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THE GUARANTY LAW CONTINUES TO DIVIDE OPINION

By Matthew J. Schenker and Joshua Kopelowitz

In our article in the October 2022 issue, we discussed NYC Administrative Code §22-1005 (the Guaranty Law), which, under certain conditions, cancelled the obligations of guarantors of commercial leases. This article discusses the recent developments surrounding the constitutionality of the statute. In particular, we address the Southern District's view that the Guaranty Law is unconstitutional and the splintered view of the statute's constitutionality expressed by New York State courts.

THE SOUTHERN DISTRICT HOLDS GUARANTY LAW UNCONSTITUTIONAL

In *Melendez v. City of New York*, 503 F.Supp.3d 13 (S.D.N.Y. 2020), a group of landlords sued the City of New York in the United States District Court for the Southern District of New York for a declaration that the Guaranty Law was unconstitutional under the Contracts Clause of the Federal Constitution. On Nov. 25, 2020, the District Court issued a decision upholding the Guaranty Law against constitutional challenges. *See, id*. The District Court's decision was appealed to the Second Circuit. On appeal, the Second Circuit identified serious concerns about the Guaranty Law being a "reasonable and appropriate" means to serve the City of New York's proffered purpose — to help shuttered businesses survive the pandemic. *Melendez v. City of New York*, 16 F.4th 99, 1038–47 (2d Cir. 2021). Accordingly, the Second Circuit vacated the dismissal and remanded the action back to the District Court for further proceedings.

On remand, the District Court evaluated the constitutionality of the Guaranty Law according to the guidelines set forth in *Sullivan v. Nassau Cty. Interim Fin. Auth*., 959 F.3d 54 (2d Cir. 2020), asking: "(1) whether the contractual impairment is substantial and, if so, (2) whether the law serves a legitimate public purpose such as remedying a general social or economic

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problem and, if such purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and necessary." *Melendez v. City of New York,* 668 F.Supp.3d 184, 187 (S.D.N.Y. 2023).

The District Court held that the contractual impairment on landlords was substantial, and that the City's passage of the law in response to the economic impact of the Covid-19 pandemic was for a legitimate public purpose. *Id.* at 197–98. However, the District Court held that the means the City of New York used to advance that purpose were not "reasonable in their design." *Id.* at 199. This was because, among other reasons: i) the law was a permanent, not temporary, impairment of contracts; ii) the record did not support the City of New York's assumption that shuttered small businesses are usually owned by the individuals guaranteeing their leases; and iii) the law's burden was placed exclusively on landlords. *Id*. at 200–07. Accordingly, the District Court held the Guaranty Law to be unconstitutional. *Id.* at 207. This decision is currently on appeal to the Second Circuit.

NEW YORK COURTS ARE DIVIDED ON CONSTITUTIONALITY

Melendez did not finally resolve the constitutionality of the Guaranty Law. New York state courts are not bound by *Melendez* because the interpretation of a Federal constitutional question by a lower Federal court is not binding on New York state courts. *People v. Kin Kin*, 78 N.Y.2d 54, 60 (1991).

Nevertheless, the reasoning in *Melendez* has already been adopted by trial level courts in New York several times. *See, Robert T. Iannucci. v. Prime Four Inc. d/b/a Forno Rosso*, Index No. 527321/2021, NYSCEF Doc. No. 108, at p. 11 (Sup. Ct. Kings Cty., July 27, 2023) ("the Court adopts the reasoning in Melendez and permits plaintiffs to seek unpaid rent and arrears for the periods covered by the Guaranty [Law]"); *370 8th Ave. Group, LLC v. Burke*, 2023 WL 8436038 (Sup. Ct. N.Y. Cty. Dec. 4, 2023) (finding Guaranty Law unconstitutional pursuant to reasoning in *Melendez*); *APF 28 W 44 Owner L.P.*, 2023 WL 7997662 (Sup. Ct. N.Y. Cty. Nov. 15, 2023) ("[t[his court agrees that the reasoning in Melendez is thorough and sound"); *Pearlbud Realty Corp. v. Eagle Pedicab Inc.,* 2023 WL 6465015 (Sup. Ct., N.Y. Cty. Oct. 2, 2023) (same); *Mark Propco LLC v. Noro*, 2023 WL 5750432, at *2 (Sup. Ct. N.Y. Cty., Aug. 30, 2023) (same); *Donqi 79 Alumni, Inc. v. United Pos Inc.*, 2023 WL 4234297, at *3 (Sup. Ct. N.Y. Cty. June 27, 2027) (dismissing affirmative defense based on Guaranty Law due to *Melendez* decision); *Kensington House NY LLC v. Accardi*, 2023 WL 3505284, at *2 (Sup. Ct. N.Y. Cty., May 17, 2023) ("the Court adopts the reasoning in Melendez and permits plaintiff to amend to seek unpaid rent … for the period previously covered by Section 22-1005."); *1325 Fifth Ave., LLC v. Yuryeva*, 2023 WL 3304213, at *1 (Sup. Ct. N.Y. Cty., May 3, 2023) (dismissing affirmative defense based on Guaranty Law due to *Melendez* decision).

