ADAM LEITMAN BAILEY, P.C.

NEW YORK REAL ESTATE ATTORNEYS

Newsletter
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Articles

How to Run A Board Meeting

Adam Leitman Bailey explains how using Robert's Rules of Order can assist with effective and productive board meetings in real estate matters.

"The holding of assemblies of the elders, fighting men, or people of a tribe, community, or city to make decisions or render opinion on important matters is doubtless a custom older than history," notes Robert's Rules of Order, Newly Revised ("Robert's Rules"). This resulted in the need for rules of procedures to organize and obtain results.

Using a simplified version of Robert's Rules, cooperative and condominium boards of directors and managers have been able to run effective, efficient and productive board meetings that assist, run and decide important and unimportant matters for their buildings.

The most important objectives of Robert's Rules are (a) to set goals or an agenda for the board meeting, (b) to keep the meeting streamlined and on topic, (c) to allow everyone to have input without allowing one or more board members to highjack the meeting, (d) to ensure that there is discussion of important matters

and (e) that votes are cast to decide policies of the cooperative or condominium that the board deems necessary and appropriate to the interests of the cooperative or condominium building and its shareholders or unit owners.

The Agenda

To keep everyone focused and tempers restrained, I have always suggested that the agenda be long enough to get results, but short enough to achieve the silent goal of the agenda—a productive meeting lasting no more than an hour. I have always noticed, in the thousands of meetings I have attended in my career, that those meetings where bread is broken are not only more productive but result in better behavior. I have also noticed that in a few cases food can be a distraction. I have seen boards provide pizza or desserts at every meeting, and many more buildings have no food at all.

The agenda should be prepared in advance, and board members should be prepared from recommendations submitted by all board members, the building's manager/super and compiled by a designated agent or managing agent who makes it into a workable document. I suggest putting the most important topics earlier in the meeting, but if any topic is likely to require prolonged discussion, to place topics that will take very little time before the one requiring prolonged discussion.

Making a Motion: Step 1 in Attempting to Vote

The goal of a motion is to have an idea or item that a board member wants/decided/agreed to by a majority (51%) of the board. The board member makes a motion by stating I make a motion for [fill in the blank].

The Second

If the motion is not seconded or if another person does not vote to support or agree with the motion being proposed, the motion does not go forward. The second can be made by voice, "I second the motion" or by raising your hand after someone says "is there a second for the motion?"

Discussion

Once the motion is seconded, the floor or meeting is open for discussion. The person running the meeting will call on persons raising their hand in turn to speak one at a time. Once everyone has a turn to speak that wants to speak, a vote on the motion is taken.

Calling A Vote

Any board member can move to end discussion and/or call a vote on the motion at any time. If the deflation or motion to end the discussion is challenged, then a formal motion must be made to end discussion on the motion and to call a vote on the motion. The board member making this motion cannot start a new discussion or do anything else other than vote to end discussion and call a vote on the current motion. Once seconded to end the discussion, the voting to end discussion begins.

If a majority vote is not received or, more frequently, if the person running the meeting does not get a unanimous "all in favor of calling a vote on the motion," then discussion shall continue until "we have a majority ready to vote up or down or yes or no on the motion, or until an amendment to the motion is made, or a motion to deal with this motion at a subsequent meeting once more information is gained, is made."

Voting

The person running the meeting can call for an oral vote or a paper ballot where everyone votes at once. If a board member wants the votes in the minutes and recorded, an objection may be made, and an alternative

voting means will be adopted. If there is a debate on which way to vote, a motion must be made on the voting protocol, and a majority vote will decide how voting will take place—usually raising a hand, roll call, voice voting or private ballots. In all cases, majority vote or one more than half wins, and the action voted on passes.

Amending a Motion

Many times, board members agree with the decision or action to be taken by the building and board but desire to change the wording of the motion or add something to the original motion that may have been forgotten or that strengthens the motion. The amended motion follows the same path as the path taken when making a motion, and the person in charge of the meeting (or "Chair") declares "making a motion to amend the motion to add… Is there a second…" And then the discussion leads to a vote on the proposed amendment.

Point of Order

One of the most essential rules for a well-run meeting is that every person speaks uninterrupted. However, Robert's Rules provide that when a particular Robert's Rule is not being followed, a speaker can be interrupted. That person interrupting the speaker must declare "Point of Order," and the room freezes, and the person declaring "Point of Order" obtains the right to speak and explain how the current discussion at the meeting is being conducted in a manner that is in violation of a particular Robert's Rule. The Chair then either agrees with the Point of Order and halts the discussion or rejects the Point of Order by declaring the objector "out of order" and allows the discussion to continue.

Adjourning the Meeting

Most votes to adjourn the meeting are unanimous and called by the person running the meaning, by saying "all in favor of adjourning the meeting," and everyone usually answers "I." However, sometimes board members have one more topic that was not addressed and deemed important which they want to be discussed by the board. In every meeting I have ever attended, that board member gets an audience, but the meeting may nevertheless be adjourned and that topic handled at another time or not at all. Sometimes, however, that new last topic leads to significant debate and important decision making.

Point of Information

A person may rise to offer information that is considered necessary for the group. This provision is not used to offer debate.

Right to Speak and Present

The moderator of the meeting must give every member the same opportunities to present and speak without favoring any one board member. A person who has not spoken gets precedence in speaking before board members who have already spoken.

When a group agrees on a set of rules to follow, and they are followed every time, year after year, decade after decade, you trust that those rules and the resulting process engendered by those rules will work to help your meetings run smoothly. In my experience, in most cases, when a person running the meeting chose to not follow a Robert's Rules format, what then occurred was what would happen if that person were thrown a ball in a game he/she was playing for the first time without knowing what was happening. But, when followed, Robert's Rules works, and they have helped thousands of buildings to get results in helping their buildings in meeting their goals and tackling their problems, and in seeking answers and solutions to the tasks before them. The danger occurs when the rules are amended or shortened, like in the book "Animal Farm." Once a meeting does not have a set of rules to follow, usually one or two board members

are able to highjack the building, and that is when problems eventually start occurring. I have not seen any alternative to some form of Robert's Rules for Cooperatives and Condominiums, and for almost three decades, board meetings are running well—mostly because of the dedicated men and women serving to make their buildings better than how their buildings were run before they were on the board.

Read More

New York Law Journal

A Lender's Guide To Hiking Through the Retroactive Trails of the Foreclosure Abuse Prevention Act

Foreclosure Litigation Group
Adam Leitman Bailey | Jackie Halpern Weinstein | Danny Ramrattan

Lenders in New York are battling backwards to foreclose on loans that are indisputably due and owing. On Dec. 30, 2022, Governor Kathy Hochul signed into law the controversial Foreclosure Abuse Prevention Act (FAPA) in direct response to the New York State Court of Appeals' decision in Freedom Mtge. Corp. v. Engel, 37 N.Y.3d 1 (2021), which case confirmed and established circumstances under which a lender could deaccelerate a loan and re-restart the six-year statute of limitations to foreclose it.

Under FAPA, however, among several other rockfalls, a lender can no longer unilaterally deaccelerate a debt, resulting in countless cases where a borrower, who has not made a mortgage payment or paid property taxes in over a decade, will no longer have to repay his or her loan.

This article highlights the main statutory amendments of FAPA—that took effect immediately and retroactively—and endeavors to guide lenders on adjusting its practices and procedures as needed to rightfully pursue their rights and remedies to collect on the money that was borrowed.

Savings Statute: CPLR §205

CPLR §205, commonly referred to as the savings statute, provides a six-month grace period within which an originally timely action, including a foreclosure action, that was terminated and now outside of the statute of limitations, can be timely recommenced under several circumstances.

Savings Statute: Pre-FAPA. Pre-FAPA, CPLR §205 was necessarily used by lenders to recommence an action that would otherwise be time-barred by the statute of limitations, for relevant examples, when an action is dismissed for the technical failure to prove that a pre-foreclosure notice was properly mailed, or when an action is dismissed for an accidentally missed conference or court appearance. In these cases, it is undisputed that the money was borrowed and not repaid, but because the lender did not sufficiently prove the proper mailing of a pre-foreclosure notice, or because the lender missed a conference, the actions are

dismissed.

Oftentimes in these scenarios, in the time between the actions being commenced and then dismissed for these reasons, the notes and mortgages are sold and assigned to new lenders, who, as successors in interest, step into the shoes of the original plaintiff lenders and recommence the actions as needed using the Savings Statute. The Court of Appeals in Eitani confirmed for these scenarios that, for example in that case, Wells Fargo as assignee of the note and mortgage being foreclosed was entitled to the benefit of the Savings Statute, even though the prior action was commenced by and in the name of Wells Fargo's predecessor in interest. Id. at 199.

Additionally, in dismissed cases not on the merits, so long as there was no specific finding of neglect, the Savings Statute could be used. U.S. Bank Trust, N.A. v. Moomey-Stevens, 168 A.D.3D 1169, 1170-1171 (3d Dept. 2019); Eitani, 148 A.D.3d at 195.

Savings Statute: Post-FAPA. Post-FAPA, a successor in interest or an assignee of the original plaintiff in an action is seemingly no longer permitted to use the Savings Statute. In practice, this means, for example, that now when an action is dismissed for the lender failing to prove that a pre-foreclosure notice was properly mailed (not on the merits)—and that action was already pending for more than six years for settlement conferencing, motion practice, court delays, loss mitigation efforts, and/or the like, and during that time the loan being foreclosed was sold and assigned to a new lender (as most loans are expressly permitted to be as an agreed upon term of the loan)—the action can no longer be recommenced using the Savings Statute by the new lender.

There is a carve-out, however, for an assignee to use the Savings Statute if it pleads and proves that it is acting on behalf of the original plaintiff—a standard that will become increasingly defined as the anticipated litigation over it ensues.

Also post-FAPA, the Savings Statute can no longer be used to recommence an action dismissed not on the merits, but for a missed appearance, for example, with no specific finding of neglect to prosecute. Now, "a dismissal of the complaint for any form of neglect…, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment…" will prevent the action from being recommenced using the Savings Statute. CPLR §205(a). Lenders in these scenarios will have to vacate the dismissal orders on a case-by-case basis in order to avoid the harsh penalty of being left with a time-barred loan for its counsel missing a court appearance.

Separate Action for Mortgage Debt: RPAPL §1301

Historically, the purpose of RPAPL §1301 was to shield a borrower from the expense and annoyance of defending two independent actions at the same time with reference to the same debt. Central Trust Co. v. Dann, 85 N.Y.2d 767 (1995); Deutsche Bank Nat'l Tr. Co. v. O'Brien, 175 A.D.3d 650 (2d Dept. 2019).
Separate Action for Mortgage Debt: Pre-FAPA. In practice, foreclosure proceedings are sometimes abandoned and left open on the dockets—especially older ones. Pre-FAPA, if a borrower raised as a defense to a foreclosure proceeding that there is a prior action pending to foreclose the same mortgage, so long as that prior action was not being actively litigated, it was well settled that Plaintiff's failure to first move in the prior action for leave to commence the new one should be disregarded as a mere irregularity. Bank of New York Mellon v. Adam Plotch LLC, 162 A.D.3d 502, 502–03 (1st Dept. 2018).

Separate Action for Mortgage Debt: Post-FAPA. Post-FAPA, RPAPL §1301 was amended to expressly clarify that actions to foreclose a mortgage where there is a prior action pending or after final judgment for the plaintiff cannot be commenced without leave of the court in the prior action, and now adds that "the procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action". RPAPL §1301.

Lenders must take heed of this change most urgently on all loans with pending actions and approaching statute of limitations expiration dates. In these actions, should a restart be anticipated for any reason, immediately seeking leave to do so should be considered on a case-by-case basis.

Revocation of Acceleration: CPLR §203, Rule 3217, NY GOL §17–105

In New York, it was well settled that an election of mortgage acceleration could be revoked by an affirmative act of the lender occurring during the six-year statute of limitations period.

Revocation of Acceleration: Pre-FAPA. Pre-FAPA, defaulted loans were often deaccelerated by lenders in many cases to stop foreclosure proceedings and offer loss mitigation alternatives to the benefit of the borrowers. The Court of Appeals in Engel clearly reiterated that "a voluntary discontinuance of an action—i.e. the withdrawal of the complaint—constitutes a revocation of that acceleration." Engel, 37 N.Y.3d at 7. Revocation of Acceleration: Post-FAPA. Post-FAPA, the discontinuance of a foreclosure proceeding no longer deaccelerates the loan being foreclosed. FAPA amended CPLR §203 to add a subdivision that "no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute." CPLR §203(h).

This was coupled with amending CPLR Rule 3217 regarding the effect of a discontinuance adding a subdivision that a "voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute." CPLR Rule 3217(e).

Lenders must ensure that the requirements of NY GOL §17–105 and/or NY GOL §17–107 are met in order to renew the statute of limitations in these scenarios. If a borrower acknowledges the debt in writing and expressly confirms the intent to repay it without conditions, the statute of limitations on the mortgage debt will reset to the date of that promise. National Loan Investors, LP v. Piscitello, 21 A.D.3d 537, 538 (App. Div. 2d Dept. 2005).

Guidance can also be taken from the recent Court of Appeals decision in Federal National Mortgage Association v. Jeanty, 39 N.Y.3d 951 (2022), where a borrower made seven payments, and while the first three payments were required pursuant to a trial modification plan, the other four payments were not and found to have "established circumstances amounting to 'an absolute and unqualified acknowledgement by the debtor of more being due, from which a promise may be inferred to pay the remainder'," thereby restarting the statute of limitations to foreclose the debt.

