in paper currency.

In 1977, Congress repealed the ban, but ambiguously provided the 1930's resolution wouldn't apply to leases issued on or after the 1977 amendment. After a series of lawsuits, in 1996, Congress passed a law which allowed owners to enforce pre-1977 gold clauses only when the parties specifically agreed to that obligation.

In 1982, S & R Playhouse assumed the lease and paid the annual rent in paper currency. In 2006, when 216 Jamaica Avenue purchased the land, the new owner demanded the "rent equivalent to the value of 35,000 1912 gold dollar coins." Upon S & R Playhouse's refusal to comply, 216 filed suit and the District Court for the Northern District of Ohio found the gold clause unenforceable.

On appeal, the Sixth Circuit Court of Appeals was of the opinion the 1912 gold clause was "resuscitated" by S & R's assumption of the lease and could be enforced against the tenant. The argument there was no "meeting of the minds" fell on deaf ears as the Sixth Circuit found "nothing unclear" about the lease's terms.

How fine was that?

GET OUT OF HERE!

Normally, the post-lease acceptance of rent creates a month-to-month tenancy which requires a 30-day notice of termination before a holdover proceeding can be started. Here's an exception to that rule.

In *Chaim v. Medina,* Chaim wanted to evict Maritza Medina so that her apartment could be used for a not-for-profit purpose. To that end, on July 29, 2005, Chaim served a nonrenewal notice on Medina advising that her lease wouldn't be renewed and her tenancy was to end on November 30, 2005.

Medina claimed her tenancy should have expired on November 14, 2005, and that her landlord hadn't given her the appropriate notice required by Rent Stabilization Law. She also argued that a month-to-month tenancy was created when Chaim cashed her rent check (for the period of November 15, 2005 to December 14, 2005) and, without a thirty-day notice terminating that tenancy, the proceeding had to be dismissed.

The Kings County Civil Court noted the law which applied to this particular kind of case allowed the tenant to remain in possession until a summary proceeding was started. That court was of the view no month-to-month tenancy was created by the November 15th rent acceptance.

On appeal, the Appellate Term, Second Department, agreed. The statute's unequivocal language provided the acceptance of rent (under these particular circumstances) neither created a month-to-month tenancy nor required any additional notice.

Le Chaim?

WHAT'S "POSITIVE DRAINAGE?"

In *Kibler v. Gillard Constr., Inc.*, Stephen Kibler sued Gillard Construction, Inc. (GCI) and its president, John Gillard, for breach of contract and negligence.

Kibler hired GCI to build a single-family home. Although the company successfully constructed the structure, Kibler claimed GCI failed "to provide for positive drainage," and "to construct the home in accordance with applicable building codes." He also alleged GCI was negligent in fulfilling the contract's terms.

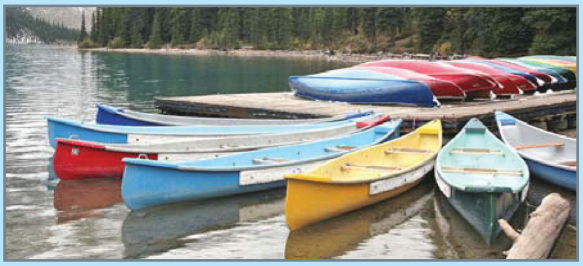
When the Orleans County Supreme Court granted GCI's request to dismiss the case, Kibler appealed to the Appellate Division, Fourth Department, which modified the outcome.

Because the parties' agreement failed to define "positive drainage," GCI couldn't show the term was unambiguous. Without a clear definition, that aspect of the dispute couldn't be resolved on the parties' submissions and a formal hearing or trial was required.

But since the town's code enforcement officer submitted an unrefuted affidavit, which attested to the company's compliance with all laws, the AD4 was of the view GCI was entitled to dismissal of the remaining parts of Kibler's case.

That must have been draining.

CONTEMPT FOR BOATERS



In *Aison v. Hudson River Black River Regulating District*, Howard Aison argued the Hudson River Black River Regulating District violated an agreement which governed the use of Sacandaga Park's beach and swimming area.