Yet, the trial courts are not all following *Melendez*. Two state court decisions have reached a contrary conclusion. In *141 Avenue A Associates, LLC v. Sneak EZ LLC,* 80 Misc.3d 1225(A), at *1 (Sup. Ct. N.Y. Cty. Oct. 9, 2023) the trial court, noting that it was not bound by *Melendez*, relied on its earlier holding in *45-47-49 Eighth Avenue LLC v. Conti,* 72 Misc.3d 1210(A) (Sup. Ct. N.Y. Cty. July 23, 2021) that the statute was constitutional. Likewise, in *M & E Mott, LLC v. Dirty Hands Jewelry Corp*., 2023 WL 8456284 (Sup. Ct. N.Y. Cty. Dec. 1, 2023), the trial court declined to apply *Melendez* and, instead, denied plaintiff-landlord's request to amend its complaint to add a breach of guaranty claim.

The Appellate Division has not yet ruled on the constitutionality of the Guaranty Law. However, on appeal of the decision in *Conti*, the First Department reversed the dismissal of the guaranty claims and remanded the constitutional question "so the parties can further develop the record in the trial court for the purpose of applying the Contracts Clause test for constitutionality." *45-47-49 Eighth Avenue LLC v. Conti,* 220 A.D.3d 473, 474 (1st Dep't 2023).

It seems inevitable that the Appellate Division will directly address the constitutionality of the Guaranty Law. New York practitioners will be watching closely.

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DEVELOPMENT

ZBA's Abandonment of Its Prior Determination Invalid

Matter of Upper Delaware Hospitality Corp. v. Town of Tusten Zoning Board of Appeals (ZBA)
2024 WL 117275, AppDiv, Third Dept. (Opinion by Aarons, J.)

In landowner's article 78 proceeding challenging the ZBA's abandonment of its decision to dismiss neighbors' appeal challenging the issuance of a certificate of occupancy, neighbors appealed from Supreme Court's grant of the petition and declaration that the abandonment was invalid. The Appellate Division affirmed, holding that because the abandonment was not unanimous, it was invalid under the town code.

In 2020, the town granted landowner a special use permit to convert its property into an eating and drinking establishment. Landowner obtained a building permit, and then, in October 2021, a certificate of occupancy. In January 2022, neighbors, lessees of property across the street, submitted an appeal to the ZBA challenging issuance of the certificate of occupancy. By a vote of 4-1, at its February 2022 meeting, the ZBA dismissed the appeal as untimely. Later, at that same meeting, the ZBA also by a 4 to 1 vote, passed a resolution abandoning dismissal of the appeal and scheduling a rehearing. Before any rehearing, landowner brought an article 78 proceeding seeking to annul the determination to rehear. Supreme Court granted the petition, and neighbors appealed.

In affirming, the Appellate Division relied on a town code provision that provides that for a rehearing of a decision of the ZBA a motion must be "adopted by unanimous vote of the members present." Because the vote was not unanimous, the motion to reconsider was invalid, and the initial determination dismissing the appeal was in full force and effect.

Denial of Area Variance Upheld

Kami Holding Corp. v. Zoning Board of Appeals (ZBA) of the Village of Westbury
2024 WL 253204, AppDiv, Second Dept. (memorandum opinion)

In landowner's article 78 proceeding to review denial of an area variance, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that the ZBA's determination was not arbitrary or capricious.

