

Should the Warranty of Habitability Apply to Condominiums?

Enforcing Owners' Rights Against Delinquent Boards

By William Walzer

When an owner of a cooperative apartment in New York endures persistent leaks or other disruptions emanating from faulty building components, the remedies are clear under the New York Real Property Law.¹ However, the remedies available to a condominium owner suffering identical conditions are far less clear.²

The owner of a cooperative apartment receives, as one of the indicia of ownership, a proprietary lease from the building owner, the apartment corporation.³ Because the relationship between the apartment corporation and the unit owner is one of landlord and tenant,⁴ the warranty of habitability set forth in section 235-b of the Real Property Law applies.⁵ It states:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.⁶ (emphasis added)

The standard for a breach of the implied warranty of habitability is measured "in the eyes of a reasonable person," not in a vacuum that ignores the "essence of the modern dwelling unit."⁷ The statute was intended to provide an objective standard for

"those essential functions which a residence is expected to provide."⁸

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A tenant who is able to show a breach of the warranty under this section is entitled to damages. Proof of the conditions constituting the breach will result in a court's award of damages based upon a percentage reduction of the rent. Typical breach of warranty conditions include persistent leaks, holes in walls, odors, mold, and the failure of essential services such as fresh water or heat. It is not uncommon to see reductions of 10% to 50% of the rent, according to the severity of the conditions in a leased apartment. The statute specifically allows these reductions to be awarded without expert testimony as an aid to the fact finder.⁹ Rent reductions are commonly made in landlord-tenant summary proceedings by Civil Court judges who are experienced with the issues relating to these conditions and the relevant law.¹⁰

Condominium owners, on the other hand, have a different legal relationship with their building management. Instead of a proprietary lease, Condominium owners receive a deed to evidence ownership of

their condominium.¹¹ Condominium owners are not tenants. Thus the statutory warranty of habitability has been held inapplicable to condominiums.¹² Without the same statutory support, condominium owners seeking recourse for the conditions that constitute a breach of the warranty of habitability must navigate a more circuitous and sparsely traveled route of state and local statutes, as well as case law, to achieve a damage award. The lack of a comprehensive and straight-forward statutory remedy for condominium owners suffering from uninhabitable conditions, as there is for cooperative owners, makes enforcement by a condominium unit owner much more expensive and time consuming, and any potential damage award is far less certain. In light of the patchwork legislation currently supporting condominium owner's claims and the strength of defenses that can be asserted by the condominium boards of managers, it would make sense for the legislature to extend the warranty of habitability to cover substandard conditions in condominiums.

Laws Which Aid Condominium Unit Owners

Governance of a condominium is vested in its board of managers.¹³ The key documents that dedicate a building to a regime of condominium ownership are the declaration, the by-laws, and the floor plans that show the units.¹⁴ The declaration describes in narrative form, and the floor plans show visually, which portions of the building are the individual units (generally within the four walls of the apartment) and which building elements are common areas; the upkeep of which is a concern of all owners.¹⁵ The declaration generally imposes

upon the board of managers the duty to maintain the common elements.¹⁶

The obligation of a condominium board of managers to the unit owners is one of a fiduciary.¹⁷ In *Board of Managers of Fairways at North Hill Condominium v. Fairway at North Hills*, the Second Department held that board members of a condominium must perform their duties "in good faith and with that degree of care which an ordinary prudent person in a like position would use under similar circumstances."¹⁸

The Condominium Act is found in Article 9-B of the Real Property Law. Section 339-ee (1) of the Condominium Act creates an obligation on the part of all condominium boards to maintain and repair the common elements of their buildings. The section states:

[E]ach unit owner shall be deemed the person in control of the unit owned by him or her, and the board of managers shall be deemed the person in control of the common elements, for purposes of enforcement of any such law or code, provided, however, that all other provisions of the multiple dwelling law or multiple residence law, otherwise applicable, shall be in full force and effect...¹⁹

Section 78 of the New York Multiple Dwelling Law imposes affirmative obligations or repair on multiple dwelling owners.²⁰ The section reads, in pertinent part, as follows:

Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused

by his own willful act, assistance or negligence or that of any member of his family or household or his guest. Any such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four.²¹

Similarly, the New York City Housing Maintenance Code, in § 27-2005, requires the owners of multiple dwellings in the City of New York to keep the premises "in good repair."²²

The New York City Department of Housing Preservation and Development promulgated a list of violations deemed rent impairing, pursuant to authority given by § 302-a of the Multiple Dwelling Law.²³ This list is found in Title 28 of the New York City Rules, and includes a requirement that owners fix leaky roofs.²⁴

Both New York State law,²⁵ and the New York City Administrative Code define a nuisance.²⁶ New York Multiple Dwelling Law § 309, in pertinent part, reads as follows:

The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewerred, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful....²⁷

Courts Have Viewed Condominium Boards as the "Owner" of the Common Elements

A surprisingly small number of reported court cases apply these statutes in the context of a multifamily condominium building. The condominium association was deemed the "owner" responsible for repairs of the common elements under the Multiple Dwelling Law in *Pershad v. Parkchester South Condominium*,²⁸ *Smith v. Parkchester North Condominium*,²⁹ and *Gazdo Properties Corp. v. Lava*.³⁰ In *Independence Community Bank v. East 86th Street, L.L.C.*, the court concluded that the condominium association was responsible to cure violations of the New York City Building Code in the common areas.³¹ In *Hatcher v. Board of Managers of the 420 West 23 Street Condominium*, the court examined whether a Multiple Dwelling Law provision requiring resident superintendents in buildings having absentee landlords should apply to condominiums. The *Hatcher* court held that, since the condominium's board of managers was deemed the owner and each member of the board resided in the building, no resident superintended was required.³²

Damages May Be Awarded Against Condominium Boards

Since condominium boards have been held responsible to make repairs, it would seem logical that their failure to make repairs should result in monetary liability in the same way that similar failures in the landlord-tenant context result in rent abatements. However, even fewer cases have held condominium boards liable to unit owners in damages for breach of their duties to make repairs to the common elements. Also troubling, the statutes and ordinances cited above, on which condominium owners may rely to support a duty owed to them, have no provisions specifying damages for violations.

Affirmative claims for damages brought by condominium owners

were allowed in *Board of Managers of Dickerson Pond Condominium I v. Jagwani*³³ and *Granada Condominium I v. Morris*.³⁴ Defenses asserted by owners in actions brought by their boards to recover common charges survived summary judgment in *In re Abbady (Mailman)*,³⁵ and *Residential Board of Managers of the Century Condominium v. Berman*.³⁶ But these cases provide little analysis to support their holdings. Despite a paucity of condominium cases allowing damages, case law does allow courts considerable latitude in fashioning a remedy for breaches of fiduciary duty. The First Department in *Wolf v. Rand*,³⁷ said:

Since the breach of fiduciary duty was proved, the court may be accorded significant leeway in ascertaining a fair approximation of the loss,³⁸ as contrasted with the more precise, compensatory, standard of a contract or tort case,³⁹ so long as the court's methodology and findings are supported by inferences within the range of permissibility,⁴⁰ which is the case herein. After all, "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated."⁴¹

The general principles for establishing a monetary award for damage to real property are well established. In the case of *Jenkins v. Etlinger*, the Court of Appeals stated:

Recovery for temporary injury to real property may be measured by the value of the loss of use, which is determined by the decrease in the property's rental value during the pendency of the injury.⁴²

Condominium Owners Face Litigation Hurdles

Tenants asserting a breach of the warranty of habitability need only show evidence of poor conditions, without regard to questions of negligence or active fault.⁴³ However, the law regarding condominiums is unclear and requires further development. One can imagine numerous issues and defenses that could be asserted by condominium boards.

