ANDERSON KILL
CO-OP, CONDO & REAL ESTATE ADVISOR

Getting Work Done on Your Co-Op or Condo? Protect Yourself

By Allen R. Wolff

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You just got home from a long day at work to discover that the unit owners above you installed a waterfall through your apartment ceiling when their bathtub overflowed. If you suffer damage to your own condo unit or co-op apartment, look to your own homeowner's policy for coverage. Have your insurance company make you whole and let them bear the effort and expense to go after others who may have caused the damage. That's one of the reasons why you have been paying for the insurance!

Beware that many homeowner's policies exclude damage caused by construction defects. If you suffer damage because of construction defects, look to the contractor that performed the work. The defective work itself may not be covered by insurance and will be the contractor's direct responsibility, but the contractor should have insurance that will often cover damage to other property resulting from defective work. Be precise about what is defective work and what is resulting damage.

Make your contractors carry general liability insurance, commonly called CGL insurance, and make them name you as an additional insured. Additional insured status should provide you with coverage if you are brought into a lawsuit for damage or injury resulting from the contractor's acts or omissions. All contractors performing work at the building should also be required to name the condo/co-op board and the condo association or co-op corporation as an additional insured.

Never trust a certificate of insurance. On its face, the standard certificate of insurance states, "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER." Insurance companies will disclaim coverage when they can (see grammar discussion in the next paragraph) and they will not extend coverage solely on the basis of a certificate of insurance. This is a common disappointment to would-be insureds. Don't fall prey to it!

Require all contractors to provide complete copies of their insurance policies to which you have been named an additional insured. Check the policy and the additional insured requirements to confirm that the contractor has complied with them and also with any documentation requirements. Some policies require a direct written contract between an additional insured and a primary insured. In a recent case in New York, an insurance pol-

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icy provided that additional insured status would be extended to those with whom the primary insured agreed to extend additional insured status. The would-be additional insured did not have a direct contract with the primary insured. Recognizing this, the insurance company denied coverage by arguing that the use of the words "with whom" required a direct contractual relationship, as opposed to the words "for whom," which would have preserved the coverage status to the additional insured. All parties to the project agreed that additional insured status was intended to be extended "for" the additional insured. But the insurance company avoided having to cover the loss because of the preposition that had been used in the policy and the failure of the parties to document their additional insured status correctly.

Require written contracts with everyone performing work on your property. Also require written indemnities from everyone performing work on your property. Their obligation to defend, indemnify and hold harmless should be spelled out in the contract and should provide that you will be indemnified to the fullest extent permitted by law, including claims arising under New York's Labor Laws, and that the contractor's insurance will be primary and non-contributory.

Beware the New York Labor Law. It can make you pay for compliance with the law of gravity. If a construction worker is injured in almost any way that involves the function of gravity, a property owner can be held absolutely liable for the injury. The role of gravity is not confined to a worker's fall. If a worker is struck by a falling object, there could be liability on the part of the property owner under the New York Labor Law. This is an unfortunate vestige of a bygone era and New York is the only state in the nation to still have such laws on its books. It doesn't matter how much you stressed safety. Indeed, in most instances, the property owner is not even able to make the injured person bear responsibility for that person's own carelessness.

Require that contractors carry completed operations coverage for six years after the work is complete and that their indemnification obligation in the contract survives the completion of the work for this six-year period.

Require written lien waivers for every payment — stating that the contractor has received payment and waives any future lien rights to the property for the amount paid. Make contractors provide lien waivers to you for themselves and for each of their subcontractors. Consider the lien waiver as a legal receipt you get for the payment. The lien waivers should be partial lien waivers that track the progress of payments already made and correspondingly increase to the full and final lien waiver you require upon making final payment.

Withhold final payment until all permits are closed and confirm that they are closed by checking at the NYC Department of Buildings or other regulatory authority.

When problems arise, do not hesitate to consult with counsel. The right lawyer can help you navigate the complex landscape of construction risk and liability.

About Anderson Kill

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