





















Advising Condominiums, Cooperatives and Landlords on Smoking Issues Afflicting Buildings

















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THE OBLIGATIONS OF BOARDS AND LANDLORDS RE: SECONDHAND SMOKE

The law is still being developed respecting secondhand smoke. At present, there are very few reported cases, but given the amount of poor new and renovated construction that occurred over the past decade, it is likely there will be a significant increase of litigation over smoke issues in the near future.

At present, there are no appellate rulings holding secondhand tobacco smoke subject to the RPL 235-b implied warranty of habitability that governs cooperatives and rental buildings.

Poyck v. Bryant, 13 Misc.3d 699, 820 NYS2d 774 (NYC Civil Ct., New York Co., 2006) and Reinhard v. Connaught Tower Corporation, Index No. 602503/08, 2011 WL 6119800 (Sup. Ct., New York Co., 2011), have held that a landlord and a cooperative corporation (as landlord) can be held liable for breach of the RPL 235-b implied warranty of habitability for not preventing conditions that allow secondhand smoke to infiltrate from a common area and/or from a smoker resident's apartment to a neighboring resident's apartment.

It is generally agreed, however, that proof of a single occurrence of smoke infiltration will not qualify as a breach of the RPL 235-b warranty of habitability, and that the answer in each is case is "necessarily fact sensitive." *Upper East Lease Associates, supra*; see also East End Temple v. Silverman, 199 AD2d 94, 606 NYS2d 56 (1st Dept. 1993).

As for condominiums, "[i]n the absence of a controlling statute, bylaw or rule imposing a duty upon condominium residents from smoking inside their own apartment, a private nuisance cause of action by the offending residents' neighbors is not sustainable for secondhand smoke infiltration where the secondhand smoke unintentionally seeps into the neighbors' apartment." *Ewen v. Maccherone*, 32 Misc.3d 12, 927 NYS2d 274 (App. Term, 1st Dept. 2011)(Emphasis added).

In this regard, Ewen explains: "not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. . . . If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life." (quoting Nussbaum v. Lacopo, 27 NY2d 311, at 315, 317 NYS2d 347 (1970).

1. CONDOMINIUM/COOPERATIVE BOARDS AND LANDLORDS HAVE OBLIGATION TO PREVENT CONDITIONS FROM EXISTING IN THEIR BUILDINGS THAT INTERFERE WITH EACH OCCUPANT'S USE AND ENJOYMENT OF HIS/HER INDIVIDUAL APARTMENT.

Cooperatives and Rental Buildings:

The obligation of cooperative Boards and of landlords is based on the statutory implied Warranty of Habitability contained in RPL 235-b(1) which governs all rental leases and all cooperative proprietary leases:

In every written or oral lease or rental agreement for residential purposes 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 the 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, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

Cooperative corporations and landlords of rental buildings are fully subject to the requirements of RPL 235-b and must protect their shareholders and tenants against any condition that unreasonably interferes with the ability of the shareholders and tenants to use their apartments for their intended residential purposes.

As noted above, under *Poyck v. Bryant*, and *Reinhard v. Connaught Tower Corporation*, landlords and cooperative corporations can be held liable for breach of the RPL 235-b implied warranty of habitability for not preventing conditions that allow secondhand smoke to infiltrate from a common area and/or from a smoker resident's apartment to a neighboring resident's apartment.

In addition, under *Reinhard*, the corporation may also be held liable (a) for breach of contract where secondhand smoke infiltration interferes with the peaceable possession and use of the apartment and (b) for negligence where it had actual notice of the condition and failed to take any action to remediate the condition. *Reinhard* also held that any contention, that a building's construction (which may facilitate the smoke infiltration from one apartment to another) was typical for the time in which it was built, will not be sufficient to enable a court to conclude, as a matter of law, that the corporation was not also negligent for failing to take action to remediate the condition.

Moreover, although cooperative shareholder-tenants are not deemed to be third-party beneficiaries of the proprietary leases between the corporation and all other shareholder-tenants, and although proprietary leases generally provide that the cooperative shall not be responsible for the nonobservance or violation of house rules by any other shareholder-tenant, cooperative Boards, nevertheless, "must act for the benefit of the residents collectively." *Levandusky v. One Fifth Avenue*, 75 NY2d 530, At 538 (1990).

To the extent, therefore, that a board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the cooperative to possible suit for breach of the warranty of habitability, the board is acting contrary to the collective interests of all residents and is in breach of its fiduciary duty. Shareholder-tenants aggrieved by a smoking neighbor can thus sue the board for failing to enforce the anti-smoking bylaw if, by failing to enforce the bylaw, the board has permitted a condition to exist that denies aggrieved shareholder-tenants peaceable possession and use of their apartments.

Condominiums:

The condominium board's obligation is based on RPL 339-v(b)(i) which requires all condominium by-laws to include:

Such restrictions on and requirements <u>respecting the use and maintenance of the units</u> and the use of the common elements, not set forth in the declaration, <u>as are designed to prevent unreasonable interference with the use of their respective units</u> and of the common elements by the several unit owners. (Emphasis added).

As stated in Ewen v. Maccherone, supra:

In this regard, the board of managers of the subject condominium is specifically authorized to make determinations regarding the operation, care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners.

Condominium boards, like cooperative boards, "must act for the benefit of the residents collectively." *Levandusky v. One Fifth Avenue*, 75 NY2d 530, At 538 (1990), and they likewise have a fiduciary duty to enforce, in a non-discriminatory fashion, their bylaws and rules among unit owners.

To the extent, therefore, that a condominium board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the condominium to possible suit and recovery of

damages by aggrieved unit owners, the board is acting contrary to the collective interests of all residents and is in breach of its fiduciary duty.

Under *Ewen*, in the event that the board fails to enforce a bylaw designed to limit the effects of secondhand smoke, or fails to prevent secondhand smoke from infiltrating into apartments from the common areas, or where a building-wide ventilation problem facilitates the circulation of the secondhand smoke, the offended unit owners' sole recourse against "unintentional" secondhand smoke infiltration, from a neighbor's apartment or from a common area, is against the condominium board.

2. CONDOMINIUM/COOPERATIVE BOARDS AND LANDLORDS HAVE AUTHORITY TO PREVENT OR PENALIZE RESIDENTS IN THEIR BUILDINGS WHO CREATE CONDITIONS THAT EITHER (a) UNREASONABLY INTERFERE WITH THE USES REASONABLY INTENDED FOR THE PREMISES, OR (b) MAKE THEM UNFIT FOR HUMAN HABITATION.

Cooperatives:

Most old proprietary leases, by-laws, and house rules do not prohibit smoking within the building or within individual apartments. However, authority to do so can be established through provisions of the proprietary lease signed by each shareholder of the cooperative and in provisions of the cooperative's by-laws and house rules.

Cooperative proprietary leases and rental leases generally provide that the shareholdertenants and rental tenants are obliged to comply with all laws affecting the occupancy and use of the property. Accordingly, cooperative boards and landlords may enforce smoking restrictions by reference to the New York City Air Pollution Control Code which, by virtue of such lease and bylaw provisions, is necessarily incorporated into their leases and by-laws.

NYC Administrative Code, Title 24, Chapter 1 (Air Pollution Control), Sub-Chapter 6, §24-141, provides as follows:

No person shall cause or permit the emission of air contaminant, including odorous air contaminant, or water vapor if the air contaminant or water vapor causes or may cause detriment to the health, safety, welfare or comfort of any person, or injury to plant and animal life * * *.

The Code expressly provides that "the prohibition of this section includes . . . contaminants" derived from "coal tar products manufacture," the kind of contaminants that are typically found within secondhand cigarette smoke.

In extreme cases, the business judgment rule, see Levandusky v. One Fifth Avenue, 75 NY2d 530 (1990), permits an offending shareholder's cooperative tenancy to be terminated, if the proprietary lease contains a provision authorizing such termination (a "Pullman" clause), and if the termination is based on competent evidence of the shareholder-tenant's objectionable conduct and done in accordance with the procedures specified in the proprietary lease.

Under New York law, proof of a cause of action for private nuisance requires: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." Copart Industries, Inc. v. Consolidated Edison Co. of New York, 41 NY2d 564 (1977); see also 61 West 62 Owners Corp. c. CGM EMP LLC, 77 AD2d 330, 906 NYS2d 549 (1st Dept. 2010).

However, such cases are rare and difficult to prove, and termination is not likely to be condoned by the courts except where the facts show that the offending shareholder's conduct has been severely obnoxious. *See 40 West 67th Street v. Pullman*, 100 NY 147 (2003).

Rental Buildings:

The landlord's authority is contained in appropriately drafted provisions of the rental agreement and in associated building house rules. The issues are similar to those involving cooperative leases. The landlord must include specific provisions regarding how and when smoking may occur in the building.

Condominiums:

The condominium's authority is derived from RPL 339-j (of the Condominium Law) which requires each unit owner to "comply strictly with the by-laws and with the rules, regulations, and resolutions adopted pursuant thereto," and which empowers the condominium board to sue an offending unit owner for damages or injunctive relief, or both, or "in any case of flagrant or repeated violation by a unit owner," to require the offending unit owner to "give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions."

See Ewen v. Maccherone, supra; see also Board of Managers of Village House v. Frazier, 81 AD2d 760, 439 NYS2d 360 (1st Dept. 1981)(Permanent injunction granted enjoining unit owner from leasing or otherwise permitting occupancy of his unit other than in strict conformity with the condominium's by-laws).

Condominium by-laws also generally require that unit owners comply with all laws, regulations, zoning ordinances, and requirements of any governmental agency relating to any portion of the property. Therefore, condominium boards may also promulgate bylaws against smoking based on the New York City Air Pollution Control Code.

- 3. CONDOMINIUM/COOPERATIVE BOARDS AND LANDLORDS CAN ADOPT A VARIETY OF PROPHYLACTIC MEASURES TO PREVENT OFFENSIVE SMOKE CONDITIONS IN THEIR BUILDINGS AND TO REDUCE THEIR POTENTIAL LIABILITY WHEN SUCH CONDITIONS ARE CREATED IN THE BUILDING
 - (A) Adopt rules and by-laws or lease terms that clearly address smoking issues by making clear what is expected of unit owners and shareholders as neighbors or tenants and of what is required of them by law.
 - a. The rules and by-laws and lease terms should also clearly state what protocols the board or landlord will use to enforce the rules and describe the possible consequences or sanctions that can be invoked to punish continuing violations.
 - b. Condominium and cooperatives, as part of their application process, can require new purchasers and shareholder applicants to sign an agreement expressly acknowledging the building's smoke restriction policies and promising to not violate the building's policies. Landlords can include similar provisions in their leases.
 - c. Condominiums can exercise the right of first refusal to purchase the selling unit owner's apartment if the new purchaser does not agree to abide by the building smoking polices.
 - d. Cooperative proprietary leases and rental leases generally provide that the shareholder-tenants and rental tenants are obliged to comply with all laws affecting the occupancy and use of the property. Condominium by-laws also generally require that unit owners comply with all laws, regulations, zoning ordinances, and requirements of any governmental agency relating to any portion of the property. Accordingly, condominium and cooperative boards and landlords may enforce smoking restrictions by reference to the New York City Air Pollution Control Code which, by virtue of such provisions, is necessarily incorporated into their leases and by-laws.

- (B) Provide periodic written advisements to remind residents of what is required:
 - a. Public "notices" displayed on building bulletin boards and/or in letters circulated to all apartment residents stating clearly where in the building smoking is permitted and where it is not permitted and what residents may do to alleviate the effects of smoking upon their neighbors.
 - b. Periodic notice of the building's policies, rules, and by-laws regarding resident-generated noise, as well as the application of local noise and building code noise requirements.
- (C) Upon receiving notice of violation of building smokeing policies, send letters directly to the offending resident restating the rules and demanding compliance.
- (D) In cases where violators continually ignore the building's rules and notices, follow the previously announced protocols and take effective action to stop the offending conduct, whether enforcement of the rules is done by imposition of authorized internal fines and penalties or, if necessary, by court action.
- (E) Virtually all cooperative leases provide for recovery of legal fees incurred to successfully enforce the rules against violating shareholders. Similar attorney's fees provisions are also routinely included in condominium by-laws and in rental leases.

4. CONDOMINIUM/COOPERATIVE BOARDS AND LANDLORDS MUST DILIGENTLY OVERSEE ALL ALTERATIONS AND REPAIRS IN THEIR BUILDINGS

- (A) Boards and landlords should be diligent in overseeing alterations and repairs, to ensure that unit owners, shareholders, and tenants comply with building codes when such work is done in their apartments.
- (B) Care should be taken to ensure that, when the work is completed, no condition will exist that will allow secondhand smoke or excessive or annoying noises to travel through walls, floors, ceilings, or passageways.

- (C) Care should also be taken, during the course of any alteration or repair, to ensure that the noise generated during the alteration or repair does not itself cause undue annoyance or stress to neighboring residents.
- (D) Building alteration agreements customarily require that the scope of work and plans and specifications for any proposed work within an apartment be submitted to the Board, for review by the building's engineer or architect, before the alteration is approved and work is permitted to start.
- (E) In addition, alteration agreements can require:
 - a. installation of sound-proofing materials and insulation between walls, ceilings, and floors;
 - b. 80% carpet covering throughout the apartment (except for kitchens and bathrooms);
 - c. smoke-reducing ventilation equipment and apparatus;
 - d. prohibit incompatible living spaces from being situated adjacent to, or above or below, each other; and
 - e. restrict how structural beams can be adjusted.
- (F) Residents seeking approval for the work are normally required to pay for the building's engineer to inspect and approve the planned alterations to ensure compliance with noise and smoking abatement code requirements and any additional requirements imposed by the building.
- (G) Engineers are more important than lawyers when considering the various ways to abate noise, smoke, and other causes of nuisance. The engineer is in a position not only to discover potential defects in construction, but also to evaluate whether the proposed construction is lawfully permissible. The engineer and the alteration agreement go hand in hand. Requiring an inspection by an engineer as part of the alteration agreement is essential to enforcing the obligations set forth in the agreement. The alteration agreement should require that the building's engineer "sign-off" on the work after it is completed.