Landowner owns a 5,051 square foot lot with a frontage of 40 feet on one street and 45.65 feet on another street in a district that requires 6,000 feet of minimum lot size and 60 feet of frontage and lot width. When the Department of Buildings denied a building permit for a two-story home, landowner sought area variance. The ZBA denied the variances, and Supreme Court then denied landowner's article 78 petition.

In affirming, the Appellate Division first rejected landowner's argument that its application should have been treated as a special use permit application rather than a variance application. The court noted that under the village code, the Board of Trustees, and not the ZBA, is authorized to hear special permit applications. The court then held that the ZBA engaged in the required balancing test, and noted that the area variances were substantial. The court therefore found that the ZBA's determination was not arbitrary.

LEASE OF TOWN PROPERTY UPHELD; PROPERTY NOT SUBJECT TO PUBLIC TRUST

Waller v. Town of Brookhaven

2024 WL 172910, AppDiv, Second Dept. (memorandum opinion)

In an action by neighbors to enjoin the town from leasing property to a yacht club, neighbors appealed from Supreme Court's grant of summary judgment dismissing the complaint. The Appellate Division affirmed, holding that the subject property was not impressed with a public trust.

In 1975, the town purchased property that had been leased by the prior owners to the yacht club. The town then leased the property to the yacht club for continued use as a yacht club open to residents of the town and others. As the lease was approaching expiration, plaintiff marina LLC submitted a proposal to lease the property for use as a restaurant. The yacht club also submitted an offer to continue its existing use. After a public hearing, the town accepted the yacht club's offer. The marina LLC and neighbors then brought this action to enjoin the town from leasing to the club. Supreme Court granted summary judgment to the town.

In affirming, the Appellate Division held first that the town had never dedicated the property to public use, and therefore no public trust was ever created by implication. The court also concluded that the lease agreement was not arbitrary and capricious because the record demonstrated a rational basis for the town's determination to accept the club's offer, which was only marginally less than the marina LLC's offer.

EAST SIDE REZONING UPHELD AGAINST SEQRA CHALLENGE

Matter of 301 East 66th Street Condominiums Corp. v. City of New York

2024 WL 436463, AppDiv, First Dept. (memorandum opinion)

In a combined article 78 proceeding and declaratory judgment action challenging a rezoning, neighbor appealed from Supreme Court's denial of the petition and dismissal of the declaratory judgment cause of action. The Appellate Division affirmed, holding that the environmental impact statement was adequate and the rezoning did not constitute unconstitutional spot zoning.

At the behest of the New York Blood Center, the city rezoned an area on Manhattan's East Side to permit the Blood Center to modernize its current facilities. The Environmental Impact Statement (EIS) compared the impact of the proposed project with the impact of the Blood Center's construction of a new as-of-right facility that conformed to the pre-existing zoning ordinance and found no increase in hazardous exposure. Neighbor challenged this finding and also contended that the rezoning constituted spot zoning. Supreme Court upheld the rezoning and neighbor appealed.

In affirming, the Appellate Division held that, based on the EIS, the city rationally determined that there would be no increase in risk as a result of the proposed zoning change. The court then rejected neighbor's spot zoning challenge, concluding that the rezoning did not benefit only one owner, but instead, brought existing properties with nonconforming lots into conformity, and also served the city's plans to encourage the

life sciences injury by enhancing synergies between the Blood Center and hospitals and research institutions in the neighborhood.

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LANDLORD & TENANT LAW

PARTIAL CONSTRUCTIVE EVICTION DEFENSE RECOGNIZED

Black Quarry Millwork, LLC v. Sandy Littman Realty Corp.

2023 WL 8814771, AppDiv, First Dept. (memorandum opinion)

In commercial tenant's action for a declaratory judgment that it is not in breach of the lease, landlord appealed from Supreme Court's denial of its motion for summary judgment. The Appellate Division affirmed, holding that questions of fact remained about tenant's partial constructive eviction defense.