Prior Invalid Accelerations: CPLR §213

It is well settled law in the State of New York that "service of a complaint is ineffective to constitute a valid exercise of the option to accelerate a debt where the plaintiff does not have the authority to accelerate the debt or to sue to foreclose at that time". 2lst Mortgage Corporation v. Rudman, 20l AD3d618,62l (2d Dept. 2022).

Prior Invalid Accelerations: Pre-FAPA. A prior foreclosure action commenced by a plaintiff who was not the holder of the underlying note and mortgage at the time of commencement could not operate to accelerate the mortgage debt. 21st Mortgage Corporation v. Adames, 153 A.D.3d 474, 475 (App. Div. 2d Dept. 2017). Oftentimes, with standing to foreclose being so heavily litigated of recent, lenders are now reviewing full note possession records from prior servicers of the loans and learning, for example, that a prior foreclosure action was commenced to foreclose a loan by a lender that was not in possession of the note at the time, and, therefore, was without standing to foreclose. In these situations, pre-FAPA, a lender could defeat a borrower's statute of limitations defense to a new foreclosure proceeding by proving that the prior plaintiff did not have standing to commence that action or accelerate the debt.

Prior Invalid Accelerations: Post-FAPA. FAPA now amended CPLR §213 to add that: "if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not

validly accelerated."

It is anticipated that lenders with loans burdened by a prior action invalidly accelerated due to the plaintiff not having standing to commence it, but without a specific court order dismissing the action for invalid acceleration due to lack of standing, will be moving within those prior actions, as needed and appropriate.

Conclusion

When purchasing loans that are already non-performing, investors must immediately expand their due diligence procedures to consider the statutory amendments of FAPA and how they will affect each loan on a case-by-case basis.

Furthermore, all pending foreclosure actions must urgently be reviewed and assessed for any needed litigation plan adjustments considering these changed pathways that a lender must now navigate in order to foreclose a debt and be repaid the funds it lent.

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, P.C., Jackie Halpern Weinstein is a partner and the head of the firm's Foreclosure Litigation Group, and Danny Ramrattan is a partner of the firm.

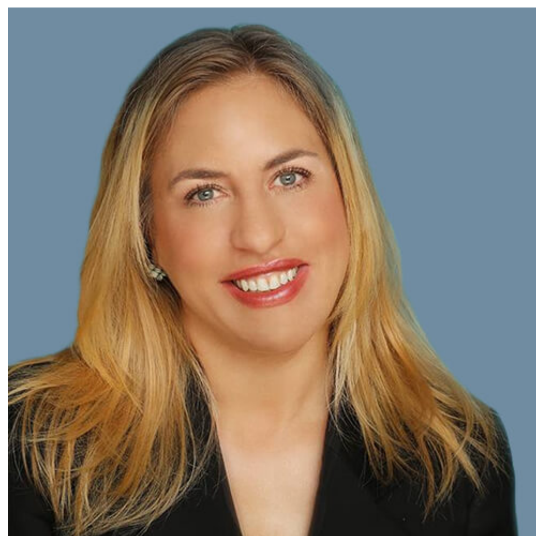
Read The Orignal Article

New York Law Journal

What Happens When a Party Wall Spoils the Party?

Real Estate Litigation

Adam Leitman Bailey | John M. Desiderio | Assisted by Joanna C. Peck



Many reasons occasioned by the Housing Stability and Tenant Prevention Act disincentivized property owners from improving existing buildings because either (a) they could not greatly increase rents after a rent-regulated tenant vacated a unit, or (b) they could not obtain approved rent increases by improving the major components of a building.

The only way to create a free-market building, which would enable a landlord to pay its mortgage and other expenses, was to demolish the existing building and build a new one.
As a result, party wall litigation and RPAPL 881 litigation increased disproportionally to the many other types of real estate litigation in our office, and the issues explained in this article were foreign to many developers. Thus, we are writing to explain many of the most common disputes that arise over the party walls.

New York City abounds in building structures—both commercial and residential—constructed adjacent to each other, but which share a single wall supporting both buildings and that lies upon the property line separating the properties on which each building stands. Such walls are known as “party walls.” The law of party walls is well and long established in New York. See Brooks v. Curtis, 50 NY 639 (1873).

Party Wall Basics

Mutual Easements of Support Only. Where the party wall is partially on one piece of land and partially on the other, and runs directly over the boundary between the two parcels, “[i]n the absence of any agreement or statute providing otherwise, ‘[e]ach of the two adjoining owners…owns in severalty so much of the wall as stands upon his own lot, each having an easement in the other strip for purposes of the support of his own building.’” Sakele Brothers, LLC v. Safdie, 302 AD2d 20, 25, 752 NYS2d 626 (1st Dept. 2002), citing National Commercial Bank v. Gray, 24 NYS 997, 71 Hun.295 (1893), affirmed, 144 NY 701 (1895).

Therefore, “[a]lthough the land covered by [the] party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled,” 5 East 73RD Inc. v. 11 East 73RD Street Corporation, 16 Misc.2d 49, 183 NYS2d 605 (Sup. Ct., New York Co., Special Term, 1959), “[e]ach [owner] may subject it to whatever uses are proper to a wall,” 116 East 57th Street v. Gould, 273 AD 1000, 79 NYS 243 (1st Dept. 1948), but neither owner may interfere with the wall being completely available to the other owner.

In Varriale v. Brooklyn Edison, 252 NY 222 (1929) (Cardozo, Ch. J.), the Court of Appeals explained that “[a] party wall is for the common benefit of contiguous owners. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other.”
As further explained in Sakele, supra, 302 AD2d, at 26, “[t]his principle means that neither owner may subject a party wall to a use for the benefit of its own property that renders the wall unavailable for similar use for the benefit of the other property.”

Party Wall Status Does Not End So Long As Two Buildings Exist. In Sakele, the building on the plaintiff’s side of the party wall had been destroyed in a fire and was rebuilt with fewer stories than the original building which had stood on that side of the party wall.

The First Department ruled that the leasing, for advertising purposes, of the exposed portion of the upper party wall on the plaintiff’s side, by the defendant owner of the adjoining building was a trespass on the plaintiff’s property rights in plaintiff’s side of the party wall.

Contrary to the defendant’s contention, as both an affirmative defense and counterclaim, i.e., “that plaintiff’s ‘easement’ in the upper portion of the subject wall terminated upon the demolition of the upper stories of the [plaintiff’s original building], and that the wall ceased to be a party wall at that time,” the Sakele court held that “[p]laintiff does not have an easement in the disputed upper north face of the wall. Rather, plaintiff owns outright that portion of the wall which stands on plaintiff’s property, and it is defendant who holds an easement therein for the support of her own building.” Id., at 27.
The court held that defendant’s use of the plaintiff’s side of the wall for advertising was “a use wholly

outside the scope of [defendant's] easement" for the support of her building.

The court further ruled that the plaintiff's proper measure of damages for the defendant's trespass was "the gain the trespasser [had] derived from its wrongful conduct.," Id., and plaintiff was entitled to recover all the proceeds of defendant's misconduct.

Conduct That Does Not Prevent Use of the Party Wall. Nevertheless, "[t]he principle [set forth in Varriale, supra] does not...prevent one of the adjoining owners from using its own side of the party wall for its sole benefit where such use has no effect on the other owner's enjoyment of its separate property." Sakele, supra., at 26.

This is illustrated by the facts in Lei Chen Fan v. New York SMSA Ltd Partnership, 94 Ad3d 620, 943 NYS2d 451 (1st Dept. 2012), where defendant Verizon placed steel support beams for its equipment on "a small portion" of the party wall.

The beams extended beyond the centerline of the party wall by approximately two inches, but defendant presented expert evidence that the beams neither interfered with plaintiff's use of the wall, nor were detrimental to the party wall's structural integrity.

The court explained that "[a]lthough an owner may not weaken a party wall or encroach onto the property of the adjoining property owner, commercial use of a party wall that is on the owner's property is permissible."

The court noted that the complaint did not state a cause of action for trespass, "because there is no allegation that the structural integrity of the wall or plaintiff's property has been affected by the beams or that there is a possibility that the beams will prevent plaintiffs from using the party wall."
The evidence plaintiff presented did not set forth "the expertise upon which she based her determination that the weight being placed upon the party wall would affect its structural integrity."

Read the Original Article

Buildings for Landlords: Want to End Short Term Rentals in Your Building? Get on the "Prohibited Buildings List"

Cooperative and Condominium

Rachel Sigmund McGinley

On January 9, 2023, a new law known as Local Law 18, also known as the Short-Term Rental Registration law, became effective. This new law requires short-term rental hosts (rentals fewer than 30 consecutive days) to register their apartment with the Mayor's Office of Special Enforcement (OSE) and receive a registration number. Booking services such as Airbnb, VRBO, Booking.com, etc. will be prohibited from listing any unregistered short-term rental.

To register an apartment with OSE, the owner or tenant of the apartment must certify to OSE that (a) the short-term rental is not prohibited by a lease or other agreement; (b) that they "understand and agree to comply with provisions of the zoning resolution, multiple dwelling law, housing maintenance code and New York city construction codes relating to short-term rentals;" (c) that "there are no uncorrected violations of the New York city construction codes, the housing maintenance code or the fire code that would endanger occupants of such dwelling unit;" and, critically, (d) that the building does not appear on the Prohibited Buildings List (PBL).

The PBL is the portion of the law that condo and co-op boards have been yearning for. The PBL allows building owners (including condo and co-op boards) to simply register with the City to prohibit short-term rentals in their building.

OSE is required to deny any registration requests for apartments located in buildings on the PBL. In addition, OSE is required to notify building owners (including condo and co-op boards) of any registration application for an apartment in its building, which will take out all the investigatory work that, up until now, boards have had to do in order to confirm that an apartment is being used as an illegal short-term rental.

Registration through OSE has not yet begun; OSE currently estimates that registration will open in late February.

Enforcement of the registration requirements will not begin until July 2023, but enforcement of existing short-term rental laws remains ongoing. Hosts who violate the new law will be subject to fines ranging from $1,000 to the lesser of $5,000, or three times revenue from illegal rentals. Fines for booking platforms would be limited to the higher of $1,500 or the total fees collected from illegal transactions.

Short-term rental listings for units in "Class B" multiple dwellings, which have been approved by the City for legal short-term occupancies, are exempt from the registration requirement, as are rentals for 30 consecutive days or more.

By Rachel Sigmund McGinley, the Chair of Adam Leitman Bailey, P.C.'s Cooperative & Condominium Representation Group.

Read the Original Article

Dismissal of Mechanic's Liens

Real Estate Litigation

Bonnie Reid Berkow

The Court does not have the discretion to dismiss a mechanic's lien except on the statutory grounds stated in the Lien Law. These are:

(1) Section 19(6) – summary discharge if the lien is defective on its face;

(2) Section 20 – payment into court of the amount of the lien;

(3) Section 37 – obtaining a bond to discharge the lien;

(4) Section 59 – after notice to the lienor to commence an action to foreclose the lien and no action is commenced within 30 days.

Section 19(6) of the Lien Law provides that a lien may be summarily discharged but only if the defect appears on the face of the lien. If the lien is facially valid (even if proven later to be wrong) it cannot be summarily discharged. For example, if the lien states that the last labor or material furnished was within 4 months of the filing of the lien, it is facially valid so an allegation that the last labor or material was not within the 4-month period requires proof and cannot be the basis of a summary discharge.

Recovery under a mechanic's lien is limited to claims for unpaid labor and materials furnished. It cannot include claims for delay damages, insurance, overhead, or profit. Therefore, failure to separately state the amount of labor unpaid and materials furnished unpaid may be grounds for dismissal of the lien as facially invalid, pursuant to Section 19(6) of the Lien Law.

Section 38 of the Lien Law provides that the owner may demand an itemized, verified statement setting forth the items of labor and/or material and the value thereof which is claimed in the lien. If the lienor fails to comply within 5 days or delivers an insufficient statement, then the owner can petition the Court to compel a sufficient statement or dismiss the lien.

Section 59 of the Lien Law provides that the owner can send a notice to the lienor, requiring the lienor to commence an action to enforce the lien within 30 days, or show cause as to why the lien should not be vacated or canceled. If the lienor does not commence an action to foreclose the lien within such time period, the owner can apply to the Court to have the lien vacated. The owner might want to do this because Section 39 of the Lien Law provides that a claim may be made to discharge a mechanic's lien on the grounds it is willfully exaggerated, but only as a counterclaim in an action by the lienor to enforce the lien. Smith v. Otis–Charles Corp., 279 A.D. 1, 107 N.Y.S.2d 233 (4th Dept. 1951), affd. 304 N.Y. 684 (1952).

Section 39-a provides for liability of the lienor for a willfully exaggerated lien, but only after the lien has been discharged for willful exaggeration. Liability penalties will not be imposed if the lien is discharged for any other reason (e.g. that it was not timely filed).