LETTER TO THE SMOKING TENANTS

Dear Tenants.

We have previously contacted you with regard to the problems associated with your smoking of tobacco products. We are trying to accommodate your rights to your individual privacy, but must also answer to the health concerns of other tenants in the building.

I call your attention to paragraph 15 of your lease, a portion of which reads as follows:

The Tenant shall not permit conditions to exist in The Apartment that are unhealthy or unsanitary. The Tenant will neither permit The Tenant's health or safety nor the health or safety of any other persons living or working in the Building to be endangered by any conditions in The Apartment, regardless of whether such conditions in The Apartment require repair or are a matter of cleaning and maintenance of The Apartment.

While this language does not restrict your right to smoke in your own apartment, if you so choose, it does forbid you to do so in such a way as to interfere with the health and safety of other tenants.

Therefore, if you are to continue smoking in your apartment or to allow others to smoke in your apartment, it will be necessary for you to allow the management to attend to the sealing of your apartment as effectively as possible. That, however, is not enough. When you are smoking, it will be necessary for you to ventilate the smoke out of the apartment through open windows, weather permitting, and if the weather is not permitting, for you to run machinery in the apartment that cleans the smoke and its products out of the air. Both the purchase of that machinery and the running of it will have to be at your expense.

We have done some research on the matter and would like to point out to you that a number of machines are commercially available for the purpose. We take no responsibility for either the effectiveness or the safety of the machines in question and list them here only as a place for you to start your research in how to handle your smoking habit.

- 1) Alive Air Purifier
- 2) Rabbit Air Purifier
- 3) IQAir Health Pro Air Purifier
- 4) Austin Air
- 5) Blue Air Purifier
- 6) Sharp Plasmacluster Air Purifier

- 7) Alen Air A350
- 8) Oreck XL
- 9) Honeywell 50250
- 10) Friedrich Air Purifier

It is extremely important for you to do research yourself to determine which, if any, of these machines could or would resolve the situation for you in an acceptable manner.

At the place, we place heavy emphasis on the comfort and safety of all of our residents, smokers and non-smokers alike. We therefore look forward to your cooperation in this matter.

Best Regards,

LETTER TO THE ENTIRE BUILDING

Dear Tenants,

We have written to you before about the increasing problem of smoking at the It is becoming necessary for us to take sterner measures.

Smoking in or on any of the halls, corridors, lobbies, public spaces and amenity spaces of the building is absolutely forbidden, not only by building policy, but by New York City law. As a result, violation of this law will lead to extreme measures. This includes the loss of apartments by tenants who themselves or by their guests and families violate this policy. Tenants who violate this will be responsible not only for the loss of their apartments but for reimbursing the for its attorneys' fees in enforcing this policy.

Further, it is imperative that all tenants confine any cigarette smoke to their own apartments. This, they may do by opening windows to clear the smoke or by using various devices to remove the smoke from the air. Ventilating cigarette smoke from the apartment into the corridors of the is forbidden and will be considered interference with the health, safety, and comfort of other tenants of the building. This is called a nuisance and is also grounds for eviction.

We want life at the for both smokers and nonsmokers to be as healthy and congenial as possible. We therefore ask that the smokers show consideration for their neighbors and be sensitive to their needs.

I would like to thank everyone in advance for the anticipated help with this.

Best Regards,	

PUBLICLY POSTED

ATTENTION: ALL RESIDENTS

Smoking of all kinds is prohibited in all public areas of this building, in all of the amenity rooms of the building, in all of the stairwells, elevators, corridors, lobbies, roof decks, and other spaces of the building available to tenants with the exception of their own apartments.

Smoking inside apartments is only permitted to the extent allowed by law. All smoke within an apartment must be ventilated to the outside by a window or fan or scrubbed out of the apartment air with a properly functioning recirculating filter device.

ERWIN·LOBO·BIELINSKI PLLC

FORENSIC ARCHITECTS AND ENGINEERS

		Memorandum
TO:		
COMPANY:		
FROM:	PE, AIA, CIH	
DATE:		
PROJECT # AND NAME:	New York, NY	
RE:	Odor Migration after Recent Unit Renovation - Unit	
COPIES TO:		
Background	d	
	on 14 September 2010 and ending on 17 November 2010, this write have performed several site visits to the "J" side of Unit wall conditions and penetrations after the walls were demolished / s.	
	renovation revealed or created breaches in the otherwise sealed sp locations, means and methods to insure no air communication fron he work. The work was completed on 17 November 2010.	paces, our task was to n the unit below would
Recently, re the unit rend made on 17	ports of smoke odor have, again, been reported by the residents, a ovation by their contractor. A site visit to investigate the current class March 2011.	fter the completion of aim of smoke odor was
Investigation	n	
On 17 March	the unit residents. We were accompanied by e man, and one of the construction men for their unit residents.	the building
The access pa penetrations	anel for the pipe risers in the pipe chase was opened, and the seal as at the floor inspected. The seals appeared intact, all around.	at the pipe
n the adjacei oot yet been	nt bathroom, the penetrations were viewed from above (as the me installed), and from small openings on the former kitchen on the	edicine cabinet had K" side, using our

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$\underline{\text{E-L-B}}$

Memorandum

	Re: Page	Odor Migration after Recent Unit Renovation – 4 April 2011
	fiber op the seal	tic remote inspection device. They all appeared intact. We physically could not smoke check is without demolishing the walls.
		ner issue was whether the bathtub for the adjacent bathroom was changed. The contractor t was not. The concern was that the seal previously made at the drain pipe floor penetration curbed. The contractor stated it was not disturbed.
	1 L - L o.	then entered and went into the office room. With ion, we sprayed one ounce total of peppermint extract at the back of the fan coil and the netrations leading to the pipe riser. We all agreed the odor of peppermint was strong in the hen we left and returned to
	None of panel fo	us detected the odor in even getting our face close to the fan coil and the access the pipe risers.
1	determi	coil was then turned on, to determine if the negative pressure located at the air intake to the create an odor pathway, and none was noted. We also, then, opened the window, to ne if a natural draft, in addition to the fan coil operation would draw odor, but none was and the contractor).
	Discussio	on
		ways discovered penetrating through the floor in the renovation area on the "J" side of lead the discovered penetration of acoustical sealant, plaster of paris and/or silicone sealant pipes), between 14 September 2010 and ending on 17 November 2010.
		iat time period, using air current tubes (smoke tubes), all the seals were tested for any in the sealing system. If any were found, they were immediately corrected, and re-tested seal was tight.
		e visit of 17 March 2011, all the pipe penetrations inspected appeared well sealed and bed, and, as we documented previously, were well sealed before the walls were acted. The pipe penetrations are not the source for any odor noted by the residents.
	onclusio	
		co smoke odor, nor the applied peppermint extract odor from was detected during our vith No breaches were found in the pipe penetration seals previously addressed in our per 2010 memorandum.
ſ	ALCHIOL M	a pathway, it was due to removing the old fan coil unit, which broke the seals to the vall that were made when the former Superintendant was at the building, the potential pathway is a direct result of the renovation contractor's work, albeit onal.

ADAM LEITMAN BAILEY, P.C.

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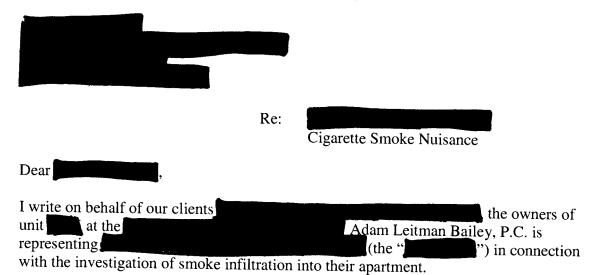
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- ⁴ Also Admitted to California
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- ⁶ Also Admitted to Texas
- ⁷ New York Admission Pending

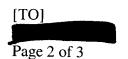
September 20, 2011

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED



As you are aware, there is a long history of complaints by our clients regarding the smoke infiltration into their apartment since before closing. At a Board meeting in July 2009, my clients told the Board about the smell of smoke in the apartment. My clients moved into the apartment in August 2009 at which point my clients began sending letters to the Board via and telephoning the management company regarding the heavy smoke infiltration. Please see the annexed letters dated November 14 and November 22, 2009 (Exhibit A).

120 Broadway, 17th Floor, New York, NY 10271 tel: (212) 825-0365 fax: (212) 825-0999 14 South Main Street, New City, NY 10956 tel: (845) 639-3099 www.alblawfirm.com

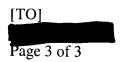


As you are also aware, the Board hired an engineer, Erwin Lobo, to investigate the smoke infiltration. As these tests were inconclusive, our clients have hired Jack Green Associates to perform testing on their unit and _____. The results of the testing can be found in the annexed report by Lawrence Green (Exhibit B). Mr. Green's investigation has revealed that there is a systemic problem with the According to Mr. Green, there is a gap between the floor slab and the facade of the Building which must be sealed in order to prevent the smoke from apartment from infiltrating apartment Mr. Green notes that my clients have already taken measures on their own to perform remedial work to seal penetrations between the two apartments but that this work has only been partially successful. Our clients are suffering damages through reduced marketability, remediation expense, and health problems. In fact, has developed Asthma since he moved into the apartment. Furthermore, "...It is prohibited to cause emission of air contaminants or odors potentially detrimental to a person's health or comfort..." under NYC Department of Environmental Protections, Air Code Title 24, Chapter 1, Title 15, Chapter 1-5,8-10 & Our clients demand that the Cooperative hire a contractor or other appropriate professional to properly seal all pipe penetrations at the floor slab and seal the entire gap between the floor slab and façade in accordance with Mr. Green's recommendations at the Buildings expense. Our clients also demand that the Cooperative install or require the unit owner of install two (2) portable recirculating type air filtration systems within Apartment reduce the output levels of hazardous and carcinogenic smoke. Lastly, our clients demand that the Board enforce the Proprietary Lease signed by the unit owner of which states that "the lessee shall not permit unreasonable cooking or other odors to escape into the building. 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 or obstruct the public halls or stairways." (emphasis added) Proprietary Lease, Section 18(b). Please note that the Lawrence Green recommendations only apply if her smoking to the second bedroom of her apartment. If continues to smoke in

Please reply in writing no later than 5:00 pm, September 30, 2011, whether the will comply with the above demands.

other areas of her apartment, the recommendations will have to be extended to seal the

gaps in all rooms of the apartment and install more air purifiers.



Please do not hesitate to contact me if you have any questions.

Very truly yours,

John M. Desiderio



MEMORANDUM OF FIELD INSPECTION

DATE OF MEMO: August 10, 2011

DATE OF VISIT: July 28, 2011

PROJECT:

LOCATION:

TO:

Ms. Blair Parsont - <u>bparsont@alblawfirm.com</u>

FROM:

Mr. Lawrence Green, P.E. – Jack Green Associates

PURPOSE:

The purpose of the report is to investigate the path of cigarette

smoke migration from into

Recommendations to alleviate smoke migration will be outlined.

EXISTING CONDITIONS

The shareholder of the complaints about smoke migration which is transmitted from the complaints are focused on the northern portion of the apartment with highest concentration of smoke within the 2nd bedroom. Smoke/odors predominantly occur in the mornings and late evenings. Odors are strongest at the northwest pipe enclosure in the 2nd bedroom.

The building is approximately 50 years old with a brick façade and concrete floor slabs. The façade of the building is supported from the concrete structure. There is a small gap between the edge of the concrete floor slab and the inner face of the brick façade. This gap is a potential source for smoke transmission.

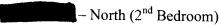
Air conditioning for the apartments consists of fan coil units typically located beneath perimeter windows. A series of hot/chilled water risers extend vertically throughout the building. Branch piping extends from the risers to the individual fan coil units. The risers penetrate floor slabs and are concealed within plaster or sheetrock enclosures. In a similar type installation, plumbing risers serve kitchens and bathrooms throughout the building. Typically, plumbing pipe enclosures and chases are provided where risers serve kitchens and bathroom fixtures.

On July 28, 2011, I inspected Apt. Nos. Additionally, the board and the resident of has engauged the services of Erwin, Lobo, Bielinski (Architects/Engineers) to consult on mitigating smoke migration. Mr. Bielinski described the remedial work which was recently implemented. The following comments and observations are outlined.

- 1.0 Mr. Bielinski stated the following remedial work was implemented within
 - a. Penetrations (chilled/hot piping, plumbing piping and intercom conduit/wiring) throughout the apartment were sealed. The methodology for sealing included installing plaster and acoustical sealant between the pipes and floor slab.
 - b. The fan coil unit, located in the 2nd north bedroom, was removed. All penetrations behind the unit were sealed. The gap between the wall and slab (left and right of the fan coil unit) was not sealed.
 - c. Ultrasonic and micro particle tests were conducted. After the remedial work was implemented, the tests indicated no particle transmission between Apts.

