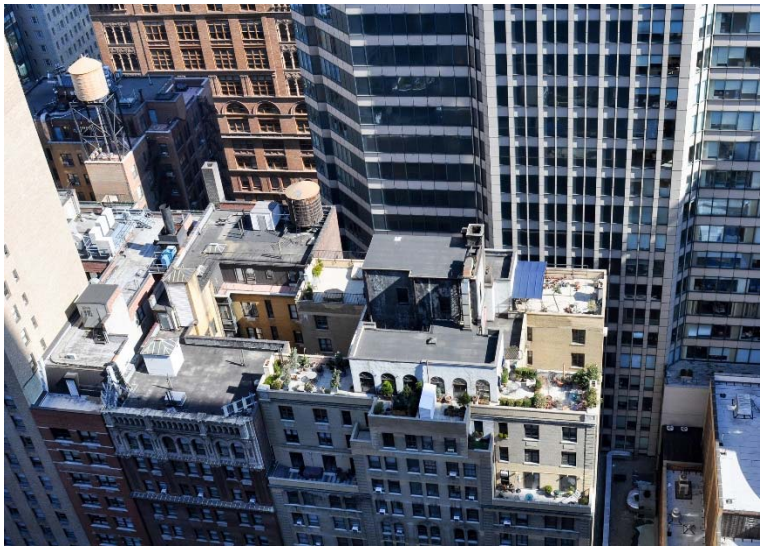
BRAVERMAN | GREENSPUN

A PROFESSIONAL CORPORATION

Recent First Department Decision Provides Guidance
for Cooperatives and Cooperative Shareholders

By: Tracy Peterson, Esq.

When a co-op board amends governing documents to add rules pertaining to outdoor terraces, what statute of limitations applies to a shareholder's challenge to such rules? Is an exclusive terrace space appurtenant to a luxury penthouse apartment subject to the protection of the implied warranty of habitability?



These questions were addressed when the Appellate Division, First Department issued a decision in Musey v. 425 East 86 Apartments Corp., 154 A.D.3d 401, 62 N.Y.S.3d 93 (1st Dep't 2017).

The issues presented by this case of interest to shareholders and boards of directors of residential cooperative corporations are: (1) when a cooperative shareholder wishes to challenge a board action such as the amendment of the cooperative's governing documents, such a challenge is to be made in the form of an Article 78 proceeding, subject to a four-month statute of limitations; and (2) the implied warranty of habitability, though applicable to proprietary lessees, does not extend to an exclusive terrace area, which space is an "amenity," rather than "an essential function that the co-op must provide."

In Musey, the shareholder/proprietary-lessee sought to challenge certain rules enacted by the cooperative's board of directors pertaining to the use of the terrace spaces appurtenant to the two penthouse apartments in the building. While the shareholder sought to frame the issue as one sounding in breach of contract – *i.e.*, the co-op had breached the terms of the lease by enacting rules contrary thereto – both the trial court and the First Department construed the claim as a challenge to board action, which challenge is required to be made via an Article 78 proceeding. Because the claim was asserted via a plenary action commenced over a year after the subject rules became final, the challenge was dismissed as time-barred.

In reaching its conclusion, the First Department relied on its 2012 decision in Katz v. Third Colony Corp., 101 A.D.3d 652, 653 (1st Dep't 2012), in which shareholders-proprietary lessees sought to challenge amendments to a cooperative's bylaws addressing, *inter alia*, a flip tax. In Katz, too, the plaintiffs' claim was time-barred. The First Department held that the plaintiffs were "prohibited from challenging the propriety of those amendments because they were required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof." Id.

This recent decision in Musey concretizes the rule that shareholders-proprietary lessees seeking to challenge corporate action must do so quickly, within four months (or seek a tolling agreement in the interim), via an Article 78 proceeding.

The Musey decision is also important in its holding that the implied warranty of habitability does not apply to outdoor terrace spaces appurtenant to penthouse cooperative apartments. This implied warranty, set forth in New York Real Property Law §235-b, has been interpreted by the Court of Appeals to address "the Legislature's concern that tenants be provided with premises suitable for residential habitation, in other words, living quarters having 'those essential functions which a residence is expected to provide.'" Solow v. Wellner, 86 N.Y.2d 582, 589 (1995) (internal citation omitted). Based on Solow, the First Department determined that the implied warranty was not expansive enough to address the exclusive terrace space appurtenant to the penthouse apartment. See Musey, 62 N.Y.S3d at 96-97. In so doing, the First Department found that the terrace space was not an "essential" component of the residence, but instead, is an "amenity" falling outside the scope of the implied warranty. See id.

Tracy Peterson is a partner at Braverman Greenspun, P.C., a law firm dedicated to representing cooperative boards of directors and condominium boards of managers in the metropolitan New York City area. Over the firm's 50-year history, we have served as general counsel to hundreds of properties and developed broad expertise in litigation, transactions, leasing, financing, and the governance issues facing cooperatives and condominiums. One of the first firms in New York to specialize in this practice area, Braverman Greenspun, P.C. provides some of the most sought-after counsel in the industry.