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COOPERATIVES AND CONDOMINIUMS

BY [redacted]

When Boards Determine Not to Act

Urban living usually means sharing walls, ceilings, floors, hallways and lobbies with neighbors. This close living and sharing of space may lead to disputes between neighbors. In co-op and condominium buildings, the aggrieved party often looks to the board of directors or building manager to solve or alleviate the problem at the source of the dispute.

However, it would place an unreasonable and likely impossible burden on volunteer boards to deal with every resident complaint.

This column discusses when a board may justifiably elect not to address such complaints and provides guidance and recommendations to boards and managers for efficient ways to foster resolution of disputes between apartment owners.

Warranty of Habitability: Case Law

Because of the leasehold aspects of co-op ownership, co-op boards are also landlords and have a statutory duty to comply with the unwaivable covenants of the warranty of habitability.1 However, as the Court of Appeals made clear in 1979, the warranty of habitability creates only a minimum standard for essential functions, those without which an apartment is rendered uninhabitable, and protects only against conditions that materially affect the health or safety of residents.2

Thereafter, in Solow v. Wellner,3 the Court of Appeals established an objective, uniform standard for determining which essential functions a landlord is expected to provide, rejecting a subjective standard based on expectations of building residents who leased apartments in a luxury building. The court held that the landlord was under no duty under the warranty of habitability to provide luxury conditions and therefore garbage accumulation and stench and an overflowing sink in a laundry room did not breach the warranty.

Based on these well-settled principles, courts have addressed a landlord's duty to remedy apartment conditions under the warranty of habitability in a variety of factual settings.

Noise

In Kaniklidis v. 235 Lincoln Place Housing Corp.,4 co-op tenants complained of heavy walking and banging noises coming from the apartment above and claimed the board breached the warranty of habitability by failing to abate the noise. The Appellate Division, Second Department dismissed the lawsuit because the noise was not so excessive that it deprived plaintiffs of the essential functions of a residence,5 and held the board was therefore not obligated to alleviate the noise or abate maintenance charges to compensate tenants for the disturbance.

Light

In 169 East 69th Street Corp. v. Leland,6 a co-op resident complained of bright light emanating until 10:00 p.m. from an awning erected by the co-op's commercial tenant directly below his apartment. The court held that to constitute a breach of the warranty of habitability, an offending light source must cause a substantial and serious interference with use of the apartment and concluded that the disruption was minimal and within the parties' reasonable expectations given the apartment's location above the commercial space and facing a busy street. Therefore, the board had no duty to abate the light disturbance or the shareholder's maintenance payments.

Threats and Criminal Acts

Does a landlord have a duty under the warranty of habitability to protect tenants from offensive or threatening acts of other tenants? In Palais Partners v. Vollenweider,7 the sublessee of a condominium unit claimed the premises were uninhabitable because of his neighbor's nudity and sexual acts within view of the sublessee's window. The court rejected the claim because the conduct did not render the premises unfit for human habitation or create conditions that were dangerous to life, health or safety.

However, if the neighbor's acts had taken place in common areas or were readily observable by other occupants, might the decision have come out differently? If the same claim were asserted against a co-op board having the duty of the landlord, rather than against an individual unit owner with limited control over a neighbor's conduct, would the outcome have been different? There is a dearth of authority to answer these questions.8

However, where there is a threat of foreseeable criminal conduct, it is wellestablished that a landlord has a duty to take minimal precautions to protect tenants from harm.9 Nonetheless, even where harm is foreseeable, the landlord/board may not be obligated to act. In Knudsen v. Lax,10 tenants sought to terminate their lease after a registered sex offender leased an adjacent apartment. The court held that failure to address the tenants' legitimate concern regarding foreseeable sex crimes against his three daughters would constitute a breach of the warranty of habitability, provided the landlord could lawfully abate the threat. However, the court found that Real Property Law §235-f prohibits a landlord from evicting a lawful occupant who is a registered sex offender solely by reason of that designation.11 Therefore, because the landlord could not lawfully abate the problem, the warranty of habitability imposed no duty to act.