COMMENTS AND RECOMMENDATIONS

1.	Remedial work to seal penetrations between the two apartments has recently been
	implemented. After the remedial work was complete, there continues to be
	smoke/odor migration into This recent work has only been partially
	successful. Additional measures shall be implemented to further alleviate smoke and
	odor migration. Based upon the Resident smoking in the 2 nd Bedroom (Study) the
	following recommendations are outlined:



- a. Remove north perimeter wall within the 2nd bathroom. Wall removal shall occur from the floor level to 36" above the floor.
- b. Check and reseal all pipe penetrations at the floor slab.
- c. Seal the entire gap between the floor slab and façade.
- d. Rebuild the wall. Rebuild the original access door, at the pipe enclosure, shall not be reinstalled.
- e. Seal gap between the new sheetrock wall and the floor slab.

Note: The recommendations outlined above are based upon the Resident of Apt. smoking within the 2nd Bedroom (Study). If this smoking criteria is not used, then the entire floor gap and all pipes within the sealed.



a. Install two (2) portable recirculating type air filtration systems within Whenever possible Resident smoking shall occur adjacent to the air purifiers.

CODE REFERENCE

The following code section is referenced regarding air contaminants:

Air contaminants and odors must be in compliance with the NYC Department of Environmental Protection. Department of Environmental Protection Regulations: Air Code Title 24 Chapter 1 Title 15 Chapter 1 - 5, 8 - 10 & 12. states "... It is prohibited to cause emission of air contaminants or odors potentially detrimental to a person's health or comfort...".

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Prepared by Adam Leitman Bailey and Dov Treiman, © 2011 by Adam Leitman Bailey, P.C.

LEASE FOR A RENTAL OF A CONDOMINIUM UNIT IN NEW YORK

Lease dated:		20	The Tenant is:		
The Landlord is:					
Address:	(the "Landlord")	SSN: Present address:	Driver's Lic. No.:	(the "Tenant")
The Unit (¶ 1) No. in the building at		(the "Unit")	The Rent is:		
m my canamy av	,	41 - 45D - 1141 22)			(the "Rent")
(the "Building"). As used in this Lease, the term "Building Management" shall mean all entities and organizations charged with the care, maintenance, administration, and/or setting of policy in the Building.			The Security Deposit (¶ 12 & 13) \$ Security Deposit") which is equal to is deposited at:		("the months' rent
Term (¶ 3) Lease starts:		20	1		(641 D1 22)
(the "Start Date"), and ends: (the "End Date") Years ("the Term")	Months	20 Days	Other Riders (¶ 2)		("the Bank")
The number of Parking Space	e(s) is zero (0)	for a Fee of			
zero dollars \$ per y	, ,		Insurance required (¶ 43) \$	
The Occupants are: (Name, Date of Birth and Relation to the Tenant)			The Additional Utilities (¶ 4)		

NOTE: Select among alternative wording in Section 8. If there are no riders to the lease, cross out Section 2.

1. The Unit Rental Agreement

a. By this Lease, the Landlord rents to the Tenant the Unit and the Landlord's interest in the Common Elements located in and at the Building for the Term and for the Rent stated. Whether or not either side reads this Lease, both sides are bound by it. This Lease shall be construed according to the laws where the Building is located, or, where local law does not address the matter at issue, or if there be no such law, according to New York law.

b. Parking Space(s) is set forth above. The Fee set forth above for such parking space is payable as Additional Rent.

2. Riders

Attached are riders and notices that set forth additional rights and obligations of the Tenant and the Landlord. The riders and notices include:

☐ Guarantee of Payment ☐ Rider for Additional Rules Under Section 19 of this Lease

3. The Term of the Lease

This Lease runs from the Start Date to the End Date. If the Tenant violates the Tenant's responsibilities under this Lease, the Landlord has the right to terminate this Lease before the end of the Term. If The Landlord does not obey all the Landlord's responsibilities under this Lease, under certain circumstances, the Tenant may have the right to end this Lease before the end of the Term.

4. Complete Agreement

This Lease contains all the agreements between the Landlord and the Tenant. There are no oral agreements between the Landlord and the Tenant that are not set forth in this Lease. Any claimed agreements between the Landlord and the Tenant not set forth in this Lease are void. The Tenant is not relying on anything that was said by the Landlord or by anyone unless set forth in writing and signed by the Landlord.

The Tenant is not relying on any floor plans or brochures. The Tenant has inspected the Unit and is accepting the Unit "as is," except for those things that the Tenant could not reasonably see by inspecting the Unit. The Landlord has not made any promises to do any work on or in the Unit unless set forth in a writing signed by the Landlord.

☐ Rider for Additional Sections of this Lease

□ Other Riders stated above.

No changes to this Lease are enforceable unless they are in writing signed by both the Landlord and the Tenant. However, both the Landlord and the Tenant have other rights and responsibilities provided by state and local law in addition to the rights and responsibilities set forth in this Lease. This Lease is not meant to violate any of those rights and responsibilities provided by state and local law.

5. Titles

At various places in this Lease, there are titles given to certain sections. These titles are meant only to make it easier to find provisions in this Lease and these titles have no legal effect.

6. Parties Bound

This Lease binds the Landlord, the Tenant, and all persons who legally succeed to their interests.

7. The Unit: Purpose

a. The Unit is rented to the Tenant for residential living purposes only. The Unit may only be occupied by the Tenant and the immediate family of the Tenant and those persons the Landlord is required by law to permit to reside in the Unit. Occupancy of the Unit by persons other than, or in addition to, those allowed by this paragraph is a

- xi. The Tenant shall not shake out clothing or rugs on the terrace.
- xii. The Tenant shall not allow anything to fall from the terrace.
 - xiii. The Tenant shall not paint the Terrace.
- xiv. The Tenant shall not interfere with any gate and shall not make any claim or oppose any claim by the Landlord or Building Management on account of any gate that the Landlord or Building Management installs allowing access to and from the terrace to other parts of the Building. The Landlord and Building Management may use such access gate at will without any notice to or permission from the Tenant. The Tenant is responsible for controlling access to the Unit from the terrace.
- xv. Whatever property the Tenant places on the terrace, is placed there at the Tenant's own risk.
- xvi. The Tenant shall remove from the terrace all accumulations of leaves, debris, water, ice, and snow, regardless of whether other persons have access to the terrace.
- xvii. The Tenant shall not install any satellite dish or other antenna on the terrace without the Landlord's prior consent in writing.
- xviii. The Tenant shall not install on the terrace any swimming pool, wading pool, Jacuzzi, spa tub, fountain, or plant watering system.
- xix. The Tenant shall not permit on the terrace any child of ten years of age or younger without the supervision of a person fifteen years of age or older.
- xx. The Tenant shall not permit on the terrace any unrestrained pet, regardless of whether such pet belongs to the Tenant or to some other person. This paragraph shall not be understood to mean that the Tenant may have pets.
- xxi. The Tenant shall not place on the terrace any plantings exceeding the load-bearing capacity of the terrace; or any plantings that cause water, snow, or ice to accumulate on, damage, or infiltrate the terrace. The tenant shall not possess any plants that attach themselves to the walls, floors, or other surfaces of the Building.
- xxii. In the event of a severe weather alert issued by a governmental agency for the region where the Building is located, the Tenant shall remove from the terrace all items which may pose a hazard to human life in such weather.
- f. Terraces, Floors and Flat Surfaces Weight and Water Restrictions. The Tenant shall not place anything on the terraces, floors, and other flat surfaces of the Unit or of the Building that will place more weight on such terrace, floor or flat surface than that terrace, floor, or flat surface is designed to bear. The Tenant shall not tamper with any of the structural elements of the Building, including but not limited to walls, terraces, floors, balconies, and roofs of the Building, so as to make them less resistant to the intrusion of water.
- g. **Laundry.** The Tenant shall not use the roof or other common areas to dry laundry. The Tenant shall not use any clothes washing or drying machines except those, if any, placed by the Landlord or Building Management in the Unit or in a Building laundry room. The laundry equipment located in the laundry room, if any, whether operated and maintained by a separate vendor or by Landlord or by Building Management is an accommodation to the tenants of the Building. The Landlord is not responsible for the maintenance of the laundry equipment in the laundry room, if any; any damage to Tenant's personal property caused by such equipment; or the operations of the laundry service itself.
- h. **Antennas.** The Tenant may not attach any satellite dish or other antenna to the roof, outside walls, or windows of the Building without the written consent of the Landlord. This shall not be construed to limit the rights granted by any federal or state law to any communications company.
 - i. Freight. The Tenant shall only use for freight those elevators

- designated by the Landlord or Building Management for such purpose and only on designated days and hours after making reservations in accordance with then-existing procedures. Before access is permitted, proof of reasonable and appropriate insurance protecting the Landlord and other tenants is required from any person moving furniture or possessions into or out of the building. A reasonable cash security deposit may also be required. The Landlord shall not be liable to the Tenant for any delays caused by or the result of such rules regarding freight.
- j. Carpeting. The floors in the Unit shall be covered with sufficient insulated floor coverings so as to insulate against the transmission of sound from the Unit to another Unit in the Building and the Tenant shall carpet at least 80% of the floor of each room, except the kitchen, pantry, and bathrooms. In the event the Tenant uses wall to wall carpeting, the tacking strip shall be glued and not nailed to the floor. Wall to wall carpeting shall only be installed with water soluble adhesive or no adhesive or with other products that shall not damage the underlying flooring in any way. Tenant shall be responsible for any damage to the flooring caused by any carpet installation.
- k. **Animals** Generally. No pets of any kind shall be kept or harbored in the Unit except by the written consent of the Landlord. Consent given by the Landlord with respect to any number or type of animals for any particular tenant in the Building shall not mean that the Landlord will consent to the same number or type of animals for another tenant in the Building. Consent given by the Landlord with respect to any number or type of animals for the Tenant shall not mean that the Landlord will consent to the same number or type of animals other than the particular individual animals to which Landlord consented. Such consent shall be given with respect to all animals kept by the Tenant for purposes of engaging in basic life functions as understood by the Fair Housing Act and may be given with respect to other animals as well. The Tenant must, however, restrain and control all animals the Tenant possesses or harbors so as not to interfere with the health, comfort or safety of others in the Building. Barking of unreasonable duration, timing, or volume shall be considered to be such an interference with the health, comfort and safety of other tenants. Defecation and urination on terraces, common or public areas of the Building, by animals harbored by the Tenant shall be considered to be such an interference. The Tenant shall not permit dogs or other animals to be in any grass area or garden on private property around the Building. No animals shall be allowed in the public areas of the Building unless carried or restrained by a leash. The Tenant shall not feed birds on the private property around the Building. The Tenant shall not harbor animals prohibited by local law to be kept as a pet.
- l. **Appliances and Fixtures.** No cabinets, fixtures, sinks, wires or appliances of any sort shall be attached to or connected with the gas or electric fixtures within the Unit, except such as are approved by the Landlord. No pipes or radiators shall be moved or tampered with in any manner. No doors shall be removed from their hinges.
- m. **Smoking.** The Tenant shall not permit smoking in the Unit so as to interfere with the health, comfort, or safety of other occupants of the Building.
- n. **Landscaping**. The Tenant shall have the same rights and obligations as the Landlord has with respect to landscaping appurtenant to the Unit, if any, and on the property associated with the Building, if any.
- o. **Snow, Ice, and Other Weather Hazards**. The Tenant assumes the rights and obligations of the Landlord during the term of this Lease with respect to snow and ice removal and any and all other weather-borne hazards. The Tenant shall indemnify the Landlord and hold the Landlord harmless with respect to any claim made by any person against the Landlord by reason of any such matters.
- p. **Storage Areas and Outbuildings**. The Tenant's use of storage facilities and outbuildings at the Building is solely at the Tenant's own risk. Landlord makes no representations as to the security of any such facilities.



SUBLEASE OF A COOPERATIVE APARTMENT IN NEW YORK

Prepared by Adam Leitman Bailey, Leonard H. Ritz and Dov Treiman [®] 2012 by Adam Leitman Bailey, P.C.

Sublease dated:

The Sublessor is:

(the "Sublessor")

Address:

(if more than one person, they shall all be referred to as "the Sublessor")

Present address:

The Sublessee is:

SSN: Driver's Lic. No.:

SSN: Driver's Lic. No.:

(if more than one person, they shall all be referred to as "the

Sublessee")

Present address:

The Cooperative Corporation is:

Rent (¶ 14): Monthly sub rent for the Apartment designated

below is:

(the "Rent")

Term (\P 3): Sublease starts: (the "Start Date"),

and ends: (the "End Date"),

Years Months Days ("the Term")

Apartment and Use: Sublessor agrees to sublease to Sublessee Apt. No. (the "Apartment") in the apartment building at

Borough of City and State of New York (the "Building"). Sublessee shall use the Apartment for living

purposes only. The Apartment may be occupied only by

Sublessee and the following permitted occupants:

As used in this Sublease, the term "Building Management" shall mean all entities and organizations charged with the care, maintenance, administration, and/or setting of policy in the Building.

The number of parking spaces is for a fee of

\$ dollars per year.

The Security Deposit (¶ 17&18) \$ ("the Security Deposit") which is equal to month(s) rent is deposited at:

("the Bank").

Information from the Proprietary Lease between the Cooperative Corporation, as Lessor, and the Sublessor, as Lessee:

Cooperative Corporation:

Address for notices:

Sublessor:

Address for notices:

Date of the Proprietary Lease (¶ 6 & 7): Term:

from: to

A copy will be provided upon request or can be inspected at the Cooperative Corporation's Manager's office.

Insurance Required (¶ 46) \$

The Additional Utilities (¶ 4)

NOTES FOR USE OF THIS SUBLEASE:

The preparer of this Sublease must select among alternative wording in \P 13. If there are no riders to the Sublease, cross out \P 2.