First, as noted above, the primary claim of a condominium owner will be a breach of fiduciary duty by the board. Since the nature of a breach of fiduciary duty is tort,⁴⁴ the plaintiff will have to establish all the elements of a tort claim. In any such claim, a threshold question is whether a breach occurred. Since the owner can't rely on the warranty of habitability, the court will need to struggle with the question of whether specific statutes establishing a duty were breached.

The plaintiff will then have to establish negligence on the part of the condominium board. It is unclear whether a board may claim in defense of damages that the board acted prudently despite the fact that, for example, leaks inundated an apartment for a period of months. A board might argue in defense that it took months to hire a contractor and for that contractor to prepare for and perform the repair.

Questions of proximate cause will also be at issue. Under tort doctrine, the condominium owner must establish that the board's breach of duty was the proximate cause of the injury.⁴⁵ This in turn will involve questions of burden of proof. Must the plaintiff prove exactly how water found a route into the apartment, or can she simply rely on a logical presumption that if the water came from outside the apartment it must have been the result of a failure of the common elements? Can the plaintiff meet the burden without expert witness testimony concerning the manner

in which the physical damage to the apartment occurred?

Proving Damages Requires Expert Witness Testimony

To prove diminished value damages under *Jenkins*, supra, the plaintiff will need to provide the testimony of an expert witness who will assume as true the plaintiff's description of unlivable conditions within the apartment during the period it suffered from the board's inattention. A three-year limitations period applies to breaches of fiduciary duty when damages are sought, with each adverse event signaling the start of a new limitations period.⁴⁶

The damage expert will consider the rental value of the apartment as if it were not affected by the conditions of neglect, and compare it to the rental value of the apartment as it actually was during the period of board inattention. The difference of each monthly assessment, added for the entire loss period, would yield the damages. Of course, the fact finder is not required to accept the calculation of the damages provided by the expert and can substitute its own judgment. Moreover, the board could argue that the loss calculation should be based on a diminution of the common charges payable with respect to the unit as a substitute for fair rental value, instead of the actual fair rental value as calculated by the expert. In most cases the fair rental value of an apartment would be substantially higher than the common charges.

Condominium Boards Will Assert the Protections of the Business Judgment Rule

In addition to the burden of proving case elements that a typical tenant doesn't need to address, a condominium owner squaring off against her board potentially faces a powerful defense—the business judgment rule. Under the business judgment rule, courts will not review decisions of a board made in good faith.⁴⁷ As a

general matter, the business judgment rule applies to decisions of a condominium board of managers, just as it does to other boards.⁴⁸ But the rule does not apply where the contested board action either (1) is not authorized under the condominium governing documents or state law; or (2) has no legitimate relationship to the welfare of the condominium; or (3) is in breach of fiduciary duty to unit owners.⁴⁹ It is difficult to imagine the effective assertion of this defense in a matter in which rainwater regularly inundates a condominium unit. Yet there may be circumstances where the board can assert business judgment protections for an extended period of time, such as when repairs are delayed while a contractor is engaged and a comprehensive plan of work for the entire building is finalized.⁵⁰

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Conclusion

Leaks and other physical problems associated with multifamily condominium buildings often fall disproportionately on a single owner or small group of owners. Sometimes, litigation is the only available response to a board's inattention or sheer indifference. Yet the burdens facing a condominium owner seeking damages for having to live with uninhabitable conditions are many. While the same conditions in a cooperative apartment can result in a quick and efficient abatement award, rendered by a judge with expertise in the area, the condominium owner must proceed in a plenary action, hire experts, conduct extensive discovery to understand how the board has breached its duty, and then face uncertainties at trial concerning burdens of proof and qualitative standards of board

conduct. There is no justification for this dichotomy, and the New York legislature should act by extending the protection of § 235-b of the Real Property Law to condominiums.

