

## Court Opens Door for Owner Liability for Secondhand Smoke

A recent ruling by a New York housing court judge opens the door for tenants to get rent abatements by claiming that secondhand smoke from another apartment or common area is seeping into their apartment and causing health problems. The court refused to dismiss a tenant's claim that second hand smoke was a breach of the warranty of habitability warranting a rent abatement [Poyck v. Bryant: NYLJ 9/1/06, p. 22, col. 1 (Civ. Ct. NY)]. The court's ruling is very troubling for building owners, notes Manhattan attorney Adam Leitman Bailey. That's because there's not always much owners can do to correct a secondhand smoke situation, he notes.

Here's what happened in the case: An owner of a condo unit rented his unit to tenants. After the tenants lived in the unit for about three years, new neighbors moved into the apartment next door. They constantly smoked in the common hallway and in their apartment. The smoke penetrated into the tenants' unit. The tenants complained to the building's superintendent, who spoke to the neighbors. But, the smoke continued unabated, despite additional efforts the tenants took to reduce it. The tenants finally moved out of their unit because of health concerns from the secondhand smoke. The owner then sued the tenants for rent they owed. The tenants counterclaimed that the secondhand smoke condition breached the warranty of habitability and was a construction eviction (that is, the secondhand smoke condition make the apartment uninhabitable, forcing them to move out). The owner asked the court to dismiss these counterclaims, arguing that he wasn't responsible for the secondhand smoke and had no control over the neighbors' actions.

The court refused to dismiss the tenants' counterclaims. It ruled that an owner could be found responsible for the action of third parties (the neighbors). And, it noted that the owner didn't offer any evidence to show that he took any action to eliminate or alleviate the secondhand smoke condition (for example, by asking the condo's board of managers to stop the neighbors from smoking in the common areas, or by properly ventilating the neighbor's unit so secondhand smoke didn't seep into the tenant's apartment). A trial was required.

### What Should You Do?

Since the case hasn't yet been decided on the merits, it remains to be seen exactly what actions the court will require the owner to have taken to avoid a finding that he breached the warranty of habitability. But, to play it safe, here are some suggestions of steps you may want to take if this comes up in your building. These steps were taken by Martin Traum, RAM, an account executive with the Manhattan-based Matthew Adam Properties, Inc. after a building he managed received complaints about secondhand smoke from a tenant.

- 1) **Install air filters.** Install an air filter or some other type of smoke eating device in the complaining tenant's apartment and in the apartment that is producing the secondhand smoke (if possible) he says. You can get these devices at stores like Home Depot.
- 2) **Caulk open spaces.** To prevent the smoke from seeping into one apartment from the other, caulk any open areas—for example, by the space between the floor and any walls that the apartments share. You also may have to insulate inside outlets and switch plates on the wall that the apartments share. If the smoke is coming from the hallway, you may have to block up any open space between the tenant's door and the floor with weather stripping.
- 3) **Insulate medicine cabinets.** If medicine cabinets are in back to back apartments, remove them, insulate them and reinstall them.
- 4) **Install small fan for ventilation shaft.** If your building has passive air vents (that is, no ventilation fans on the roof, only stacks), you can install a small fan to exhaust into the ventilation shaft.

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