

New York Law Journal

Co-Op Resident Entitled to Keep Air Conditioner, Court Decides

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December 6, 2011

An elderly woman can keep the air conditioner in her Queens apartment that eases her asthma and allergies after a judge ruled the cooperative building's demand she remove the appliance or face eviction would constitute housing discrimination.

Queens Supreme Court Justice Martin J. Schulman recently confirmed a judicial hearing officer's report that found a co-op building's demand for Clara Feldman to remove her air conditioner would amount to discrimination under the Fair Housing Amendment Act, as well as state and city anti-discrimination statutes.

The federal act extended the Fair Housing Act's anti-discrimination statutes to protect against the discrimination owing to a person's handicap.

Ms. Feldman, 86, has asthma and is allergic to dust, pollen and airborne allergens; when coming into contact with the allergens, she coughs, sneezes and experiences headaches and difficulty breathing.

To alleviate her condition, Ms. Feldman installed the air conditioner in 2000 in her Whitestone co-op apartment building, called the Cryder House.

She spends a large part of her day near the air conditioner in the less-than 1,000 square foot apartment she shares with her husband, Jerome.

After a repairman for the co-op spotted the appliance during maintenance work inside the Feldman's apartment, the co-op sent a notice to the leaseholder, the Feldman's son Stuart, warning of a breach of lease. The building is equipped with central air conditioning.

The March 2006 notice gave the Feldmans a one-month deadline to remove the air conditioner or face eviction.

The Feldmans responded with a lawsuit alleging violations of the Fair Housing Amendments Act because of a threat of eviction due to Ms. Feldman's physical impairment. The suit also called for a declaration that the air conditioner did not break house rules and a permanent injunction against evicting the couple because of the air conditioner.

The co-op maintained that the couple never got written permission to install the unit, which was a violation of the lease and house rules. Furthermore, it claimed the Feldman's continued occupancy without removing the appliance violated the lease.

After an evidentiary hearing of several days over two months, Judicial Hearing Officer James P. Dollard issued a March 2011 report finding that the Feldmans did not comply with building requirements on alterations. But the co-op could not show the alteration resulted in any damage to the building or provoked complaints from tenants.

Mr. Dollard determined the co-op's notice and defense of the lawsuit were discriminatory under the Fair Housing Amendment Act "because of Mrs. Feldman's handicap both by refusing permission to maintain the air conditioner and by refusing to make reasonable accommodations in its [sic] rules, policies and practices when such accommodations are necessary to afford her equal opportunity to use and enjoy her dwelling."

In a Nov. 16 decision, Justice Schulman affirmed Mr. Dollard's report.

In *Feldman v. The Cryder House*, 16570-2006, Justice Schulman wrote that the judicial hearing officer "properly concluded that the refusal to permit plaintiff Clara Feldman to maintain the air conditioner, the service of the notice to cure, and the continued defense of the action, constituted unlawful discriminatory acts, and under such circumstances, the Co-op's determinations are not protected from judicial inquiry under the business judgment rule."

Justice Schulman's decision affirmed the report's recommendation that the plaintiff should not be awarded attorney fees under a provision of Real Property Law.

Nevertheless, the judge held the plaintiffs' were entitled to attorney fees under a provision of the Fair Housing Amendment Act.

In his decision, Justice Schulman noted that the co-op asked him to reject Mr. Dollard's finding of discrimination.

The Feldmans could not prove the air conditioner was a medical requirement, the co-op argued, adding that Mr. Dollard erred in deeming Ms. Feldman was impaired.

Nor could the plaintiffs show they requested and were refused an accommodation of Ms. Feldman's conditioner—or that the co-op knew about her health but still did not act.

The co-op also asked Justice Schulman to reject Mr. Dollard's finding that the co-op was not shielded from judicial inquiry by the business judgement rule.

The co-op had invoked the common law doctrine whereby courts defer to the judgment of a board of directors on business decisions.

But the co-op's arguments fell on deaf ears. Justice Schulman said there was "sufficient evidence" of Ms. Feldman's impairment without the air conditioner.

He also said there was enough evidence to show the board had notice of Ms. Feldman's need for the appliance. For example, Justice Schulman noted that one board member on the same floor as the Feldmans knew of her health and need for the appliance after it had been installed.

Adam Leitman Bailey of **Adam Leitman Bailey PC** represented the Feldmans. "For our clients, it gives them peace of mind that they can continue to live without fear of adverse health consequences or death," he said.

"This is a wonderful example about how the court stood behind the special needs of a shareholder despite the incredible powers that co-op boards have in running their buildings."

Matthew Tracy of Winget, Spadafora & Schwartzberg and Marc H. Schneider of Schneider Mitola represented the co-op. Neither returned a call for comment.