GROUNDS TO DEFEAT A MECHANIC'S LIEN

Lienor's right to recover is limited by the contract price or the reasonable value of the labor and materials provided; the lienor must offer proof of the price of the contract or the value of labor and materials supplied. Extended general conditions, insurance, and profit may not properly be included in a mechanic's lien pursuant to New York Lien Law and applicable case law in New York. Lien Law §3; DiSario v. Rynston, 138 A.D.3d 672, 30 N.Y.S.3d 129 (2d Dept. 2016); (Lienor's right to recover is limited by the contract price

or the reasonable value of the labor and materials provided; lienor must offer proof of the price of the contract or the value of labor and materials supplied); DHE Homes Ltd. V. Jamnik, 121 A.D.3d 744, 994 N.Y.S.2d 349 (2d Dept. 2014) (Court erred in awarding increased general costs relating to delays in action to foreclose mechanic's lien). A claim for damages consisting of lost profits may not be included in a Mechanic's Lien (see, Goldberger–Raabin, Inc. v. 74 Second Ave. Corp., 252 N.Y. 336, 169 N.E. 405; E. Hills Metro, Inc. v. J.M. Dennis Const. Corp., 183 Misc. 2d 439, 441, 703 N.Y.S.2d 897, 899 (Sup. Ct.), aff'd, 277 A.D.2d 348, 717 N.Y.S.2d 202 (2000).

WILLFUL EXAGGERATION OF LIEN

Under New York Lien Law § 39, if a Court finds that a lienor has willfully exaggerated the amount for which the lienor claims a mechanic's lien, the lien "shall be declared to be void and no recovery shall be had thereon." Additionally, if a lien is voided under this provision, the property owner is entitled to damages equal to the amount that the lien was exaggerated, along with the costs and attorney's fees associated with bonding and discharging the lien. Id. § 39-a. A claim under Lien Law § 39 may be subject to a summary disposition where the evidence that the amount of the lien was "willfully exaggerated" is conclusive (see Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp., 25 A.D.3d 392, 808 N.Y.S.2d 654 (1st Dept. 2006); Northe Grp., Inc. v. Spread NYC, LLC, 88 A.D.3d 557, 931 N.Y.S.2d 231 (1st Dept. 2011); Casella Constr. Corp. v. 322 E. 93rd St. LLC, 211 A.D.3d 458, 459, 181 N.Y.S.3d 20, 21 (1st Dept. 2022).

Lien Law § 39 provides:

In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the Court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the Court on two days' notice.

Section 39-a of the Lien Law sets forth the penalty for willfully exaggerating a lien and provides:

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement, the Court shall have declared said lien to be void on account of wilful exaggeration. The person filing such notice of lien shall be liable for damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

Lien Law § 39-a's remedies and damages are "available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action." Matrix Staten Island Dev., LLC v. BKS-NY, LLC, 204 A.D.3d 1004, 1006 (2nd Dep't 2022). In circumstances where a lien is discharged "for reasons unrelated to its supposed exaggeration, there remains no lien to be declared void by the court." Wellbilt Equip. Corp. v. Fireman, 719 N.Y.S.2d 213, 216 (1st Dep't 2000). In this connection, section 39–a, by its terms, only permits a wilful exaggeration claim to be asserted in an action "to enforce a mechanic's lien," namely, a foreclosure action. Where the lien has been discharged prior to trial, the action is no longer one seeking to enforce a mechanic's lien. The action is, at that juncture, merely one in the contract. Smith v. Otis–Charles Corp., 279 A.D. 1, 107 N.Y.S.2d 233 (4th Dept. 1951), affd. 304 N.Y. 684 (1952).

The Courts have established a very high bar to prove a willful exaggeration. Even if the amounts are wrong or excessive, if the lienor alleges ignorance or honest mistake then it will not be "willful". The willful exaggeration of a Notice of Lien has been defined as an exaggeration that is intentional, deliberate, fictitious, or fraudulent (Collins v. Peckham Road Corp., 18 A.D.2d 860, 236 N.Y.S.2d 415). The burden is on the opponent of the Mechanic's Lien to show that the amounts set forth in the Notice of Lien were

intentionally and deliberately exaggerated (see, Fidelity New York, FSB v. Kensington–Johnson Corp., 234 A.D.2d 263, 651 N.Y.S.2d 86); E. Hills Metro, Inc. v. J.M. Dennis Const. Corp., 183 Misc. 2d 439, 442, 703 N.Y.S.2d 897, 899–900 (Sup. Ct.), aff'd, 277 A.D.2d 348, 717 N.Y.S.2d 202 (2000).

Bonnie Reid Berkow is a partner at Adam Leitman Bailey, P.C.

Read the Original Article

Changes to the Peconic Bay Tax

Purchase and Sale of Homes

Rosemary Liuzzo Mohamed

The five East End towns of the Peconic Bay Region in Suffolk County, New York are East Hampton, Shelter Island, Southampton, Riverhead, and Southold. When purchasing a home in this region, a purchaser will pay a one-time transfer tax called the Peconic Bay Region Community Preservation Fund (or CPF), ("Peconic Bay Tax"). Up until recently, the Peconic Bay Tax has been 2% of the purchase price of any home or lot after certain allowances.

In the fall of 2021, Governor Hochul signed The Peconic Bay Region Community Housing Act, which increases the Purchaser paid Peconic Bay Tax due at real estate transfers and will create an Affordable Housing fund.

Under the new legislation, effective on April 1, 2023, all transfers in the Peconic Bay Region on or after April 1, 2023, with the exception of Riverhead, will be subject to an increased Peconic Bay tax of .5%. Along with this increase will be an amended CPF form to be used on all transfers on or after April 1, 2023. This form may be accessed on the Suffolk County Clerk's website.

Additionally, the new legislation increases certain allowances on all transfers occurring on or after April 1, 2023. The allowances are: In East Hampton, Shelter Island, and Southampton, $400,000.00 Improved, $100,000.00 Vacant (unimproved), and no exemption on conveyances $2,000,000.00 or greater. In Riverhead, $150,000.00 Improved and $75,000.00 Vacant (unimproved). In Southold, $200,000.00 Improved and $75,000.00 Vacant (unimproved).

The original tax was created to assist in preserving the vast undeveloped open spaces, wetlands, and natural vistas found in the Hamptons and North Fork. The new increase will go towards community housing, housing counseling, and assisting first-time homebuyers financially, among other things.

Rosemary Liuzzo Mohamed is a Partner at Adam Leitman Bailey, P.C. and the Chair of the Mortgage Finance Group.

Read the Original Article

Case Studies

A Street Fight in the Bronx Over Land–Italians v. Irish. Then the Court Case Over Who Gets To Use the Land–and a Winner

Title Insurance Claims Group

Adam Leitman Bailey | John M. Desiderio | Jeffrey R. Metz

This matter came to Adam Leitman Bailey, P.C. (ALBPC) at the beginning of 2017. The resulting decision issued by the Appellate Division on March 9, 2023 – six years later – shows how dogged investigation was important to finding the evidence necessary to persuade both the trial court and the appellate court to rule in favor of Adam Leitman Bailey, P.C.'s client.

Close Avenue is a mapped but unopened and unpaved, one-block-long street in the Bronx, running north-south between Bruckner Boulevard and Storey Avenue. It is mainly used to facilitate access to and from the commercial warehoused businesses located along the block. Since the 1960's, there have been gates at both the North and South ends of the street which are locked after business hours to prevent theft and vandalism.

Since 1999, the O'Farrell family, who operate a scaffolding business and who own the two lots on opposite sides of the southern end of Close Avenue (the "900 Lots"), have controlled the Storey Avenue Gate ("Gate

sides of the southern end of Close Avenue (the "900 Lots"), have controlled the Storey Avenue Gate ("Gate 1") that controls ingress and egress to Close Avenue between the 900 Lots. In 2015, the O'Farrells installed a second gate ("Gate 2") at the northern end of their two lots to control access to and secure that part of Close Avenue lying between their lots, to protect the trucks and equipment overnight.

The O'Farrells also own a lot on the eastern side of Close Avenue (the "950 Lot") that is located immediately above the 900 Lot they own at the southern end of the block on same side of the avenue.

This was a battle to the end. The adversary spent his life savings trying to beat our client, the O'Farrells, but no person's life savings is enough to beat Adam Leitman Bailey P.C.'s premiere team of Bailey/Desiderio/Metz. Even the now retired head of a title insurance company told me that this would be our first losing case involving prescriptive easements. We slugged it out and gave it everything we had. War waged in the courthouse and disrupted the peaceful Bronx. Even the CIA and Defense Contractors became part of the story. On a personal note, I am very proud to work with these legendary lawyers. This was a case we were supposed to lose. Heart won out. I never had any doubts. Not for a minute.

All the remaining lots on Close Avenue between the O'Farrells' properties and the northern end of Close Avenue are owned by Ciminello Property Associates (CPA). All of the CPA properties on Close Avenue are rented to CPA's tenants.

For many years, the O'Farrells permitted CPA's tenants to use the eastern half of Close Avenue abutting the O'Farrells' 950 Lot. However, after Gate 2 was installed, CPA objected to certain Jersey barriers the O'Farrells had installed alongside of the 950 Lot, claiming that the barriers obstructed the access of its commercial tenant who rented the property across from the 950 Lot.

CPA then sued the O'Farrell companies, which own the 950 Lot and the two 900 Lots, and sought a declaratory judgment that Ciminello had either an implied or prescriptive easement over the full length and width of Close Avenue.

A prescriptive easement is the right to use and pass over land to another property or public thoroughfare, after having done so, without permission, for a ten-year period without interruption. The courts hold that the principles for acquiring title to property by adverse possession are analogous to acquiring a prescriptive easement, except that there is no requirement for the claimant to prove exclusive use during the ten-year prescriptive period.

CPA based its claim on its predecessor owner's control of the avenue and CPA's purported use and maintenance of the whole length of the avenue from as early as the 1970's, and that the O'Farrells essentially were johnny-come-lately interlopers who were preventing CPA's tenants from the free use and access of Close Avenue to carry on their businesses.

In addition to seeking compensatory and punitive damages, for alleged trespass, CPA asked the Court to permanently enjoin the O'Farrells from placing physical impediments or otherwise interfering with the ability of CPA, its tenants, and their respective invitees and guests, to make use of Close Avenue to its full length and width, or to otherwise interfere with CPA's easement in, upon, over and through Close Avenue.

Despite CPA's claim that it controlled use of Close Avenue, and that CPA had been solely responsible for maintaining the Close Avenue roadbed and for snow removal, for more than 30 years before the O'Farrels acquired their Close Avenue properties, the O'Farrells were able to produce evidence refuting CPA's claims.

CPA initially moved for a preliminary injunction to enjoin the O'Farrell's control of Gate 1 and 2. However, the trial court ruled that "CPA's evidence 'falls far short of establishing a prescriptive easement by clear and convincing evidence." The trial court held that "a review of all of the evidence shows that CPA' use of the purported easement was not hostile but appears to have been permitted as a matter of neighborly accommodation."

The trial court's ruling denying the grant of a preliminary injunction was affirmed on appeal. The Appellate Division ruled that CPA had "failed to demonstrate a likelihood of success on the merits."

The parties then engaged in extensive discovery proceedings. Longtime residents and business owners from the local community testified that prior to the installation of gates at the northern and southern ends of Close Avenue, the avenue had been freely accessed by the public, including commercial traffic, drug dealers, prostitutes, and derelicts. CPA was unable to produce evidence rebutting the community witnesses and could not produce any evidence to support its own claimed easement over the avenue. Indeed, CPA's own commercial tenant testified that its access from Storey Avenue was essentially permissive access given by the O'Farrells to facilitate the tenant's use of the Storey Avenue Gate.

At the conclusion, the O'Farrell's moved for summary judgment, and the trial court granted the motion.

CPA appealed again to the Appellate Division which, in affirming the trial court's grant of summary judgment to the O'Farrells, held that CPA "failed to establish the requisite elements of exclusivity and hostility required for a prescriptive easement," and that "the record on summary judgment reflects that, since at least 1999, [the O'Farrells] had controlled access to the south gate at Storey Avenue, and that [CPA] and its tenants' use of the disputed portion of Close Avenue had been permissive. The testimony of [CPA's] tenants further established that they permitted members of the general public to access Close Avenue and traverse the south gate during regular business hours by using the keys obtained from the [O'Farrells]."

When CPA made its first objections to the O'Farrells' control of access to Close Avenue from Storey Avenue, the O'Farrells brought their problem to Adam Leitman Bailey, P.C., and Adam Leitman Bailey, P.C. advised that, in order to refute CPA's claimed easement, it was imperative to find long term members of the community who could recollect how Close Avenue had been used by business and members of the public over the past 40 years. Fortunately, there were members of the public with strong ties to the local community who were willing to truthfully recount their memories of what had occurred on Close Avenue.

The Adam Leitman Bailey, P.C. attorneys who worked on this matter over the years were: Adam Leitman Bailey, John M. Desiderio, and Jeffrey R. Metz.

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Adam Leitman Bailey, P.C. Prevails for Title Company in Policy Claim and Wins Attorney Fees

Title Insurance Claims Group

Adam Leitman Bailey | Colin E. Kaufman | Danny Ramrattan

Adam Leitman Bailey, P.C. swiftly and successfully moved to dismiss a claim and cross-claim for a failed

Adam Leitman Bailey, P.C. swiftly and successfully moved to dismiss a claim and cross-claim for a failed 1031 exchange and was awarded attorneys fees in an amount to be determined.

Plaintiffs were principals of commercial property holders who, in 2015, attempted to engage in a 1031 exchange. To do so, they engaged Pardalis & Nohavicka LLP, ("P&N") who held themselves out as 1031 exchange experts. When the IRS disallowed the 1031 exchange, Plaintiffs sued for malpractice based on the incorrect legal advice given to them.

