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COOPERATIVES AND CONDOMINIUMS

Expert Analysis

Increased Vigilance For Secondhand Smoke

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Since our 2014 column dealing with secondhand smoke,[1] co-op and condominium boards continued to be challenged by secondhand smoking claims made by apartment owners, alleging negligence, nuisance and breach of contract and the warranty of habitability. But until the March 2016 decision in *Reinhard v. Connaught Tower Corp.*,[2] courts had generally afforded boards flexibility and tolerance in addressing secondhand smoke. The Connaught ruling, although it is currently being appealed to the Appellate Division, First Department, may mark a shift in such judicial forbearance, and therefore impact the obligations of boards to remediate/address secondhand smoke complaints. In addition, the changing landscape of marijuana use legalization and New York State legislation increasingly being proposed to restrict smoking and secondhand smoke may further heighten the challenges that boards and managers will have to address.

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This column updates our prior columns dealing with secondhand smoke,[3] analyzes the 2016 Connaught decision and other recent case law, and provides recommendations for boards and managers in dealing with secondhand smoke.

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Courts and Legislature

Cases. In 2015, in *555-565 Associates, LLC v. Kearsley*,[4] a rental landlord brought a nonpayment case to recover possession of an apartment from a rent-stabilized tenant; the tenant counterclaimed for a rent abatement for breach of the warranty of habitability due to secondhand smoke infiltration from his upstairs neighbor. The New York City Civil Court found that the tenant's expert could not confirm with certainty that the tenant's alleged allergic symptoms were caused by the neighbor's smoking, nor that smoke had actually entered the tenant's apartment, and rejected the tenant's counterclaim.

The court noted the landlord's inspection of the neighbor's apartment and her compliance with the landlord's request to install an exhaust fan and air purifier. Overall, the court ruled in favor of the landlord because of the prompt steps the landlord took to address the secondhand smoke complaints, including sending cautioning letters to tenants regarding smoking policies, requiring smokers to ventilate their units, inspecting the neighbor's apartment for sources of infiltration areas and sealing the same.

In the condominium context, in February 2016, the Appellate Division, Second Department, similarly found for the condominium board and property management company in *Feinstein v. Rickman*,[5] where unit owners brought negligence, breach of duty and injunctive relief claims against the board, property management company and neighbors for secondhand smoke allegedly infiltrating their apartment.

The court relied heavily on the Appellate Term's 2011 analysis in *Ewen v. Maccherone,*[6] where plaintiffs' private nuisance claim against their neighbors was denied, with the

court reasoning that smoking in the privacy of their own apartment was not so unreasonable as to justify the imposition of tort liability. The court found that defendants were not barred from smoking in their apartment, nor from allowing smoke to penetrate into other units, under any statute, condominium rule or bylaw. The defendants had no duty to refrain from smoking in their apartment, causing the negligence claim to also fail. The court went so far as to assert that public policy is against allowing private causes of action for secondhand smoke infiltration.

In addition to tobacco smoke, which building occupants have had to deal with for years, marijuana smoke infiltration is becoming more of an issue and will likely become increasingly so as the marijuana use legalization movement accelerates. For example, in April 2016, the board of The 400 Central Park West Condominium sued an apartment owner for allowing marijuana smoke to infiltrate from her apartment to other areas of the condominium building, claiming that the smoke infiltration is a nuisance to other residents and violates the house rules—which expressly require smokers to insure that smoke does not enter into adjacent units or common areas.[7] The board seeks to enjoin the occupants from smoking or to install an air filtration system to contain the smoking odors.

Proposed Legislation. Two bills introduced in the New York State Legislature over the last year address secondhand smoke. Neither have yet been adopted. Assembly Bill 83308 would ban smoking in public housing and require that all such buildings be smoke-free by Jan. 1, 2020. Regarding private housing, Assembly Bill 359 would amend the Public Health Law by requiring owners of multiple dwellings (expressly including co-ops and condominiums) to develop and implement a written smoking policy and generally permits owners to restrict smoking within their properties pursuant to such policies.

The Connaught Decision

Connaught is the most significant and recent decision dealing with the legal and financial consequences of a board failing to remediate secondhand smoke in a co-op or other residential building. The plaintiff apartment owner sued the co-op for constructive eviction, breach of the warranty of habitability and breach of contract based on the claim that her apartment was significantly polluted by secondhand cigarette smoke from an adjacent apartment. Plaintiff had repeatedly complained to the co-op about smelling smoke, but the co-op denied any problem, denied it had an obligation to remedy it and did little in the way of addressing the situation.

Plaintiff's primary residence was in Connecticut, but she refused to stay in her Connaught Tower New York apartment (with the exception of allowing a few overnight guests to stay there) because of the smoke odor. Based on the plaintiff's testimony and that of friends, relatives and an expert witness, the Supreme Court, New York County, found that secondhand smoke had intruded into plaintiff's apartment and took judicial notice of the well-established health hazards of secondhand smoke.

With the facts overwhelmingly in plaintiff's favor, the court awarded her generous relief. For plaintiff's breach of warranty of habitability claim, the court, relying on precedent, ruled that a co-op apartment owner who is unable to safely reside in an apartment is entitled to a complete rent abatement. The court found that plaintiff suffered the loss of 97 percent of her apartment (because of its occasional use by her guests), and she was thus entitled to a 97 percent reimbursement of maintenance charges paid since the time of her first smoke complaint—July 1, 2011. The court stressed that a landlord can breach the warranty of habitability even when circumstances may be, as the co-op alleged, out of its control because the smoking emanated from a neighbor's apartment.

