2013 4th Quarter

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Thursday, Feb 27th

2014

Saturday
• January 25th
Dinner Dance Gala
Leonard's of Great Neck
Long Island
Property Management Awards Banquet

Thursday
• February 27
• April 24
Networking Lunch &
Building Management Seminar
At The General Society of Mechanics & Tradesmen
20 West 44th St bet 5th & 6th Aves

Thursday
• March 20th, noon
Ethics Seminar at
Buildings NY, Javits Center NYC
The Politics and Ethics of Strike Management

Monday
• June 2nd
18th Annual Golf
Colonial Springs Golf Club
Long Island

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The New York Association of Realty Managers Presents

• **Steven Kirkpatrick**, Esq., Belkin Burden Wenig & Goldman, LLP
ADA and Human Rights Law Issues — Feb 27

• **Mark Hankin**, Esq., Hankin & Mazel, PLLC
The epidemic of Human Rights complaints
and how to avoid and handle them.

• **Geoffrey R. Mazel**, Esq., Hankin & Mazel, PLLC
Ramifications of Board communications, with each other & third parties, including their attorneys.

10:30 to 11 … Networking, Brunch, Meet the Speakers
11 to 12:30 … Legal Seminar
12:30 to 1:30pm ... Buffet Lunch, Networking, Meet the Speakers

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Keeping on your bank's good side means more than just making your payments on time.

By
Jay L. Hack, Esq., partner, Gallet Dreyer & Berkey, LLP

November, 2013

Commercial mortgage borrowers often assume that once their loan closes, all they need to do is make the monthly payments, and so long as they pay, they can't get into trouble with their lender. However, that couldn't be farther from the truth, especially if the lender is an FDIC-insured bank.

When a lender looks at a mortgage loan, it is not relying on one source of repayment. The lender always wants at least two sources to repay the loan, and usually three or more. First, there is the regular cash flow from the building, such as rent or maintenance payments from the tenants or unit owners. If those dry up for any reason, then the second source to repay the loan is the building itself. If the building has a fire or flood, then the third source is insurance proceeds. If it's a mixed use building with a commercial component, then lenders frequently require personal guaranties as a fourth source of repayment.

Once the loan is made, the lender monitors your loan to make sure that the sources of repayment are still there and supportable. Why do they do this when you are paying every month? First of all, because it's good lending practice to know what's going on so that problems can be avoided or addressed before they get serious. Second, when the lender is a bank, there are government regulators who are looking over their shoulder to make sure they are managing their loans well.

Federal bank regulators, like the FDIC and the Federal Reserve, conduct detailed on site examinations of every bank at least once every two years, and usually more often. For even a small bank, that means six weeks with bank regulators sitting in the conference room reading files, especially loan files. The regulators want to make sure that the bank knows everything there is to know about its loans. Regulators spot check loan files and make sure that the bank analyzes whether the sources of repayment are still there. Woe to the borrower if the loan is past due. It's no longer a spot check. The regulators read the significant past due loan files to verify that the bank is "convincing" the borrower to clean up its act and, if the borrower can't do that, make sure that the bank is enforcing the loan documents.

If the loan department is not collecting current financials, not checking to make sure that insurance is in effect; or not verifying that the building is being maintained, why does that affect you if you are paying your loan? Each bank gets a rating from its regulator, known as a CAMELS rating, which stands for: **C**apital **A**ssets **M**anagement **E**arnings **L**iquidity and **S**ensitivity to interest rates. Loans are assets, and if too many loans look bad, even though they are not actually bad, then a regulator downgrades **A** - Assets. If assets are weak, management is not doing a good job, so the regulators downgrade **M**. If loans are in default, earnings are down, so they downgrade **E**. If **A**, **M** and **E** are all downgraded, it means the bank should have extra capital, and if it doesn't, they downgrade **C**. So four out of six categories are downgraded because of loan problems, and that could mean an overall downgrade. An overall downgrade costs money - higher FDIC premiums, consultant costs, legal fees, etc.

It also means that the government bank regulators will complain to the bank's Board of Directors, the Board of Directors will complain to senior officers, the senior officers will complain to the junior officer in charge of your loan, and the officers will be miserable, even if you are making your monthly payments. To avoid being miserable, banks review loans annually to make sure that you are doing what you are supposed to do – paying your insurance and taxes; providing financial statements that the bank can

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analyze to see if there is sufficient income to pay; and maintaining the property so it is in good condition without depreciation in value.

What happens if the bank's monitoring discloses that you are not up to snuff? The bank keeps a list, known politely as the "Watch List," for all significant loans with weaknesses. Even borrowers who make every payment can get on the Watch List. You do not want to be on the Watch List. Not only will it mean greater scrutiny, but when it is time to refinance or get a new loan, you will not be considered a top quality borrower, meaning the possibility of a higher interest rate and perhaps even a loan denial. I have one client with a board committee that gets a monthly list of every commercial mortgage loan showing whether the borrower is current on insurance, financial statements, taxes, etc. There is a pink box if the borrower has not provided current financials. One director counts the number of pink boxes every month and reports the count to the committee. When the number goes up, woe is to the borrowers who are the cause of the increase.

There are different types of defaults you need to avoid. Obviously, nonpayment is the most serious. Next is anything that risks a decline in the value of collateral, like failing to keep insurance or pay taxes. Then there is anything that portends future default and anything, like the failure to provide current financials, that makes it harder for bank to evaluate your ability to pay in the future.

Unfortunately, regulatory review suffers from a "Flavor of the Month" problem. In 2008 and 2009, the Flavor of the Month was subprime residential loans. What was the flavor of the month in 2013? Flood insurance! After Hurricane Sandy, bank regulators have been reviewing flood insurance requirements more closely, and borrowers who have been lax in maintaining flood insurance because they thought it wasn't important are being criticized. Banks must force place expensive flood insurance. Flood maps are being re-drawn by FEMA and banks have been told to watch for the new maps. Flood insurance will be required on any mortgaged property that is in a new flood zone and if the borrower doesn't provide it, the bank will have to place it, and bank-placed insurance usually costs more than borrower-placed insurance, even though it normally provides less coverage.

