

What a Co-op, Condo or Landlord Can Do About Smokers

COUNSELS' CORNER:

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WHITE PLAINS – In a recent decision a judge has allowed a tenant to assert a warrant of habitability defense, in an action seeking payment of rent, based on the second-hand smoke emanating from a neighbors apartment into the complaining tenant's apartment. *Poyck v. Bryant*, 33752 CVN 2002--, NYLJ, Sept. 1, 2006, p. 22, col. 1 (Civ. Ct. N.Y. Co.).

In a first impression case the Court reviewed the applicable law, the current state of "urban dwelling," and went so far as to reference the "Golden Rule." The warranty of habitability is codified in Real Property Law §235-b. The Court referenced the significant case of *Park West Management Corp. v. Mitchell*, 47 NY2d 316 (1979), and found that "in every landlord-tenant relationship where the landlord impliedly warrants as follows: first, that the premises are fit for human habitation, second that the condition of the premises is in accord with the uses reasonably intended by the parties; and third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. *Park West Management Corp. v. Mitchell*, at 326."

Additional Findings

The Court went on to find that odors, fumes, noise, water and dust all may constitute violations of the implied warranty of habitability. The Court specifically found in comparison, that "as a matter of law that secondhand smoke qualifies as a condition that invokes the protections of RPL §235-b under the proper circumstances. As such it is axiomatic that second-hand smoke can be grounds for a constructive eviction."

The Court, given that finding, held that it "must look to the operative facts to determine whether or not the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction."

The facts of the instant matter were reviewed and require notation herein. The Landlord was the owner of a condominium who had rented the unit to the tenants. The tenants had lived in the apartment for approximately three years when a neighbor moved in next door who smoked constantly and incessantly. The tenants wrote to the Landlord and advised him of the problem. They also spoke to the superintendent of the building.

They attempted to remedy the situation themselves by sealing the apartment door

lord "could have asked the board of managers to stop the neighbors from smoking in the hallway and elevator as well to take preventive care to properly ventilate [the smoker's apartment] so that the secondhand smoke did not seep into the [tenant's] apartment."

The Court pointed out further that the Board of Managers had an obligation to "prevent unreasonable interference with the use of respective units and of the common elements by several unit owners" and could have commenced an action seeking injunctive relief against the smoking residents and/or the posting of a bond to insure compliance with the by-laws and decisions of the Board of Managers.

A Hearing

The Court thereafter re-

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with weather stripping but the smoke continued to permeate the apartment. The Landlord evidently took no action and the tenants subsequently advised him that they needed to move as a result of the health issues appurtenant to second hand smoke.

The tenants moved and the landlord brought an action to collect the unpaid rents accruing under the lease. The tenants raised the warranty of habitability defense and the Landlord responded that he could not be held responsible for the actions of third parties. The Court pointed out that the Land-

quired a hearing on the issues of the warranty of habitability and constructive eviction, but the fact that the Court allowed the defenses to stand and be litigated gives weight to their viability when the basis is second-hand smoke. This finding is significant. Given the language and the findings of fact required to be made it remains to be seen whether the tenants will prevail.

Nonetheless this case must serve as a wake up call for those faced with complaints as to second-hand smoke.

For current landlords it may simply behoove them to place a

restriction as to smoking in their leases. For Cooperatives and Condominiums the call to action may be much more complex and may require amending the proprietary lease (Cooperatives) or by-laws/declaration (Condominium).

As to Cooperatives, the proprietary lease will most likely dictate what, if anything, can be done about a shareholder smoking in an apartment and smoke emanating from the smoker's apartment into other apartments.

Many proprietary leases contain a section which states that "The Lessee shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them."

Although not specifically directed at second-hand smoke and although there are virtually no reported cases applying such sections to same, this section would seem to be appropriate fodder for addressing a complaint as to second-hand smoke.

Additionally, most proprietary leases contain a provision allowing for the termination of the lease on the basis of objectionable conduct repeated after notice. Certainly, the defining of smoking as "objectionable conduct" has not been placed before courts to date. However, with the adoption of appropriate procedures this may also prove an effect tool.