Plaintiffs had engaged Titlevest Agency of New York and 1031Vest, LLC, a Qualified 1031 Intermediary (the "FirstAm Defendants") to act as the Qualified Intermediary and to hold and disburse sale proceeds in accordance with the IRC. In an action brought in mid-December, 2021, Plaintiffs sued P&N for malpractice and the FirstAm Defendants on the theory that each was a fiduciary with a duty to examine the details of the 1031 exchange and to advise Plaintiffs that the proposed exchange would not qualify. P&N cross-claimed, alleging that the FirstAm Defendants violated their contractual duties to P&N and were negligent.

Adam Leitman Bailey, P.C.was asked to defend the FirstAm Defendants. Based on the contract between Plaintiffs and the FirstAm Defendants, Adam Leitman Bailey, P.C. moved in April 2022 to dismiss the complaint on the basis of documentary evidence and for attorneys' fees. By order of September 15, 2022, Justice Headley granted the motion and set the matter down for a hearing on the amount of attorneys' fees at a future date.

Adam Leitman Bailey, Colin E. Kaufman, and Danny Ramrattan of Adam Leitman Bailey, P.C. worked on this matter.

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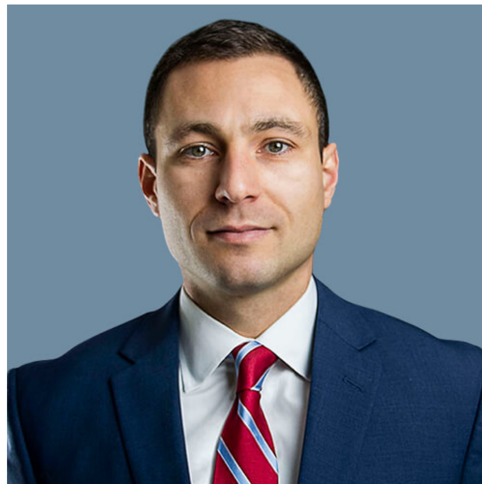
Adam Leitman Bailey, P.C. Wins Summary Judgment and Dismissal of Prior Owner's Affirmative Defenses in Highly Contested Post-Foreclosure Eviction Proceeding

Landlord Representation

Vladimir Mironenko



Representing the purchaser of a single-family Queens home after foreclosure, Adam Leitman Bailey, P.C. won summary judgment and dismissal of affirmative defenses with a judgment and warrant of eviction against the prior owner, following a foreclosure sale.

We commenced the summary eviction proceeding by filing a holdover petition after serving the prior owner with a requisite notice to quit and exhibiting to him the certified referee's deed in foreclosure.

The respondent, through counsel, answered the case asserting a myriad of affirmative defenses, including failure to properly serve the commencement papers, misdescription of the premises alleging that the respondent occupies only a portion of it, failure to properly plead the rent regulatory status of the premises as a de facto multiple dwelling, arguing that the one family home has been converted to at least seven units, and asserting rent stabilization rights claiming that the respondent paid rent to an unidentified individual purporting to be an owner before the foreclosure sale while the respondent still owned the premises.

We immediately moved for summary judgment, to dismiss the affirmative defenses, and, in the alternative, for use and occupancy pendente lite.

In support of the motion, we argued that the respondent's service and premises description defenses are meritless because, as the prior owner of the premises, he is in constructive possession of the entire premises and that the challenge to the mailing of the petition to an additional address, even if respondent no longer had a connection to that address, is irrelevant since service was completed timely and properly at the premises. We also argued that the respondent's de facto multiple dwelling defense fails because there is no dispute that our client never controlled the premises, any condition was created by the respondent, and the respondent should not benefit from his own wrongdoing. We countered the respondent's claims to rent stabilization using case law to show that as the prior owner, he cannot also be a tenant or entitled to rent stabilization protections.

The court agreed with and adopted our arguments in its decision, granting our client summary judgment of possession with the issuance and execution of a warrant of eviction.

Vladimir Mironenko, a partner at Adam Leitman Bailey, P.C., represented the owner.

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No Time to Waste: Adam Leitman Bailey, P.C. Expeditiously Stops Condominium Board From Forcing Impermissible Conditions Upon Right of First Refusal Waiver's Issuance

Cooperative and Condominium

Adam Leitman Bailey | John M. Desiderio | Joshua D. Glatter

French philosopher Simone de Beauvoir famously remarked "[t]here is something in the New York air that

makes sleep useless." That maxim is particularly resonant in the intense world of real estate disputes, especially when a condominium or coop's board of managers engages in obstructionist behavior that, if not swiftly addressed, can quickly decimate a high-value sale. A recent engagement handled by Adam Leitman Bailey, P.C.'s senior litigation team demonstrates how the firm's ability to deploy quickly and aggressively saved a transaction that would have otherwise forced our clients to go back to an expensive and burdensome "square one" in connection with their apartment's sale.

THE ENGAGEMENT

Adam Leitman Bailey, P.C. was engaged by a married couple in Manhattan who had contracted to sell their condominium apartment for several million dollars. The buyer was an existing rental tenant in the building, who had already obtained a loan commitment to purchase the property. The buyer had locked in their mortgage's interest rate, but the clock was ticking on the rate's expiration. Everything was lined up to close the sale. The only pending item was an action by the condo board to waive their "Right of First Refusal", which grants the board an option to acquire a unit upon which an offer has been made for the condo association itself. Here, though, the board had been baselessly dragging its heels with respect to exercising or waiving its right of first refusal, and then demanded a condition on the waiver it was not permitted to make in the form of a separately funded escrow. The buyer's patience was nearly exhausted, and he had no obligation to agree to that term. The sale was in peril. Adam Leitman Bailey, P.C. had to move fast.

THE RACE IS ON

Adam Leitman Bailey, P.C. was retained late on a Thursday afternoon by the sellers, who believed the board was unreasonably and inexplicably dragging its collective feet in issuing the Right of First Refusal Waiver. The buyer was becoming understandably impatient, and the sellers reasonably feared the board would continue to "slow play" matters until the buyer, in sheer, perfectly justifiable frustration, canceled the deal. The Adam Leitman Bailey, P.C. litigation team, consisting of managing partner Adam Leitman Bailey, Real Estate Litigation Department head John M. Desiderio, and Real Estate Litigation partner Joshua D. Glatter, snapped into action. They reviewed the sale contract and confirmed that the buyer had no obligation to remain bound to the deal if the Right of First Refusal Waiver did not issue, and reviewed prior correspondence between their clients' transactional counsel and the board's managing agent to evaluate the current state of play. Alarmingly, the board was taking the position that the buyer had supposedly failed to submit a complete application, and therefore – according to the managing agent – the time for the board to exercise its Right of First Refusal had not accrued. But Adam Leitman Bailey, P.C. needed some more information to determine the correct strategy and was awaiting copies of the governing documents.

ADAM LEITMAN BAILEY, P.C. FIRES THE FIRST SHOT ACROSS THE BOARD'S BOW

The next morning, Friday, Adam Leitman Bailey, P.C. learned that the board intended to condition its Right of First Refusal Waiver on the buyer escrowing thousands of dollars of funds in what, for all practical purposes, would be a security deposit for the board. Adam Leitman Bailey, P.C. promptly reviewed the condo's by-laws and determined that they did not provide the board any such right. But the situation called for a careful approach; the clients' goal was to consummate their apartment's sale, not get embroiled in litigation of indeterminate length against, literally, their neighbors in the building.

Accordingly, that same day, Adam Leitman Bailey, P.C first expeditiously emailed a letter to the Board's managing agent (who the board had designated to communicate on this issue) setting forth Adam Leitman Bailey, P.C.'s position and warning the board to not demand an escrow or any other condition on the Right of First Refusal Waiver not permitted under the governing documents. Knowing that the board would claim that conditioning the Right of First Refusal Waiver on an escrow was a valid exercise of its business judgment, Adam Leitman Bailey, P.C. pre-empted that argument. Adam Leitman Bailey, P.C. directed the board's attention to long-standing jurisprudence demonstrating that the board's demand would not be regarded by a court as merely a request for information to enable the board to vet the question of whether to exercise its Right of First Refusal, but was instead an improper condition precedent the board had no right to demand under the current governing documents. Adam Leitman Bailey, P.C. also warned the board that

to demand under the current governing documents. Adam Leitman Bailey, P.C. also warned the board that its foot-dragging would not be tolerated any further, that its information demands appeared superfluous and pretextual, and that its conduct threatened to tank the deal and cause the buyer to walk away.

Adam Leitman Bailey, P.C. made clear that, although the goal was to simply close the transaction and avoid a fight, Adam Leitman Bailey, P.C. would have no qualms about initiating formal action. Adam Leitman Bailey, P.C. continued to gather documents and prepare for its next move while awaiting the board's response.

THE COMPLAINT IS RAPIDLY PREPARED

The weekend came and went without any word from the board. On Monday morning, Adam Leitman Bailey, P.C. learned that, notwithstanding its letter, the board had sent the buyer's attorney a draft escrow agreement, which made clear that it was conditioning the Right of First Refusal Waiver on the escrow. The draft imposed the escrow on the buyer for the life of his ownership, and while the draft permitted the buyer to apply in two years for the right to remove the condition and have the funds returned to him, it granted the board almost unfettered discretion to refuse that application, and allowed it to further probe his finances and circumstances in the future.

The board and its agents had either ignored Adam Leitman Bailey, P.C.'s letter, or doubted Adam Leitman

Bailey, P.C.'s ability to expeditiously assemble a hard-hitting complaint. There was no time to waste. In the space of a single day, the Adam Leitman Bailey, P.C. team drafted and finalized a detailed, nearly 30-page complaint that summarized the governing documents' metes and bounds, detailed the board's obstructionist conduct, and explained why imposing an escrow condition upon the Right of First Refusal was impermissible. Adam Leitman Bailey, P.C. was prepared to bring 5 claims against the board and its individual directors: a declaratory judgment (asking the Court to declare the board's conduct was improper and requiring it to issue a Right of First Refusal), breach of the board's various fiduciary duties, negligence, breach of contract (*i.e.* – the board was violating the terms of the governing documents), and tortious interference with contract (*i.e.* – the board was illegally interfering with the contract running between the sellers and buyer).

THE BOARD THROWS IN THE TOWEL

The complaint was filed the next morning, Tuesday. Virtually contemporaneous with that filing, Adam Leitman Bailey, P.C. was contacted by the board's attorney, a lawyer who well knew that Adam Leitman Bailey, P.C. does not bluff, and was fully capable of litigating the matter aggressively and efficiently. In the space of only a few communications, the board agreed to withdraw its escrow demand, and asked that the closing be scheduled as soon as possible. Adam Leitman Bailey, P.C. in turn agreed to voluntarily dismiss the lawsuit once the closing occurred. As a result of the firm's speedy action, Adam Leitman Bailey, P.C.'s clients have avoided significant legal fees and costs, along with the inexorable headaches and burdens litigation carries even under the best circumstances.

The clients were represented by Adam Leitman Bailey, John M. Desiderio, and Joshua D. Glatter of Adam Leitman Bailey, P.C.

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Adam Leitman Bailey, P.C. Negotiates Access and License Agreements for Residential Co-Op, Ensuring Façade Repair Work Will Be Completed by Spring

Niki Khindri | Steven R. Wagner

Adam Leitman Bailey, P.C. represents a 21-story, 495-unit residential co-op located in the heart of Union Square. Facing a looming deadline for its 8th-cycle FISP façade inspection and repairs with a desire to complete the façade work before spring, the co-op turned to Adam Leitman Bailey, P.C. to negotiate access and license agreements with the adjacent buildings to the east and west. Adam Leitman Bailey, P.C. stepped in to lead the negotiations with these buildings.

The first building consisted of a commercial space on the bottom floor with residential units above. An issue arose when it was discovered that several units located in the residential portion were rent-regulated units with terraces. The façade work being performed by the client required restricting access to terraces bordering the work zone (so-called "controlled access zones"), but the neighboring building was reluctant to restrict access to these terraces due to the potential reduction of services claims that could be raised by tenants to the Division of Housing and Community Renewal (DHCR). The neighboring building was only willing to permit access if Adam Leitman Bailey, P.C.'s client would submit to a host of unreasonable demands. The experienced attorneys at Adam Leitman Bailey, P.C. used their negotiation skills to push back on these demands, resulting in an agreement that only obligated the client to indemnify the neighboring owners for any reduction of services claims actually commenced by tenants of those units. The agreement did not include any obligation for Adam Leitman Bailey, P.C.'s client to deposit money in escrow or to pay any license fees.

The second building presented another problem. What at first seemed like a straightforward reciprocal access and license agreement (this building would also soon be performing its own façade repairs), became infinitely more complicated when it was discovered that a portion of the chimney of the neighboring building was located on the roof of Adam Leitman Bailey, P.C.'s client's building. It turns out that, when the building of Adam Leitman Bailey, P.C.'s client was first constructed in 1965, the building code required that it extend the chimney of the pre-existing neighboring building, which it did. The neighboring building then demanded that, as a condition to providing access to its roof, Adam Leitman Bailey, P.C.'s client must agree to perform repairs to the entire chimney. The attorneys at Adam Leitman Bailey, P.C. researched the issue, and discovered that there was no legal requirement for the client to maintain the chimney since it was extended before the certain amendment to the building code which would have imposed maintenance obligations. However, a twist to the story was uncovered upon the discovery that the parties had in fact entered into an agreement in the late 1960s which appeared to impose some maintenance obligations for the chimney on Adam Leitman Bailey, P.C.'s client, although the extent of which was ambiguous. By this point, winter was fast approaching, and Adam Leitman Bailey, P.C.'s contractors needed to get started so that the project could be finished by spring. The skilled attorneys at Adam Leitman Bailey, P.C. were able to guide the parties to a resolution that recognized limited maintenance obligations on the part of Adam Leitman Bailey, P.C.'s client without acknowledging any long-term rights to repairs. Like the first agreement, this agreement also did not require Adam Leitman Bailey, P.C.'s client to deposit any money in escrow or pay any license fees.

escrow or pay any license fees.