What will be the next flavor of the month? Hard to tell. When the economy gets better, the regulators usually tilt away from whether the bank is in sound financial condition towards consumer quality of life issues. What does that mean for you as a building owner or manager? You should focus on issues like maintenance, violations, bed bugs and mold contamination, and green energy. Converting away from #6 fuel oil and keeping your fuel oil and burner permits current will be important. Provide a top quality environment in your building. Make your building the type of property that your lender wants to photograph and highlight in its annual report. Doing so will ultimately cause less aggravation and save you money by making you a desirable borrower when you need to refinance.

Jay L. Hack, Esq. is a partner in the law firm of Gallet Dreyer & Berkey, LLP. The firm has a substantial real estate practice and represents the owners of hundreds of commercial properties and more than 200 condominium and cooperative buildings. Mr. Hack's practice focuses on the regulation of banks and other financial institutions. He is the Chair of the Business Law Section of the New York State Bar Association, which is the second largest section, with over 4,400 members. He is also a member of its Banking, Securities and Derivatives committees. He is a graduate (with honors) from the University of Michigan and a cum laude graduate of Boston University School of Law. His article on the Federal Rules of Evidence in the Boston University Law Review has been cited as authority by the United States Supreme Court.

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PART 2:

RESPONSIBILITY OF THE BUILDING OWNER

It shall be the owner's responsibility to maintain the Standpipe system and to determine the individual qualifications and competencies of the individual his C of F holder to perform certain functions related to inspection, testing and maintenance.

901.6.2 Records. Records of all system inspections, tests, servicing and other maintenance required by this code, the rules or the referenced standards shall be maintained on the premises for a minimum of 3 years and made available for inspection by any department representative.

901.7.1 Impairment coordinator. The building owner shall assign an impairment coordinator to comply with the requirements of this section. In the absence of a specific designee, the owner shall be considered the impairment coordinator.

The building owner or their agent shall assign an impairment coordinator to maintain records of all system inspections, tests, servicing and other items of maintenance on premise for a period of three years and made available for inspection by any member of the FDNY. In absence of a specific designee, the building owner shall be considered the impairment coordinator (FC 901.7.1). :

PART 3:

OUT OF SERVICE SYSTEMS (OOS)

Planned removal from service: When the system, or a portion of the standpipe system, is placed out of service for a scheduled inspection, testing, regular maintenance, minor repairs or for construction affecting not more than 1 floor, the C of F holder and the impairment coordinator shall be made aware of and authorize the placing of the system out of service.

Unplanned out of service condition: A serious defect in the standpipe system including, but not limited to: an empty tank, a break or major leak in the system's water piping, inoperative or shut water supply valves, defective fire department connections, construction related shut downs affecting more than one floor, or complete or partial shut downs of the standpipe system, other than a shut down for a planned removal from service.

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Minor defects observed by the C of F holder shall be reported to the owner. Orange and yellow deficiencies if not corrected with 30 days it shall be deemed to be impairment and reported in writing to the Fire Department (FC 901.7.5).

Fire Department Notifications For Out of Service Conditions:

a) For a planned removal from service, as described above, no notification to the Fire Department is required provided the system will be returned to service within an 8 hour period and when all other fire protection systems in the building (standpipes and alarm systems) are fully operational.

b) For an unplanned removal from service as described above, the C of F holder, impairment coordinator, and/or other person responsible for inspecting, maintaining or supervising the operation of a fire protection system shall immediately report such condition to the owner of the building and to the FDNY Borough Dispatcher (FC 901.7.5). The telephone numbers are as follows:

Manhattan	**212-570-4300**
Bronx	**718-430-0200**
Brooklyn	**718-965-8300**
Queens	**718-476-6200**
Staten Island	**718-494-4296**

c) The initial Fire Department notification shall include the following:

1. A brief description and extent of the out of service condition.
2. The area of the building affected.
3. The type of occupancy
4. The estimated time the system will be out of service.
5. The name and phone number of the person making the notification.

d) When the C of F holder observes a minor defect or other condition not presenting a serious safety hazard, he or she shall report the defect or condition to the owner, and if the defect or condition is not corrected within 30 days it shall be deemed to be an impairment and reported in writing to the Fire Department (FC 901.7.5). Correspondence should be sent via email spkstp@fdny.nyc.gov or by certified documents to:

New York City Fire Department
Bureau of Fire Prevention
Fire Suppression Unit, 3rd Floor
9 Metro Tech Center
Brooklyn, New York 11201

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Identifying OOS Systems Using Discs/Tags: Systems that are out of service, both planned and unplanned, shall be immediately identified by placing a tag at each of the following locations: fire department connections, system control valves, fire command center or other clearly visible location in the lobby of the building, indicating which system or part thereof is out of service. Impairment coordinators/ building owners shall ensure the placement of these tags by MFSPC's or MLP (as restricted) or FDNY units. In addition, for an unplanned out of service condition, a disc (white or blue) shall be placed at all affected fire department connections to inform responding fire department units of the out of service condition. When the condition has been corrected, the disc(s) shall be removed immediately.

Tag Requirement: A tag shall be used to indicate that a system, or portion, is out of service (FC901.7.2). An Impairment coordinator, Owner, Master Fire Protection Piping Contractor (A or B license), Master Plumber (as restricted) or any authorized person with a proper certificate of fitness from FDNY shall place out of service tags at all required and appropriate locations. This is for planned and unplanned removal of fire protection piping systems from service. The tag shall indicate the area affected, a brief description of the condition, the occupancy classification, C of F number and the estimated time until the system becomes operational.

Drain test results shall be posted on the tag indicating both the static and flow pressures before and after the system was placed in an out of service condition.

If no impairment is found in the entire system green tags will be placed on the main control valve.

Systems Partially or Fully Out of Service: Fire suppression piping systems equipped with Fire Department connections shall follow the following procedures for identifying systems out of service:

Systems Fully Out of Service: The impairment coordinator/building owner shall ensure that the local administrative fire company, Master Fire Suppression Contractor (Class A or B) or MLP's (as restricted) has placed one White disc 8 to 9 inches in diameter on all affected fire department connections. A RED tag shall be placed at the main control valve indicating the standpipe/sprinkler company name, C of F number, date of removal from service and anticipated return to service date.