The Condo Scenario

Condominiums by their nature invite a more complicated solution and do not face the same issue.

As the Court in *Poyck* recognized the warrant of habitability defense does not apply in a condominium (against the Condominium), but it nonetheless implied that the Landlord and the Condominium could take some action when faced with complaints of second-hand smoke.

Because the resident owns the unit, there is no lease to rely upon. A review of many condominium by-laws indicates that there are most likely

few provisions as those cited heretofore in the proprietary leases of cooperatives.

A Review

However, New York State Real Property Law § 339-v 1 should be reviewed:

"The by-laws shall provide for at least the following:...(i) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners.

"The suggestion would be that based on the relevant portion of the by-laws, the smoking party was unreasonably interfering with the use of the units by other unit owners. The remedy in a condominium would also be somewhat more attenuated than the termination of the proprietary lease. New York State Real Property Law §339-j allows for the condominium to maintain an action for injunctive relief and in the case of repeated violations the condominium may seek the posting of "sufficient surety" for future compliance.

Actually evicting someone in a condominium is quite problematical.

Regardless of the precise process or remedy appurtenant to the cooperative and its proprietary lease or the condominium and its by-laws, or the lease in a rental apartment, Boards of Managers, Boards of Directors, and Apartment Owners should all be on notice that complaints about second-hand smoke must be dealt with seriously as second-hand smoke can cause a constructive eviction which may be upheld by the Courts.

Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

Report: Home Prices Flat or Falling in Rockland, Orange Counties

WHITE PLAINS – The housing markets in Orange and Rockland counties entered a period of adjustment this summer, with flat or falling prices being seen in areas where values had doubled during the previous three-to-five years, according to third-quarter statistics analyzed by Prudential Rand Realty.

The market is going through a transition from a "seller's market" to a "buyer's market," said Matt Rand, managing partner with Prudential Rand Realty.

"It's a healthy thing," Rand said. "Some markets will give back a correction of five percent to 10 percent and some

will just go flat. The demand is clearly there just below the surface to purchase property when it meets the buyer's pricing needs."

The median price of a single family house in Rockland County fell 3.8 percent during the third quarter to \$510,000 from \$529,950 a year earlier, according to figures from the Greater Hudson Valley Multiple Listing Service. The median price in Orange County was unchanged at \$325,000.

Other Trends

High-end sales have slowed the most and shown the most pressure on prices, Rand said,

while some parts of the entry-level market remain robust.

The median price for a condominium in Orange County, Rand noted, rose 6.4 percent to \$234,000 this summer from \$219,950 in the third quarter of 2005. But just across the border in Rockland County the median price for a condo fell 7.9 percent to \$285,493.

MLS members sold fewer single family homes in Rockland County this summer, with 459 deals closed, down 20.3 percent from 576 a year ago. Single family houses also took longer to sell, with the year-to-date average days on the market rising to 85 days from 63 in

the third quarter of 2005. Inventories rose, with 1,558 homes on the market with MLS members as of Sept. 30, an increase of 40.4 percent above last year's level of 1,110.

In Orange County, 892 single family homes were sold during the third quarter, down 19.7 percent from 1,111 during the summer of 2005. The year-to-date average days on the market was 98 at the end of the 2006 period, up from 86 a year before, and the number of homes listed for sale rose to 3,274, up 18.9 percent from 2,753 on Sept. 30, 2005.

"The region's economy is strong and interest rates are

still at historic lows, so I don't see any reason to expect prices to fall dramatically," said Rand. "We're returning to a normal market and I think prices will remain relatively unchanged for the near future."

Prudential Rand Realty, founded in 1984, is the largest real estate brokerage in the Greater Hudson Valley with 21 offices in Westchester, Rockland, Orange and Sullivan counties, the company said. Based on market share, Rand is the top real estate company in Rockland, first in Orange and third in Westchester. The company has more than 700 sales associates, officials said.