Niki Khindri and Steven Wagner of Adam Leitman Bailey, P.C. represented the client and led the negotiations in this matter.

Read Original Case Study

Be Quick but Don't Hurry: Adam Leitman Bailey, P.C.'s Proficient and Efficient Representation of Transactional Clients

Real Estate Litigation

Keith A. Bialek

It is crucial for both the prospective purchaser and prospective seller in a real estate transaction to understand the contract of sale as it relates to both the financial terms of the transaction and the respective obligations of the parties pursuant to the terms of the agreement. Parties to a real estate transaction have traditionally been nudged, if not pressured, to finalize the contract as quickly as possible. In the course of searching for a property, a prospective purchaser may make an offer to a prospective seller containing basic terms of the transaction, i.e., the purchase price, the amount of the earnest money deposit, whether there will be financing and a timeframe for when the closing may occur. If the seller of the premises is agreeable to said terms, the parties would then proceed toward entering into a contract. Oftentimes, at this point, the parties are prodded to finalize a contract with all expediency possible. A seller may be advised to have an attorney draft a contract and send out to the buyer's attorney immediately so as not to lose the buyer. A purchaser may be told of other offers being entertained by the seller, evoking a sense of risk in losing the property if a contract is not finalized posthaste. In the current real estate market beset with low inventory, homebuyers may be persuaded to waive certain protections and safeguards as a means of making their offer more attractive to a seller that may be entertaining others in a competitive market.

With the increased technological capability to electronically sign documents and the acceptability of the same as a means of binding parties to an enforceable contract, parties should be careful not to enter into enforceable agreements with potentially serious ramifications in a hasty manner. Utilizing an E-sign platform for the purpose of executing a contract certainly has benefited from a convenience and efficiency standpoint, but it should not be a substitute for a meeting between the parties to the transaction and their respective attorneys. Whether in person, over the telephone, or via a Zoom meeting, reviewing and discussing the contract is invaluable for both the client and the attorney. During this interaction, the attorney may explain a provision in the contract that may be counter to the client's understanding. Likewise, the client may raise an issue that the attorney is unaware of and is not addressed in the document.

The conference and discussion of the terms of the agreement may result in the need for further discussion with counsel for the other party to clarify terms. At a minimum, it serves to ensure that the client understands what in fact is being agreed to and what rights, obligations, contingencies, timeframes, etc., are pertinent to the transaction and essential for the client to understand and follow. Of course, it is conceivable that during a transaction something completely unforeseen materializes, and then the parties would have to address it. However, for terms that are addressed in the agreement, it would be unfortunate for a client to have misunderstood as a result of bypassing the opportunity to discuss the provisions of the contract with the attorney prior to signing. For circumstances arising from provisions within the contract, an attorney would never want to hear a client begin a sentence with "Had I known that then I would (not) have…" Working through the contract together not only is beneficial to the client in that they are receiving the attorney's explanation of the terms of the agreement, but it is additionally extremely beneficial to the attorney to be able to ascertain from the conversation whether the client truly understands a certain provision so that further explanation may be provided as needed.

As an illustration, during Adam Leitman Bailey, P.C.'s representation of sellers on a residential real estate transaction, while consulting with the clients it became apparent that the sellers were not in agreement as to the final disbursement of the proceeds at the closing of the transaction. Ultimately, we worked together towards a resolution, and our clients entered into a contract with the purchaser for the sale of their property, and just recently successfully and smoothly closed the transaction. Had the attorney and clients not all discussed the contract, but merely circulated an agreement to be signed, this issue would likely not have surfaced until the closing of the transaction which would have created more of a challenging issue for both the clients and the attorney.

Moreover, in representing a purchaser, Adam Leitman Bailey, P.C. negotiated favorable provisions into the contract allowing contractors and architects to have access to the premises without a cap on the number of visits. When the seller attempted to restrict access, the provision in the contract became crucial as it was carefully drafted to facilitate the client in achieving the completion of the renovations within their tight timeframe, which was discussed between the attorney and client during the initial consultation.

The nature of the real estate market has been and will continue to be fast-paced. Tools have been developed that, when utilized appropriately, assist in consummating transactions in a more efficient manner. Parties to a transaction, however, should be cautious not to skip essential steps along the way. Hall of Fame basketball coach, John Wooden, frequently told his players "be quick but don't hurry." This phrase has meaningful applications beyond the basketball court, real estate contracts among them. An attorney should work with the client to fully grasp the transaction at hand in as timely a manner as possible. A client, however, should resist foregoing necessary due diligence for the sake of expediency. Coach Wooden famously asked his players, "if you don't have time to do it right, when will you have time to do it over?" The harsh reality for parties to a real estate transaction and their attorneys is that there may not be an opportunity for a "do-over."

Keith A. Bialek, Esq., of the Transactional Department at Adam Leitman Bailey, P.C. handled both transactions.

Read Original Case Study

Adam Leitman Bailey, P.C. Successfully Defeats Motion to Dismiss Condominium Unit Owner's Claims Related to Defective Plumbing

Cooperative and Condominium Litigation

Adam Leitman Bailey | Brandon M. Zlotnick | William M. Pekarsky

A recent decision from the Appellate Division, First Department has upheld breach of fiduciary duty and breach of contract claims brought by a condominium unit owner against the Condominium's (the "Condominium's") Board of Managers (the "Board"). Adam Leitman Bailey P.C.'s client, the owner of a condominium apartment in Manhattan, commenced an action against the Board in connection with the Board's failure to address the client's constant complaints related to dirty and hazardous water (the "Supreme Court Action"). These issues have deprived the client of the ability to bathe in her apartment for over two (2) years. Shortly after the Complaint was served, the Board filed a Motion to Dismiss (the "Motion") seeking to dismiss all four of the client's causes of action. In the Motion, the Board argued that the client, among other things, failed to include sufficient factual allegations that were otherwise required to show that the Board was on notice of the plumbing issues in her apartment.

Upon receiving a copy of the Motion, Adam Leitman Bailey P.C. immediately sprung into action and vigorously defended the client against the Board's claims. First, Adam Leitman Bailey P.C. compiled mountains of evidence in the form of emails and formal letters showing that the Board, through the Condominium's managing agent and other employees, was on notice of the plumbing issues shortly after the client purchased the condominium apartment back in the Fall of 2018. After compiling all the necessary evidence, Adam Leitman Bailey, P.C. then conducted an additional, in-depth review of the Condominium's governing documents to show that the Board is responsible for performing plumbing-related repairs and was effectively put on notice of these issues over the years. Critically, Adam Leitman Bailey, P.C. carefully crafted a detailed and bulletproof affidavit for its client to submit in opposition to the Board's Motion.

Ultimately, while the Supreme Court found that the negligence and declaratory causes of action should be dismissed as duplicative of the breach of contract cause of action and the client had an adequate remedy at law, respectively, the Court nonetheless agreed with Adam Leitman Bailey, P.C. and found that the breach of contract and breach of fiduciary duty causes of action were adequately pled, as supplemented by the client's affidavit, to survive dismissal.

Despite receiving this decision, the Board nonetheless filed an appeal with the First Department (the

"Appeal") seeking to challenge the Supreme Court's determination. Again, Adam Leitman Bailey, P.C. took immediate action to defend the Appeal. After fully briefing the Appeal by utilizing similar arguments brought in opposition to the Supreme Court Motion., Adam Leitman Bailey, P.C. appeared before the First Department to argue against the Board's Appeal. In less than a month after the parties argued the Appeal, the First Department came down with a notably perspicuous decision affirming the Supreme Court's decision on the Motion.

As a result of Adam Leitman Bailey, P.C.'s zealous advocacy and winning strategies in both the Supreme Court and First Department, the client can rest easy knowing that Adam Leitman Bailey, P.C. will be able to continue fighting for her right to enjoy and use her apartment, free of unclean and hazardous plumbing facilities.

Adam Leitman Bailey, John M. Desiderio, and William M. Pekarsky represent the client in all aspects of the Supreme Court Action while Jeffrey R. Metz handled and argued the Appeal and Brandon M. Zlotnick assisted with drafting the appellate brief.

Read Original Case Study

Adam Leitman Bailey, P.C. Obtains Payment of Commission for Real Estate Salesperson

Real Estate Litigation

Adam Leitman Bailey | Brandon M. Zlotnick

Adam Leitman Bailey, P.C. obtained payment by a real estate brokerage of commissions owed to a real estate salesperson as a result of his involvement in a sale of property that had generated millions of dollars in commissions to the brokerage. The salesperson had assisted in locating a purchaser for the property in a new, high-end development. The broker had initially received commissions from the purchaser but had not paid any share of them to the salesperson, Adam Leitman Bailey, P.C.'s client. The client was entitled to commissions in the hundreds of thousands of dollars.

Adam Leitman Bailey, P.C. initially communicated with counsel to the brokerage in an attempt to obtain payment without resorting to litigation that might have proven expensive to the client. When this effort did not bear fruit, Adam Leitman Bailey, P.C. brought an action on behalf of an individual real estate broker who had been employed by the same brokerage and who had been involved in the same transaction and also had not been paid any commissions therefore, seeking payment of commissions for that transaction, and others, under various theories of liability.

Within a month of the filing of the summons and complaint in that action, the brokerage made a payment to the real estate salesperson of the full amount owed to him in connection with that transaction. The brokerage also made a partial payment to the individual broker of commissions owed to him in connection with the same transaction.

Attorneys Adam Leitman Bailey and Brandon M. Zlotnick of the Supreme Court Litigation Group represented the salesperson client in obtaining this result.

Read Original Case Study

Press Mentions

Heroes Among Men: How Adam Leitman Bailey, P.C. Saved Lives of the Lifesaving

New York City is known for its towering buildings, visible from all corners of the city. The maze of sky-high buildings is home to offices, schools, residences and thousands of important companies. Not all that glitters, as they say, is gold, though.

Among the older buildings—structural legacies that rise above the bustling streets—new construction is quite literally around the corner. A city that bears the weight of thousands of structures still has a seemingly endless capacity for new buildings. But sometimes, new construction can get messy and even dangerous.

When Adam Leitman Bailey, P.C. got a call from a company that their building was in danger due to construction from a large developer directly next door, the firm and Adam Leitman Bailey himself did what they do best—put on their capes and leaped to action.

A LIFE-SAVING COMPANY IN DANGER

The business, a 911 Center and Fortune 500 company, held its office in one of New York's many buildings—and had for years—when the disruption began. The company, which must remain nameless for privacy, performs daily life-saving work. They also relied on the assurance that they themselves were safe in the building from which they functioned.
Right beside their building, a developer began construction on a tower that would house residences and a shopping center. Due to the sheer size and scope of the new construction, the existing building and thus, the 911 Center were put in jeopardy.

Cracks in the foundation erupted, traversing the walls and reaching far into the Center's building. Bailey's firm quickly jumped into action, and it wasn't long before the workers had to leave for their safety while the building was properly inspected.

Bailey's firm called in professional experts to evaluate the building and moved to put an immediate stop to the developer's actions. The firm had the building assessed and the damage estimated so that the proper care could be enacted to reinforce the building, mitigating any risks of damage and destruction.

A team of experts, including lawyers from the firm, representatives from the Center, engineers, firm-selected structural and geotechnical engineers, as well as architects, went to work inspecting the building and documenting all damage, cracks and further destruction. What they found was extensive, and the developer was asked to halt all further construction. That

request, though, was wholly ignored.

BROKEN BUILDINGS, BROKEN LAWS

The 911 Center had previously entered into a license agreement with the new building developer, which, required under the New York City Buildings Code, put temporary protections in place that would halt construction until deemed safe.
Despite the agreement, including a physical plain paper copy listing the requirements, the developer proceeded with construction. As the team of experts investigated the building, Bailey and his firm went into legal battle. They reviewed the agreement, finding several contract breaches, not the least of which included the continued construction during the investigation, which caused further damage to the Center's building.

Bailey's firm immediately called for a cease and desist until the building was made safe again, even contacting the New York City Department of Buildings Commissioner to explain the developer's blatant building code violations and negligence. Bailey explained that the developer's actions, not only illegal, posed incredible risk and forced workers into hazardous, life-threatening conditions. Bailey supplied the NYC Department of Buildings with thorough documentation from his team of experts that highlighted the extensive damage and the developer's non-complicity with even the most minor of building codes that would have protected the Center's building.

Because of Bailey's efforts, the NYC Department of Buildings performed its own inspection, resulting in an immediate stop issuance to the developer, forcing all construction and excavation near or around the Center's building to cease. Following this, the Department flagged the entire project for an audit, further forcing scrutiny onto the developer and his plans and methods for the project.

It was big win for Bailey and his team, but more work was still to be done.

A MEASURE OF SUCCESS

Now that construction—and the developer—were properly stopped, Bailey's team of experts worked with the representatives from the Center to go a step further with the installation of monitoring devices. These devices were put in place to continue gauging the safety of the building and ensure that the developer's work would not cause the building any further foundational distress.