Systems Partially Out of Service: The impairment coordinator/ building owner shall ensure that the local administrative fire company, FSPC's or FDNY units Master Fire Suppression Contractor Class A or B has placed one Blue Disc 8

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to 9 inches in diameter on all affected fire department connections. A RED tag shall be placed at the main control valve and any closed sectional valve indicating the company name, C of F number, the date of removal from service and anticipated return to service date.

An Example of FDNY White and Blue Discs

The C of F holder and the impairment coordinator shall be made aware of and authorize the placement of system(s) out of service that are planned to be shut down. The impairment coordinator prior to taking a system out of service shall:

- Determine the duration the system is to be out of service,
- Inspect the areas of the building affected and assess the increased risk,
- Notify the insurance carrier, the central station operator (if so equipped), the occupants of the affected area, and place out of service tags and discs at the appropriate locations (901.7.4).

Impaired Equipment: Underground service mains, water storage tanks, Fire Department connections, control valves, fire and or booster pumps, that are out of service and are considered vital to part of the system that are required to be tagged following procedures outlined in chapter 14 NFPA #25 2002 Ed.

Tags placed at control valves shall indicate the level of impairment for system fully or partially shut down or defect as follows:

	Tag	Disc
System fully out of service	Red	White
System partially out of service	Red	Blue

Only **FDNY**, Owner, **MFSPC** or **MLP** (as restricted) may place a white or blue disc on a system. For systems that are fully or partially out of service that are not equipped with Fire Department connections, the appropriate tags shall be placed at the main control valve. FDNY is to be notified immediately.

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In a building required by the NYC Fire Code to have a Fire Safety Director with (F-58 or F-25), an Engineer (Q-01 & Q-99) with the S-12, S-13 or S-14 C of F, is authorized to take the system out of the service for less than 8 hrs and place an appropriate colored tag on that system. The FSD and the Engineer must be on the premises at the all times.

Prior to returning a system to service, the impairment coordinator shall ensure that the necessary tests and inspections are conducted to verify that the system is operating normally, notify FDNY borough dispatcher, the building owner's tenants in the affected area, the insurance carrier, central station operator (if so equipped) and remove out of service tags and discs. (FC 901.7.6)

Part 4:

Procedure for Detail Record Keeping, Impairments & Safety

It shall be the responsibility of the C of F holder to perform the following:

Record keeping - The C of F holder shall maintain a detailed record of all inspections. A record card with the date of each inspection, the C of F number, and the signature of the C of F holder shall be posted on the premises near the main water supply control valve.

The detailed inspection report shall include information relative to conditions of water supply, gravity and pressure tanks and levels therein, valves, risers, piping, and Fire Department connections, alarms, fire, booster and special service pumps, obstructions, and conditions of all other system equipment and appurtenances. All defects and/or impairments shall be noted on the report. Records shall be readily available to any representative of the Fire Department. These records are to be maintained on premise by the building owner for three years.

Part 5:

Individual Authorized to Perform Tasks as per NYC Fire Code

1. Certificate of Fitness (C of F) for S-13 and/or S-14-visual inspections only, proper notification and keeping record of inspection results for examination by FDNY.
2. C of F for S-13* for Refrigeration Operating Engineer (Q-01 & Q-99), NYC High pressure Operating Engineer, NYS High Pressure Operating Engineer are permitted to perform visual inspections, test notification

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appliances, perform daily and weekly routine maintenance and record all inspection, testing and maintenance results for examination by FDNY.

* (For employees of a single or multiple properties under common ownership employed by the same building owner/management company)

3. C of F holder for S-14 employed by a site-specific building owner with the following certifications: Refrigeration Operating Engineer (Refrigeration Q-99 & Q-01), High Pressure Operating Engineer and NYS High Pressure Operating Engineer are permitted to perform visual inspections, test notification appliances, perform daily and weekly routine maintenance and record all inspection, testing and maintenance results for examination by FDNY.
4. Master Fire Suppression Piping Contractor (MFSPC) with S-13 C of F can inspect, test, maintain and repair/replace all fire standpipe and sprinkler systems components, record maintenance, inspection and test results for examination and evaluation by FDNY.
5. Master Plumber (MP) – with S-13 for Standpipe Systems that are not combined with sprinkler systems. can inspect, test, maintain and repair/replace all fire standpipe systems, record of maintenance, inspection and test results for examination by FDNY.

The article from which this piece was extracted "Study Material for the Examination for the Certificate of Fitness for Standpipe System" is located at http://www.nyc.gov/html/fdny/pdf/cof_study_material/s_13_citywide_standpipe_system.pdf

"An Attorney Discusses Labor Law 240 and Commercial and Residential Shareholder Renovations"

By C. Jaye Berger, Esq.

Labor Law 240, also known as the "Scaffold Law," is the law that makes owners, contractors and their agents liable for injuries to workers who fall from a height. Most people know about Labor Law 240 in the context of renovations on the exterior of commercial and residential buildings. They also only think about this law in the context of workers falling from a scaffold and hanging precariously from the side of a building. However, under this statute, falling from a height can include a wide range of causes that you might not otherwise think about. Falling from a height can include when a worker stands on a box to install a light fixture in a hallway or in apartment and falls. Most residential property managers and shareholders would be surprised to learn that it can also apply in some instances to renovations in co-op apartments. It does not just apply to renovations being performed on the exterior facades of commercial buildings.

The statute applies to "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work...." It is considered to be an absolute liability statute. In other works, the negligence of the injured worker generally is not a defense unless he was very specifically advised about a safety issue and refused to comply. The exception in the statute for owners of one and two-family dwellings is known as the "Homeowner Exemption." One family dwellings has been interpreted by the courts to include co-op apartments.

