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Expert Analysis

New Developments Regarding Apartment Alterations

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Recent appellate decisions have upheld the enforceability of apartment alteration agreements, including provisions permitting suspension of unauthorized work, recoupment of costs and attorney's fees incurred by co-ops and condominiums, and indemnification for damages.

This column discusses these decisions and updates our previous article, which focused on the importance of board adoption of alteration agreements.[1] We also provide recommendations, guidance and cautions to assist co-op and condominium boards and managers in navigating the challenges posed by apartment alteration projects.

Unauthorized Alterations

When apartment alterations are performed without board permission or work differs from approved plans, board action is warranted to protect the building and its occupants. First, the building's architect, engineer and/or superintendent should conduct frequent inspections of the alteration site. If unauthorized work is discovered, the board can stop the work, prevent workers from entering the apartment (if the alteration agreement permits) and compel removal of unauthorized work.

In *Silverman v. 875 Tenants Corp.*,[2] the apartment owners and co-op board executed an alteration agreement which included the owners' waiver of all claims for the co-op's suspension of work. The building superintendent subsequently discovered unapproved work—a seven-foot wall opening. The board suspended the work and barred workers from the apartment. The owner sued, arguing that the board's actions constituted an unlawful eviction, fraud and breach of contract. The Appellate Division, First Department, unanimously held that the owners' waiver of all suspension-of-work claims was enforceable, as a matter of law.

Further, boards can compel removal of unauthorized alterations. In *Meadow Lane Equities Corp. v. Hill*,[3] the apartment owners obtained board consent for certain alterations but also made alterations that had been proposed to but rejected by the board. The co-op sued, and the Appellate Division, Second Department, summarily compelled removal of the unauthorized alterations and restoration of the apartment, holding that the board's decisions were made in good faith and the owners failed to raise triable issues of fact to support their allegations of fraud and self-dealing, thereby precluding further judicial inquiry.

> Board actions regarding alterations should be made in good faith and otherwise conform to the business judgment rule.

Resumption of Work

If an apartment owner sues a board to compel work to continue, one potential resolution is a stipulation so-ordered by the court detailing conditions the owner must meet for the alteration to proceed. In *Batsidis v. Wallack Management Co. Inc.*, [4] the owner and board entered into such a stipulation. However, when the owner recommenced work, the board objected, arguing that its legal and engineering fees must first be paid. The Appellate Division, First Department, held that while the co-op could seek to recover such fees under the alteration agreement, the co-op could not prevent resumption of work because the stipulation did not require that such payments be made.

Recovering Attorney's Fees

Cost-shifting of legal fees and other alteration-related expenses to the altering owner can be provided for in the apartment alteration agreement, which is preferable, or the proprietary lease, as was done in *Silverman*.[5]

In *Batsidis*, the court upheld the alteration agreement's cost-shifting provision as written, rejecting the owner's contention that it applied only when the co-op was the adjudicated prevailing party and its legal fees were reasonable. The court thereby expressed a strong policy that a co-op (or condominium) and its owners should not be burdened with any costs relating to or resulting from an owner's apartment alteration and that such costs should be fully borne solely by the altering owner.

Lorne v. 50 Madison Avenue LLC[6] involved responsibility for defective flooring in an apartment. The apartment owners agreed to do the work but proposed numerous changes to the condominium's standard form of alteration agreement. The board requested a $15,000 retainer to retain counsel to review the proposed changes. The owners refused, claiming the work was not an "alteration" but a "repair" and the board's demand was unreasonable.

The Appellate Division, First Department, summarily dismissed the owners' claims and, citing *Levandusky v. One Fifth Avenue Apt. Corp.*,[7] reviewed the board's actions under the business judgment rule. Because the condominium's bylaws required owners to pay for the board's expenses in connection with alterations/repairs and execute the building's alteration agreement, which required payment of the board's professional fees, the board's retainer request was enforceable, as a matter of law. The owners failed to raise triable questions of fact as to the board's good faith or authority, precluding judicial inquiry.

This strong policy in favor of holding apartment owners who cause a board to incur attorney's fees or other costs solely responsible for their payment was reinforced in a recent decision that did not involve alterations, *Residential Board of Managers of Vanderbilt Condominium v. Goldberg*.[8] A board sued to compel access to an apartment to perform terrace repairs and prevailed. Upon its completion, charges for the work, including attorney's fees incurred in obtaining court-ordered access, were added to the owners' bill for common charges.