Tenant's business requires a fire sprinkler system. The City of Newburgh discontinued fire water supply services to the premises, citing deficiencies in the water supply system. Tenant asked landlord to remedy the deficiencies, but landlord asserted that the owner of neighboring property was responsible for remedying those deficiencies. Tenant then stopped paying rent and brought a declaratory judgment action to establish that it was not in breach of the lease. Landlord counterclaimed for unpaid rent and use and occupancy. Supreme Court awarded landlord summary judgment on its counterclaim for tenant's failure to comply with an order to post a bond or pay use and occupancy, but otherwise denied landlord's summary judgment motion. Landlord appealed.

In affirming, the Appellate Division concluded that tenant's principal's affidavit created issues of fact about partial constructive eviction, which would abate tenant's responsibility to pay rent. The court indicated that questions of fact existed about the extent of any eviction and about landlord's responsibility for the water shortage. The court also concluded that questions of fact remained about whether landlord breached the express covenant of quiet enjoyment and the lease obligation to deliver the premises free of orders, restrictions, and decrees. The court indicated that the lease was ambiguous about landlord's obligation to remediate the water supply condition.

COMMENT

Generally, the tenant must abandon the premises to avail herself of the doctrine of constructive eviction. In *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 83, the Court of Appeals held that the tenant's partial constructive eviction claim should have been dismissed because the tenant remained in possession of the demised premises. In *Barash*, the tenant claimed that he was constructively evicted because it the premises were inhabitable due to a lack of ventilation after business hours. The Court held that even if the tenant could establish the lack of ventilation constituted a wrongful act by the landlord that deprived the tenant of the beneficial enjoyment or actual possession of the demised premise, the tenant's constructive eviction defense would fail because it is inequitable for the tenant to remain in possession without payment of rent.

In the First and Second Departments, the courts have held that the tenant can assert a partial constructive eviction claim if the tenant actually abandoned part, but not all, of the premises. In *Mijak Co. v. Randolph*, 140 A.D.2d 245, in a proceeding by landlord, the First Department held that a tenant was entitled to assert partial constructive eviction as a defense to the nonpayment of rent, when tenant abandoned the music studio portion of the demised premises due to the landlord's acts in making that portion of the premises unusable by the. In *Oresky v. Azouni*, 232 A.D.2d 463, in landlord's action for rent, the Second Department held that because the tenant was constructively evicted from her roof terrace, tenant was entitled to a rent abatement equaling 100% of the value of using the terrace for 32 months. The landlord removed and failed to replace wooden decking from the terrace for 32 months, which rendered the terrace unusable. However, in both cases, the tenants prevailed on their constructive eviction defenses when they actually vacated part of the premises

By contrast, the Fourth Department took a different approach, rejecting a partial constructive eviction defense but instead holding that tenant could asset a counterclaim of breach of covenant in response to landlord's nonpayment claim. In *Perry Properties v. Servico Protective Covers, Inc.*, 59 A.D.2d 1014, tenant responded to landlord's nonpayment claim by asserting a partial constructive eviction defense and two counterclaims in an amount that exceeded the rent due. The court rejected the constructive eviction defense because tenant remained on the premises, but held that the landlord's judgment for rent should be stayed pending consideration of tenant's counterclaims.

Unless tenant in *Black Quarry* abandoned part of the premises, the case appears to extend the First Department's rule in *Mijak* which, had suggested that tenant must abandon part of the premises to prevail on a partial constructive eviction defense.

CONDITION PRECEDENT TO SUB-SUBLEASE NOT SATISFIED

OKL Holdings, Inc. v. Abercrombie & Fitch Stores, Inc.

2024 WL 117271, AppDiv, First Dept\. (memorandum opinion)

In sub-sublandlord's action for breach of a sub-sublease, both parties appealed from Supreme Court's denial of sub-subtenant's motion to dismiss and denial of sub-sublandlord's cross-motion for sanctions. The Appellate Division modified to dismiss the complaint, holding that a condition precedent to the effectiveness of the sub-sublease had not been satisfied.

The parties executed a sub-sublease which stated that it was contingent on obtaining written consent from the landlord, the tenant, the sub-sublandlord, and the sub-subtenant — the last two of which were the parties to the action. The landlord, the tenant, and the sub-sublandlord signed the landlord consent, but the sub-subtenant did not. Sub-sublandlord then brought this breach of contract action, and sub-subtenant moved to dismiss based on its own failure to execute the landlord consent. Supreme Court denied the motion to dismiss, but also denied sub-sublandlord's motion to dismiss. Both parties appealed.