The catch is that these shareholders cannot "direct or control the work." What that means is open to interpretation of the facts in each case. Shareholders who like to give a lot of orders and directions to contractors and are very involved in the day-to-day details of the work in their apartment renovations will find it harder to be let out of or dismissed from such lawsuits, since the Plaintiff will be claiming that they "directed and controlled" the work. That can create issues of fact, which are for the judge or jury to decide. Shareholders who have more traditional roles where they have architects communicating with the contractor and just comment on aesthetic issues will have an easier time being dismissed from lawsuits when the attorneys file motions for summary judgment.

Activities such as being involved in aesthetic matters, selecting paint colors and the type of wood used for kitchen cabinets are not considered to be directing or controlling the work. It is a question of the degree of the owner's involvement. However, owners speaking to workers and telling them what to do or allowing them to use ladders may cause a homeowner to remain in the lawsuit.

The language in the contracts between shareholders and their contractors can be helpful in establishing the role of the shareholder under this law. In other words, the contract can say such things as that the work will be directed by the contractor and the contractor will supervise his men and the means and methods of performing their work. It can say that all equipment will be provided by the contractor. Things of that nature will help shareholders in establishing their role as just homeowners. Shareholders are well-advised to work with an attorney who knows this area of the law when they are entering into contracts with contractors and Alteration Agreements with their co-op or condominium.

Co-op buildings can be sued under the Labor Law as owners, but condominium associations are not considered to be owners. However, the individual condominium unit owners are considered owners

C. Jaye Berger, Esq., Law Offices C. Jaye Berger, is an attorney located at 110 East 59th St., 22nd Floor, New York, NY 10022, (212) 753-2080. Ms. Berger's clients include co-ops, condominiums, shareholders, architects, engineers, interior designers, owners, developers and contractors.

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cont'd previous page

under the law. The work is considered to be for the benefit of the unit owner and not the condominium. The fact that there may be an Alteration Agreement with the condominium association is not considered an exception to the law. A court considering this issue recently found that having an alteration agreement merely reflected the condominium board's interest in making certain that the renovations were carried out in a way that safeguarded the integrity of the building, the units and the common areas, as well as applicable laws. This was true even though the condominium retained the power to insist on compliance with the Industrial Code and could re-enter the apartment to inspect the owner's work and to ensure that the work conformed to the plans and specifications in the agreement. This was a controversial ruling which may be heard about further in the future.

While these lawsuits are often reported to the co-op's or commercial building owner's insurance carrier to provide a defense, there can be problems. If the worker who was injured is an employee of the contractor, there may be an exclusion in the contractor's policy for such lawsuits and coverage may be denied. The building may then report it to their general liability carrier and obtain a defense. This is a very complicated area of the law, because there are coverage questions and there may be other secondary lawsuits against insurance carriers asking the Court to declare that there is coverage and the carriers should provide a defense. I have been consulted on a number of occasions by building owners, co-ops and shareholders about these issues, especially when there may not be any coverage under the policy.

Renovations involve many legal issues which is why I always recommend that clients come to me for advice before starting such projects. There are a lot of issues to be considered and things can be done before the work is commenced to position both the shareholder and the co-op to the best advantage.

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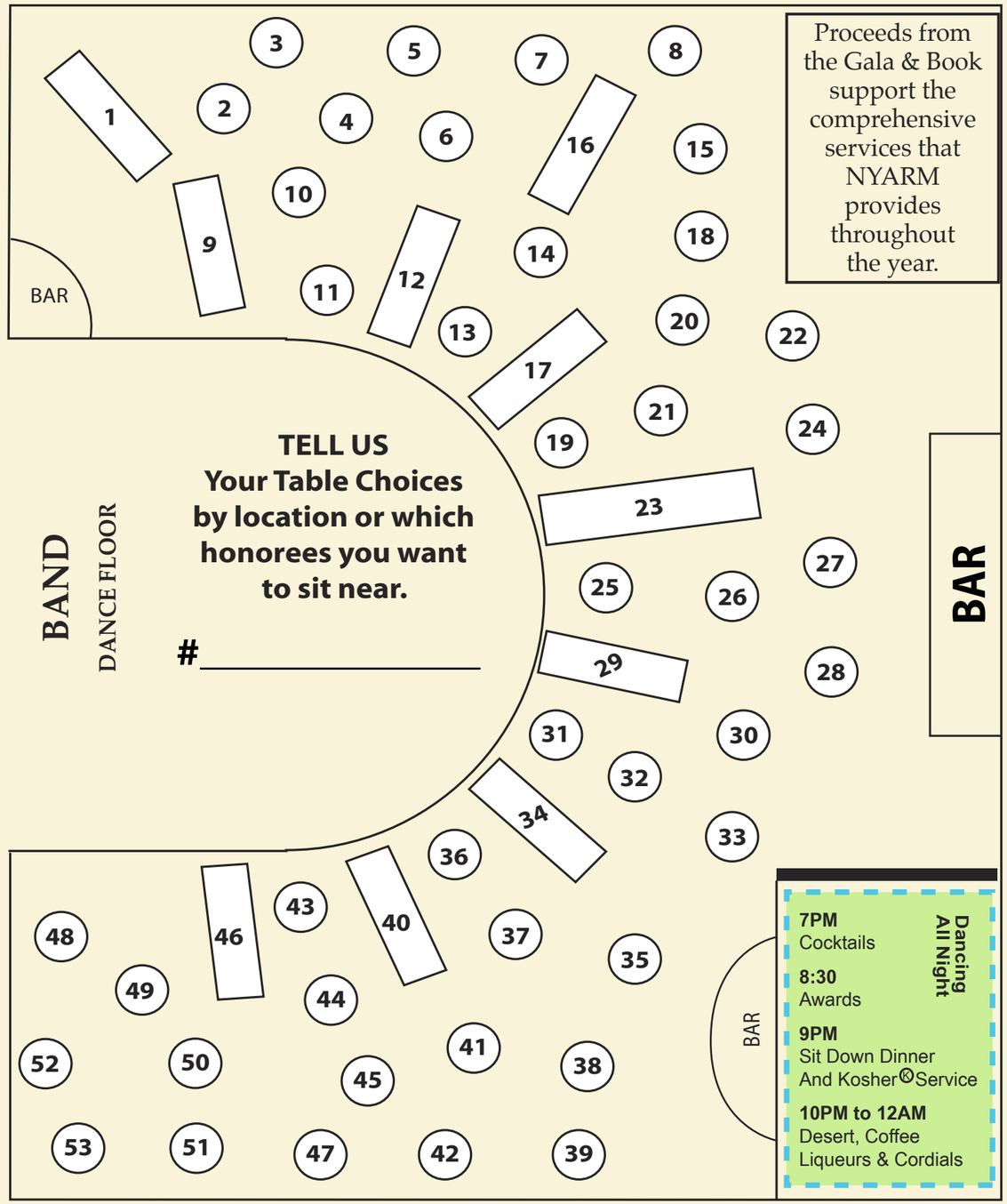

