
CLIENT ADVISORY

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COURT RECOGNIZES CONDOMINIUM UNIT OWNERS' POTENTIAL CLAIM AGAINST NEIGHBOR FOR SECOND-HAND SMOKE

A Manhattan judge has recognized potential claims for nuisance and negligence by the owner-occupants of a condominium unit against the occupant and the owner of the neighboring unit, based on allegations that second-hand smoke from the neighboring unit was disturbing them, required them to vacate their unit from time to time, and caused their daughter to become ill. Ewen v. MacCherone, 2009 WL 4432449, 2009 N.Y. Slip Op. 52428(U) (Civil Ct. N.Y. Co. Dec. 1, 2009).

The plaintiffs and defendants in this case are the occupants and owners of two adjoining condominium apartments. Plaintiffs' complaint alleged that defendant occupant and his guests smoke cigarettes in his apartment and that secondhand smoke invades plaintiffs' unit, with the problem being exacerbated by design and construction defects allowing smoke and odors to migrate throughout the structure. Plaintiffs asserted, among other things, that defendants violated a rule and regulation of the Condominium providing that "[n]o Unit Owner shall make or permit any disturbing or objectionable noises, odors or activity in the Building, or do or permit anything to be done therein, which will interfere with the rights, comforts or conveniences of other Unit Owners or their tenants or occupants."

In moving to dismiss the complaint, defendants asserted that the Condominium's by-laws and rules and regulations did not prohibit smoking in apartments, although they did prohibit smoking in other parts of the building, such as a playroom and a health club. The court found the Condominium's documents to be "silent regarding whether smoking is permitted or prohibited in individual units." Additionally, while the by-laws provided that the Board of Managers had the right to commence legal action to redress any violation of the by-laws, rules and regulations, they did not provide that the board had the *exclusive* right to commence such an action, nor did they preclude an owner or occupant of a unit from commencing a nuisance action against the owner or occupant of an adjoining unit.

Defendants also argued that smoking inside an apartment was insufficient to constitute a legally actionable nuisance. The court noted that there existed at least some precedent for this type of nuisance claim. (One such case, in which a judge held that excessive second-hand smoke could result in a breach of the warranty of habitability imposed on property owners, is discussed in the October 2006 issue of this *Client Advisory*.) The court held that the allegations of the complaint were sufficient to survive the motion to dismiss. The court reached the same result on plaintiffs' negligence claim, in view of the fact that defendants continued to smoke in their apartment even after all building residents had received engineering reports regarding the building's "odor migration problem."

Finally, the court rejected defendants' argument that the case should be dismissed because plaintiffs had not named the Condominium Board of Managers as a party to the case. The court noted that under the Condominium's rules, individual Unit Owners were responsible for enforcing compliance by all occupants of their Units. Accordingly, the proper defendants included the adjoining unit owner, who had been named as a party, and the Board of Managers did not have to be added.

BOARD'S DENIAL OF PERMISSION TO ADD BATHROOM UPHELD

New York courts continue to accord broad, although not unlimited, deference to business decisions of cooperative and condominium boards in running their buildings, pursuant to the business judgment rule. Another recent illustration of such deference is the recent appellate court decision in **West v. 332 East 84th Owners Corp.**, 2009 WL 4672154, 2009 N.Y. Slip Op. 9152 (App. Div. 1st Dep't Dec. 10, 2009).

In this case, the tenant-shareholders requested board approval to construct a new bathroom in their apartment, but the board denied permission. The tenant-shareholders sued, claiming that there was no reasonable basis for the denial. The board stated that it had denied the request because adding the bathroom "would violate a recently enacted building policy to prohibit 'wet' construction over 'dry' space." The court upheld the board's decision because it found no issue as to whether this policy "was legitimately related to the welfare of the cooperative" and no evidence that the policy "was unreasonable or applied in an arbitrary or discriminatory manner."

COOPERATIVE FAILED TO PRESERVE RIGHT TO SEEK LEGAL FEES INCURRED IN ENFORCING JUDGMENT

Many proprietary leases authorize cooperatives to recover attorneys' fees and expenses in the event it becomes necessary to bring legal proceedings to enforce the lease. However, a cooperative can, by its conduct in the litigation, waive the right to seek an award of legal fees. An instance of such waiver, possibly inadvertent, occurred in **Amalgamated Dwellings, Inc. v. Blutreich**, 2010 WL 155550, 2010 N.Y. Slip Op. 379 (App. Div. 1st Dep't Jan. 19, 2010).

The cooperative in this case had previously obtained two judgments for unpaid maintenance and electric charges against a tenant-shareholder couple. It then brought another proceeding to enforce the judgments against the tenant-shareholders. That proceeding was subsequently settled. The cooperative then brought yet another proceeding, this one seeking an award of the attorneys' fees it had incurred in the prior proceedings.

The court held that the cooperative had waived any right it might have had to recover attorneys' fees by settling the prior litigation without preserving its claim for the fees. The cooperative's initial court papers in the prior case had mentioned the claim for fees, but the settlement neither provided for the cooperative to recover attorneys' fees nor preserved the claim for future litigation. The court concluded that "[i]n short, the cooperative [previously] asserted a claim for the attorneys' fees it seeks herein, and settled it." The court rejected the cooperative's claim that attorneys' fees had been sought in the prior case "inadvertently." It also held that the "no waiver" provision of the proprietary lease did not apply to a waiver in the context of a litigation.

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