These devices assisted the engineers while they and Bailey's team worked together to steady the building and restore its structural safety, including soil stabilization. They were also able to meet directly with the developer of the new building to further evaluate the new construction and advise against particular actions that may impact the Center's building.

In the end, not only was the 911 Center's building restored of its structural security and safeguarded against future damage, allowing the employees to get back to the important work they did daily, but the developer was eventually able to resume construction following the NYC Department of Building rules.

OUT OF HARM'S WAY

Adam Leitman Bailey, attorney and owner of the firm Adam Leitman Bailey, P.C., worked with his team of experts, including lawyers Joanna C. Peck and Rachel Sigmund McGinley, to represent the Center and essentially save the building.

Their tireless commitment to their clients not only provided life-saving workers with life-saving solutions but also kept a developer in line with the laws and forged a safe path forward for all involved.

The lawyers at Adam Leitman Bailey, P.C. fight for their clients as any heroes would—with determination, tenacity and the hope that their work can make a difference.

Read the Original Article

Best Lawyers®

Adam Leitman Bailey Saves Upper East Cooperative From Forced NYU Combination With Neighboring University Building

To fall in love with where you live is one of life's grandest gestures, finding peace and passion in the places

you call home. For residents of New York, the city that glimmers day and night, it's hard not to cherish the homes made among the glittering buildings. New York is a place so uniquely other, a city with historical roots that run deep for those already living there and those who seek it out.

Bordering 5th Avenue on the 70s between the towering residences are some of the most prestigious and profitable businesses, organizations and institutions of higher education. These establishments usually usher in significant change—and throngs of people. And while positive enhancement and growth to the cityscape are cherished, unnecessary destruction can be harrowing, especially for those who live there. When big organizations and schools spanning several city blocks threaten the harmony and structural integrity of New York's most beloved buildings, legal action becomes the primary—sometimes the only—plan of recourse.

Perhaps no one is more acutely aware of just how special New York real estate is than long-time resident and powerhouse real estate lawyer Adam Leitman Bailey. With an office that skims the clouds in a Battery Park high-rise, Bailey has spent the last several decades working for New Yorkers to ensure that they remain defended against those who try to take their peace—and property.

Between the Brownstones

Real estate developer and decades-long resident of New York City Marius Fortelni bought his city apartment in the late 1980s when it was converted from a rental to a condominium. The apartment, situated in one of New York's most notable Brownstone buildings bordering 5th Avenue on the 70s, was constructed by famed architect C.P.H. Gilbert and bore the signet gargoyles upon its entrance. Its opulence and history were part of its charm, and for that, Fortelni loved living in the building. He even became the cooperative building president upon moving in.
Fortelni's building resided on one of New York's most iconic spots—78th Street. Known for its history of luxury, both among the homes themselves and the residents who inhabited them, the Upper East Side's 78th Street in Manhattan remains among the biggest jewels in America's crown city. For it's on this street that some of the country's most affluent families have called home, and it was here that Fortelni sought to protect his building, both for himself and his fellow residents.

Although Fortelni's building was not landmarked, it resided in a landmark district with its very famous neighbor, the James Duke building, owned and operated by New York University (NYU) for its Institute of Fine Arts. Chartered in 1831, NYU has buildings peppered in and around various blocks of the city. When Fortelni's building was originally converted to condominiums, the fine print of that transaction conceded to several entry points of the building, even granting the institution access to the lower level and basement. Famed Real Estate developer Sheldon Solow has also donated a unit on the ground floor of the cooperative to NYU.

NYU eventually sought to put in a breezeway between Fortelni's building and the NYU building to create an entrance so that students might pass between them as they traveled around campus. The breezeway would run directly into the building, opening into the building's basement and creating additional points of entry. This would, essentially, gut a hole into Fortelni's beautiful, preserved building. It would also allow for several hundred people to walk through the lower level between buildings, herding heavy noise and foot traffic right to the residents' doorsteps. As Fortelni described it, it would also force the residents to surrender control over who could enter their building, their home. To say the least, it was an unwelcome and unfair intrusion that none had anticipated, threatening the harmony—and property value—of their beloved building.

Fortelni, protective of the building and its residents, sought to rectify this, discussing with several law firms

his options. He was told by all that he was "wasting his time" and that "the language is written in such a way that it gives them [NYU] all the rights." The lawyers with whom he spoke believed he had little chance—less than 1%, in fact—of winning such a litigious case against a powerful institution.

But then, a friend of Fortelni mentioned Adam Leitman Bailey, P.C.: "You know what? There's this one law firm that probably can help you, even though your case seems to be hopeless." Fortelni took a chance and reached out, and rather than watching a construction crew pave a new path through his building, Fortelni worked with Bailey to pave a different path—to victory.

Bailey's Brilliant Battle Back

Fortelni describes Bailey as one of those rare people who is simply brilliant and takes different approaches to problem-solving. He says every field has a few of them, those unique minds who can look at a situation, dig into it, turn it on its head and produce an unexpected solution.

Bailey and Fortelni sat down to again pore over the text that originally granted NYU the rights to access the Brownstone. This same text, which several lawyers had declared to be without any loopholes, reminded Bailey of something pivotal to the entire ordeal: the buildings involved were classic, famous, landmark feats of architecture, and NYU was proposing—quite literally—a blight on the foundation.

Bailey knew, from years of living and working in New York real estate, that the historical value was tantamount to the monetary value of these buildings, and NYU's renovation plans would drastically compromise both.
Bailey got to work doing one of the things he does best—research. He dug through arsenals of paperwork—about New York, the history of the buildings, the Brownstones on 78th Street—and uncovered important facts about each that had long lay dormant.

The Hearings

NYU maintained that the bylaws allowed the owner of the commercial ground floor condominium to make alterations without the board's consent, according to the New York Times. NYU representatives appeared before the area's Community Board 8 and presented the plans, which were met with a hostile reception by building residents and the community. NYU representatives continued that, "The addition of the breezeway was included in large part to reduce the traffic in the main entrance in order to minimize impact to the condo residents." Bailey appeared before Community Board 8, demonstrating how NYU had falsely represented itself in the application to the Landmarks Preservation Commission and never received permission from the cooperative to sign its name to any application.

As a result, Landmarks formally withdrew NYU's application until NYU followed the proper protocols in receiving permission to do the exterior construction and sign the appropriate name on the application. To this day this has never been achieved. "NYU knows this will ruin the value of the building and then they can capture the rest of it cheap, which is what they really want. How can you take the Mona Lisa and edit it, so it fits in with a Picasso?" Bailey expressed to the Community Board. He then discussed the effect of those changes on the small cooperative next door and introduced expert studies on the foot traffic and potential sound implications of such an instruction. The Community Board sided with Adam Leitman Bailey and the small cooperative. About this case, The New York Times noted:

> *"The community board voted 41-1 to disapprove the plans. 'The presentation information did not fully illustrate the proposed changes,' the board stated in a letter to the LPC dated May 22. The letter notes that 'the materials are not appropriate to the existing buildings' and that the construction would disturb 'the original fabric' of the two buildings."*

Bailey achieved the similar results in State Supreme Court. Before the Community Board, the Landmark Association, a well-known judge and a large, competitive law firm with some of the best landmark attorneys in the world, Bailey presented his findings. Language from corporate documents supported his case. Bailey gave them all powerful examples, outlining why we have these landmark buildings and how vital they are not only to the city held so dear but to its residents and organizations who represent New Yorkers. The

Landmark Association and the Community Board realized what a detriment NYU's plans were to the buildings, to the city, to the people who lived there and to the legacy of 78th Street. Bailey's representation was, as Fortelni described it, "a simple and powerful approach" that won their case.

Tenacity and Triumph

Adam Leitman Bailey has built his career, his law firm and his reputation on his fearlessness. Where others back down, he steps up, forging creative solutions and keeping his focus on the success of his clients. Fortelni attests to this strength after working with him on this case. "Honestly, I don't think he has any weaknesses. You know, I think that man is made to do what he's supposed to do, and he's just set apart. There're always some people in some fields, in sports, whatever it is, that are extraordinary. I think he really gets into the case, thinks outside the box, finds a path no matter what, does not give up, has a tenacity that is amazing. I think he doesn't sleep at night because I think he works seven days a week, 24/7 for you. If you really have a difficult case, any case really, you want to make sure that you're on the winning side, and the way Adam approaches any kind of deals that I've seen, any kind of agreements, he finds a path. I think if he would have lived a long time ago, he would have been Caesar in an army because he doesn't give up, he's the only one I would recommend."

Indeed, Bailey is cut from a different cloth, with a knack for pulling back the veil and defeating what others deem unbeatable. "He doesn't give up. That tenacity to say no matter what, I'm going to find a path to victory. That is something that is rare."

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THE REAL DEAL
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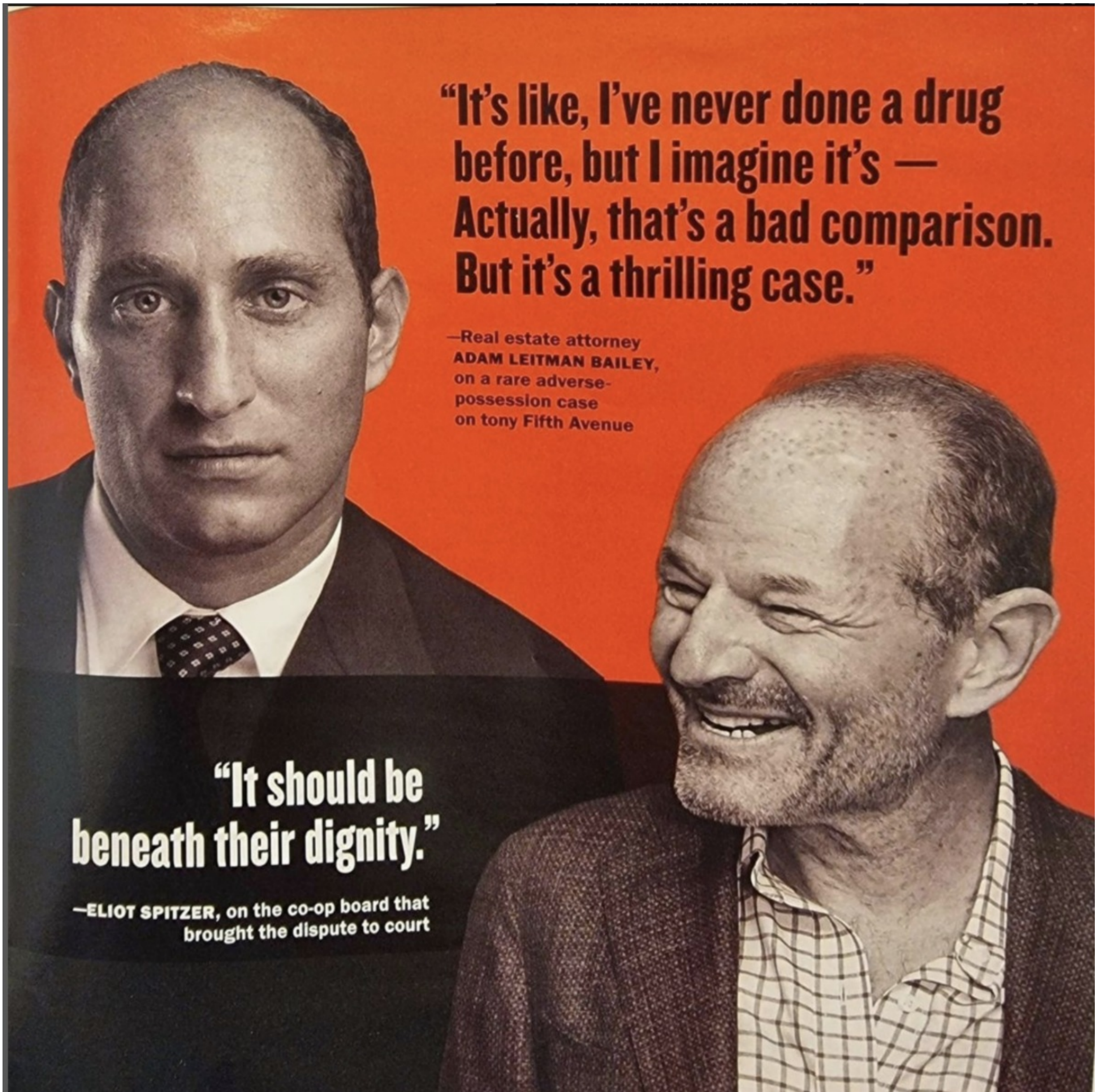
In Their Words: The Most Colorful, Insightful and Incendiary Comments on Real Estate



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THE REAL DEAL
REAL ESTATE NEWS

What a ban on noncompetes could mean for real estate

Brokerages may have fewer arrows in their legal quiver if the Federal Trade Commission makes good on its new goal of banning noncompete clauses in employment contracts nationwide.

The contract provision restricts managers and executives from benefiting rival brokerages by switching jobs, usually within a defined geographic area or time period once a contract ends. Noncompete clauses do not typically affect agents, who are independent contractors.

"The higher you go in the food chain, the more common they are," said New York real estate attorney Adam Leitman Bailey, who said he sees, and litigates, both sides of the issue.

Noncompete clauses "constitute an unfair method of competition," according to the FTC, and have forced some real estate professionals into de facto unemployment — albeit compensated.