Importantly, the warranty of habitability is inapplicable to the relationship between a condominium board of managers and individual unit owners because

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condominiumunits are owned and no landlord-tenant relationship exists.12 However, condominium boards should be mindful of statutory standards, such as those prescribed by the New York City Noise Control Code, as well as condominium bylaws which generally require maintenance of the building and common elements.13

Fiduciary Duties

While deprivation of nonessential apartment functions does not give rise to a claim under the warranty of habitability, other legal duties may require board action. Both co-op and condominium boards have a fiduciary duty to act for the benefit of the apartment owner community.14 When a board becomes aware of a problem affecting a member of the community, it has three choices: to act, not to act or to not consider the problem.

When a board acts, its actions are generally protected by the business judgment rule, which applies to both co-ops and condominiums. Levandusky v. One Fifth Ave. Apt. Corp.15 established the business judgment rule as the standard for review of co-op and condominium board actions, mandating judicial deference to board determinations so long as the board acts within its scope of authority, in good faith and in the lawful and legitimate furtherance of the co-op or condominium's purpose.

In Quasha v. Third Colony Corp.,16 a co-op shareholder complained of noise from loud parties, barking dogs and flushing toilets coming from a neighboring apartment. The shareholder sued the board for breach of fiduciary duty because the board acted by not renewing the neighbor's lease, not by taking steps to stop the noise immediately. The court held the board did not exceed its authority or act in bad faith by not seeking to enjoin the disturbance and was therefore protected by the business judgment rule.

When a board makes a decision not to act, that decision is also likely protected by the business judgment rule. However, where a board does not consider the complaint at all, the business judgment rule is not applicable and does not afford the board protection from judicial review. "The [business judgment] rule only applies where there actually was a business decision—it does not protect directors in 'omission' cases where injury resulted from directors passively doing nothing."17

In Miller v. Schreyer,18 shareholders sued for breach of fiduciary duty alleging that directors failed to monitor operations and implement procedures to prevent a scheme that lost the company hundreds of thousands of dollars. The Appellate Division, First Department held that the business judgment rule did not protect the board because it did not make a deliberate decision, but rather negligently failed to discover or prevent the wrongdoing.

Thus, in order to be protected by the business judgment rule, in addition to acting in good faith and within its authority, a board cannot ignore complaints from residents. Rather, a board should deliberate on the issue and, if it so determines, make an informed decision not to act.

Private Nuisance

A board is not liable for private nuisance unless it is substantial or unreasonable.19 In Kaniklidis v. 235 Lincoln Place Housing Corp.,20 the court held that noise from heavy walking and banging did not constitute a private nuisance because it was not a substantial and unreasonable interference with the use of the property. And in Lewis v. Stiles, landowners brought a private nuisance action against adjoining landowners for sounds of "[d]ogs barking, children frolicking, and the discordant sounds of music and outdoor summer life."21 The court held that the noise was not a substantial and unreasonable interference with the plaintiffs' use of their property.

Does second-hand smoke rise to the level of substantial and unreasonable interference with the use of property? Residents of a condominium unit at The Ansonia, a Manhattan West Side Landmark building, believed it did. Plaintiffs resided with their young son in an apartment adjacent to defendant's apartment, where defendant allegedly chain-smoked without providing adequate ventilation. As a result, second-hand smoke allegedly filled the shared hallway and seeped into plaintiffs' apartment through vents. While the board repaired the vents and required residents to take reasonable steps to eliminate secondhand smoke, the problem continued and plaintiffs sued their neighbor for private nuisance. The issue before the court would have been whether second-hand smoke in a shared hallway constitutes a substantial and unreasonable interference with the use and enjoyment of the property. However, the case was settled.22