In 2003, Aison and other homeowners entered into an agreement which allowed the District to "regulate and control the beach and swimming area, ... make reasonable rules and regulations governing the use of said beach and swimming area," and promulgate an annual permit system. Aison thought the District violated that arrangement by "allowing boat docks, a pontoon boat and personal watercraft."

When Aison asked the District be held in contempt of court for its breach, the Fulton County Supreme Court denied that request. On appeal, the Appellate Division, Third Department, reiterated that civil contempt is available when "to a reasonable degree of certainty, a party has knowingly disobeyed a clear and unequivocal mandate of the court which results in prejudice to the rights of another party."

While the parties' stipulation specifically prohibited "pets, glass, cooler, cooking or barbeque equipment" on the beach and in the swimming area, since there was no mention of pontoon boats or boat docks, the District wasn't in violation of the agreement.

Bet those homeowners were singing the Hudson River Blues.

KEEP ON TRUCKIN'

In *Donohue v. DeLea & Sons, Inc.*, Janine Donohue was injured while operating a truck leased to her employer by DeLea Leasing Corp. After the accident, when Donohue filed suit against DeLea Leasing Corp. -- and others -- claiming the company negligently failed to inspect, maintain, and repair the truck, the Suffolk County Supreme Court granted DeLea's request to end the lawsuit (at least as far as that particular entity was concerned).

Since DeLea wasn't responsible for the truck's maintenance and repair, the Appellate Division, Second Department, thought the lower court properly gave the leasing company an out.

Truck that!

AN AGGRESSIVE VICTIM?

In *Metro N. Owners, LLC v. Thorpe,* Metro N. Owners wanted to evict its Section 8 tenant, Sonya Thorpe.

While Metro alleged Thorpe stabbed John Capers, her "ex-husband/boyfriend," she denied attacking anyone or that she was the aggressor, and claimed to have been the victim of domestic violence when a drunken Capers forced his way into her apartment and assaulted her.

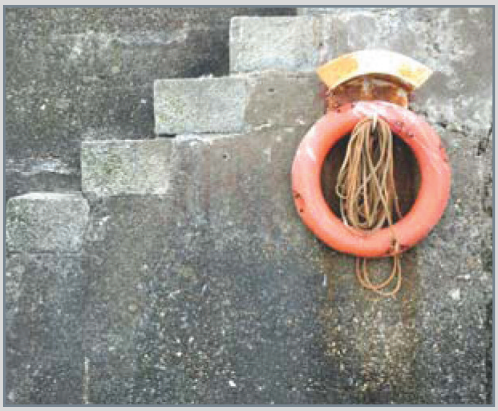
In a New York County Civil Court holdover proceeding, Thorpe contended she was entitled to protection under the Violence Against Women and Department of Justice Reauthorization Act of 2005 -- a federal law which forbids landlords from terminating government-assisted tenancies, based on incidents of domestic violence.

Since Thorpe presented the court with copies of multiple police reports, an order of protection, and, in view of the fact the district attorney's office didn't prosecute her for the alleged stabbing, the Civil Court granted her request to dismiss the case.

Metro's papers -- which included affidavits by its property manager and a security guard (both of whom didn't witness the incident) -- were viewed as "unsubstantiated and conclusory." And, the court attributed Thorpe's "inconsistent" conduct, such as allowing Capers into the apartment, to "battered-woman syndrome."

Did the judge get it right? Beats me.

TRY STICKING TO THE SCRIPT!



In *Choice v. Gill,* Kurt Barnes was building basement steps within a fenced and gated yard. Although the opening was covered by plywood, and marked with cones and yellow caution tape, Beverly Choice still managed to fall down that gap and injure herself.

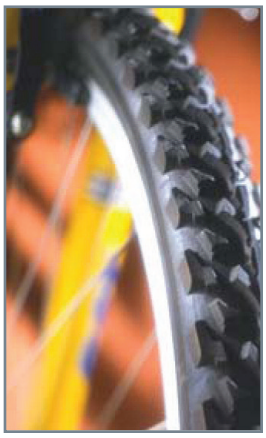
While she first claimed there were no witnesses to the incident, Choice later submitted an affidavit from her son, Alfred.