The owners failed to pay, and the board filed a lien for unpaid common charges; the owners sued to restrain foreclosure of the lien, which the Supreme Court, New York County, denied. Instead, the court granted the board summary judgment for its attorney's fees, holding that while

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neither the condominium's bylaws or declaration expressly authorized board recovery of attorney's fees in connection with repairs, the owners' refusal to allow access necessitated a lawsuit and the board's attorney's fees therefore constituted a cost incurred in making the repair.

Indemnification

Appellate courts have also upheld board indemnification for alteration-related damages or injuries. In *Canela v. TLH 140 Perry Street, LLC*,[9] a worker injured during an apartment alteration sued the board, which settled the case and then sued the apartment owner for indemnification and attorney's fees. The Appellate Division, Second Department, held that the condominium's bylaws require owners to indemnify the board for liability stemming from alteration work, specifically personal injury or property damage, and unanimously ordered the owners to reimburse the board for the settlement amount paid and its attorney's fees.

Similarly, in *Messner v. 112 East 83rd Street Tenants Corp.*,[10] the Appellate Division, First Department, summarily dismissed the apartment owner's claims to compel the co-op to: (i) repair leak damage to her apartment from her greenhouse, installed by her predecessor; (ii) permit the greenhouse to be connected to the building's heating system; and (iii) obtain a certificate of occupancy for the greenhouse. The court found that when the owner purchased the apartment, she and the co-op executed an agreement obligating her to indemnify the co-op for all repairs to alteration work previously performed, which included the greenhouse. Further, relying on the business judgment rule, the court held that the co-op's decision not to obtain a certificate of occupancy was made in good faith and for legitimate corporate purposes; judicial inquiry was therefore precluded.

However, in *Edge Management Consulting Inc. v. Blank*,[11] a tenant in a leased condominium suffered water leaks from alterations in the apartment above, eventually causing a mold condition that rendered the apartment uninhabitable. The alteration agreement required the altering owner to indemnify other owners for losses resulting from her alteration. However, as a landlord, the owner of the damaged apartment had a duty to maintain the apartment in good repair. The court held that once water entered the apartment and mold began to grow, it became the landlord/unit owner's responsibility to remediate. Having failed to do so, the owner was negligent and the indemnification provision was vitiated and of no effect.

Defining Scope

The importance of clearly defining the scope of approved alterations is illustrated by several recent appellate decisions. In *Alper v. Seavey*,[12] the seller executed a contract of sale representing that no apartment alterations had been made without board consent. However, the purchaser subsequently learned that the seller had made major apartment alterations that the New York City Department of Buildings (DOB) had not signed-off on, appeared inconsistent with plans filed with the DOB and could violate applicable laws. Purchaser refused to close and sought return of the deposit. Seller contended he had obtained tacit approval from the co-op to perform the work and that under the doctrine of caveat emptor, purchaser agreed to take the premises "as is" and must therefore forfeit the deposit.

The Appellate Division, First Department, unanimously held that because the record failed to disclose whether seller's work conformed to board-approved plans or might require the purchaser to make further alterations to comply with law or the co-op's rules, the court could not summarily determine disposition of the contract deposit.

In *16 East 96th Apartment Corp. v. Neubohn*,[13] the co-op claimed that the apartment owners made alterations without board consent and sued to remove same. The record revealed that detailed specifications regarding air conditioning systems and activation of fireplaces were not submitted prior to execution of the alteration agreement and the scope of board approval was therefore unclear. As a result, the court could not summarily determine the parties' rights and ordered a trial.

A Few Words of Caution

While boards are generally afforded wide latitude with regard to apartment alterations, where boards improperly withhold consent to a proposed alteration, punitive damages may be awarded to the thwarted apartment owner. In *Bishop v. 59 West 12th Street Condominium*,[14] the Appellate Division, First Department, unanimously reinstated an owner's claim for punitive damages where the board halted alterations in a commercial unit although the owner had the right to make such alterations without board consent. The owner alleged that the board initially granted but then withdrew consent at a meeting where no quorum was present and at the behest of a board member whose property could have been adversely impacted, and that the DOB had twice rejected the board's attempt to withdraw its approval. The court held that if such allegations proved true, punitive damages would be warranted.

When stipulations are entered into to permit stopped work to proceed, all conditions necessary to resume work should be spelled out, including the owner's payment of all professional fees incurred by the board.