• **Alternative Dispute Resolution.** A potentially effective method for resolving shareholder disputes is nonbinding mediation. Requiring shareholders to engage in this process would prevent a board from becoming the flashpoint in a dispute that does not implicate board duties, while providing a forum in which shareholders can voice their concerns, air their grievances and settle their differences in a cost effective manner. Boards may wish to consider adopting required nonbinding meditation provisions in their foundation documents and, where appropriate, contributing to the relatively modest cost of such mediation.23

Recommendations

Duties placed on co-op and condominium boards are not unlimited and vary by specific circumstances and contexts. Therefore, after proper deliberation and consideration, boards may have the legally warranted option of inaction. Co-op boards have an implied duty under the warranty of habitability to keep premises habitable, so that shareholders are not deprived of an essential function of the residence. However, boards do not have a duty to abate nuisances that they can not take lawful steps to abate.

Both co-op and condominium boards are bound by fiduciary duties to their communities. These duties are measured by the business judgment rule, which protects board action where a conscious decision to act or not to act has been made. Passive inaction when there is a duty to act is not protected by the business judgment rule. Both co-op and condominium boards may be liable for private nuisance if they fail to abate a nuisance, but only if board action or inaction causes a substantial and unreasonable interference with the use and enjoyment of the property.

Lastly, boards should consider adopting a provision in the entities' proprietary lease, bylaws, house rules and/or rules and regulations, which in some instances may require approval of a requisite number of shareholders or unit owners, requiring apartment owners to adjudicate disputes with fellow owners, in the first instance, by engaging in nonbinding mediation. This relatively inexpensive and costeffective process may provide a vehicle to ameliorate or resolve the source of apartment owner disputes.

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1. N.Y. Real Prop. Law, §235-b (McKinney 2006). The statute provides, in relevant part:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous,

tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

2. Park West Management Corp. v. Mitchell, 47 NY 2d 316 (1979). While this case deals with a residential rental building, generally, cases dealing with rental buildings are relevant to co-op buildings as well.

3. 86 NY 2d 582 (1995).

4. 305 AD2d 546 (2nd Dept. 2003).

5. Recently, however, it has been shown that excessive and continuous noise can be hazardous to physical and mental health and can contribute to a reduced quality of life. Therefore, notwithstanding a historical reluctance to find noise complaints actionable under the warranty of habitability, courts are beginning to extend the warranty of habitability to address excessive and unreasonable noise disturbance, while recognizing that noise generated by construction in a large, crowded city such as New York is inevitable and should not entitle noise complaints based on such activity to relief. See, generally, Richard Siegler and Eva Talel, "Noise and the Warranty of Habitability," NYL J, March 1, 2006 at 3, col. 3.

6. 156 Misc2d 669 (N.Y. City Civ. Ct. New York Co. 1992).

7. 173 Misc2d 8 (N.Y. City Civ. Ct. New York Co. 1997).

8. A reference point for authority in answering these questions may be found in cases interpreting 40 West 67th Street v. Pullman, 100 NY 2d 147 (2003), where the Court of Appeals validated a co-op's right to terminate a proprietary lease for a shareholder's objectionable conduct. See, e.g. Siegler and Talel, "'Pullman' Interpreted," NYL J, March 2, 2005 at 3, col 3.

9. Burgos v. Aqueduct Realty Corp., 92 NY 2d 544, 548 (1998). (However, "[L]iability can only arise where the owner knew or should have known of the probability of conduct on the part of the trespasser which was likely to endanger the safety of those lawfully on the premises [and] such notice can be established only by proof of a prior pattern of criminal behavior."); Buckeridge v. Broadie, 5.AD3d 298, 299-300 (1st Dept. 2004). See also Klein v. Beekman Tenant's Corp., Index No. 118720/02, Sup. Ct. N.Y. Co. Nov. 22, 2005.

