



Memo

TO: All Cooperative Boards Of Directors, Condominium Boards Of Managers & Managing Agents

FROM: ERIC M. GOIDEL, ESQ.

RE: Constructive Eviction In A Cooperative Based Upon Smoke Infiltration

DATE: March 7, 2016

In a case that may have far reaching ramifications, a New York State Supreme Court judge held that a cooperative apartment corporation's failure to effectively deal with secondhand smoke entitled an adjoining shareholder-lessee to a 100% abatement in maintenance as well as an award of legal fees.

In the case of Reinhard v. Connaught Tower Corp (Supreme Court, New York County, Index No. 602503/2008) Justice Arthur Engoron found that by permitting the plaintiff's apartment to be infiltrated with secondhand smoke, the plaintiff was entitled to be reimbursed for 100% of the maintenance which had been paid since June 2007. In the case just published on March 2, 2016, Judge Engoron awarded a 97% abatement based upon a cause of action alleging a breach of warranty of habitability (finding that the apartment had been occupied for 3% of the time). However by awarding a 100% abatement, the judge made a finding of constructive eviction and breach of contract and determined that the value of a smoke infiltrated apartment is essentially zero. Judge Engoron additionally enforced the provisions of New York Real Property Law Section 234 which provides that where a proprietary lease entitles the apartment corporation to recover attorney's fees from a shareholder-lessee, a reciprocal right is implied in a shareholder-lessee who successfully prosecutes or defends a claim. An additional claim seeking injunctive relief directing the apartment corporation to take some affirmative action was apparently abandoned by the plaintiff. However, Judge Engoron discussed that claim and found that because the apartment was a pied a terre and not the plaintiff's primary residence, the plaintiff did not suffer irreparable injury which would have entitled the plaintiff to some form of injunctive relief.

The Warranty of Habitability in New York is codified in Section 235-B of the Real Property Law which requires that a landlord of a residential building covenants and warrants that apartments are fit for human habitation and that the occupants shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. Judge Engoron found secondhand smoke to be a per se violation of New York's warranty of habitability.

The finding of a breach of Warranty of Habitability was made notwithstanding the fact that the plaintiff admitted the apartment was utilized as a pied a terre on only a handful of occasions. The apartment corporation argued that where a tenant is not occupying an apartment, the tenant should not be entitled to an abatement. Judge Engoron found that argument to be less than compelling. The court further found that the apartment corporation had breached an obligation in the proprietary lease which required that the apartment corporation keep the building in good repair, including all of the apartments. Judge Engoron found that smoke was infiltrating the plaintiff's apartment through spaces between the walls of the apartment as well other areas for which the apartment corporation was responsible.

If followed by other judges, this decision would present boards with the Hobson's choice of either providing smoke free apartments by excluding smoking purchasers and subtenants from their buildings, or performing work in the building which would essentially make each apartment free from smoke infiltration. The former requires an amendment of the proprietary lease by a supermajority vote of the apartment corporation's shareholders-lessees, while the latter is physically impossible.

This decision will likely be appealed. However, while the decision may currently be an aberration, it can safely be expected that other judges will adopt certain parts thereof. Portions of this decision may also extend to condominiums.

Accordingly, it would behoove boards to consider adopting policies regarding the regulation of secondhand smoke. By law, common areas must be free of smokers. However individuals are entitled to smoke within their apartments. Boards should consider requiring smokers to take steps in their apartment to mitigate the possibility that secondhand smoke may affect neighbors. This can include requiring the installation of air purification devices, as well the sealing of doors, electrical outlets and other openings. This can generally be implemented merely by the boards adopting a house rule and in most cases should not require a vote of the shareholders. Boards should additionally take steps to ensure that other equipment for which the building is responsible such as roof exhaust fans are functioning properly.

Should any board be desirous of exploring the adoption of a smoking policy, please contact Eric M. Goidel, Esq. at (212) 431-1300, ext 438.

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