1. The Apartment Sublease Agreement

a. By this Sublease, the Sublessor subleases to the Sublessee the Apartment for the Term and for the Rent stated above.

b. The number of parking spaces stated above is included in this Sublease. The fee for the parking space(s) is payable monthly as Additional Rent.

2. Riders

The attached riders and notices that set forth additional rights and obligations of the Sublessee and the Sublessor. The riders and notices include:

- a. Guarantee of Payment
- b. Rider for Additional Rules Under ¶ 24 of this Sublease
- c. Rider for Additional Paragraphs of this Sublease
- d. Other Riders:

3. The Term of the Sublease

This Sublease runs from the Start Date to the End Date. If the Sublessee violates the Sublessee's responsibilities under this Sublease, the Sublessor has the right to end this Sublease before the end of the Term.

4. Complete Agreement

This Sublease contains all the agreements between the Sublessor and the Sublessee. There are no oral agreements. Any claimed agreements not set forth in this Sublease are void. The Sublessee is not relying on anything that was said by the Sublessor or by anyone unless set forth in writing and signed by the Sublessor. The Sublessee is not relying on any floor plans or brochures. The Sublessee has inspected the Apartment and is accepting the Apartment "as is," except for those things that the Sublessee could not reasonably see by inspecting the Apartment. The Sublessor has not made any promises to do any work on or in

- (xiii) paint the Terrace, and
- (xiv) interfere with any gate and shall not make any claim or oppose any claim by the Sublessor or Building Management on account of any gate that the Sublessor or Building Management installs allowing access to and from the terrace to other parts of the Building. The Sublessor and Building Management may use such access gate at will without any notice to or permission from the Sublessee. The Sublessee is responsible for controlling access to the Apartment from the terrace.
- iv. Whatever property the Sublessee places on the terrace is placed there at the Sublessee's own risk.
- v. The Sublessee shall remove from the terrace all accumulations of leaves, debris, water, ice, and snow, regardless of whether other persons have access to the terrace.
- vi. The Sublessee shall not permit on the terrace any unrestrained pet, regardless of whether such pet belongs to the Sublessee or other person. This Rule shall not be understood to mean that the Sublessee may have pets.
- vii. The Sublessee shall not place on the terrace any plantings exceeding the load bearing capacity of the terrace; or any plantings that cause water, snow, or ice to accumulate on, damage, or infiltrate the terrace. The Sublessee shall not possess any plants that attach themselves to the walls, floors, or other surfaces of the Building.
- viii. In the event of a severe weather alert issued by a governmental agency in the region where the Building is located, the Sublessee shall remove from the terrace items which may pose a hazard to human life in such weather.
- f. Terraces, Floors and Flat Surfaces Weight and Water Restrictions. The Sublessee shall not place anything on the terraces, floors, and other flat surfaces of the Apartment or of the Building that will place more weight on such terrace, floor or flat surface than that terrace, floor, or flat surface is designed to bear. The Sublessee shall not tamper with any of the structural elements of the Building, including but not limited to walls, terraces, floors, balconies, and roofs of the Building, so as to make them less resistant to the intrusion of water.
- g. **Laundry.** The Sublessee shall not use the roof or other common areas to dry laundry. The Sublessee shall not use any clothes washing or drying machines except those, if any, placed by the Sublessor or Building Management in the Apartment or in a Building laundry room. The laundry equipment located in the laundry room, if any, whether operated and maintained by a separate vendor or by the Cooperative Corporation or by the Building Management is an accommodation to the tenants of the Building. The Sublessor is not responsible for the maintenance of the laundry equipment in the laundry room; any damage to Sublessee's personal property caused by such equipment; or the operations of the laundry service.
- h. **Antennas.** The Sublessee may not attach any satellite dish or other antenna to the roof, outside walls, or windows of the Building without the written consent of the Sublessor. This shall not be construed to limit the rights granted by any federal or state law to any communications company.
- i. **Freight.** The Sublessee shall only use for freight those elevators designated by the Sublessor or Building Management for such purpose and only on designated days and hours after

- making reservations in accordance with then-existing procedures. Before access is permitted, proof of reasonable and appropriate insurance protecting the Sublessor and other tenants is required from any person moving furniture or possessions into or out of the building. A reasonable cash security deposit may also be required. The Sublessor shall not be liable to the Sublessee for any delays caused by or the result of such rules regarding freight.
- j. Carpeting. The floors in the Apartment shall be covered with sufficient insulated floor coverings so as to insulate against the transmission of sound from the Apartment to another Apartment in the Building and the Sublessee shall carpet at least 80% of the floor of each room, except the kitchen, pantry, and bathrooms. In the event the Sublessee uses wall to wall carpeting, the tacking strip shall be glued and not nailed to the floor. Wall to wall carpeting shall only be installed with water soluble adhesive or no adhesive or with other products that shall not damage the underlying flooring in any way. Sublessee shall be responsible for any damage to the flooring caused by any carpet installation.
- k. **Animals** Sublessee acknowledges compliance with the Sublessor's Proprietary Lease governing animals. Sublessee agrees that regardless of whether or not the Cooperative Corporation allows for animals to be kept in the Apartment, no pets of any kind shall be kept or harbored in the Apartment except by the written consent of the Sublessor. Consent given by the Cooperative Corporation with respect to any number or type of animals for any particular tenant in the Building shall not mean that the Sublessor will consent to the same number or type of animals in the Premises. Consent given by the Sublessor with respect to any number or type of animals for the Sublessee does not mean that the Sublessor will consent to the same number or type of animals other than the particular individual animals to which Sublessor consented. Such consent shall be given with respect to all animals kept by the Sublessee for purposes of engaging in basic life functions as understood by the Fair Housing Act and may be given with respect to other animals as well. The Sublessee must, however, restrain and control all animals the Sublessee possesses or harbors so as not to interfere with the health, comfort or safety of others in the Building. Barking of unreasonable duration, timing, or volume shall be considered to be such an interference with the health, comfort and safety of other tenants. Defecation and urination on terraces, common or public areas of the Building, by animals harbored by the Sublessee shall be considered to be such an interference. The Sublessee shall not permit dogs or other animals to be in any grass area or garden on private property around the Building. No animals shall be allowed in the public areas of the Building unless carried or restrained by a leash. The Sublessee shall not feed birds on the private property around the Building. The Sublessee shall not harbor animals prohibited by local law to be kept as a pet.
- l. **Appliances and Fixtures.** No cabinets, fixtures, sinks, wires or appliances of any sort shall be attached to or connected with the gas or electric fixtures within the Apartment, except such as are approved by the Sublessor. No pipes or radiators shall be moved or tampered with in any manner. No doors shall be removed from their hinges.
- m. **Smoking.** The Sublessee shall not permit smoking in the Apartment.
- n. **Landscaping**. The Sublessee shall have the same rights and obligations as the Sublessor has with respect to landscaping

appurtenant to the Apartment, if any, and on the property associated with the Building, if any.

- o. Snow, Ice, and Other Weather Hazards. The Sublessee assumes the rights and obligations of the Sublessor during the term of this Sublease with respect to snow and ice removal and any and all other weather born hazards. The Sublessee shall indemnify the Sublessor and hold the Sublessor harmless with respect to any claim made by any person against the Sublessor by reason of any such matters.
- p. **Storage Areas and Outbuildings.** The Sublessee's use of storage facilities and outbuildings at the Building, if any, is solely at the Sublessee's own risk. Sublessor makes no representations as to the security of any such facilities.

25. Enforcement of the Sublessee's Obligations

- a. The Sublessee shall hold the Sublessor harmless for any alleged failure by the Sublessor to enforce the obligations of another tenant in the Building.
- b. The Sublessee shall be considered to be in violation of substantial obligations of this Sublease if the Sublessee, any person residing in the Apartment, any employee of the Sublessee or anyone visiting the Sublessee violates any of the Sublessee's obligations under this Sublease.
- c. All expenses, including but not limited to, fines, court expenses, and attorneys' fees incurred by the Sublessor in enforcing the Sublessee's obligations under this Sublease or by reason of the Sublessee's failing to abide by the Sublessee's obligations under this Sublease shall be considered Additional Rent.
- d. Such Additional Rent may be collected by the Sublessor in any proceeding.

26. The Sublessee's Obligation Not to Be Objectionable

- a. In addition to the Sublessee's other obligations under this Sublease, the Sublessee may not engage in objectionable conduct towards or against the Sublessor or any other occupants of the Building. Objectionable conduct includes violating any of the Sublessee's obligations of this Sublease, and also engaging in any conduct which interferes with the right of others to peacefully enjoy their Apartment; and creating or tolerating any conditions which are dangerous, hazardous, unsanitary or detrimental to other occupants in the Building. If the Sublessee engages in objectionable conduct, the Sublessor will be entitled to terminate this Sublease before the end of the Term by following those legal procedures that allow a Sublessor to terminate a Sublease under the law.
- b. In addition to the Sublessee's other obligations under this Sublease, the Sublessee has the obligation to refrain from:
- i. Possession of explosives or explosive devices; controlled substances; paraphernalia used for trafficking in or use of controlled substances; stolen property; or weapons, contraband, or pornography prohibited by any law.
- ii. Commission of an unjustified act of violence or crime against any person in the Building.
- iii. Violation of the United States Patriot Act or any similar federal, state, or local law.
- iv. Harboring for more than two consecutive nights any person who engages in any of the foregoing conduct.
 - c. If the Sublessee violates any obligations under Subparagraph

26(b) of this Sublease, in addition to the Sublessor's other remedies, the Sublessor may commence an ejectment action against the Sublessee after serving a "termination notice" on the Sublessee, stating such violation and that seven (7) days after such service, the Sublease shall terminate and the Sublessee must surrender the Apartment to the Sublessor.

27. Abandonment

If the Sublessee moves out or is evicted before the end of the Term, except by a surrender of possession to the Sublessor duly accepted by the Sublessor, the Sublessee shall remain liable for every monthly payment of Rent as it comes due until the end of the Term. If this Sublease has been renewed, then such liability shall continue until the end of the renewal term. There is no right of renewal.

28. Reduction of Services Which Are Not the Sublessor's Fault

If due to strike, labor-trouble, war, national emergency, act of terrorism, repairs, the fault of any utility company, governmental action, or any other cause beyond the Sublessor's reasonable control, the Sublessor may not be able to provide services or make any repairs to the Apartment and Building, or if such services or repairs shall be delayed, the Sublessee shall have no rights against the Sublessor except such as are provided by law.

29. Right of Entry

The Sublessor may enter the Apartment in any manner and at any time in the event of an emergency. The Rent shall not be reduced by reason of the Sublessor's exercise of any right given by this Paragraph 29. Where there is no emergency, the Sublessor may enter and the Sublessee must give access during reasonable hours and upon reasonable notice, for the purposes of:

- a. Erecting, using, or maintaining pipes and conduits through the walls, floors, and ceilings of the Apartment.
- b. Inspecting the Apartment to ascertain what repairs or changes to the Apartment or the Building the Sublessor might deem necessary.
- c. Showing the Apartment to persons to whom the Sublessor may wish to sell and persons from whom the Sublessor may wish to borrow money.
- d. Showing the Apartment to persons acting on behalf of an insurance carrier from whom the Sublessor may wish to purchase insurance.
- e. Showing the Apartment during the period from five (5) months before until the end of the Term, to persons who might wish to rent the Apartment.
- f. Making changes, repairs, or redecorations during the last month of the Term, if the Sublessee has substantially or completely moved out.
- g. Complying with the Sublessor's obligations to the Building Management.

30. The Sublessee's Defaults

- a. If the Sublessee defaults under this Sublease as defined in this Paragraph 30, except for defaulting on the Sublessee's obligation to pay Rent, then the Sublessor may serve on the Sublessee a "notice to cure" that sets forth the following:
 - i. What the Sublessee's defaults are; and
 - ii. Notification that if the Sublessee does not cure the



13 Misc.3d 699, 820 N.Y.S.2d 774, 2006 N.Y. Slip Op. 26343

(Cite as: 13 Misc.3d 699, 820 N.Y.S.2d 774)

C

Civil Court, City of New York, New York County. Peter **POYCK**, Plaintiff,

V.

Stan BRYANT and Michelle Bryant, Defendants.

Aug. 24, 2006.

Background: Landlord commenced plenary action against tenants to collect rent and late charges. Tenants counterclaimed for breach of warranty of habitability and constructive eviction due to second-hand smoke from neighbors. Landlord moved for summary judgment dismissing affirmative defenses and counterclaims based on secondhand smoke.

Holding: The Civil Court of the City of New York, Shlomo S. Hagler, J., held that genuine issue of material fact existed as to whether secondhand smoke from neighbors breached the implied warranty of habitability and caused a constructive eviction, precluding summary judgment for landlord.

Motion denied.

West Headnotes

[1] Landlord and Tenant 233 \$\infty\$=125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

 ${\color{red} 233VII(A)} \ Description, \ Extent, \ and \ Condition$

233k125 Tenantable Condition of

Premises

233k125(1) k. In general. Most Cited

Cases

For purpose of statutory warranty of habitability, landlords must warrant against latent and patent conditions throughout the entire tenancy occasioned by ordinary deterioration, work stoppage by employees, acts of third parties, or natural disaster.

McKinney's Real Property Law § 235-b.

[2] Landlord and Tenant 233 \$\infty\$=125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(A) Description, Extent, and Condition

233k125 Tenantable Condition of

Premises

233k125(1) k. In general. Most Cited

Cases

The standard for a breach of the implied warranty of habitability is measured in the eyes of a reasonable person, not in a vacuum which ignores the essence of the modern dwelling unit. McKinney's Real Property Law § 235-b.