In modifying, the Appellate Division rejected sub-sublandlord's argument that the prevention doctrine prohibited the sub-subtenant from asserting the failure of a condition that the sub-subtenant caused to fail. The court held that sub-subtenant had not prevented any other person from performing an obligation. Instead, it had merely declined to execute the landlord consent, which it had not duty to execute. The court then agreed with Supreme Court that tenant's motion to dismiss was not frivolous and did not warrant sanctions

GUARANTY LAW DOES NOT BAR LIQUIDATED DAMAGES CLAIM

3rd and 60th Associates Sub LLC v. Zavolunov

2024 WL 157039, AppDiv, First Dept. (memorandum opinion)

In landlord's action against guarantor to recover liquidated damages under a commercial lease, landlord appealed from Supreme Court's dismissal of the complaint. The Appellate Division reversed holding that neither res judicata nor the Guaranty Law barred landlord's claim.

Guarantor guaranteed tenant's obligations under a lease for tenant's use of the premises as a restaurant. The lease provided that if landlord re-entered the premises after tenant's default, landlord would be permitted to re-let as tenant's agent. Tenant would remain liable for the monthly deficiency in the amount collected by landlord. The lease also provided that the liquidated damages provision and the guaranty of liquidated damages would survive lease termination. In October 2019, landlord brought a nonpayment proceeding against tenant which was settled by a February 2020 stipulation under which tenant consented to a warranty of eviction on condition that tenant pay monthly use and occupancy through August 2020 as if the lease had not expired. Tenant did not make the March 1, 2020, use and occupancy payment and ultimately surrendered the premises on Sept. 28, 2020. When landlord brought an action to recover rent accrued through August 2020, the court held that the claim against guarantor was barred by the Guaranty Law. Then, in this action, landlord sought liquidated damages from July 2021 through the end of the lease term. Supreme Court dismissed on res judicata grounds, and landlord appealed.

In reversing, the Appellate division first held that res judicata did not apply because landlord was seeking damages due subsequent to the entry of the order in the earlier action. The court then held that the February 2020 stipulation did not bar landlord's claim because it did not modify tenant's liability for liquidated damages, and the lease itself provided that liquidated damages would survive termination of the lease. Finally, the Guaranty Law did not bar landlord's recover of damages accruing after the law's expiration, notwithstanding that tenant's initial default occurred during the Guaranty Law's period.

PENALTY FOR IMPROPER CONVERSION OF RESIDENTIAL BUILDING

Kwok v. City of New York Office of Administrative Trials and Hearing

2024 WL 156801, AppDiv, First Dept. (memorandum opinion)

Landlord appealed from a determination imposing a penalty of $240,000 for landlord's conversion of a residential building from two dwelling units to six. The Appellate Division modified to reduce the penalty to $60,000, but otherwise confirmed the determination.

Landlord's building had a certificate of occupancy for two dwelling units when landlord converted it to a six-unit building. Four separate summonses were issued, one for each illegal unit. The appeals board imposed the standard penalty of $15,000 for each of the dwelling units in excess of those permitted by the certificate of occupancy, but also imposed additional penalties of $45,000 for each violation based on provisions authorizing a separate penalty of $1,000 per day for each day a violation is not corrected, up to a maximum of 45 days. Landlord appealed.

In reducing the penalty, the Appellate Division confirmed the standard penalty, but held that the record contained no evidence supporting the additional penalty.

FORCE MAJEURE CLAUSE REDUCES PANDEMIC-ERA RENT

Experience N.Y. Now Inc. v. 126 West 34th Street Associates LLC

2024 WL 478472, AppDiv, First Dept. (memorandum opinion)

In commercial tenant's action for breach of contract, tenant appealed from Supreme Court's denial of tenant's motion seeking summary judgment on its breach of contract claim and seeking dismissal of landlord's counterclaim for rent due. The Appellate Division modified to reduce the amount due for the period during which state law required tenant to close during the pandemic, but otherwise affirmed.

Tenant leased retail space for sales of tourist apparel, general merchandise, and food. Tenant closed its business on or about March 20, 2020 when the state implemented its "PAUSE" program in response to the pandemic. Tenant stopped paying rent from that day through the expiration of the lease on Sept. 30, 2021.When tenant brought this action for breach of contract, Supreme Court awarded summary judgment to landlord on its counterclaim for $1,067,001.95 plus statutory interest. Tenant appealed.