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FOUR STEPS TO AVOID TOXIC MOLD LITIGATION

PHYLLIS H. WEISBERG, ESQ.
MONTGOMERY MCCRACKEN WALKER & RHOADS LLP

November 2013

• Currently, there are no United States Federal, New York State or New York City regulations for the assessment or remediation of mold growth. Two documents which are generally regarded as the most authoritative guidelines on mold prevention and remediation are:

1. New York City Department of Health "Guidelines on Assessment and Remediation of Fungi in Indoor Environments" (http://nyc.gov/html/doh/downloads/pdf/epi/epi-mold-guidelines.pdf)
2. EPA Guidance "Mold Remediation in Schools and Commercial Buildings" (http://www.epa.gov/mold/mold_remediation.html)

• Applicable Legal Principles

• Landlord's Duty of Repair – Landlords of buildings with three or more apartments must keep the apartments and the building's public areas in "good repair" and clean and free of vermin, garbage or other offensive materials. Landlords must maintain electrical, plumbing, sanitary, heating, ventilating systems and appliances which the landlord has installed (such as refrigerators and stoves) in good and safe working order. N.Y. Multiple Dwelling Law §§ 78, 80.

- A landlord has a non-delegable duty to maintain the apartment in a reasonably safe condition. Daitch v. Naman, 807 N.Y.S.2d 95 (2006). A landlord cannot avoid this responsibility, even where a tenant has undertaken to remediate a mold condition.

• Warranty of Habitability – Tenants are entitled to a livable, safe and sanitary apartment. The warranty of habitability applies to cooperative apartments but not to condominiums. N.Y. Real Property Law § 235-b.

- Courts have found that triable issues of fact exist whether the warranty of habitability was breached as a result of mold in an apartment. Wiesel v. 310 East 46 LLC, __ A.D.3d __, 2009 N.Y. Slip Op. 03849 (1st Dep't 2009); Graham v. Marshal, __ N.Y.S.2d __, 2007 N.Y. Slip Op. 32228 (Sup. Ct. N.Y. Cty. 2007). See, also Loss v. 407-413 Owners Corp., __ N.Y.S.2d __, No. 105897/07 (Sup. Ct. N.Y. Cty. 2009) ("question of fact as to whether the [mold] conditions in the unit were so severe that a reasonable person would find that the warranty of habitability

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Phyllis H. Weisberg is a partner in the Business Department of Montgomery McCracken. She has a general real estate practice with a focus on cooperative and condominium matters. Before joining Montgomery McCracken, Ms. Weisberg was a partner with Kurzman Karelsen & Frank, LLP(KK&F). Montgomery McCracken is a multidisciplinary law firm with more than 120 attorneys in offices in Pennsylvania, New York, New Jersey and Delaware providing full service to clients in a wide range of industries throughout the United States and internationally. Ms. Weisberg is the Chair of the Committee on Cooperatives and Condominiums of the New York City Bar Association. Ms. Weisberg was listed in the Martindale-Hubbell Bar Register of Preeminent Women Lawyers, First Edition, 2011; and again in 2012. She has also been listed in New York Super Lawyers for 2006, 2007, 2009, 2010, 2011, 2012, and 2013; and Super Lawyers, Business Edition 2011, 2012, and 2013. Ms. Weisberg was included in Avenue's Legal Elite, compiled by Avenue and Lexis Nexis Martindale-Hubbell, as one of New York City's top women real estate attorneys in Avenue Magazine and in New York Magazine's March 2012 and March 2013 list of New York's Women Leaders in the Law.

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had been breached."). Unclear what the import of Fraser (see below) will be with respect to mold-related habitability claims.

• Notice of a "dangerous condition" - As a general rule, a landlord is liable for its failure to remediate a mold condition in an apartment where (1) it had actual or constructive notice of the mold condition (or created the condition) and (2) had a reasonable opportunity to remediate the mold and neglected or failed to do so. Litwack v. Plaza Realty Investors, Inc., __ N.Y.2d __, 2008 WL 4700971 (2008).

- Knowledge of a leak does not, as a matter of law, constitute notice of the potential for mold growth. Lark v. Leon B. Dematteis Associates, LLC, 48 A.D.3d 354, 851 N.Y.S.2d 529 (1st Dep't 2008); Litwack, supra. See, also Daitch v. Naman, 807 N.Y.S.2d 95 (2006) (notice of discoloration of walls and knowledge of previous water damage from a flood, does not constitute notice of the likelihood of mold growth); Beck v. J.J.A. Holding Corp., 12 A.D.3d 238, 785 N.Y.S.2d 424 (1st Dep't 2004) (There is no "ongoing duty to monitor [an] apartment for the possible development of environmental hazards.").

- Fraser v. 301-52 Townhouse Corp., 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep't 2008) (Court dismissed all mold-related personal injury claims on the grounds that there is no generally accepted scientific evidence of a causal relation between indoor dampness/mold and physical injury). An appeal is pending before the Court of Appeals.

• Not mold related, but important to be aware of:

"Tenant Notification of Indoor Air Contamination" N.Y. Environmental Conservation Law § 27-2405.

- Landlords who receive test results from an "issuer" showing contamination above applicable indoor air quality thresholds (i.e. DOH indoor air guidelines or OSHA guidelines for indoor air quality) must notify the tenant(s) and occupant(s) within 15 days following receipt of such test results.