[3] Landlord and Tenant 233 @ 125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(A) Description, Extent, and Condition

233k125 Tenantable Condition of

Premises

233k125(1) k. In general. Most Cited

Cases

Statute setting forth implied warranty of habitability was intended to provide an objective standard for those essential functions which a residence is expected to provide. McKinney's Real Property Law § 235-b.

[4] Landlord and Tenant 233 \$\infty\$=125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(A) Description, Extent, and Condition

233k125 Tenantable Condition of

Premises

233k125(1) k. In general. Most Cited

Cases

Landlord and Tenant 233 5 173

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(F) Eviction

233k173 k. Acts of third persons in general. Most Cited Cases

Secondhand smoke qualifies as a condition that invokes the protections of implied warranty of habitability under the proper circumstances; as such, it is axiomatic that secondhand smoke can be grounds for a constructive eviction. McKinney's Real Property Law § 235-b.

[5] Common Interest Communities 83T \$\iint_{\iint}97\$

83T Common Interest Communities

83TV Unit Ownership and Exclusive Right of Possession

83Tk93 Use and Control of Unit

83Tk97 k. Maintenance, repair, and replacement; responsibility for condition. Most Cited Cases

(Formerly 89Ak10 Condominium)

Implied warranty of habitability does not apply to the relationship between the board of managers of a condominium and an individual unit owner. McKinney's Real Property Law § 235-b.

[6] Landlord and Tenant 233 \$\infty\$=125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(A) Description, Extent, and Condition

233k125 Tenantable Condition of

Premises

233k125(1) k. In general. Most Cited

Cases

The acts of third parties are within the scope of a landlord's implied warranty of habitability.

McKinney's Real Property Law § 235-b.

[7] Judgment 228 🖘 181(24)

228 Judgment

228V On Motion or Summary Proceeding 228k181 Grounds for Summary Judgment 228k181(15) Particular Cases

228k181(24) k. Landlord and tenant cases. Most Cited Cases

Genuine issue of material fact existed as to whether secondhand smoke from neighbors breached the implied warranty of habitability and caused a constructive eviction, precluding summary judgment for landlord as to tenants' affirmative defenses and counterclaims based on secondhand smoke, in landlord's plenary action against tenants to collect rent and late charges. McKinney's Real Property Law § 235-b.

**775 Meyers, Saxon & Cole, by Gerald Slotnick, Esq., Brooklyn, for Plaintiff.

Guralnick & Sandercock, LLP, by Margaret Sandercock, Esq., New York, for Defendant.

SHLOMO S. HAGLER, J.

*700 Issue

The novel issue to be determined herein is whether secondhand smoke emanating from a neighbor gives rise to a breach of the implied warranty of habitability and a constructive eviction under the realities of modern urban dwelling. Most urban **776 dwelling in New York City comprises "vertical living" in high-rise apartment buildings with possibly multiple neighbors in all directions. With multiple neighbors living beside each other comes basic duties and responsibilities. There is a duty to protect each other's right to privacy and a responsibility not to invade a neighbor's privacy. The unwanted invasion of privacy comes in many guises such as noise, smells, odors, fumes, dust, water and even secondhand smoke.

The key to avoiding such unneighborly behavior is for the neighbor to follow the often forgotten

"Golden Rule" You shall love your fellow or neighbor as yourself. The Golden Rule is a general principle of ethics which essentially admonishes neighbors as follows: What is hateful to you, do not do to your neighbor. The landlord also has an obligation to ensure that the conditions do not render the apartment "unsafe and uninhabitable" or prevents the premises from serving their intended function of residential occupation. When neighbors fail to respect each other and the landlord does not act, the law imposes its will on landlords and tenants through the statutory enacted implied warranty of habitability pursuant to Real Property Law ("RPL") § 235–b.

Implied Warranty of Habitability

In the landmark case of Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979), the Court of Appeals defined the history and parameters of RPL § 235-b or the implied warranty of habitability. RPL § 235-b was enacted in August, 1975, to provide modern urban dwellers with much needed protections and rights to compel landlords to make necessary repairs and essential services. (L. 1975, ch. 597). In other words, RPL § 235-b placed "the tenant in parity legally with the landlord." (1975 Sen. J. 7766-7776 Remarks of Senator Barclay). For more than thirty years, this powerful law continues to impose a warranty of habitability in every landlord-tenant relationship where the landlord impliedly *701 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., 47 N.Y.2d at 326, 418 N.Y.S.2d 310, 391 N.E.2d 1288.

[1][2][3] The scope and breadth of RPL § 235-b is far-reaching. Landlords must warrant against "latent" and "patent" conditions throughout the entire tenancy "occasioned by ordinary deterioration, work stoppage by employees, acts of third parties or natural disaster ..." (Emphasis added). 47 N.Y.2d at 327, 418 N.Y.S.2d 310, 391 N.E.2d 1288. The standard for a breach of the implied warranty of habitability is measured "in the eyes of a reasonable person" not in a vacuum which ignores the "essence of the modern dwelling unit." Id. RPL § 235-b was intended to provide an objective standard for "those essential functions which a residence is expected to provide." Solow v. Wellner, 86 N.Y.2d 582, 589, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995).

Secondhand Smoke

[4] While there appears to be no reported cases dealing with secondhand smoke in the context of implied warranty of habitability, $\stackrel{FN1}{\text{FN}}$ secondhand smoke is just **777 as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, FN4 excessive noise, FN5 and water leaks and extreme dust penetration. FN6 Indeed, the U.S. Surgeon General, the New York State Legislature and the City of New York City Counsel declared that there is a substantial body of scientific research that breathing secondhand smoke poses a significant health hazard. U.S. Surgeon General's report on *702 The Health Consequences of Involuntary Smoking (December, 1986); New York Public Health Law § 1399-n(1); The Administrative Code of the City of New York § 17–501(1). Therefore, this Court holds 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 secondhand smoke can be grounds for a constructive eviction. See, Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707 (1970). Cf., East End Temple v. Silverman, 199 A.D.2d 94, 605 N.Y.S.2d 56 (1st Dept.1993) (holding that a single occurrence of smoke did not

amount to a substantial deprivation of use and enjoyment of the residential premises).

FN1. However, this Court's independent research found the case of *Bender v. Niebel*, 11 Misc.3d 136(A), 2006 WL 820392 (App. Term 2d & 11th Jud. Dists., 2006) wherein the Appellate Term listed the landlords' cigarette smoke as part of a litany of severe conditions that survived a dismissal motion. While *Bender* has some precedential value, it did not directly deal with the single issue of secondhand smoke emanating from neighbors as opposed to the landlords themselves.

FN2. See *Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 649 N.Y.S.2d 138 (1st Dept.1996).

FN3. See *Chetworth Construction v. Casati*, May 1, 1995, p. 12, col. 5 (App. Term 2d & 11th Jud. Dists.).

FN4. See Goldman v. Sears-Robbins/Robbins, N.Y.L.J., June 15, 1998, p. 30, col. 3 (Civ. Ct. N.Y. County, Strauss, J.).

FN5. See *Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 634 N.Y.S.2d 505 (2d Dept.1995).

FN6. See *Minjak Co. v. Randolph*, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dept.1988).

Of course, the court 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. This Court will now turn to the facts of this case to make such a determination.

Procedural History

Plaintiff Peter **Poyck** ("plaintiff," "landlord," or "**Poyck**") commenced this plenary action to col-

lect rent and late charges for the months of August, 2001 through December, 2001, at \$2,597 per month. (See Exhibit "E" to the Motion.) Defendants Stan Bryant and Michelle Bryant ("defendants," "tenants," or "the Bryants") interposed a written answer, *inter alia*, denying the allegations of the complaint and asserting their third and fourth affirmative defenses and first and second counterclaims for breach of warranty of habitability and constructive eviction due to secondhand smoke. (See Exhibit "F" to the Motion.)

In or about June, 2005, plaintiff moved for an order pursuant to CPLR § 3212 granting him summary judgment striking and/or dismissing the defendants' third and fourth affirmative defenses and first and second counterclaims. The motion was adjourned to October 14, 2005. On the return date, this Court denied the motion without prejudice on procedural grounds.

FN7. Plaintiff failed to allege and/or attach the following six items of information: (1) whether plaintiff is the owner of apartment 5-D located at 22 W. 15th Street, New York, N.Y.; (2) whether plaintiff is the owner and/or tenant of the neighboring apartment 5-C of the subject building; (3) who is the owner and/or tenant of apartment 5-C; (4) who is responsible for overseeing the common areas such as the hallways and/or elevators in the subject building; (5) whether there is a "house rule" or other document such as the "by-laws" which prohibits and/or restricts smoking in the subject building; and (6) whether plaintiff is the sponsor and/or owner of the subject building. (See Exhibit "G" to the Motion.)

**778 In or about March, 2006, plaintiff moved for an order pursuant to CPLR §§ 2221(e) and 3212 renewing his prior motion for *703 summary judgment striking and/or dismissing defendants' third and fourth affirmative defenses and first and second counterclaims. The motion was ad-

journed to August 1, 2006. Defendants opposed the motion.

Background

Parties

At all times relevant hereto, plaintiff was the owner and lessor of condominium unit No.5–D located at 22 West 15th Street, New York, New York ("subject premises"). By virtue of a residential lease dated November 11, 2000 ("Lease"), defendants were the tenants or lessees of the subject premises for a two-year term from January 1, 2001 through December 31, 2002, at \$2,597 per month. (See Exhibit "A" to the Motion.) Defendants allegedly moved into the subject premises in 1998 and vacated at the end of August, 2001.

Uncontroverted Facts

After living in the subject premises for approximately three years, in or about March, 2001, new neighbors moved next door to defendants. The new neighbors constantly smoked in the common fifth floor hallway and in apartment 5–C. The tobacco smoke or secondhand smoke penetrated into the subject premises. At that time, defendants complained to the subject building's superintendent, Frank Baldanza ("Super") about the hazardous secondhand smoke condition. The super allegedly spoke to the defendants' next door neighbors to no avail. The incessant smoke continued unabated.

When the super's efforts failed, defendant Stanley Bryant wrote a letter dated June 29, 2001 to the super and to plaintiff Peter **Poyck** as well as to **Poyck's** attorney-in-fact, Charles Corso ("Corso") seeking a solution to the hazardous smoking problem and informing them that they may consider a "healthier living situation" as follows:

To date, their [next door neighbors in apartment 5–C] tobacco smoke continues to permeate this end of the fifth floor hallway and my home. This is not simply a matter of unpleasant odors; it represents an ongoing health hazard for my wife who is recovering from her second cancer surgery and who is extremely allergic to tobacco smoke.

Prior to the current tenant moving into 5–C, this problem did not exist on the fifth floor.

*704 To try to remedy the situation, I have sealed my apartment entry door with weather stripping and a draft barrier. I operate two hepa air filters round the clock, incurring additional electric charges. Despite these efforts, we can still smell the smoke from 5–C in our apartment.

If you can help in any way to remedy this problem, we would be extremely appreciative. Failing that, we must consider finding a healthier living situation.

(See Exhibit "B" to the Motion.)

Notwithstanding the above, the landlord took no action to curtail their neighbors' smoking that was invading the Bryants' home. About thirty days later, defendants decided to vacate the subject premises due **779 to the incessant secondhand smoke and wrote a letter to their landlord dated August 1, 2001, notifying him of their decision as follows:

Due to my wife's continuing health concerns and our most recent and apparently ongoing smoking' issue with our next door neighbor (please refer to our letter to Frank Baldanza dated June 29th) we have found it necessary to look elsewhere for more appropriate living quarters. Please note that we will be vacating this apartment by the end of August, 2001.

(See Exhibit "C" to the Motion.)

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. *Winegrad v. N.Y.U. Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). "[T]he remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v. Garlock*, 23 A.D.2d 943, 944, 259 N.Y.S.2d 1003) or where the issue is even arguable (*Barrett v. Jacobs*,

255 N.Y. 520, 522, 175 N.E. 275) since it serves to deprive a party of his day in court. Relief should be granted only where no genuine, triable issue of fact exists ..." *Broadway—111th Street Associates v. Morris*, 160 A.D.2d 182, 553 N.Y.S.2d 153 (1st Dept.1990).

RPL § 235-b Inapplicable to Condominium Board of Managers

[5] In this case, neither party asserted claims against the condominium's board of managers because the implied warranty of habitability pursuant to RPL § 235–b *705 does not apply to the relationship between the board of managers of a condominium and an individual unit owner. *Frisch v. Bellmarc Mgmt., Inc.,* 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dept.1993). However, the defendants as tenants of unit 5–D may rely on RPL § 235–b against the plaintiff, the only landlord in this action. *Id.,* at 390, 597 N.Y.S.2d 962.

Landlord's Lack of Control of Third Parties

[6] The gravamen of plaintiff's motion is that he cannot be held liable for the actions of third parties beyond his control such as the neighbors in unit 5-C. This argument is misplaced as the Court of Appeals since 1979 has clearly stated that the acts of third parties are within the scope of a landlord's responsibility pursuant to RPL § 235-b. Park West Management Corp., 47 N.Y.2d at 326, 418 N.Y.S.2d 310, 391 N.E.2d 1288. The courts have continuously held that the implied warranty of habitability can apply to conditions beyond a landlord's control. Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 649 N.Y.S.2d 138 (1st Dept.1996) (an alleged noxious odor emanating from a retail fish store in an adjacent building neither owned nor controlled by the landlord cooperative corporation may be a breach of the implied warranty of habitability); Sargent Realty Corp. v. Vizzini, 101 Misc.2d 763, 421 N.Y.S.2d 963 (Civ. Ct. N.Y. County 1979) (floods caused by upstairs tenant on four occasions which landlord allowed to persist resulted in substantial abatement); Quasha v. Third Colony Corp., October 10, 1990, N.Y.L.J., p. 22, col. 2 (Sup. Ct. N.Y. County) (noise emanating from neighbor stated a claim for breach of implied warranty of habitability); *Solomon v. Brandy*, September 7, 1994, N.Y.L.J., p. 22, col. 6 (Civ. Ct. Bronx County) (evicted neighboring tenant who caused nuisance resulting in lack of water supply to tenant did not constitute a good faith defense to the implied warranty of habitability).