When the Kings County Supreme Court denied his request to have the case dismissed, Barnes appealed to the Appellate Division, Second Department, which ended the lawsuit.

The AD2 refused to consider an affidavit submitted by Choice's son due to its sudden eleventh-hour appearance and since it was in contradiction of a prior representation there were no witnesses.

That wasn't a matter of Choice.

A RACE TO DISASTER



In *Chittick v. USA Cycling, Inc.,* a group of bicycle racing spectators sued USA Cycling -- and others -- after being hit by a scooter operating as a pace vehicle.

When the Bronx County Supreme Court dismissed their case, the spectators appealed to the Appellate Division, First Department, which determined USA Cycling lacked any control over the race so as to subject it to liability.

The event's organizers were merely authorized to use USA Cycling's name. While the latter provided a rule book to the race's organizer, that didn't impose a duty on USA Cycling to enforce the rules nor created a principal-agency relationship.

Try putting the pedal to that.

DIDN'T YOU WANT TO SELL ME THAT?

In *Matter of Bell-Kligler,* daughters wanted to set aside the sale of their mother's property to their brother on the grounds mom was an alleged incapacitated person.

When the New York County Supreme Court granted the ladies' request, the brother appealed to the Appellate Division, First Department.

There were a number of factors working against the brother.

First, the property was sold at a price significantly below market value and the sale took place a week after the mother executed a will which provided the son was to purchase the daughters' interests upon the mother's death. The sisters weren't told about the sale and, although the mother had an attorney, different counsel represented the mother at the closing -- an attorney who had been engaged by the brother's lawyer.

Since the brother was unable to show the property's sale was voluntarily made, fair, and free of undue influence, the AD1 affirmed the outcome.

Not just another momma's boy.

AN INNOCENT LAW-BREAKER?

In *Cambridge Dev., LLC v. Staysna,* Cambridge Development wanted to evict a tenant when it was discovered Bruce Staysna subleased his apartment and charged more than three times the lawful regulated rent for that unit. (Staysna paid only $425 a month but rented out the apartment for $1,625 a month while "out of town.")

When Cambridge brought its holdover proceeding, the New York County Civil Court found Staysna's conduct violative of applicable law and granted the landlord's request for an eviction.

On appeal, the Appellate Term, First Department, agreed "profiteering" or "commercial exploitation" of a rent-stabilized apartment can result in a tenancy's termination, but thought the isolated, short-term sublet which transpired in this instance didn't comprise the type of conduct needed to justify an eviction -- particularly since the tenant refunded the money when he learned he was violating the law. (Staysna applied the excess to future rent owed by the subtenant and when the latter prematurely left the apartment the unapplied amount was insubstantial in the AT1's view.)

Because he didn't think Staysna's activity was insubstantial and saw "profiteering" as undermining the integrity of the rent stabilization system, a lone dissenter -- Justice McKeon -- disagreed with the majority's decision and would have affirmed the loss of Staysna's home.

We hope to profit from the Appellate Division's wisdom on this subject.

GOING, GOING … NOT GONE!

In *KPSD Mineola, Inc. v. Jahn,* KPSD Mineola contracted to buy real estate from Myra Jahn, but after a dispute arose, and Jahn refused to sell the property, KPSD sued in Nassau County Supreme Court for "specific performance" -- to force a sale.

When Jahn sought to dismiss the case based on KPSD's noncompliance with the contract's mortgage contingency clause, the Supreme Court denied that request. On appeal, the Appellate Division, Second Department, affirmed the lower court's decision.

While Jahn established KPSD never obtained a mortgage commitment nor provided a signed agreement to close as required by the contract, KPSD raised a "triable issue of fact" as to Jahn's waiver of the contract's requirements. (While Jahn raised additional arguments in support of the case's dismissal, the AD2 refused to consider them, as they were raised for the first time on appeal and thus not properly before the appellate court.)

How's that for a closing?

RESIDENTIAL TENANT GETS YELLOWSTONE

In *Hopp v. Raimondi,* Susan Hopp was a rent-controlled tenant who lived in the building for over forty years, even after it converted to cooperative ownership back in the 80's.