- "Issuer" is defined as:

(i) The New York State Department of Environmental Conservation, (NYSDEC");

(ii) A municipality that has entered into a contract with NYSDEC to undertake an environmental restoration project;

(iii) A person subject to an order issued pursuant to New York's hazardous waste and oil spill clean-up laws; or

(iv) A "participant" in New York's Brownfield Cleanup Program ("BCP").

- The notice must include (i) a "fact sheet" identifying the compound of concern, the applicable reportable detection levels, the health risks associated with exposure to the compound and where to obtain information and (ii) "timely notice of any public meetings required to be held to discuss such results." Landlords must also send the actual test results and any applicable closure letter to the tenant/occupant upon request.

- Tenant notification fact sheets for specific air contaminants prepared by the DOH can be found at: http://www.nyhealth.gov/environmental/indoors/air/contaminants/.

- No exceptions are permitted even if the tenant(s)/occupants are aware of the contamination.

- Notice is not required from someone who is not defined as an "issuer" - such as

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the test generated in the course of the landlord's own due diligence - even if the results exceed applicable guidelines.

• The key to reducing potential health risks and avoiding costly repairs and toxic mold litigation is educating property managers, maintenance staff and tenants about mold and mildew, establishing a program of regular building maintenance and developing a step-by-step protocol for building staff to respond to water intrusion issues, leaks and respond to mold complaints.

Step 1 – Education

Building Manager/Board of Directors

• Develop a basic understanding about water and mold issues as well as an awareness regarding the urgency in addressing water issues as expeditiously as possible (Remember: the key to mold control is moisture control).

• Develop a working knowledge of the scope of insurance coverage; assess coverage periodically and update as needed.

• Develop a working knowledge of the respective maintenance and repair obligations of the tenants/shareholders and the building owner.

Building Maintenance Staff

• Develop a basic understanding about water and mold issues as well as the necessity of responding to leak and moisture complaints as expeditiously as possible.

• Develop a working familiarity with building procedures and protocols instituted to address water issues and mold complaints (see below).

Tenants/Unit Owners

• Encourage tenants to promptly report any evidence of water leakage, water intrusion or excessive moisture in the apartment, any evidence of mold or fungi growth within the apartment that cannot be completely removed with a common household cleaner and/or any failure or malfunction of the HVAC equipment, ventilating systems and related equipment serving the apartment.

• Communicate regularly with tenants about the status of any building investigation and remediation, providing information about the nature of the problem (facts, not speculation), the remediation plan and timetable. If possible, identify a person with whom tenants can directly discuss their questions and comments regarding any remediation activities. (According to the both DOH and EPA guidelines, it is important to communicate with building occupants when mold problems are identified in the building as occupants' perceptions of the health risk may rise if they perceive that information is being withheld from them. "When building-wide communications are frequent and open, those managing the remediation can direct more time toward resolving the problem and less time to responding to occupant concerns." EPA "Mold Remediation in Schools and Commercial Buildings" Appendix C).

Step 2 – Establish a Program of Routine Inspections & Maintenance

• Encourage building staff to monitor the property for signs of moisture, water damage and/or situations favorable to mold growth when conducting routine maintenance and repairs.

• Conduct random site checks in areas where water can cause potential problems such as the roof and building envelope.

• Institute a program of preventive maintenance for HVAC, plumbing, roofs, terrac-

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es, windows and other building systems to help reduce water issues and the potential for mold growth. See, "Mold Prevention Tips" excerpted from EPA "Mold Remediation in Schools and Commercial Buildings" (copy annexed).

Step 3 – Develop Water & Mold Remediation Protocols

• Develop routine procedures for building staff to follow when responding to water and mold complaints. See, "Water Damage – Cleanup and Mold Prevention" excerpted from EPA "Mold Remediation in Schools and Commercial Buildings" (copy annexed). At a minimum, these protocols should include:

(i) Determine the source of the leak or the cause of the excessive moisture.

(ii) Stop the leak/moisture and dry all affected areas completely within 24-48 hours.

(iii) Thoroughly clean and dry the affected areas and remove all water damaged materials to prevent mold growth.

(iv) If mold is either observed or smelled (musty odor), it should be remediated. (Note: it is generally not necessary to identify the types of mold involved through costly testing in order to remediate.)

(v) If the mold condition is extensive (i.e. the total surface area of visible mold exceeds 100 sq. feet or the potential for resident/remediator exposure is estimated to be significant), consult an experienced professional with specific experience in mold projects to develop an appropriate remediation plan.

(vi) Where mold has been identified, identify and correct the underlying source of the water intrusion – otherwise mold growth will recur.

Step 4 – Accurate & Detailed Record-keeping

• Develop a standard protocol for documenting water and mold complaints whether through printed emails, telephone logs or formal building reports. Building records should not include any speculation or guesswork such as speculation about the cause of the leak or any alleged mold condition or the possible adverse health effects. Records should be limited to verifiable facts which include:

(i) Date and time the leak or mold was first reported to management.

(ii) What was done to investigate the complaint.

(iii) All work performed by the maintenance staff to mitigate the damage.

(iv) Name, date and time any outside professional was notified for consultation and the date and time the specialist addressed the problem.

(v) Certification that the professional completed the work and corrected the problem (i.e. endpoint testing).

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Luke Surowiec, LEED AP NYC Clean Heat, Eve Martinez, Outreach Specialist Bureau of Waste Prevention, Reuse and Recycling City of New York Department of Sanitation speaking at a recent NYARM Seminar

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For information on what precisely this is, and how it can help, please turn to page 55

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Richard Harris, Local 32BJ Thomas Shortman Training Fund speaking at a recent NYARM Seminar

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Phyllis Weinberg Esq., Partner Montgomery McCracken Walker & Rhoads LLP and Chair of the Coop/Condo Committee of the New York City Bar Association, and Stephen Beer, CPA, Partner Czarnowski & Beer, LLP, speaking at a recent NYARM Seminar

Margie Russell with Brigadier General (Ret) New York Guard, Sidney Baumgarten, Founder of 1st FEMA CERT Team, NYC

Property Management Residential and Commercial Preparing for Disasters Like Never Before! New Rules on Emergency Preparedness

Int 1085-2013 – title 30 – sect 1 – chapter 1

By Ralph Petti and Philip M. Hecht

We understand that you are a market that is truly driven by client satisfaction. To that end, you need to deliver high quality emergency preparedness. Everyone must create a documented plan that works, whatever the emergency, or disaster, and solutions need to include everyone from owners to suppliers.