Steven James and Brad Loe waited out year-long noncompete clauses after leaving Douglas Elliman to join Berkshire Hathaway HomeServices as CEO and director of sales, respectively.

"People should be free to work where they want and associate with who they want," said Jonathan Sack, an employment attorney in New York City opposed to broad noncompetes.

"Parties are free to contract," said Sack, but trying to enforce overly broad restrictions can be "a total disaster." Once a noncompete clause is found invalid for one worker, others working under the same restrictions are more likely to be freed. "They can be very difficult to enforce," he said.

WeWork had to release 1,400 workers from an overly broad noncompete clause and reduced restrictions on a further 1,800 people after New York and Illinois attorneys general challenged the company in 2018.
The result has not stopped other real estate companies from trying to enforce noncompetes.

Cushman & Wakefield sued rival brokerage JLL in October after two former salesmen changed jobs, claiming they had violated the noncompete provision in their employment contract. Cushman also sued over a non-solicitation clause, which aims to stop workers who have changed jobs from recruiting others to join them at the new company — in this case, non-producing supportive staff.

Sack defended the ability of teams of workers to relocate, likening them to a musical quartet that needs the talents of each individual to function as a whole. Proving damages can also be tricky, he suggested, because the beneficiary of someone changing companies — such as a landlord who wants to close a deal — is unlikely to testify against their own broker.

Compass became a target of litigation for poaching managers of rival brokerages in order to build its company in the late 2010s. While Compass claims not to use noncompete clauses, it has gone to court to enforce non-solicitation clauses.

In one such dispute in California, rival brokerage The Agency countersued Compass to argue that its non-

solicitation provision was illegal. Noncompete clauses are unenforceable in California due to state law, but the ban does not cover non-solicitation agreements.

The FTC's noncompete agreement ban must still undergo a 60-day public comment period, though a final proposal is unlikely to proscribe non-solicitation. Nor will it ban other contract provisions that real estate professionals may enter into, such as clawback agreements that require agents to repay commission advances if they leave a brokerage prematurely.

Job seekers may lack leverage to negotiate specific language with employers, but real estate professionals who spoke with The Real Deal advised retaining an employment attorney to ensure noncompete restrictions are narrowly tailored. Several people spoke harshly of noncompete clauses but objected less to non-solicitation agreements. They asked to remain anonymous in order to preserve their relationship with an employer.

Bailey said he recently viewed a noncompete clause that would restrict a real estate professional from working for rival firms in New York City, the Hamptons and Miami — a geographical range he felt was too broad.

"If you're paying people millions of dollars, you don't want them competing against you in a year or two," said Bailey. "But are they needed at brokerages? I think the free market should reign."

The FTC claims that as many as 30 million Americans toil under noncompete clauses, dampening their total earning potential by as much as $300 billion per year.

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Client Testimonials

"(Adam Leitman Bailey) is one of the most impressive individuals I've ever met, and I had lawsuits in Europe, I'm European, I had lawsuits in Paris and in Vienna and out here in the Hamptons, but Adam is extraordinary in every way. Honestly, I don't think he has any weaknesses, you know, I think that man is made to do what he's supposed to do, and he's just set apart… there's always some people in some fields, in sports, whatever it is, that are extraordinary, and Adam, if you were a golfer, you would be Tiger Woods." - Maurius

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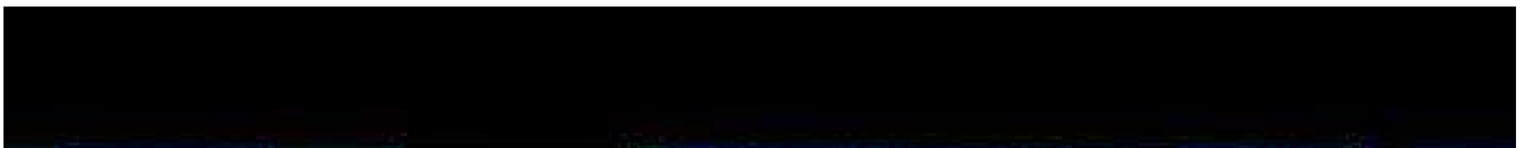
“He doesn’t give up, that tenacity to say no matter what it says, I’m going to find a path to Victory. That is something that is rare. I think if he would have lived a long time ago, he would have been Caesar in an army because he doesn’t give up, he’s the only one I would recommend.”

Letter of Reference

“My name is Marius Fortelni. I’m a real estate developer. I’ve developed properties in New York but mainly now develop in Florida, Palm Beach County, as the market there is really good and a lot of New Yorkers are moving down to Florida. I was the president of a building, 3 East 78th Street. I bought the apartment when Soford took it from a rental to a condominium in the late 80s. Loved the building, it is truly one of the most magnificent Brownstone buildings. It’s a limestone building. The architect is a very famous architect, CPH Gilbert. He did entire blocks and it’s 30 feet wide — 35 feet wide — with gargoyles, I mean, it’s an amazing building with an amazing history. And so right next to us is NYU, and when the sponsor converted the building from rentals to condominiums, they wrote up a text that basically gave NYU every possibility to enter the building, to open the building, to use the basement space and the first floor, and we really had no outs. So we discussed this with several law firms and they said “look you’re wasting your time, the language is written in such a way that it gives them all the rights.” And then, a friend of mine said “you know what, there’s one law firm that probably can help you even though your case seems to be hopeless and that’s Adam Leitman Bailey,” and that’s how I got to him. In every field, doesn’t matter what field, you find one two or three people that are brilliant and Adam is brilliant and he doesn’t take the normal approach, he takes a totally different approach because when we read the text together, the text gave NYU all the rights.

takes a totally different approach because when we read the text together, the text gave NYU all the rights, and there was no loophole in there because that's how they wrote it. Adam took a very different approach in our conversations and said "look, this is a landmark building, and an original is only original if it's an original." And he came up with the example of if you go to a classic car auction, and there's a really famous car that is worth a lot of money, but if a couple of pieces have been replaced with new pieces it's not a classic car anymore. Only a classic car, only the original, is an original, and he used that in front of court, in front of landmarks, to drive home the point that if they start breaking open the side of the building in order to get into the basement we would have given up all the rights, of course, because we don't know who enters the basement then. But besides that, the building would have lost its originality and it's a very famous and really special building, and that's how he approached the case. NYU had rights to our basement which was quite large, about four thousand feet and two parts of the first floor. They wanted to create a direct entrance through the side of the building, open up the side of the basement wall, and create direct access from NYU, which is next to us, into our building [...] so that their students could flow in and out of our building freely. Obviously, that would have given us the loss of control over who enters the building, as well as the building would not have been the same, it would not have been original anymore... I read that text several times, we took it to several attorneys and they gave us exactly the same explanation, "the text is what it is, it's written to make sure any and all possible loopholes are eliminated and it said that NYU will be able to do this". And so we thought we really have no chance until I finally talked with Adam and he took a totally different approach, well, he took a different approach by saying "you know what, this text gives them the right but it doesn't give them the right to basically destroy a landmark building", and it was a pretty simple and powerful approach. And he took examples of why we have landmarks, why a building like that cannot just be altered, regardless of what our agreement said, and that really was a very powerful argument in front of landmarks and they said "no, you can't do this." Adam is brilliant. Adam thinks outside the box. Adam doesn't give up; he goes to war for you. He takes the case and really, you've hired somebody who's going to take it all the way through. He's one of the most impressive individuals I've ever met, and I've had lawsuits in Europe, I'm European, I've had lawsuits in Paris and in Vienna and obviously in the Hamptons, but Adam is extraordinary in every way. Honestly, I don't think he has any weaknesses. You know, I think that man is made to do what he's supposed to do, and he's just set apart. There's a Tiger Woods, there are always some people in some fields, in sports, whatever it is, that are extraordinary, and Adam, if you were a golfer, you would be Tiger Woods. I said I think he really gets into the case, thinks outside the box, finds a path no matter what, does not give up, has a tenacity that is amazing. I think he doesn't sleep at night because I think he works seven days a week, 24/7 for you, and if you ever have a case, he's the only one that I would hire again. If you really have a difficult case, any case really, you want to make sure that you're on the winning side, and the way Adam approaches any kind of deals that I've seen, any kind of agreements, he finds a path. He doesn't give up, that tenacity to say no matter what it says, I'm going to find a path to victory. That is something that is rare. I think if he would have lived a long time ago, he would have been Caesar in an army because he doesn't give up, he's the only one I would recommend."

"I'm grateful that I was able to find Adam and he came through in what he promised"- Ahmet Nejat Ozsu



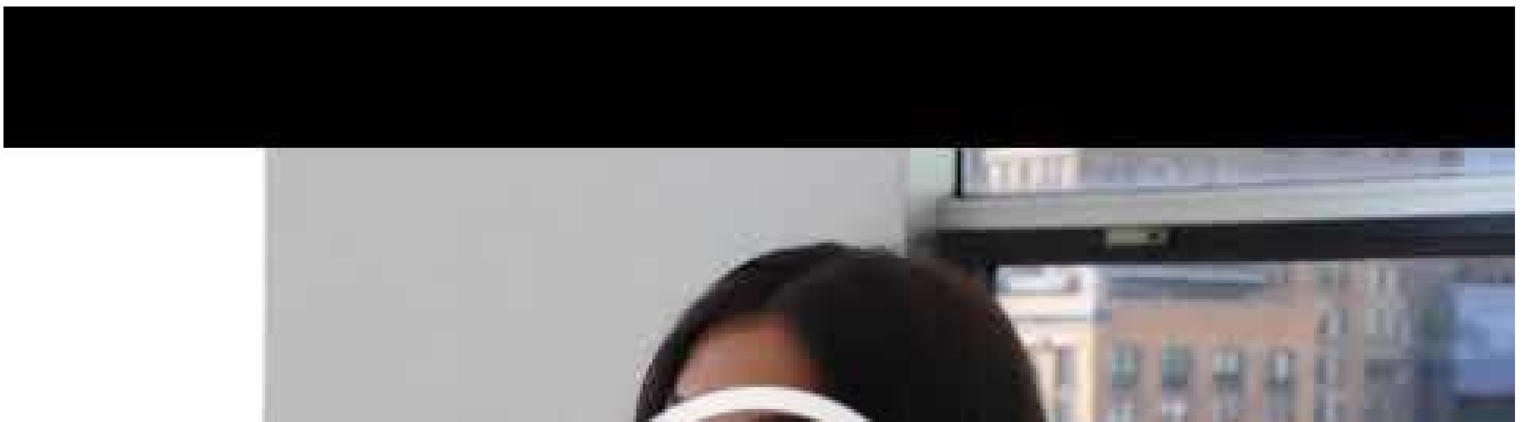
“Weaknesses? You guys are hard-working, that is your weakness” – Nilesh Shah

Click Here for More Client Testimonials.

Staff Testimonials

“He’s the best boss ever. He is a very good teacher. […] He encourages and rewards hard work” – Courtney J. Lerias

“Without Adam Leitman Bailey and Adam Leitman Bailey, P.C., I wouldn’t be the person I am today and I wouldn’t be able to flourish on my own.” – Ashley, Executive Assistant and Chief of Staff



Letter of Reference

"When I look back on my time here at Adam Leitman Bailey P.C., I cannot help but smile. The amount of joy working at this firm has brought me is indescribable, but I will do my best to depict it in this letter. Starting here, fresh out of college, I was quiet, hesitant, and reserved. I can confidently say, after my time here with Adam, I am a strong, self-assured, and assertive woman. This would not have happened without Adam and all the amazing people at this firm who have helped me develop into the person I am today. To work for a person who is so outspoken and talented, has been a true blessing. They say you should surround yourself with the best people who you aspire to be like. Well, at this firm, I have been lucky enough to have been in the presence of the hardest working, kindest, and most devoted people I know. To say that I am honored to work alongside these great people and have their characteristics rub off on me is an understatement.

At this firm, I was Adam's Executive Assistant and Chief of Staff. Working alongside Adam daily and observing his tenacious attitude towards work and life, has taught me to never give up and always be assertive in my beliefs. Adam was always willing to teach, and trust me when I say, he has a lot of knowledge to pass along. I was given the responsibility of being Adam's right-hand, running the firm alongside him. It was my pleasure to have him as my mentor/boss in this massive task, because I always felt like he was there to support me with whatever I needed. And although my job was a challenge, I enjoyed every second of it because no matter if I was feeling overwhelmed or needed assistance, I knew Adam would help me through any task and he would even crack a joke or two to put me in a better mood. Adam genuinely cares and goes above and beyond for his employees, which makes him a unique boss. For example, when I was sick with the flu, he sent me two quarts of soup, a sandwich, and a cookie to make sure I was eating. To know that someone truly has your best interest at heart is one of the most comforting feelings, which I have gotten to experience here. Adam has built a place with an outstanding team that makes employees and clients feel respected and valued.

Adam Leitman Bailey and Adam Leitman Bailey, P.C. have not only provided me with incredible work experiences and lessons, but I now walk away with life-long friendships and memories that I will cherish forever. Therefore, I am eternally grateful for my time here and would not change a single thing. For whoever is reading this, and if you get the chance to work at this law firm, I hope you understand what a true pleasure the opportunity is.