Endnotes

1. See *Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 139, 438 N.Y.S.2d 164, 167 (1st Dep't 1981) (per curiam) (holding that the implied warranty of habitability is applicable to cooperative apartments); see also VINCENT DI LORENZO, *NEW YORK CONDOMINIUM AND COOPERATIVE LAW* § 2:6 (2d ed. 2007).
2. DI LORENZO, *supra* note 1, § 2:6.
3. *Id.* § 1:2.
4. *Id.* § 3:13.
5. *Suarez*, 107 Misc. 2d at 139, 438 N.Y.S.2d at 167.
6. N.Y. REAL PROP. § 235(b)(1) (McKinney 2006).
7. *Park W. Mgt. v. Mitchell*, 47 N.Y.2d 316, 328, 391 N.E.2d 1288, 1295, 418 N.Y.S.2d 310, 317 (1979) (finding that landlord's failure to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon health and safety of tenants and entitled tenants to rent abatements).
8. *Poyck v. Bryant*, 13 Misc. 3d 699, 701, 820 N.Y.S.2d 774, 776 (N.Y. Civ. Ct., N.Y. Co. 2006) (quoting *Solow v. Wellner*, 86 N.Y.2d 582, 589, 658 N.E.2d 1005, 1008, 635 N.Y.S.2d 132, 135 (1995)) (holding in a secondhand smoke case that the warranty applied to a lessor of a condominium even if it didn't apply to the condominium board).
9. N.Y. Real Prop. § 235(b)(3)(a) (McKinney 2006).
10. See e.g., *Park W. Mgt.*, 47 N.Y.2d at 330, 391 N.E.2d at 1295, 418 N.Y.S.2d at 318 (upholding a Civil Court ordering a 10 percent rent reduction for the period during which unsanitary conditions persisted on the premises).
11. See Di Lorenzo, *supra* note 1, § 3:1.
12. *Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383, 385, 597, N.Y.S.2d 962, 963 (1st Dep't 1993) (finding warranty of habitability inapplicable to condominiums).
13. See DI LORENZO, *supra* note 1, at § 3:2; see also N.Y. REAL PROP. § 339 (v)(1) (a) (McKinney 2006) (requiring that condominium bylaws provide for the nomination and election, as well as enumerate the powers and duties, of a board of managers).
14. See DI LORENZO, *supra* note 1, § 3:2.
15. See N.Y. REAL PROP. § 339(n); see also N.Y. REAL PROP. § 339(e)(7) (providing the statutory definition of "declaration").
16. *Bd. of Mgrs. of Fairway v. Fairway at N. Hills*, 193 A.D.2d 322, 325-326, 603 N.Y.S.2d 867, 869 (2d Dep't 1993) (noting that the board of managers governed "the affairs of the condominium" including maintenance, repair, and replacement of common elements).
17. See DI LORENZO, *supra* note 1, at § 3:2, n.11; see also 193 A.D.2d at 324-325, 603 N.Y.S.2d at 869.
18. 193 A.D.2d at 324, 603 N.Y.S.2d at 869 (quoting N.Y. BUS. CORP. LAW § 717) (noting that although the Condominium Act is silent, a fiduciary duty akin to that imposed in B.C.L. § 717 is imposed on the initial board of managers); N.Y. BUS. CORP. LAW § 717 (McKinney 2003).
19. N.Y. REAL PROP. § 339-ee (McKinney 2006).
20. N.Y. MULT. DWELL. LAW § 78(1) (McKinney 2006).
21. *Id.*
22. See NEW YORK, N.Y., ADMIN. CODE tit. 27, ch. 2, § 27-2005 (2008).
23. N.Y. MULT. DWELL. LAW § 302-a(2)(b) (McKinney 2006).
24. See NEW YORK, N.Y., ADMIN. CODE tit. 28, ch. 25 § 25-191 (2008).
25. N.Y. MULT. DWELL. LAW § 309 (McKinney 2006).
26. See NEW YORK, N.Y. ADMIN. CODE tit. 17, ch. 1 § 17-142 (2008).
27. N.Y. MULT. DWELL. LAW § 309(1)(a) (McKinney 2006).
28. *Pershad v. Parkchester S. Condo.*, 174 Misc. 2d 92, 94-95, 662 N.Y.S.2d 993, 995-96 (N.Y. Civ. Ct., New York Co. 1997), *aff'd per curiam*, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (Sup. Ct. App. T. 1st Dep't 1998) (incorrectly noted in Official Reports as New York County) (finding condominium association's duty to maintain premises in good repair is non-delegable and that condominium unit owner's action against condominium association, seeking removal and or correction of water leaks due to faulty drainage pipes, stated a valid cause of action).
29. 163 Misc. 2d 66, 67-69, 619 N.Y.S.2d 523, 524-25 (N.Y. Civ. Ct. Bronx County 1994) (finding Housing Part proceeding available when violation stems from defective conditions in common area in condominium association's exclusive control).
30. 149 Misc. 2d 828, 831-33, 565 N.Y.S.2d 964, 966-67 (N.Y. Civ. Ct., Kings Co. 1991) *appeal dismissed mem.*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 2d Dep't 1991) (holding condominium managing board or agent responsible for common areas).
31. 34 A.D.3d 219, 219, 824 N.Y.S.2d 33, 34 (1st Dep't 2006).