In modifying the Appellate Division held that the government regulation that required nonessential businesses to close constituted a "force majeure" which frustrated the purpose of the lease and excused tenant from payment of rent for the period during which retailers were required to close. But the court then held that tenant became liable for rent again beginning on June 8, 2020 when retailers were permitted to offer curbside pickup and dropoff services. The court held that the force majeure provision did not permit tenant to terminate the lease unilaterally.

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REAL PROPERTY LAW

CONTRACT LANGUAGE DOES NOT BAR PURCHASER'S RECOVERY OF PREJUDGMENT INTEREST

IHG Harlem 1 LLC v. 406 Manhattan LLC,

2024 WL 157401, AppDiv, First Dept. (Opinion by Kapnick, J.)

In purchaser's action to recover a deposit paid to a breaching seller, purchaser appealed from Supreme Court's denial of prejudgment interest. The Appellate Division modified to award prejudgment interest, holding that the contract language did not bar an award of interest.

Three contracts of sale between the parties required sellers to obtain assignments of mortgages on the properties. Sellers failed to obtain the assignments, which resulted in a prior judgment concluding that sellers had breached the sale contract. The sale contracts also provided that purchaser's sole remedy for seller's failure to convey would be either specific performance or return of its deposits. In a prior action, the Appellate Division concluded that because seller elected not to seek specific performance, its sole remedy was return of its deposits. When the parties then proposed judgments to Supreme Court, purchaser proposed a judgment for the deposits plus seven years of prejudgment interest. Supreme Court signed the judgment proposed by seller, which provided for return of the deposits without interest. Purchaser appealed.

In modifying to award prejudgment interest, the court relied on CPLR 5001(a) which provides that prejudgment interest "shall be recovered upon a sum awarded because of a breach of performance of a contract." The court distinguished cases in which courts had declined to award statutory prejudgment

interest, noting that in those cases, the nonbreaching parties had already been made whole or the parties had contracted around CPLR 5001(a) or interest would have been a windfall to the nonbreaching party. In this case, none of those circumstances applied, and purchaser was entitled to statutory interest.

COMMENT

In *Spodek v. Park Property Development Associates*, 96 N.Y.2d 577, 581, the court found that the plain language of CPLR 5001(a) mandates awarding interest to a breach of contract verdict, even when the judgment was based on a note that included interest as well as principal. The court held that prejudgment interest was appropriate because "a debtor 'who has had the use of the money has presumably used the money to its benefit and … has realized some profit … from having it in hand during the pendency of the litigation." 96 N.Y.2d 577, 581. The court recognized that the purpose of awarding interest is to make an aggrieved party whole and compensating the aggrieved party for the loss of that benefit. *Id*.

However, CPLR 5001(a) does not entitle a non-breaching party to statutory interest on a deposit, if the contract clearly and explicitly waived the right and provides for an alternative form of interest. In *J. D'Addario & Co., Inc. v. Embassy Industries, Inc.*, 20 N.Y.3d 113, the court denied prejudgment interest to a non-breaching party when the contract provided that return of the non-breaching party's deposit, which was to be held in an interest bearing account, was to be the "sole remedy" available in case of breach. The court held that unless offensive to public policy, the contract language providing specified exclusive remedies should preclude an award of prejudgment interest. The court noted that the provision for bank-accrued interest, together with the sole remedy language, were equivalent to an express waiver of the statutory provision for prejudgment interest.

IHG Harlem I LLC v. 406 Manhattan LLC, N.Y.S.3d, establishes that language purporting to make return of the deposit an exclusive remedy does not, in the absence of a provision for compensation in lieu of statutory interest, deprive a judgment creditor of statutory interest. In *IHG Harlem*, the court distinguished *J. D'Addario & Co., Inc.*, noting that in that case, the parties were entitled to bank-interest by the terms of the contract and had therefore been compensated for the loss of the use of their money.

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CO-OPS AND CONDOMINIUMS

HOUSING DISCRIMINATION CLAIM DISMISSED

Levy v. 103-25 68th Owners, Inc.