Next, the court found in favor of plaintiff for a 100 percent rent abatement on her constructive eviction and breach of contract claims, holding that the value of a smoke-polluted residential apartment is zero and the value of her apartment had it been smoke-free was the amount of maintenance paid. Importantly, the court also awarded plaintiff the attorney fees she had incurred in instituting (in 2011) and maintaining the lawsuit, as the prevailing party. Interest at 9 percent was also awarded on the amount of the abated maintenance.

The decision is unique in its unforgiving rulings against the co-op. Although the Connaught board was demonstrably unwilling to take any action to address secondhand smoke, on its face, the court's ruling applies to concerned and responsive boards alike. While the court recognized the severe burden being placed on building owners, it justified its ruling by relying on historic examples of how courts have continuously made decisions "that public health and/or safety and/or the public good require," making comparisons to landmark cases such as *Brown v. Board of Education*.[10]

Further, the court stressed how building owners/co-ops (and presumably condominiums) have the ability and resources to make buildings and

apartments smoke-free while tenants/apartment owners do not. The court attempted to limit its decision by pointing out that it was not forbidding an owner from smoking in his or her apartment, but only that if an owner avails itself of the right to rent out residences (including via proprietary leases), the owner assumes the obligation to insure that tenants/apartment owners are not forced to smell and breathe carcinogenic toxins.

The decision is also unique by refuting the generally accepted understanding in the legal community that the claimant must live in the apartment in order to obtain a rent abatement. The co-op's argument that plaintiff could not claim a breach of the warranty of habitability because she did not reside in or inhabit the apartment was rejected, with the court holding that there is no absolute rule that a tenant of record who is not occupying the apartment is not entitled to an abatement. The court expressly held that owners of pieds-a-terre are also entitled to smoke-free environments.

Recommendations

Connaught has imposed a new reality and strict burden on co-op boards dealing with secondhand smoke. As suggested in our prior columns, boards may now wish to consider instituting a building-wide smoking ban by amending a co-op's proprietary lease or a condominium's bylaws through the requisite affirmative vote of apartment owners. As *Connaught* reinforces, smoking bans are legal, not contrary to existing laws, and our research does not disclose any court rulings striking down such bans. Smoking bans are also non-discriminatory as smokers are not a protected class. A ban also does not violate any privacy rights. Specifically, in a co-op or condominium, an apartment owner submits to the co-op's or condominium's rules and allows a board to lawfully govern the conduct of apartment owners who choose to live in such buildings.[11]

If a board chooses not to ban smoking, it may adopt a resolution declaring that allowing secondhand smoke to permeate beyond an owner's apartment is "objectionable conduct" under the proprietary lease, which is a basis for terminating apartment ownership. A typical objectionable conduct clause provides for lease termination for "repeatedly violat[ing] or disregard[ing] the rules and regulations" and a co-op board may therefore determine what constitutes "objectionable conduct," including allowing secondhand smoke to enter other apartments or common areas.

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Alternatively, a co-op board can present a proprietary lease amendment for adoption by apartment owners which expressly stipulates that permitting secondhand smoke to permeate beyond an apartment owner's apartment is conduct constituting objectionable conduct. However, these procedures are not available to condominium boards, because condominium apartment ownership does not include a lease.

Another approach, available to both co-op and condominium boards, is to present to apartment owners an amendment to the entity's proprietary lease or bylaws, respectively, prohibiting owners from permitting secondhand smoke to permeate other apartments or building common areas and making owners who violate this prohibition responsible to remediate the secondhand smoke.

The one approach that prudent boards should not take is to ignore complaints of secondhand smoke. As *Connaught* teaches, doing so exposes both co-op and condominium boards to significant adverse legal and financial consequences.

1. Siegler and Talel, Cooperatives and Condominiums: "Warranty of Habitability in 2014: Seeking to Strike a Balance," N.Y.L.J., Sept. 3, 2014, p. 3, col. 1.

2. 602503/2008, NYLJ 1202751009993, at *1 (Sup. Ct., NY Co., Decided Jan. 25, 2016)—Decision and Order Entered and Published March 2, 2016. Notice of Appeal was filed on April 1, 2016.

3. Supra, note 1. See also, Siegler and Talel, Cooperatives and Condominiums: "Second-Hand Smoke and Smoking Bans," N.Y.L.J., March 6, 2013, p. 3, col. 1.; Siegler and Talel, Cooperative and Condominiums: "Secondhand Tobacco Smoke Revisited," N.Y.L.J., March 3, 2010, p. 3, col. 1; Siegler & Talel, Cooperatives and Condominiums: "Dealing With Secondhand Tobacco Smoke," N.Y.L.J., Sept. 6, 2006, p. 3, col 1.

4. 48 Misc.3d 121(A), at *4 (N.Y. City Civ. Ct. July 17, 2015).

5. 136 A.D.3d 863 (2d Dept. 2016).

6. 32 Misc.3d 12 (N.Y. Sup. Ct. App. Term 1st Dept. 2011).

7. *The Board of Managers of The 400 Central Park West Condominium v. Josefina Hentiguez-Berman and Charlie Berman*, Sup. Ct. N.Y. Co., Index No. 152705-2016.

8. 2015 N.Y. Assembly Bill 8330.

9. 2015 N.Y. Assembly Bill 35.

10. 347 U.S. 483 (1954).

11. *Levandusky v. One Fifth Avenue apartment Corp.*, 75 N.Y.2d 530, 536 (1990).

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