Super Storm Sandy was – shock and awe! Afterwards we all had to look at how we address future emergencies whether natural or man made, local to a property or widespread. The property management and residential real estate market has a particular exposure during a disaster: there are unique requirements to provide owners and residents with added levels of security and assurance long before disaster arrives. Emergency generators and a few cases of water aren't the answer.

Sandy affected everyone – but so did 911, sustained power outages, gas leaks, and Christmas week snowstorms with 2 feet of snow. Sandy, though, was the final impetus, enough for the City Council to just pass legislation (Int 1085-2013 – title 30) mandating Emergency Preparedness Plans be written, customized and posted for most residential and commercial buildings. In addition, they must contain special considerations for

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at-risk owners and tenants. They must outline protective measures, flood zone status, system shutdown criteria, supplies, and communication methods prior to and during weather or power events. Similar doctrines have been added to industry in commercial structures and, into areas such as healthcare, transportation and many others.

It's all about resiliency. Minimize impacts, maintain service levels, and reduce or eliminate damage.

What's the difference between a water main break that floods a basement, or a Con Ed fire, vs Sandy? No warning vs. for-warned! Impacts from both, however, can be mitigated, that way the next Sandy doesn't catch everyone off-guard. Even "Black Swan" events – multiple disasters occurring at the same time – like extreme weather and power outage – can be planned for. It requires detailed assessment – understanding vulnerability and facility risks – broad and deep – in order to create a level of process, solution and preparation – that provides resiliency.

Impacts linger, clients and owners escalate their issues to managers - louder and longer – when preparedness is absent or insufficient. Impacts from Sandy linger today, locally and community-wide – and make no mistake about it – properties, people, businesses large and small, and communities, remain affected. Planning is key. What remains to be seen is whether or not – these same groups - have really learned the lessons – the city government has taken the first step with the new rules. …. Maybe. We hope so. There is a lot to learn.

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Three key themes to take-away from an event like Sandy are:

- Rebuilding, Restoral, and Recovery – are NOT Resiliency – and Resiliency is what is needed
- Devastating impact from weather, does not have to come from the fiercest of storms – so Preparedness correlated to Potential risk is needed, not conventional thinking related to the size of a storm – or the lights going out
- Don't ever Underestimate again – this requires us to shift from the understandable into the "unthinkable"

Sandy should not have been the "Storm Nobody Expected" – it's storm surge pushed volumes of water where it was never thought possible – it's because conventional thinking and frameworks about Emergency Preparedness and Disaster Recovery – were widely in use. It's not about fault – but avoiding more faulty thinking. It requires capabilities and resiliency to be embedded into the very culture of a property, management organization, and community. Emergency preparedness is needed not only – to recover - but to remain competitive and maintain value and a brand. Perhaps from the bottom-up, everything needs to be rethought and reviewed.

What is the City of New York doing: They hired Arcadis, known as the 'water guru", an Amsterdam based engineering and consulting firm to perform hydrological-modeling to determine how best to make the City resilient. They accepted 7 major recommendations to date.

What should you be doing?

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Don't look to just be compliant with a new law. Do what is right for the property. Do what is right for your clients, owners, and tenants alike. In so doing you protect your own business, as property management leaders. It is your job to keep "them" safe and minimize impacts during an event – seek the professionals and recommendations that show you how. These skills are not in the core competencies of management firms – they're not expected to be – the same as Local Law 11, or the Energy laws 84, 85, and 87. Property vulnerabilities are deeper than most might think. Weather and power events can exploit those risks with devastating impacts. Complete risk and vulnerability reviews – then create the custom plan – that includes the solutions, technologies, supplies, and processes that can make the difference between devastation and local impact.

The NYSE said that 2013 had better be the year of Resiliency, the WSJ says if you haven't re-thought your planning by 2013 – then you are not prepared – and now lack of emergency preparedness – can't be accepted. Rethink Resiliency.

Mr. Pettie is founder of Continuity Dynamics – a Business Continuity consulting firm – and is the Subject Matter Expert on Disaster Planning for Fox News

Mr. Hecht is co-founder of Howard and Hecht LLC – an Emergency Preparedness and Resiliency consulting firm – a thought leader who has assisted commercial and government clients with disaster planning – around the world

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MOLD COMPLAINTS-NOT TO BE IGNORED OR WISHED AWAY

By Morrell I. Berkowitz, Esq.

Complaints by residents of buildings in New York about mold conditions, whether observations of black substances in bathroom ceilings, stained living room ceilings where leaks have occurred, or even foul odors, have grown and are unfortunately becoming more and more common.

The potential for exposure to various dangerous forms of mold, fungi, heavy metals and other toxic substances has also increased as a result of repair and restoration efforts over the last year involving hurricanes, storms, and floods around the country. Superstorm Sandy has itself caused a substantial increase in toxic substance exposure risks.

Managing agents, owners of residential buildings, and cooperative and condominiums must therefore be constantly alert to the potential dangers, and must address these issues immediately upon the slightest hint of a problem. After being involved in many mold lawsuits, I assure you that if mold or other toxic and harmful substances exist, they do not go away by themselves; the condition does not get better on its own; and the potential harm to individuals who are exposed only increases and worsens. As the extent of the problem increases, the probability of litigation and its costs, as well as remediation expenses, grow geometrically. Mold spreads effortlessly from unit to unit, into elevator shafts, easily exposing all residents and possibly risking a full evacuation of an entire building.

The most prudent course of action is to investigate as soon as a complaint is made or when there is knowledge that a leak has occurred, no matter what the reason, where it is located or who is at fault. Addressing and stopping the infiltration of water is essential to prevent further development of mold for the safety of residents and to avoid damage to the building itself and to personal property contents.