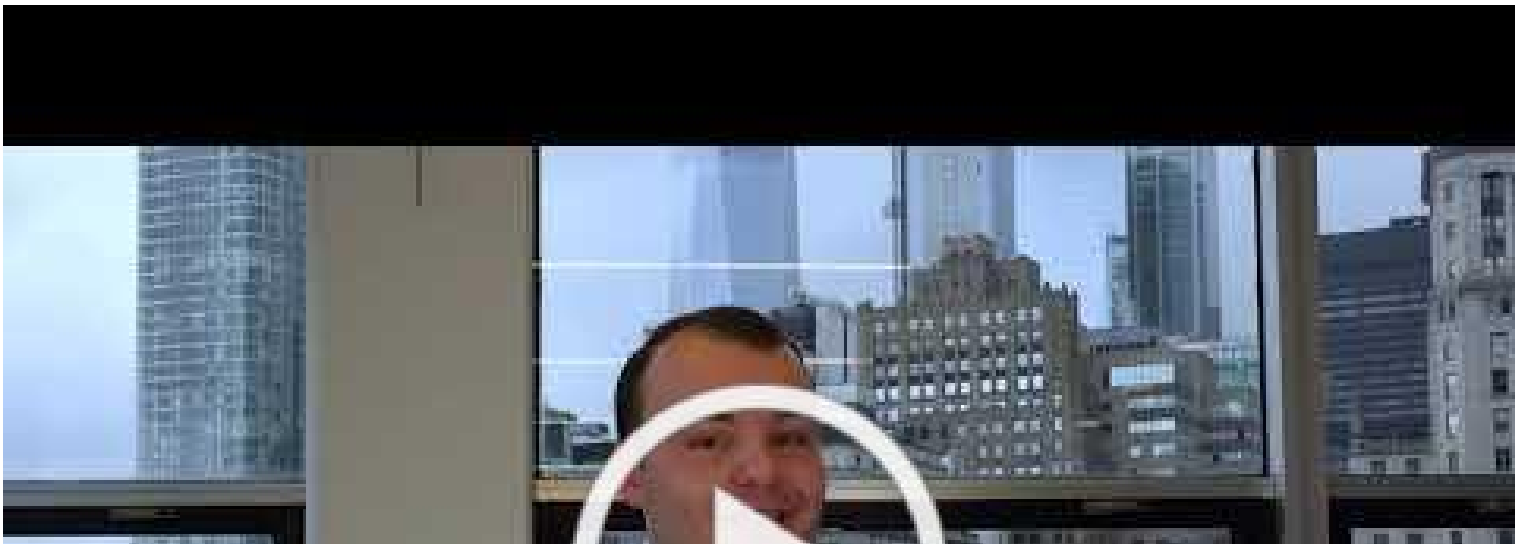
As I write this, I find myself tearing up, as I have been dreading the moment that I would have to say my goodbyes. It is difficult to put into words, but I hope this letter at least coveys how thankful I have been to work at such an outstanding, well-respected law firm. Countless memories–from working on projects to

team-bonding experiences–have been engraved in my brain so I will never forget my time spent here. Thank you, Adam, and to everyone who I have worked with at the firm to make this not only a place to work, but a place I look forward to going everyday because I know I get to be with my friends and mentors. As cheesy as this next statement is, it is truly how I feel: it is not goodbye, but is see you later, because I know everyone will continue to be in my life and have my back.

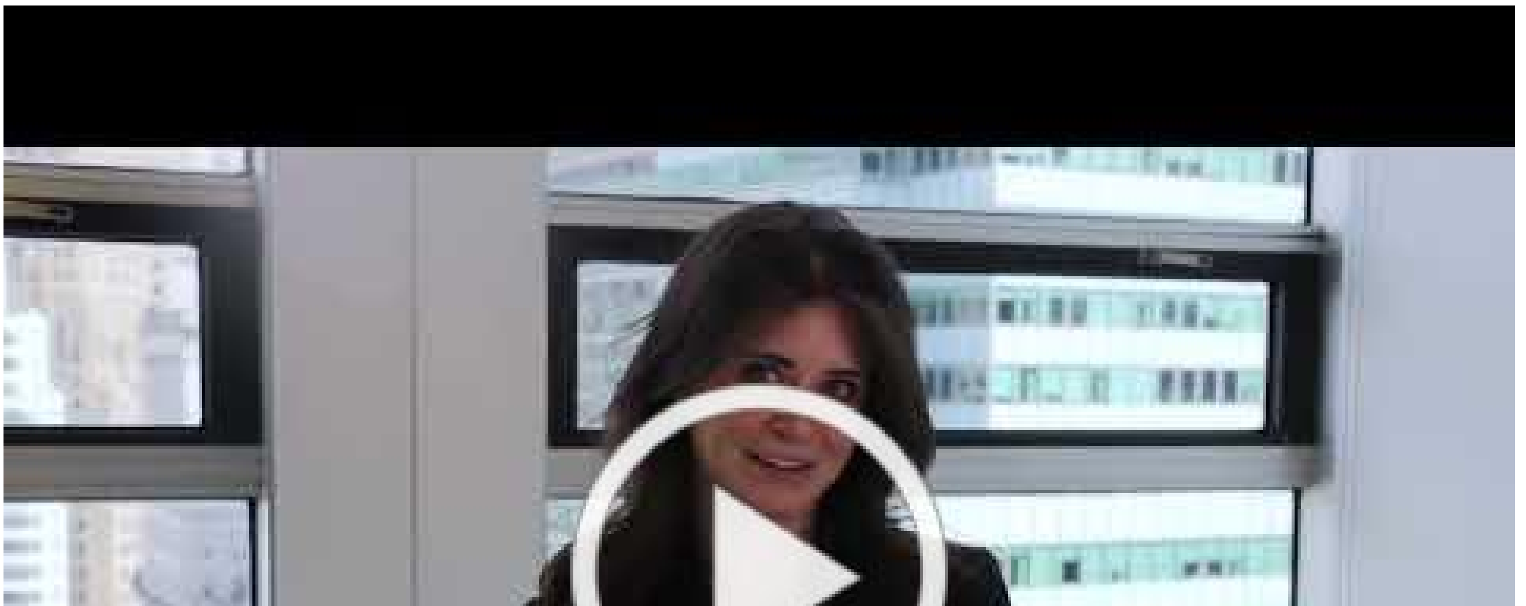
With Many Thanks,

Ashley Weiner"

“When I started law school, and I envisioned working at a law firm, Adam Leitman Bailey, P.C. was exactly what I was looking for” – Chris, Extern



“He wants everybody who works here to be their best and he pushes everybody to be their best.” – Elisabeth, Marketing Intern



Click Here for More Staff Testimonials

Client Testimonials

“Adam Leitman Bailey. As no other in New York.”

Letter of Reference

“The attorneys do close significant deals. They also celebrate each time they win a case, most seeming insurmountable. That’s why there’s always an important commemoration going on. Adam Leitman Bailey. As no other in New York.” – Esther Shayna

“We had at best a 1% chance to win it and you made it possible!”

Letter of Reference

“Let me know if you need anything- the case you won for us against NYU was truly amazing, we had at best a 1% chance to win it and you made it possible! Should be studied by other law firms on how to go to war.” – Marius

“Adam is really a good guy always positive, happy, & willing to help others.”

Letter of Reference

“You’re one lucky guy to be a partner in the firm! Adam is really a good guy always positive, happy, & willing to help others. You know it & I know it and now! The whole world knows it!!! Congratulations on your achievement of becoming a partner.” – Ricky Arnau, long-time board member of one of the largest

cooperatives in New York.

“Can we agree a good nickname for our mutual friend would be Awesome Adam?”

Letter of Reference

BS: “Can we agree a good nickname for our mutual friend would be Awesome Adam?”
IV: “Agree halfway. If he is on your side yes. If he is on the other side then it’s Terrifying Adam.”
BS: “Then maybe Alarming Adam or Ballistic Bailey?”

“That’s why you’re an amazing attorney. Your twisted creative mind is always thinking of the unthinkable!”

Letter of Reference

“I agree with you 100% !!! You couldn’t have said it any better even though you’re using the fictional video. What’s funny it happens to be true! That’s why you’re an amazing attorney. Your twisted creative mind is always thinking of the unthinkable! 😂☐” – Ricky Arnau (Former board member of a large Mitchell-Lama Cooperative)

“Adam Leitman Bailey, P.C. you are a gem and a true ally to your clients!!”

Letter of Reference

“Perhaps no one is more acutely aware of just how special New York real estate is than long-time resident and powerhouse real estate lawyer Adam Leitman Bailey. With an office that skims the clouds in a Battery Park high-rise, Bailey has spent the last several decades working for New Yorkers to ensure that they remain defended against those who try to take their peace—and property.” -Rebecca Blackwell

As a response to the above, “All true! I can vouch for the validity of the above statement and my only regret is that I didn’t say this myself! Adam Leitman Bailey, P.C. you are a gem and a true ally to your clients!!” -Michelle Kelner, Board President, Condominium Brooklyn

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“[Adam is] a really impressive human being”

Letter of Reference

“Quick back story: I met Adam Leitman Bailey over 20 years ago through mutual friends (Kim K. and Lori W.–if you are reading this, Adam). We all went to SU law or undergrad. I watched on the sidelines as he built this incredible business with smarts, skill, and work. I have also watched on the sidelines as he gives back so much to students and the community. This is an American Dream story, and when my son and I ran into him trick-or-treating with his son in the neighborhood a couple years ago I reintroduced myself. A really impressive human being. Just wanted to give you the back story, because it is so awesome seeing someone who does well, and does good. ” – SEB, Esq.

See More Testimonials Here

Miracle Lawyering, Strategizing and a Bit of Luck Allows Client To Buy Dream Home While Being Sued

Testimonial Transcript

"Hi, my name is Adrian Bartos. I'm professionally known as Stretch Armstrong, I'm a DJ in New York City. I've got an extensive past on the radio doing nightclubs since the early 90s and I'm a native New Yorker. I've been into music since the late 80s, first as a just die-hard music fan and then I became a DJ around 1989, and started DJing in nightclubs in 1990. I also had the good fortune of getting a radio slot on Columbia University's WKCR, which is also the first FM station on planet Earth, and started a radio show there which became kind of like a cult must-listen-to station for all the 90s hip-hop artists that were emerging from New York City in the 90s, like Jay-Z and Nas and Wu-Tang Clan and Buster Rhymes and MOB deep and Big L and Biggie Smalls, the list goes on. They all kind of came through my radio show before anybody else got a chance to hear them.

I met Adam when an ex of mine was battling the president of her Co-op board in a small Co-op in Midtown off Fifth Avenue. The president was a very famous comedian who was treating the co-op like it was her own private fiefdom and my ex had an issue with that and brought Adam in to kind of shake things up. I think they were largely successful and we got along really well.

Less than two years ago I owned a brownstone in Bed Stuy and we found out just before renovating that there was an off-market Brownstone across the street that was wider, on the sunnier side and on a whim I went to check it out. It was off-market and it turned out that I knew the broker for the estate that was selling it and I put in an offer and it was accepted - this was in the middle of the pandemic, kind of on the verge of Thanksgiving, with cold weather. We knew that to successfully purchase the property across the street, without making it too complicated, we should sell our place as quickly as possible without being greedy. So we found a buyer and on consecutive days signed a contract to sell and a contract to buy. We found out about three weeks later, when we didn't have a returned signed contract for the purchase across the street, that the woman was actually the daughter of the deceased owners of the property and she had agreed to sell us the property, and then she passed away before she could sign the contract. And then this sent the whole process into kind of a spiral of pain agony and anxiety.

I wasn't protected by my attorney - he neglected to put a contingency clause in so I was getting pressure from the buyers of my place to let them see the property with an appraiser so they can complete their financing, and my wife was seven months pregnant and kind of emotionally we didn't really want to go anywhere - we had a home birth planned and even beyond that we didn't want to leave if we knew that we did not have the property across the street. That's when I called Adam to see what our options were - to see if we could get out of the contract to sell and to see what it would take to complete the purchase across the street. So the first thing that Adam asked me is what do you guys want to do and I said well ideally we'd like to get out of the contract to sell, and find another buyer because we don't know when we'll be able to complete the purchase across the street, or even if we will be able to - I mean all bets were off across the street - are we going to be able to buy this property or not? We had no idea and of course, it's across the street from us so we're seeing it all the time. It's this constant reminder of a real estate transaction that went south very quickly.

Basically, Adam said I could keep you in your home probably for as long as you want to, it's just a matter of how much pain you want to feel financially. He said he couldn't predict what it would cost us but he said if it got to the point where there'd be litigation, obviously, the bills are going to start to really stack up. I said well let's just kick the ball...kick the can...uh...what's the metaphor? Anyway, let's just move ahead and kind of shut the whole process down however way you feel is the best way to do that, and basically that's what

happened. Through his guidance, we ended up staying in the property for probably a year and a half and at the end of it, we actually were able to purchase the property across the street. We were able to stay home, complete the purchase across the street and we ended up getting what we wanted. We got it done and we feel really good about it.

Talking to Adam, well, first of all, his availability is great - he's accessible and he was just really friendly and fun and, you know, he's a straight shooter and great communicator and, you know, through the whole process pretty much everything that Adam said would happen, is what happened and, you know, you feel like you're taken care of. I felt protected and in good hands. Listen, I've got no complaints about the firm or Adam whatsoever."

See More Testimonials Here

Community

Danny Ramrattan Was Made Partner at Adam Leitman Bailey, P.C.

"It's been a great 7 years and I'm just grateful for this honor so thank you" - Danny Ramrattan, newest partner at Adam Leitman Bailey, P.C.

ADAM LEITMAN BAILEY, P.C.

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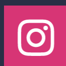

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