AppDiv, Second Dept. (memorandum opinion)

In an action by former co-op shareholders alleging that the co-op corporation had engaged in housing discrimination and had acted outside the scope of its authority, the co-op corporation appealed from Supreme Court's denial of its motion to dismiss. The Appellate Division reversed and dismissed holding that shareholders' conclusory allegations were insufficient to survive a motion to dismiss.

Plaintiff shareholders had been engaged in noise disputes with occupants of a neighboring apartment. After unsuccessful attempts to mediate the dispute, the co-op board voted to terminate plaintiff shareholder's

lease and brought eviction proceedings. Shareholders moved out, sold their shares, and brought this action alleging discrimination against them for having children, acting in bad faith, and exceeding the scope of their authority. Supreme Court denied the co-op corporation's motion to dismiss, and the corporation appealed.

In reversing, the Appellate Division cited the business judgment rule. Although the court noted that the rule does not apply when the board acts outside its authority, the court emphasized that the amended complaint, as amplified by plaintiff shareholder's evidentiary submissions failed to set fort acts outside of the board's cope of authority. The court also noted that the assertions of discriminatory motive were conclusory without any factual basis.

CO-OP DID NOT BREACH SHAREHOLDER'S GUARANTY AGREEMENT

Churchill Owners Corp. v. Kent

2024 WL 234871, AppDiv, First Dept. (memorandum opinion)

In co-op corporation's action on a shareholder's guaranty, shareholder appealed from Supreme Court's grant of summary judgment to the co-op corporation. The Appellate Division affirmed, holding that the guaranty was absolute and not conditioned on transfer of the shareholder's right to possession of the apartment.

Shareholder's father occupied the apartment and owned the associated shares. The father sought to transfer the shares to his family trust, which was to pass to his son at the father's death. As a condition of the transfer, the co-op insisted on the son's personal guaranty, and the consent letter from the corporation to shareholder's father provided that the father was the sole authorized occupant and that no other person would have the right to occupy the apartment without the corporation's consent. When the father died, the shareholder did not make payments of all maintenance obligations. The co-ops barred shareholder from access to the apartment. The co-op corporation brought this action on shareholder's guaranty. Supreme Court granted summary judgment to the coop corporation.

In affirming, the Appellate Division held that the co-op did not breach the guaranty by refusing to permit the shareholder to occupy he apartment until conditions in the bylaws were fulfilled. Those conditions require payment of all sums due to the cooperative before a transfer of shares may take effect, and shareholder did not pay maintenance and other amounts due following his father's death.

CO-OP NOT EXEMPT FROM LEAD PAINT MANDATE

E.S. v. Windsor Owners Corp.

2024 WL 234992, AppDiv, First Dept. (Opinion by Oing, J.)

In an action by tenant of a co-operative apartment against shareholder and the co-op corporation for damages incurred by her child's exposure to lead paint the co-op corporation appealed from Supreme Court's grant of summary judgment to tenant, and from grant for shareholder's motion to dismiss the corporation's cross-claim for indemnification. The Appellate Division affirmed, holding that the co-op corporation did not qualify for an exemption from Local Law 1's lead paint mandate.

Shareholder sublet the subject unit to tenant without the co-op corporation's consent. Shareholder knew that tenant had a child under 7 in the apartment but did not inform the co-op corporation of that fact. The corporation's agents, including the building doorman, did, however, know of the sublease and of occupation by the tenant. Tenant discovered that her child suffered from lead poisoning. When tenant brought this action, the co-op corporation disclaimed liability, and cross-claimed against unit owner for indemnification. Supreme Court granted tenant summary judgment against both tenant and the co-op corporation and dismissed the cross-claim. The co-op corporation appealed.

In affirming, the Appellate Division first held that the co-op corporation was on constructive notice that tenant had a child under 7 in the apartment because tenant had introduced herself and her child to building agents, including the doormen. The court then turned to Local Law 1's exemption in cases where a co-operative or condominium unit owner occupies the dwelling unit. In this case, the court concluded that the shareholder did not occupy the unit, despite the co-op's assertion that the shareholder's reservation of a right to of access for repairs or improvements constitutes occupation. The court then held that the co-op corporation was not entitled to indemnification under the terms of the proprietary lease because General Obligations Law section 5-321 precludes the co-op from obtaining indemnification for its own negligence.

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