It is important to ascertain if in fact mold or other harmful substances have developed as a result of the water infiltration. Surface and air tests done by properly trained testers should take samples and have them tested by an experienced lab.

November 2013

Morrell I. Berkowitz is a partner at Gallet Dreyer & Berkey, LLP, whose practice focuses on real estate related litigation. He is the former Co-chairman of the Supreme Court Committee of the New York County Lawyers Association and has lectured on mold issues to many bar association groups. Gallet Dreyer & Berkey, LLP, represents hundreds of cooperative and condominium boards, and other property owners. The firm of 25 lawyers includes five lawyers who have been designated as "SuperLawyers." www.gdblaw.com

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Effective remediation cannot occur until the water infiltration has been stopped. That is easier said than done because water infiltration can come from a number of sources: a faulty roof, leaking pipes, exterior walls and terrace doors and other water carrying conduits. Sometimes, the source is far from the damaged apartment. Water travels! So you should bring in experienced contractors and professionals. The same applies to the remediation once the infiltration has been addressed, and once the area containing questionable substances has been tested. Contrary to some efforts to "do it on the cheap," self-help use of bleach does not remove the more dangerous toxic molds and fungi.

A good first response plan must take into account the November 2008, NYC Department of Health and Mental Hygiene, "Guidelines on Assessment and Remediation of Fungi in Indoor Environments", www.nyc.gov/html/doh/downloads/pdf/epi/epi-mold-guidelines.pdf, plus all the latest regulations involving the protections that first responders are to employ issued by the U.S. Department of Occupational Safety and Health, and should include:

- immediate investigation of leaks by qualified personnel
- repair of conditions that cause water infiltration
- test any areas where either visible staining, odors, or actual appearance of questionable substances appear
- if harmful substances are found, qualified remediation personnel should be hired to perform remediation
- notify building insurance carriers and attorneys for the building of a potential claim.

Failure to do so is not only poor management, but can be indefensible, and will almost certainly result in a larger problem which will undoubtedly be much more expensive and time consuming to address.

On the legal side, the failure to cure conditions that can lead to dangers to the life, health and safety of residents can form the basis for a defense to the payment of rent as well as claims for personal injury and damage to property. In 2012, in a case we handled for a tenant who had been driven from her apartment by severe mold, the New York State Appellate Division decided that scientific evidence can establish that serious mold conditions can cause personal injury. The appeals court sent the case back to the lower court for a trial on a claim of serious personal injury damages that could exceed the amount of insurance, as well as putting the insurability of the building at risk. In that case, there was plenty of evidence well in advance that there was mold contamination, but it was ignored. A big mistake that building managers, operators and owners do not want to repeat.

Morrell I. Berkowitz
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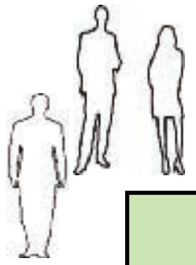

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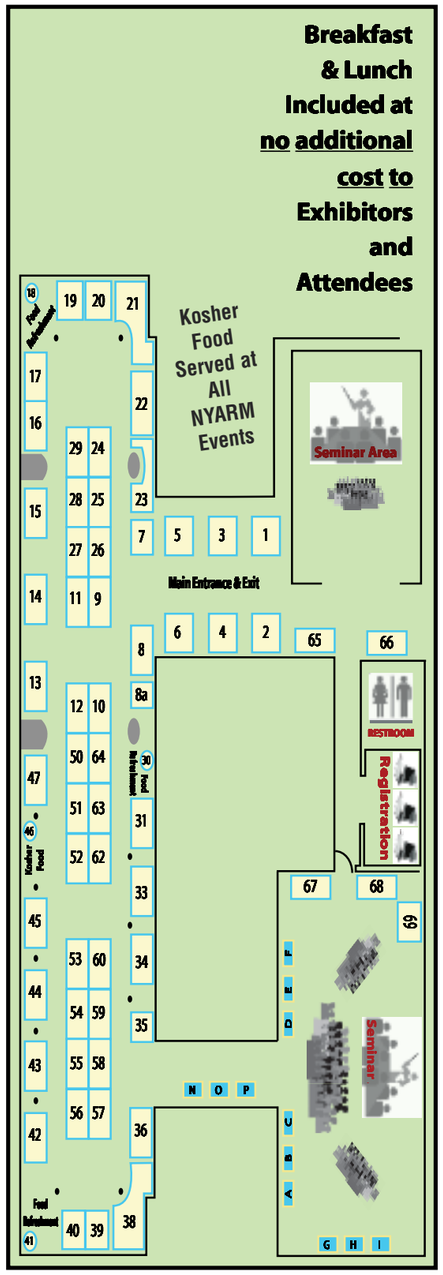

PROPERTY MANAGEMENT EXHIBITION

Book NOW FOR THE 18TH ANNUAL
NYARM GOLF & CYCLING COMPETITION

Monday, June 2, 2014

Colonial Springs Golf Club

Long Island Ave., between East Farmingdale & Wyandanch
Long Island

UP COMING EVENT

Wednesday
October 29, 2014

SELECT YOUR BOOTH LOCATION FOR THE BUILDING MANAGEMENT

EXPO

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- 10 am Buffet Brunch
- 12 noon Shot-Gun Tee-off
- 12:30 Cycling Competition
- Midafternoon Refreshments on the Course
- All Day - Networking
- 4:30 to 7:30 Barbecue Dinner & Cocktail Reception
- All Day - Shuttle jitney to & from Wyandanch or Pinelawn LIRR Station – RSVP TO (212) 216-0654

Or Join us at the Barbeque

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	Qty	$Amt.
☐ Foursome, Members Price	_____	@ $1600
☐ Twosome, Members Price	_____	@ $900
☐ Cyclist, (Non-M @ $400) Members	_____	@ $250
☐ Single, Member Price	_____	@ $475
☐ Single, Non Member Price	_____	@ $550
☐ **Cocktails/Barbeque Member**	_____	**@$150**
☐ **Cocktails/Barbeque NonMember**	_____	**@$300**
☐ **Exhibitors/Meal Sponsorships**	_____	**@$500**

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