32. *Hatcher v. Bd. of Mgrs.*, 420 W. 23rd St., 12 Misc.3d 78, 819 N.Y.S.2d 374 (Sup. Ct. App. T. 1st Dep't 2006), *order aff'd*, 30 A.D.3d 436, 835 N.Y.S.2d 112 (1st Dep't 2007) (holding that the board of managers and managing agent are not responsible for maintenance inside the individual units but are responsible for the common areas).
33. 250 A.D.2d 717, 717, 673 N.Y.S.2d 445, 446 (2d Dep't 1998) (mem.) (noting that if a roof was substantially completed, it would create an obligation on the part of condominium's board of managers to maintain and repair the roof).
34. 225 A.D.2d 520, 521, 639 N.Y.S.2d 91, 92 (2d Dep't 1996) (mem.) (holding that an owner of a condominium unit was entitled to offset monthly common charge payments based upon water damage to unit).
35. 216 A.D.2d 115, 116, 629 N.Y.S.2d 6, 7 (1st Dep't 1995) (mem.) (holding that the "warranty of habitability does not apply to individual unit within condominium, and individual unit owner cannot withhold payment of common charges and assessments in derogation of condominium's bylaws based on defective conditions in his or her unit or in common areas, or disagreement with actions lawfully taken by board of managers.").
36. 213 A.D.2d 206, 633 N.Y.S.2d 478 (1st Dep't 1995) (mem.) (finding that the mere fact that unit owners could not withhold payment of common charges and assessments based on defective conditions in their unit or in common areas did not mean that unit owners were precluded from interposing defenses to the Board's action for foreclosure).
37. 258 A.D.2d 401, 685 N.Y.S.2d 708 (1st Dep't 1999). A fiduciary must make whole the beneficiary of the trust for any damage resulting from a breach of the fiduciary's duty. *See, e.g., In re Rothko*, 43 N.Y.2d 305, 320-322, 401 N.Y.S.2d 449, 455, 372 N.E.2d 291, 296-97 (1977) (holding that children of deceased painter could obtain restitution to estate for paintings executed by painter and owned by him at time of his death, where evidence was sufficient to support an award of almost \$10,000,000 for the value of paintings wrongfully sold by executors and not returned). The proper measure of damages for such breach requires putting the beneficiary "in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty." GEORGE GLEASON
- BOGERT, LAW OF TRUSTS AND TRUSTEES § 701 (3d ed. 2009).
38. *See Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994).
39. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).
40. *Whitney v. Citibank*, 782 F.2d 1106, 1118 (2d Cir. 1986).
41. *Wolf v. Rand*, 258 A.D.2d 401, 403, 685 N.Y.S.2d 708, 710 (*Whitney*, 782 F.2d at 1118).
42. 55 N.Y.2d 35, 40, 432 N.E.2d 589, 591, 447 N.Y.S.2d 696, 698 (1982) (citing *Reisert v. City of N.Y.*, 174 N.Y. 196, 66 N.E. 731 (1903); *see also Park W. Mgmt. v. Mitchell*, 47 N.Y.2d 316, 91 N.E.2d 1288, 418 N.Y.S.2d 310 (1979) (measure of damages for landlord breach of warranty of habitability is diminution in rental value for the period of the breach); *Guzzardi v. Perry's Boats, Inc.*, 92 A.D.2d 250, 460 N.Y.S.2d 78 (2d Dep't 1983) (damages for nuisance arising from zoning violation denied because plaintiff failed to present sufficient evidence to overcome a motion for summary judgment); *Bailer v. Ringe*, 255 A.D. 976, 976, 8 N.Y.S.2d 99, 100 (2d Dep't 1938) (finding nuisance from illegal use, and holding that the loss of rental value of the plaintiff's property is the proper measure of damages, "even though plaintiff's dwelling was not rented, and [even though] plaintiff did not seek to rent it")