The Court of Appeals has also spoken to the issue of what constitutes "minimal precautions" in James v. Jamie Towers Housing Co., 99 NY 2d 639 (2003). There, the court held that by providing locking doors, an intercom service and 24-hour security, the landlord discharged its common-law duty to take minimal security precautions against reasonable foreseeable criminal acts. See also, Anzalone v. Pan-Am Equities, 271 AD2d 307 (1st Dept. 2000).

10. 17 Misc3d 350 (N.Y. Co. Ct. Jefferson Co. 2007).

11. N.Y. Real Prop. Law §235-f (McKinney 2006). The court's rationale relied on its interpretation of the statute's prohibition of "unlawful restrictions of occupancy." However, the court also held that plaintiffs were legally entitled to an early termination of the lease, thereby affording plaintiffs the relief sought. See also, N.Y. Real Prop. Law §227-c (McKinney Supp. 2008); Cohen v. Werner, 82 Misc2d 295, 298 (Civ. Ct. Queens Co. 1975).

12. Bellmarc Management Inc. v. Cooper Square Condominium, 190 AD2d 383 (1st Dept. 1993).

13. E.g., NY C Admin. Code §27-768 ("Interior walls, partitions, floor-ceiling constructions, and mechanical equipment in spaces or buildings of occupancy group J-2 shall be designed and constructed in accordance with the requirements of this subchapter, to provide minimum protection for each dwelling unit from extraneous noises emanating from other dwelling units and from mechanical equipment").

14. Block and Zetlin, "Courts Wrestle with Issues Involving Cooperative and Condominium Boards," NYL J, Nov. 15, 1989, at 41, col. 1. Siegler and Talel, "'Levandusky' Update: Slim Odds on Reversing Board Decisions," NYL J, Sept. 4, 2002, at 3, col. 1.

15. 75 NY 2d 530 (1990). See also, Siegler and Talel, "'Levandusky' and Unprecedented Board Influence," NYL J, Sept. 5, 2007, at 3, col. 1.

16. NYL J, Oct. 10, 1990 at 22, col. 2 (Sup. Ct. N.Y. Co. 1990).

17. 3A Fletcher Cyc. Corp. §1036 (2007 Cum. Supp.).

18. 257 AD2d 358 (1st Dept. 1999).

19. See Copart Industries Inc. v. Consolidated Edison Company of New York Inc., 41 NY 2d 564 (1977).

20. Kaniklidis, 305 AD2d at 547.

21. 158 AD2d 589 (2nd Dept. 1990).

22. Complaint, Selbin v. Huff, No. 08102185 (Sup. Ct. N.Y. Co. Feb. 7, 2008). See also, Anemona Hartcollis, "Suing the Smoker Next Door," N.Y. Times, Feb. 9, 2008 at B1; Josh Barbanel, "Big Deal: A Delicate Market," N.Y. Times, Feb. 17, 2008 at RE section, pg. 2; Anemona Hartcollis, "Upper West Side Couple Settles Suit Over Neighbor's Smoke," April 8, 2008 at B5. However, in Poyck v. Bryant, NYL J, Sept. 1, 2006 (Civ. Ct., N.Y. Co.), the court held, as a matter of law, that second-hand smoke is a condition that invokes the warranty of liability. See also, R. Siegler and E. Talel, "Dealing With Secondhand Tobacco Smoke," NYL J, Sept. 6, 2006, at 3, col. 1.

23. See, R. Siegler, "Alternative Dispute Resolution," NYL J Sept. 3, 1997, at 3 col. 3. An example of a clause mandating mediation for disputes between apartment owners that boards may wish to adopt follows: Any dispute or claim by Lessee/Unit Owner against any other lessee/unit owner arising out of the ownership and/or use of the Apartment/Unit, or a breach of a Proprietary Lease/By-Laws, or the House Rules/Rules and Regulations, shall be submitted to nonbinding mediation through the "Co-op and Condominium Mediation Project" of the New York City Bar Association. The New York City Bar Association offers a comprehensive "Co-op/Condo Residential Dispute" Mediation Program. See http://www.nycbar.org/Publications/Brochures.