[7] While the landlord contends that he had no control over the neighbors in **780 apartment 5-C, he failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition. The landlord could have asked the board of managers of the condominium to stop the neighbors from smoking in the hallway and elevator as well as to take preventive care to properly ventilate unit 5-C so that the secondhand smoke did not seep into the Bryants' apartment. Specifically, Real Property Law § 339-v(1)(i) mandates that condominium bylaws restrict the use and maintenance of both the units and common elements such as the hallways and elevators so as to "prevent unreasonable interference with the use of respective units and of the common elements by several unit owners." The board *706 of managers and even the landlord could have commenced an action for damages or injunctive relief for non-compliance with the bylaws and decisions of the board of managers pursuant to the Condominium Act. See, e.g., Board of Managers of Village House v. Frazier, 81 A.D.2d 760, 439 N.Y.S.2d 360 (1st Dept.1981) affd. 55 N.Y.2d 991, 449 N.Y.S.2d 188, 434 N.E.2d 257 (1982). Moreover, in the case of "flagrant or repeated violation" by a unit owner, the Condominium Act also authorizes the board of managers to impose sufficient surety to ensure future compliance with their by-laws and decisions. Real Property Law § 339-j.

Conclusion

Inasmuch as there are triable issues of fact as to whether the secondhand smoke breached the implied warranty of habitability and caused a constructive eviction, plaintiff's motion to strike and/or 13 Misc.3d 699, 820 N.Y.S.2d 774, 2006 N.Y. Slip Op. 26343

(Cite as: 13 Misc.3d 699, 820 N.Y.S.2d 774)

dismiss the defendants' third and fourth affirmative defenses and first and second counterclaims must be denied.

N.Y.City Civ.Ct.,2006. Poyck v. Bryant 13 Misc.3d 699, 820 N.Y.S.2d 774, 2006 N.Y. Slip Op. 26343

END OF DOCUMENT

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New York Real Property - Article 7 - § 235-B Warranty of Habitability

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- § 235-b. Warranty of habitability, 1. 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, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not
- constitute a breach of such covenants and warranties.

 2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

 3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in the section, the court;

result of a breach of the warranty set forth in the section, the court;

(a) need not require any expert testimony; and

(b) shall, to the extent the warranty is breached or cannot be cured by reason of a strike or other labor dispute which is not caused primarily by the individual landlord or lessor and such damages are attributable to such strike, exclude recovery to such extent, except to the extent of the net savings, if any, to the landlord or lessor by reason of such strike or labor dispute allocable to the tenant's premises, provided, however, that the landlord or lesser has made a good faith attempt, where practicable, to cure the breach.

(c) where the premises is subject to regulation pursuant to the local emergency housing rent control law, the emergency tenant protection act of nineteen seventy-four, the rent stabilization law of nineteen hundred sixty-nine or the city rent and rehabilitation law, reduce the amount awarded hereunder by the total amount of any rent reduction ordered by the state division of housing and community renewal pursuant to such laws or act, awarded to the tenant, from the effective date of such rent reduction order, that relates to one or more matters for which relief is reduction order, that relates to one or more matters for which relief is awarded hereunder.

Section: Previous 232-B 232-C 233 233-A 234 235 235-A 235-B 235-C 235-D 235-E 235-F 236 237 237-A Next

Last modified: March 31, 2010

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C

Supreme Court, New York. New York County Susan REINHARD, Plaintiff,

v.

CONNAUGHT TOWER CORPORATION and Arthur S. Olick, Defendants.

No. 602503/08.

November 30, 2011.

West Headnotes

Judgment 228 \$\infty\$ 181(24)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(24) k. Landlord and Tenant Cases. Most Cited Cases

A genuine issue of material fact existed as to whether the secondhand smoke in tenant's apartment was so pervasive as to breach the implied warranty of habitability and cause a constructive eviction, precluding summary judgment in tenant's action against landlord. McKinney's Real Property Law § 235–b.

Seq no. 006, 007

Decision and Order

[This opinion is uncorrected and not selected for official publication.]

Hon. Judith J. Gische, J.S.C.

INDEX NO. _

MOTION DATE

Sequence Number: 006

MOTION CAL. NO. _

IAS PART 10 The following papers, numbered 1 to ___ were read on this motion to/for _

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits _

- Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes [] No

Upon the foregoing papers, it is ordered that this motion MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: NOV 30 2011

<<signature>>

HON. JUDITH J. GISCHE J.S.C.

Check one: [] FINAL DISPOSITION X DISPOSITION

Check if appropriate: [] DO NOT POST [] REFERENCE

[] SUBMIT ORDER/ JUDG. [] SETTLE ORDER/ JUDG.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Olick n/m (3212) w/SAD affirm, ASK affid, exhs.	1
Connaught n/m (3212) w/SAD, JPE, exhs.	2
Pltff x/m (3212) w/GDM affirm, RB affid, exhs.	3
Connaught and Olick reply w/ SAD affirm, JPF affid	4
(2).	
Pltff reply and further support w/GDM affirm.	5
Steno minutes 10/6/11.	6

JUDITH J. GISCHE, J.:

Plaintiff Susan Reinhard (plaintiff or Reinhard), a shareholder in Connaught Tower Corporation, the cooperative corporation that owns the residential cooperative building located at 300 East 54th Street, New York, New York (the building), brings this action for damages and injunctive relief against the cooperative corporation and the president of the Board of Directors, for their failure to remediate secondhand smoke seeping into her apartment.

In motion sequence number 006, defendant Arthur S. Olick (Olick) moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint as against him. In motion sequence number 007, defendant Connaught Tower Corporation (the Cooperative Corporation) moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint as against it. Reinhard opposes the motions and cross-moves, pursuant to CPLR 3212, for summary judgment on her first, second, fourth, fifth, sixth, and eighth causes of action.

Issue has been joined and the note of issue was filed April 28, 2011. These motions were timely brought and summary judgment relief is available (CPLR § 3212; *Brill v. City of New York*, 2 N.Y.3d at 652 [2004]). Motion sequence numbers 006 and 007 are consolidated for disposition.

BACKGROUND

The following facts are undisputed unless otherwise indicated. Reinhard is the tenant-shareholder of apartment 31G in the building, which is known as Connaught Tower. Reinhard acquired her shares on August 16, 2006. Olick is also a ten-

ant-shareholder in the building and is the president of the Board of Directors.

Reinhard claims that after she purchased her apartment and performed renovations in her apartment, she detected a strong smell of cigarette smoke that was entering into her apartment from other areas of the building. According to Reinhard, the cigarette smoke has caused her to suffer from tightness in her chest, coughing, headaches, and watering eyes. Reinhard asserts that she complained about the smoke condition to the Cooperative Corporation and its building manager, nonparty Matthew Adam Properties, Inc. (Matthew Adam). The building superintendent, Rudolph Bachraty, thereafter inspected Reinhard's apartment and suggested that Reinhard re-caulk the floor, molding and outer faceplates in her bedroom. However, according to plaintiff, cigarette smoke continued to permeate her apartment even after this work was done. By letter dated September 4, 2007, Reinhard again reported the smoke condition to the building's property manager and superintendent. Harvey Greenberg, a vice president of Matthew Adam, inspected the apartment on September 5 and 7, 2007 with the building superintendent, and detected a "slight smell reminiscent of cigarette smoke" in the bedroom. Greenberg subsequently informed the board of his finding.

The board considered Reinhard's complaints at a meeting held on September 18, 2007. The minutes of that meeting state that:

"Apartment 31 G - The shareholder of this apartment has complained about odors in her apartment. Mr. Greenberg has visited the apartment in order to verify the odors and determine their cause and/or origin. Though Mr. Greenberg did detect the existence of faint odors, they were neither strong enough to be identified nor of a magnitude, in his opinion, to render the apartment uninhabitable"

(Minkin Affirm. in Support, Exh. K).

By letter dated September 25, 2007, Greenberg responded to Reinhard, stating that:

"As I informed you, with your permission, I have been in your apartment on two occasions to attempt to verify the odors and to determine their cause and/or origin. Though I did detect the existence of faint odors, they were neither strong enough for me to identify nor of a magnitude, in my opinion, to render your apartment uninhabitable. Upon due consideration and recognizing that certain alterations were performed by you in the apartment, the Board of Directors sees no obligation on the part of the cooperative corporation to cause any further work to be done at the corporation's expense"

(*id*, Exh. L). In a letter to plaintiff dated October 2, 2007, Olick stated that "[i]t does not appear that the odors of which you complain are of insufficient [sic] intensity to render your apartment uninhabitable. Moreover, the origin of the odors has not been ascertained and could be the result of alterations performed on your behalf' (*id*, Exh. M).

Reinhard thereafter hired, at her own expense, a hygienic engineer, Ronald Bielinski, P.E., to conduct air flow testing in her apartment. Bielinski inspected the apartment on January 8, 2008, and detected a "strong" and "distinctive odor of cigars" along three walls in the bedroom. Reinhard provided a copy of Bielinski's report to the Cooperative Corporation, and requested that the building locate and seal the source of the airflow and odor seepage into her apartment. On May 27, 2008, Greenberg informed Reinhard that she could hire a contractor to determine the source of the problem. Reinhard again hired Bielinski to conduct more specific air quality tests and Richfield Enterprises, Inc. (Richfield) to make penetrations in the wall. After making cuts in the wall, Penn Baluyut of Richfield detected a bad odor that smelled "like a mixture of between cigarettes and ... a dead mouse or whatever, but it's a mixture of that." Bielinski prepared a subsequent report dated May 30, 2008 in which he stated that there was an "air communication pathway in the interstitial wall space," and recommended cleaning inside the wall and sealing the "fugitive air pathway" from adjacent units and from the outside wall. On June 17, 2008, Reinhard forwarded Bielinski's report to the board for consideration, and informed the board and her fellow shareholders that she was holding the building responsible for all costs that she incurred relating

to the air quality problem in her apartment.

By letter dated July 8, 2008, Robert J. Jacobs, a member of the Cooperative Corporation's legal committee, responded to plaintiff. Jacobs noted that the board's investigation revealed that: (1) the building's construction was typical for high-rise construction built during the mid-to-late 1970s; (2) to the best of the board's knowledge, the Cooperative Corporation did not alter the original construction to cause the condition; and (3) an air communication pathway in the interstitial wall space is typical for the building's type of construction and is necessary for proper insulation of the building (*id.*, Exh. W). Additionally, Jacobs informed Reinhard that:

"there are several recommendations in the Report that do not appear to be problematic, including portions of items 1 and 2 as they relate to cleaning, as well as the need to maintain a two-hour fire separation. We are, however, advised that the sheet rock covering the demising walls does in fact provide such a fireseal and was in full compliance with all applicable codes when the Building was originally constructed. We are also advised that sealing up the space to prevent air communication as proposed in the Report may very well cause moisture and other problems to your unit as well as to others in the Building, for which you will be required to assume full responsibility.

In light of the foregoing, please note that the Board does not accept any responsibility for the matters complained of, and reminds you of the requirement for pre-approval of any actions that you or your designated contractors might take inside the apartment or the common walls of the Building, including the necessity of submitting a completed alteration agreement and related insurance documents for approval by the Building's Managing Agent, Mr. Greenberg"

(id).

This action ensued. The complaint contains the following nine causes of action: (1) breach of the warranty of habitability; (2) breach of the lease; (3) rent abatement; (4) breach of fiduciary duty; (5) constructive eviction; (6) breach of the covenant of good faith and fair dealing; (7) injunctive relief; (8) negligence; and (9) attorney's fees. Plaintiff seeks \$1,000,000 in damages on her second, fourth, fifth, sixth, and eighth causes of action, in addition to punitive and exemplary damages.

The Cooperative Corporation relies upon an affirmation from John P. Flynn, P.E., an engineer who inspected plaintiff's apartment on September 16, 2010, who states that during his inspection, there were no odors of smoke or any other unusual odors within the apartment (Flynn Affirm., ¶ 2). According to Flynn, the building's construction was typical of the time in which it was built, was not deficient in any manner, and was not predisposed to an inordinate amount of air or smoke movement or transmission (*id.*, ¶¶ 3, 4, 781 N.Y.S.2d 261, 814 N.E.2d 431). The Cooperative Corporation also submits an unsworn report from Flynn dated October 7, 2010 (Dodge Affirm. in Support, Exh. F).