In 2003, Michael Raimondi acquired the shares and proprietary lease to Hopp's unit.

When Hopp refused to provide Raimondi with a key to the apartment, he served her with a notice claiming that she violated her lease and gave her an opportunity to remedy the default. Before that cure period ended, Hopp filed suit seeking a court to declare her in compliance with her lease and simultaneously asked for a special injunction -- commonly known as "Yellowstone relief" -- stopping the running of the timeframe delineated in the landlord's notice.

When the Westchester County Supreme Court denied her request, finding such equitable relief was only available to commercial tenants or those residential tenants who owned shares in their coop apartments, an appeal to the Appellate Division, Second Department, followed.

While Yellowstone injunctions aren't usually needed by New York City residential tenants because of a state law -- RPAPL 753(4) -- which grants them a ten day post-judgment period to correct a default and avoid a forfeiture of a tenancy, no comparable statutory protection exists for those apartment dwellers outside of the five boroughs.

As a result, the AD2 concluded equitable relief should be granted and Hopp's right to cure preserved in the event the Supreme Court ultimately found against her.

Bet Susan's glad she hopped to the AD2.

NOT-SO-SLIPPERY SLOPE

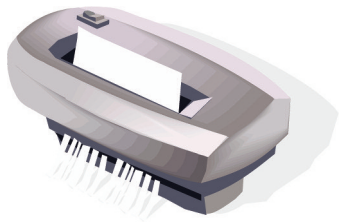
In *O'Connor v. Consolidated Edison Company,* Jennifer O'Connor sued Consolidated Edison Company for injuries she sustained in a "slip and fall."

O'Connor fell on an ice patch on a public roadway, which abutted a vacant lot owned by ConEd and argued the condition was caused by the flow of surface water from ConEd's property.

Although the utility used logs to prevent rain water from streaming down the slope, the evidence suggested that effort was ineffective. Yet, the Bronx County Supreme Court still granted ConEd's request to dismiss the case. On appeal, the Appellate Division, First Department, noted O'Connor failed to show the utility company exacerbated the situation or had a duty to adopt measures to prevent the flow of surface water from its property.

Who slipped up there?

WOULD YOU REJECT THIS?



In *Alter v. Levine,* Daniel Alter tried to sell his co-op to Richard Levine, but when the latter was rejected by the building's board, Alter sued to retain the $62,000 down payment.

The contract of sale provided Alter could keep the money if Levine acted in "bad faith." Although Alter claimed Levin submitted false data which, in turn, triggered the rejection, the Westchester County Supreme Court sided with the rejected buyer and directed the seller to return the money.

On appeal, the Appellate Division, Second Department, affirmed the outcome. Apparently, since he lacked any proof, and his allegations were conclusory in nature, Alter was unable to establish the board's rejection was due to any misconduct by Levine. (The AD2 also affirmed dismissal of Alter's anticipatory breach claim, because the board's refusal to approve the sale made the contract's performance impossible.)

Gotta have faith!

AD3 ALLOWS EASEMENT'S MODIFICATION

In *Town of Elmira v. Hutchison*, Mark Hutchison tried to stop the Town of Elmira from modifying a drainage system situated on his land.

Before Hutchison purchased the property, the prior owners granted the Town a 30-foot wide drainage easement. When a Town Board meeting was held to determine whether a new residential development could be constructed, the project's approval was subject to the drainage system's enlargement so that the anticipated increased water flow could be accommodated.

After Hutchison refused to allow those modifications, Elmira sued and the Chemung County Supreme Court granted a preliminary injunction, barring Hutchison from interfering with the project.

On appeal, the Appellate Division, Third Department, found Elmira's actions consistent with the "extent and nature" of the easement's terms.

Modifying the 30-foot drainage system to address the increased water flow was a reasonable use of the easement and one contemplated by the original grant. Elmira sufficiently established that it would be "irreparably harmed" if the injunction weren't granted since the drainage system modifications were necessary to "ensure the ongoing protection of property located within the water district."

Was that a big pipe dream?

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