43. *Greenwich Realty v. Meltzer*, 18 Misc.3d 133(A), 856 N.Y.S.2d 498, 2008 WL 162162, 2008 N.Y. Slip Op. 50119(U), at *1 (Sup. Ct. App. T. 1st Dep't 2008) (per curiam) (finding the warranty violated by water leaks into a cooperative apartment over a period of years) (citing N.Y. REAL PROP. § 235(b) (*McKinney* 2006)).
44. *Pergament v. Roach*, 18 Misc.3d 1141(A), 859 N.Y.S.2d 898, 2008 WL 586253, at *4 (Sup. Ct. Nassau Co. 2008) (citing sources).
45. *Id.* (citing *Northbay Constr. Co. v. Bauco Constr. Corp.*, 38 A.D.3d 737, 738, 832 N.Y.S.2d 280, 281 (2d Dep't 2007)); *see also Laub v. Fassell*, 297 A.D.2d 28, 30-31, 735 N.Y.S.2d 534, 536 (1st Dep't 2002) (citing *R.M. Newell Co. v. Rice*, 236 A.D.2d 843, 844-45, 653 N.Y.S.2d 1004, 1005 (4th Dep't 1997) (dismissing plaintiff's complaint because the plaintiff's injury was not proximately caused by the fiduciary's breach of his duty)).
46. *Kaymaccian v. Bd. of Mgrs. Charles House*, 49 A.D.3d 407, 407-408, 854 N.Y.S.2d 52, 53 (1st Dep't 2008) (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 118, 760 N.Y.S.2d 157 (1st Dep't 2003)).
47. *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537-538, 553 N.E.2d 1317, 1321, 554 N.Y.S.2d 807, 811 (1990) ("The business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979)).
48. *See Levandusky*, 75 N.Y.2d at 537-38, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811 (adopting the business-judgment rule for cooperatives, and in strong dicta, for condominiums); *see also Hunt v. Sharp*, 83 N.Y.2d 883, 649 N.E.2d 1201, 626 N.Y.S.2d 57 (1995) (applying the business judgment rule to condominium boards but holding that individual board members cannot avail themselves of the business-judgment rule after first failing to act upon defendants' application within the time required by the bylaws, and then acting in bad faith by denying defendants' application to make the basement garage unit a fiscally efficient operation).
49. *See Levandusky*, 75 N.Y.2d at 538, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812.
50. It is self-evident that a board can't shift blame to its own managing agent. In addition, a board can't shift blame to the professionals or contractors it hired to make the repairs. As the Court stated in *Jacobson v. 142 E. 16 Coop. Owners, Inc.*, 295 A.D.2d 211, 211, 743 N.Y.S.2d 500, 500 (1st Dep't 2002):
- Pursuant to Multiple Dwelling Law § 78(1) defendant landlord and managing agent were under a nondelegable duty to maintain the premises at issue, "including its roof or roofs, and every part thereof and the lot upon which it is situated...in good repair," and are thus "vicariously liable for any negligence on the part of the independent contractor" in effecting repairs.
- Id.* (emphasis added) (quoting *Dowling v. 257 Assoc.*, 235 A.D.2d 293, 652 N.Y.S.2d 736 (1st Dep't 1997)).

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