In support of the cross motion, Reinhard submits an affidavit from Bielinski, who states, based upon his inspections of the apartment on January 8, 2008 and May 28, 2008, he discovered, by using "smoke tubes," that there is an air communication pathway in the interstitial wall space as a result of the furred out wall system (Bielinski Aff, ¶ 6, 9). According to Bielinski, he detected communication of fugitive air (an unintended air pathway) via a combination of the outside wall interstitial air space and the furred out wall system (*id.*). Bielinski opines that the air communication pathway is a violation of the 1968 New York City Building Code, §§ [C26-504.7] 27-345 (firestopping) and [C26-504.3] 27-341 (fire separation) (*id.*, ¶ 21, 23, 781 N.Y.S.2d 261, 814 N.E.2d 431). Bielinski found evidence that previous attempts to seal the fugitive air pathway had been made; the space between the outside wall and the column was stuffed with extruded polystyrene boards at the demising wall (*id.*, ¶ 10, 781 N.Y.S.2d 261, 814 N.E.2d 431). However, because the boards were not sealed to the wall, the column, or to each other, the boards had minimal effect on air transmission (*id*). Bielinski further states that most of the fugitive air movement was horizontal, rather than vertical (*id.*, ¶ 11, 781 N.Y.S.2d 261, 814 N.E.2d 431). Therefore, Bielinski recommended that the fugitive air pathways be sealed to prevent fugitive air movement

from adjacent units and the outside wall (*id.*, ¶ 12, 781 N.Y.S.2d 261, 814 N.E.2d 431). Bielinski states, within a reasonable degree of scientific certainty, that the repairs are necessary to prevent air and odor communication from fugitive air sources, and to maintain fire separation from Reinhard's unit and the adjacent unit (*id.*, ¶ 14, 781 N.Y.S.2d 261, 814 N.E.2d 431). He notes that the cost of the repairs would be approximately \$12,000 (*id.*). Bielinski also disagrees with the board's position that sealing up the space would create moisture problems (*id.*, ¶ 24, 781 N.Y.S.2d 261, 814 N.E.2d 431). Bielinski recommends that the interstitial wall space be partitioned into two compartments, thus allowing moisture to continue to effuse through the exterior masonry wall as it currently does (*id.*).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v. Filstein*, 35 A.D.3d 184, 185-186, 826 N.Y.S.2d 216 [1st Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary proof in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228, 812 N.Y.S.2d 12 [1st Dept 2006]; *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

Implied Warranty of Habitability and Constructive Eviction (First and Fifth Causes of Action)

The Cooperative Corporation argues that the first and fifth causes of action must be dismissed because plaintiff cannot establish that she abandoned the premises. To establish a constructive eviction, the tenant must prove wrongful acts by the landlord which "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (

*Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77, 83 [1970]). The tenant must abandon possession in order to claim a constructive eviction (id.). Whether a constructive eviction has occurred is ordinarily a question of fact (Melbourne Leasing Co. v. Jack LaLanne Fitness Ctrs., Inc., 211 A.D.2d 765, 767, 621 N.Y.S.2d 682 [2d Dept 1995]). Contrary to the Cooperative Corporation's assertion, the guest status affidavit executed by Reinhard does not disprove Reinhard's claim of abandonment (Dodge Affirm. in Support, Exh. J). In any event, Reinhard affirmatively asserts in this case that she has abandoned possession of her apartment. Reinhard testified at her deposition that she has not slept there since 2007 and only visits on occasion to check on her apartment and to collect her mail (Plaintiff EBT, at 57).

"Pursuant to Real Property Law § 235-b, every residential lease contains an implied warranty of habitability which is limited by its terms to three covenants: (1) that the premises are for 'fit for human habitation', (2) that the premises are fit for 'the uses reasonably intended by the parties', and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety' "(*Solow v. Wellner*, 86 N.Y.2d 582, 587-588 [1995], quoting Real Property Law § 235-b). The implied warranty of habitability "protects only against conditions that materially affect the health and safety of tenants or deficiencies that in the eyes of a *reasonable person* ... deprive the tenant of those *essential functions* which a residence is expected to provide" (*id* at 588, 635 N.Y.S.2d 132, 658 N.E.2d 1005 [internal quotation marks omitted]). The warranty applies to cooperative apartments (*see Granirer v. Bakery, Inc.*, 54 A.D.3d 269, 271, 863 N.Y.S.2d 396 [1st Dept 2008]; *Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383, 384-385, 597 N.Y.S.2d 962 [1st Dept 1993]).

Courts have held that secondhand smoke "qualifies as a condition that invokes the protections of Real Property Law § 235-b under the proper circumstances" (*Poyck v. Bryant*, 13 Misc.3d 699, 702, 820 N.Y.S.2d 774 [Civ Ct, NY County 2006]; see also Upper E. Lease Assoc., LLC v. Cannon, 30 Misc 3d 1213 [A], *3, 2011 NY Slip Op 50054 [U] [Dist Ct, Nassau County 2011]). "As such, it is axiomatic that secondhand smoke can be grounds for a constructive eviction" (

Poyck, 13 Misc.3d at 702, 820 N.Y.S.2d 774). While a "single occurrence" of smoke is insufficient, "the court 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" *see also East End Temple v. Silverman*, 199 A.D.2d 94, 605 N.Y.S.2d 56 [1st Dept 1993] [one time occurrence of smoke did not amount to a substantial and material deprivation of the use and enjoyment of the premises]).

Here, Reinhard has offered evidence of more than a single occurrence of smoke within her apartment. Reinhard's hygienic engineer, Ronald Bielinski, P.E., states that he inspected the apartment on January 8, 2008, and detected a strong, distinctive odor of cigars (Bielinski Aff., ¶ 5). Penn Baluyut, the contractor who made several cuts into the walls of the apartment, testified that he smelled what he described as "not a 100 percent smell of cigarettes"; he stated it was "like a bad smell like a mixture of between cigarettes and I thought it was like a dead mouse or whatever, but it's a mixture of that" (Baluyut EBT, at 74, 102). Diana Grodnitzky, a resident of the building, testified that she smelled cigarette smoke in plaintiff's apartment on several occasions (Grodnitzky EBT, at 63, 67). In addition, Harvey Greenberg, a representative of the property manager, testified that when he inspected the apartment on September 7, 2007, he detected a very faint odor of cigars in the bedroom (Greenberg EBT, at 119-120). Reinhard claims that the secondhand smoke has caused her to suffer from tightness in her chest, coughing, headaches, and watering eyes (Plaintiff EBT, at 30-31). In view of this evidence, the court concludes that there are issues of fact as to whether the secondhand smoke within Reinhard's apartment was so pervasive as to breach the implied warranty of habitability and cause a constructive eviction. Accordingly, neither the Cooperative Corporation nor Reinhard are entitled to summary judgment on the first and fifth causes of action.

Negligence (Eighth Cause of Action)

The Cooperative Corporation moves for summary judgment dismissing the eighth cause of action for negligence, based upon its contentions that it did not breach a duty to plaintiff, and did not cause or create the smoke or odor. For her part, Reinhard contends that the Cooperative Corporation had actual notice of the smoke condition in her apartment, and failed to take any action to remediate the condition.

Multiple Dwelling Law § 78 "imposes upon a landlord a duty to persons on its premises to maintain them in a reasonably safe condition" (*Juarez v. Wavecrest Mgt. Team*, 88 N.Y.2d 628, 643 [1996] [internal quotation marks and citation omitted]). To make out a prima facie case of negligence, the plaintiff must demonstrate that the defendant owner either created the defective condition or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994]; *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]; *Alexander v. New York City Tr.*, 34 A.D.3d 312, 313, 824 N.Y.S.2d 262 [1st Dept 2006]).

Although the Cooperative Corporation contends that the building's construction was typical for the time in which it was built, and that air migration in a building of this type is common, the court cannot conclude, as a matter of law, that it was not negligent.

The Cooperative Corporation submits an affirmation from John P. Flynn, P.E., a licensed professional engineer who inspected Reinhard's apartment on September 16, 2010. However, this unsworn affirmation does not constitute proof in admissible form (CPLR 2106; *see also Woodard v. City of New York*, 262 A.D.2d 405, 692 N.Y.S.2d 407 [2d Dept 1999] [unsworn affirmation of plaintiffs' engineering expert did not constitute competent evidence]). Nor is Flynn's unsworn report dated October 7, 2010 competent evidence (*see 101 Maiden Lane Realty Co., LLC v. Tran Han Ho*, 88 A.D.3d 596, 931 N.Y.S.2d 299 [1st Dept 2011]).

In any event, even if the court were to consider the Cooperative Corporation's preferred evidence, there is evidence the

Cooperative Corporation had actual notice about the smoke condition including: the multiple complaints Reinhard made; the copies of Bielinski's reports Reinhard forwarded to the Cooperative Corporation; and the observations by a vice president of the property manager during an inspection apartment of a faint cigar smell (Plaintiff EBT, at 88, 90; Greenberg EBT, at 120; Minkin Affirm. in Support, Exhs. G, U). Since the Cooperative Corporation did not take any action to remedy the condition alleged, there are questions of fact as to whether the Cooperative Corporation acted reasonably under the circumstances in failing to remedy the smoke condition. [FN1] Ordinarily, "the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474 [1979]). Furthermore, while the Cooperative Corporation argues that plaintiff cannot identify the source of the smoke or odors, "[t]here may be more than one proximate cause for an injury" (*Francis v. New York City Tr. Auth.*, 295 A.D.2d 164, 744 N.Y.S.2d 9 [1st Dept 2002]). Thus, the court cannot say that the Cooperative Corporation did not cause her injuries and damages. For the same reasons, these issues of fact preclude summary judgment to Reinhard on the eighth cause of action.

FN1. There is also a dispute as to whether the air communication pathway violates New York City Building Code provisions relating to firestopping (Administrative Code of City of N.Y. § C26-504.7 [27-345]) and fire separations (Administrative Code of City of N.Y. § C26-504.3 [27-341]). A building code violation serves as "some evidence of negligence" (*see Elliott v. City of New York*, 95 N.Y.2d 730, 734-735 [2001]; *Hill v. Cartier*, 258 A.D.2d 699, 701, 685 N.Y.S.2d 336 [3d Dept 1999]).

Breach of the Proprietary Lease (Second Cause of Action)

To establish a breach of contract claim, the plaintiff must prove the following elements: (1) the existence of an agreement; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages (*Furia v. Furia*, 116 A.D.2d 694, 695, 498 N.Y.S.2d 12 [2d Dept 1986]).

Reinhard relies upon paragraph 2 of the proprietary lease, which states that "[t]he Lessor shall at its expense keep the building in good repair, including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof" (Minkin Affirm. in Support, Exh. B).

Paragraph 18 of the proprietary lease states, in relevant part, that:

"the Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance doors, frames and saddles) in good repair,... and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures ..., as may be in the apartment The Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's apartment" (id.).

The Cooperative Corporation argues, based upon these provisions, that decisions about how to maintain the building are within the discretion of the board of directors and that Reinhard was responsible for making minor repairs in her apartment. The Cooperative Corporation further contends that, in order to remedy the condition, it would have to breach its leases with other tenants by prohibiting them from smoking in their apartments, or would have to reconstruct the entire building. Reinhard counters that the Cooperative Corporation is responsible for maintaining and repairing common areas of the building, and that she is not responsible for making necessary repairs to prevent secondhand smoke from seeping into her apartment through gaps, cracks, and holes located outside her apartment. Reinhard points out that the Cooperative Corporation has refused to make any repairs, and has threatened to hold her personally liable if she attempts to perform the repairs recommended by Bielinski.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 [2002]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 [1990]).

In this case, Reinhard's hygienic engineer states that there is an "air communication pathway in the interstitial wall space," and that there is "[c]ommunication of fugitive air ... via a combination of the outside wall interstitial air space, and the furred out wall system" (Bielinski Aff., ¶ 9). Bielinski states that he found previous attempts to seal the fugitive air pathway in the form of extruded polystyrene boards at the demising wall, and indicates that the polystyrene boards had a minimal effect on air transmission (*id.*, ¶ 10, 565 N.Y.S.2d 440, 566 N.E.2d 639). Thus, the proprietary lease places responsibility to repair the condition within the wall on the Cooperative Corporation (*see Franklin Apt. Assoc., Inc. v. Westbrook Tenants Corp.*, 43 A.D.3d 860, 863, 841 N.Y.S.2d 673 [2d Dept 2007] [repair of "shower bodies" was responsibility of cooperative corporation where they could not be accessed without opening the walls]; *cf. Machado v. Clinton Hous. Dev. Co., Inc.*, 20 A.D.3d 307, 798 N.Y.S.2d 56 [1st Dept 2005] [hot water valve which exploded in hand of shareholder was sole responsibility of shareholder where valve was outside the walls]). However, the record raises issues of fact as to whether the Cooperative Corporation maintained the building in "good repair" pursuant to the proprietary lease (*see Dunlop Tire Corp. v. Occidental Chem. Corp.*, 177 A.D.2d 969, 577 N.Y.S.2d 1014 [4th Dept 1991], *lv dismissed* 79 N.Y.2d 1040 [1992] [issue of fact as to whether assignor met its contractual obligation to keep asbestos installation in good repair]).

Given the issues of fact as to whether Reinhard was constructively evicted, Reinhard's claim that the Cooperative Corporation breached paragraph 10 of the proprietary lease, which contains a covenant of quiet enjoyment, also survives summary judgment (*see Jackson v. Westminster House Owners Inc.*, 24 A.D.3d 249, 250, 806 N.Y.S.2d 495 [1st Dept 2005], *lv denied* 7 N.Y.3d 704 [2006]).

However, to the extent that Reinhard claims that the Cooperative Corporation breached paragraph 21 of the proprietary lease, the record does not support such claim. Paragraph 21 of the proprietary lease provides that no additions or alterations shall be made without first obtaining the consent of the Cooperative Corporation, which consent shall not be unreasonably withheld or delayed (Minkin Affirm. in Support, Exh. B). On June 17, 2008, Reinhard informed the Cooperative Corporation that she intended to hold the building responsible for the remediation work, and requested the building's approval to start the work recommended by Bielinski (*id*, Exh. U). However, on July 8, 2008, the board informed Reinhard that it did not accept responsibility for the work, and reminded Reinhard that pre-approval was required for any alteration work within her apartment or the common walls of the building (*id*, Exh. W). Notably, the proprietary lease and shareholders manual require the submission of a completed alteration agreement and insurance documents prior to performing any alteration work (*id*, Exhs. B, C).