And in *Babeli v. 7-11 East 13th Street Corporation*,[15] although punitive damages were not at issue, the court, in Supreme Court, New York County, granted an apartment owner's application to compel a co-op to allow her to proceed with a board-approved alteration to connect her apartment to space she "held" on the roof of the building. The court ruled that the co-op's attempt to halt the work was a pretext for compelling the owner to purchase additional co-op shares for the roof space.

Recommendations

Boards should ensure that their alteration agreements reflect the current state of the law so that the building and owners are fully protected during an apartment alteration project.[16] Such agreements should include provisions that allow work to be stopped if an owner breaches the agreement and require removal of unauthorized alterations. The use of such stop-work provisions, backed up by owner consents to court-ordered stop-work injunctions, should improve management of alteration time-frames, so that alteration projects do not exceed their designated completion dates.[17]

When stipulations are entered into to permit stopped work to proceed, all conditions necessary to resume work should be spelled out, including the owner's payment of all professional fees incurred by the board. Alteration agreements should clearly and broadly allow boards to recoup attorney's fees and costs relating to the alteration. And boards should ensure that they are indemnified for costs stemming from third-party claims. Finally, board actions regarding alterations should be made in good faith and otherwise conform to the business judgment rule, so that boards properly discharge their fiduciary duty and avoid exposure to punitive damages.

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1. Richard Siegler and Eva Talel, "Apartment Alterations—Revisited," NYLJ, May 7, 2003, p. 3, col. 1.
2. 16 A.D.3d 248 (1st Dept. 2005).
3. 63 A.D.3d 701 (2d Dept. 2009). The court cited *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147 (2003), where the Court of Appeals reiterated the primacy of the business judgment rule when co-op or condominium board actions are challenged, to support its holding that no judicial inquiry was permissible, as a matter of law. See also, *Trump Village Section 3 Inc. 4. v. New York State Housing Finance Agency*, 292 A.D.2d 156, 157-158 (plaintiff's agreement's waiver of any and all claims barred plaintiff's recovery); *Molander v. Pepperidge Lake Homeowners Association*, 25 Misc.3d 1231(A), 2009 WL 4040329 (Sup. Ct. Suffolk County) (challenge to board's decision to consider post-construction approval of alteration upon payment of a fee by apartment owner is subject to review under the business judgment rule, and plaintiff's conclusory allegations of selective enforcement are insufficient to defeat grant of the board's motion for summary judgment dismissing all claims).
4. 65 A.D.3d 332 (1st Dept. 2009).
5. 16 A.D.3d 248. In *Silverman*, the proprietary lease provided for recovery of attorney's fees only if two conditions were satisfied: (i) the shareholder commenced the action, and (ii) the co-op successfully defended it. Further, the provision required that fees and disbursements be reasonable. The owners argued that the co-op must also be the prevailing party in the action. Although the words "prevailing party" did not appear in the proprietary lease, the court interpreted the requirement of successful defense of the action to mean that the co-op must be the prevailing party and must be awarded substantial relief and prevail on the owners' central claims. Compare this more stringent standard with *Batsidis*, where the court upheld an attorney's fee provision without requiring that the co-op prevail nor that its fees be reasonable in amount.
6. 65 A.D.3d 879 (1st Dept. 2009).
7. 75 N.Y. 2d 530, (1990).
8. NYLJ Sept. 8, 2009, p.18, col. 1 (Sup. Ct. N.Y. Co.).
9. 47 A.D.3d 743 (2d Dept. 2008).
10. 42 A.D. 3d 356 (1st Dept. 2007).
11. 25 A.D. 3d 364 (1st Dept. 2006).
12. 9 A.D.3d 263 (1st Dept. 2004).
13. 25 Misc. 3d (1203) (a), 2006 WL 6351 531 (Sup. Ct. N.Y. Co.).
14. 66 A.D.3d 401 (1st Dept. 2009).
15. NYLJ, Dec. 3 2003, p. 22, col. 3 (Sup. Ct. N.Y. Co.). While the court directed that the alteration work be permitted to proceed, it left the issue of the owner's obligation to purchase additional shares attributable to the altered space to be resolved at a later date. See also, *Residential Board of Managers of the Columbia Condominium v. Alden*, 178 A.D.2d 121 (1st Dept. 1991).
16. The New York City Bar will shortly publish on its Web site a new Model Form of Alteration Agreement. The Real Estate Board of New York also maintains standardized forms of alteration agreements on its Web site.
17. See, Siegler and Talel, "Apartment Alterations—Revisited," supra, note 1, which discusses techniques for facilitating the timely completion of alteration projects.