In sum, summary judgment is inappropriate on the second cause of action.

Breach of the Covenant of Good Faith and Fair Dealing (Sixth Cause of Action)

"Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v. Paramount Communications*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 [1st Dept 1996] [citation omitted]). A claim for breach of the covenant of good faith and fair dealing is redundant of a breach of contract claim where it relies upon the same facts (*Logan Advisors*, *LLC v. Patriarch Partners*, *LLC*, 63 A.D.3d 440, 443, 879 N.Y.S.2d 463 [1st Dept 2009]). Here, Reinhard essentially claims that the Cooperative

Corporation failed to keep the building in good repair and failed to fix the smoke condition in her apartment, which is also the basis for her breach of contract claim. Therefore, the sixth cause of action is dismissed.

Breach of Fiduciary Duty (Fourth Cause of Action)

With respect to the fourth cause of action, which alleges a breach of fiduciary duty by the Cooperative Corporation, it is well established that "'a corporation does not owe fiduciary duties to its members or shareholders'" (*Peacock v. Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443, 889 N.Y.S.2d 22 [1st Dept 2009], quoting *Hyman v. New York Stock Exch., Inc.*, 46 A.D.3d 335, 337, 848 N.Y.S.2d 51 [1st Dept 2007]). Accordingly, the Cooperative Corporation is entitled to summary judgment dismissing the fourth cause of action.

Individual Officer Liability

As for Olick, there is no evidence that he engaged in any wrongful conduct, sufficient to impose liability upon him for the Cooperative Corporation's actions. Individual members of the board of directors of an apartment corporation may not be sued for damages for actions taken in their corporate capacity unless there is evidence that they engaged in independent tortious conduct (*Murtha v. Yonkers Child Care Assn.*, 45 N.Y.2d 913, 915 [1978]; *Hoppe v Board of Directors of 51-78 Owners Corp.*, 49 AD3d 477 [1st Dept 2008]; *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 10, 825 N.Y.S.2d 28 [1st Dept 2006]; *Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 326, 667 N.Y.S.2d 354 [1st Dept 1998]). Contrary to Reinhard's contention, Olick's October 2, 2007 letter did not make any misrepresentation of any facts to Reinhard. The letter merely stated that "[i]t does not appear that the odors of which you complain are of insufficient [sic] intensity to render your apartment uninhabitable. Moreover, the origin of the odors has not been ascertained and could be the result of alterations performed on your behalf" (Minkin Affirm. in Support, Exh. M). Furthermore, although Reinhard contends that Olick failed to disclose that the building manager smelled an odor "reminiscent of cigarette smoke," Olick stated that the odors of which Reinhard complained were faint. Plaintiff has also failed to establish that Olick engaged in tortious conduct by sitting on the board's legal committee. Olick only testified at his deposition that he did not recall whether he was ever told that Greenberg inspected Reinhard's apartment (Olick EBT, at 37).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 006) of defendant Arthur S. Olick for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion (sequence number 007) of defendant Connaught Tower Corporation for summary judgment is granted to the extent of dismissing the fourth cause of action (breach of fiduciary duty) and the sixth cause of action (breach of the covenant of good faith and fair dealing) as against it, and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff Susan Reinhard for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this case is ready to be tried; plaintiff shall, within ten (10) days of this decision/order appearing on SCROLL (Supreme Court Records On-Line Line), serve a copy of this decision/ order on the Office of Trial Support so the case can be scheduled.

Dated: New York, New York

November 30, 2011

So Ordered.

<<signature>>

Hon. Judith J. Gische, J.S.C.

Reinhard v. Connaught Tower Corp. 2011 WL 6119800 (N.Y.Sup.) (Trial Order)

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32 Misc.3d 12, 927 N.Y.S.2d 274, 2011 N.Y. Slip Op. 21185 (Cite as: 32 Misc.3d 12, 927 N.Y.S.2d 274)

H

Supreme Court, Appellate Term, New York.
First Department.
Christian EWEN and Britt Ewen, Plaintiffs-Respondents,

v.

Federico MACCHERONE and Caterina International, Ltd., Defendants—Appellants.

May 26, 2011.

Background: Condominium owners sued neighbors for negligence and private nuisance, alleging that defendants' excessive smoking resulted in secondhand smoke seeping into plaintiffs' unit. The Civil Court of the City of New York, New York County, <u>Anil C. Singh</u>, J., <u>25 Misc.3d 1236(A)</u>, <u>2009 WL 4572842</u>, denied defendants' motion to dismiss. Defendants appealed.

Holdings: The Supreme Court, Appellate Term, held that:

- (1) defendants' smoking was not so unreasonable as to constitute private nuisance, and
- (2) defendants owed no duty to refrain form smoking.

Reversed.

West Headnotes

1 Nuisance 279 € 1

279 Nuisance

2791 Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

279k1 k. Nature and elements of private nuisance in general. Most Cited Cases

The elements of a cause of action for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.

[2] Nuisance 279 3(1)

279 Nuisance

2791 Private Nuisances

 $\underline{279I(A)}$ Nature of Injury, and Liability Therefor

279k3 What Constitutes Nuisance in Gen-

eral

279k3(1) k. In general. Most Cited

Cases

Not every intrusion will constitute a nuisance; persons living in organized communities must suffer some damage, annoyance and inconvenience from each other.

[3] Nuisance 279 3(1)

279 Nuisance

279I Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

279k3 What Constitutes Nuisance in Gen-

eral

279k3(!) k. In general. Most Cited

Cases

The relevant question in a nuisance action is whether a defendant's use of his or her property constitutes an unreasonable and continuous invasion of the plaintiff's property rights.

[4] Common Interest Communities 83T 94

83T Common Interest Communities

<u>83TV</u> Unit Ownership and Exclusive Right of Possession

83Tk93 Use and Control of Unit 83Tk94 k. In general. Most Cited Cases

Neighboring residents' conduct in smoking cigarettes in their condominium was not so unreasonable in the circumstances as to support a private nuisance claim on part of owners who complained of smoke seeping into their unit; residents were not prohibited

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from smoking inside their condominium by any existing statute, condominium rule or bylaw.

[5] Common Interest Communities 83T € 94

<u>83T</u> Common Interest Communities

<u>83TV</u> Unit Ownership and Exclusive Right of Possession

83Tk93 Use and Control of Unit 83Tk94 k. In general. Most Cited Cases

Neighboring residents did not have a duty to refrain from smoking inside their condominium or to avoid exposing owners of another unit to secondhand smoke that unintentionally seeped in to their residence through a shared wall, as required to support negligence claim.

*275 <u>Ira Daniel Tokayer</u>, New York City, for respondents.

Shaw & Associates, New York City (Martin Shaw of counsel), for appellants.

Defendants appeal from an order of the Civil Court of the City of New York, New York County (Anil C. Singh, J.), dated December 1, 2009, which denied their motion to dismiss the complaint.

Present: SHULMAN, J.P., HUNTER, JR., JJ.

PER CURIAM.

Order (Anil C. Singh, J.), dated December 1, 2009, reversed, with \$10 costs, motion granted and complaint dismissed. The Clerk is directed to enter judgment accordingly.

Since 2007, plaintiffs have been the owners and residents of a luxury condominium unit located at 200 Chambers Street in Manhattan, New York. Their condominium unit immediately adjoins the unit owned and occupied by their neighbors, the individual and corporate defendants. In 2009, plaintiffs commenced the instant action to recover damages for negligence and private nuisance against defendants, alleging that secondhand smoke from defendants' "excessive smoking" "seeped in" through the walls into plaintiffs' apartment, which condition was "exacerbated" by a building-wide ventilation or "odor migration" construction design problem. In fact, the

complaint expressly stated that "[w]hile a smoking neighbor may be a mere annoyance under normal circumstances, due to the odor migration problem, secondhand smoke fills [plaintiffs'] kitchen, bedroom and living room, causing them to vacate their unit often at night" and resulting in personal injuries.

Prior to answering, defendants moved to dismiss plaintiffs' complaint, pursuant to <u>CPLR 3211(a)(1)</u>, (7) and (10), on the grounds that the complaint failed to state a cause of action upon which relief could be granted, that the "documentary evidence shows that plaintiffs were prohibited from maintaining the action" because the condominium's declaration and by-laws do not prohibit smoking in the individual apartments, and that they failed to join the condominium as a necessary party to the action. Defendants also alleged that plaintiffs' allegations of an "odor migration" problem in the building caused by a construction design defect failed to state *276 claims for private nuisance or negligence against an individual unit owner.

Plaintiff opposed the dismissal motion, arguing, inter alia, that smoking was not expressly permitted in individual units under the condominium rules, and that, even if it was determined that smoking was permitted, causes of action for nuisance and negligence were sufficiently pled. Civil Court agreed with plaintiffs, and denied the motion to dismiss in its entirety. We now reverse.

[1][2][3] Although there are significant similarities between nuisance and negligence claims, they constitute separate causes of action (see Nussbaum v. Lacopo, 27 N.Y.2d 311, 315, 317 N.Y.S.2d 347, 265 N.E.2d 762 [1970]). The elements of a cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus. v. Consolidated Edison Co. of NY, 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169, 362 N.E.2d 968 [1977]; see 61 W. 62 Owners Corp. v. CGM EMP LLC, 77 A.D.3d 330, 334, 906 N.Y.S.2d 549 [2010], affd. as mod. 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172 [2011]). However, "not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other ... If one lives in the city he [or

she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life" '(Nussbaum v. Lacopo, 27 N.Y.2d at 315, 317 N.Y.S.2d 347, 265 N.E.2d 762, quoting Campbell v. Seaman, 63 N.Y. 568, 577 [1876]). The relevant question is whether a defendant's use of his or her property constitutes an unreasonable and "continuous invasion of [the plaintiff's property] rights" (Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 124, 769 N.Y.S.2d 785, 802 N.E.2d 135 [2003]; see Golub v. Simon, 28 A.D.3d 359, 360, 814 N.Y.S.2d 61 [2006]; Rodriguez-Nunci v. Clinton Hous. & Dev. Co., 241 A.D.2d 339, 340, 660 N.Y.S.2d 16 [1997]).

[4] Accepting plaintiffs' allegations as true, and according them the benefit of every favorable inference, as we must do on a motion to dismiss pursuant to CPLR 3211(a)(7) (see Zumpano v. Quinn, 6 N.Y.3d 666, 681, 816 N.Y.S.2d 703, 849 N.E.2d 926 [2006]; Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), we conclude that plaintiffs have failed to state a cause of action for private nuisance against their neighboring defendants. Defendants' conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them (see Rodriguez-Nunci v. Clinton Hous. & Dev. Co., 241 A.D.2d at 340, 660 N.Y.S.2d 16). Critically, defendants were not prohibited from smoking inside their apartment by any existing statute, condominium rule or bylaw. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences.

Indeed, the law of private nuisance would be stretched beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building. Since there cannot be a substantially unreasonable interference by smoking inside the apartment, there could not be a private nuisance, even if plaintiffs were to show that they had suffered some damage, annoyance and injury (see McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 46-47, 81 N.E. 549 [1907]; Newgold v. Childs Co., 148 App.Div. 153, 132 N.Y.S. 366 [1911]). *277 To the extent odors emanating from a smoker's apartment may generally be considered annoying and uncomfortable to reasonable or ordinary persons, they are but one of the annoyances one must endure in a multiple dwelling building (see generally Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990]; Poyck v. Bryant, 13 Misc.3d 699, 700, 820 N.Y.S.2d 774 [2006]), especially one which does not prohibit smoking building-wide (cf. Upper E. Lease Assoc., LLC v. Cannon, 30 Misc.3d 1213[A], 2011 N.Y. Slip Op. 50054[U], 2011 WL 182091 [2011]).

While we recognize the significant health hazards to nonsmokers inherent in exposure to secondhand smoke (see Poyck v. Bryant, 13 Misc.3d at 701–702, 820 N.Y.S.2d 774; Duntley v. Barr, 10 Misc.3d 206, 207, 805 N.Y.S.2d 503 [2005]; Ezra, Get Your Ashes Out of My Living Room!: Controlling Tobacco Smoke in Multi-Unit Residential Housing, 54 Rutgers L. Rev. 135, 147–151 [2001]), in the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militate against a private cause of action under these factual circumstances for secondhand smoke infiltration (see e.g. Golub v. Simon, 28 A.D.3d at 360, 814 N.Y.S.2d 61 [no private cause of action for blocking view]; Herbert Paul, CPA, PC v. 370 Lex, LLC, 7 Misc.3d 747, 751, 794 N.Y.S.2d 869 [2005] [no private cause of action under Public Health Law article 13-E for smoking in public areas]; Public Health Law §§ 1399-q[1], 1399-w; cf. Duntley v. Barr, 10 Misc.3d at 208–209, 805 N.Y.S.2d 503).

In this regard, the board of managers of the subject condominium is specifically authorized to make determinations regarding the operation, care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners (see Real Property Law § 339-j; Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317; Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 5, 825 N.Y.S.2d 28 [2006]; Board of Mgrs. of Stewart Place Condominium v. Bragato, 15 A.D.3d 601, 602, 789 N.Y.S.2d 907 [2005]). Incongruously, despite plaintiffs' repeated allegations in the complaint of the building-wide ventilation problem known to the condominium board, plaintiffs failed to fully pursue their ventilation complaints with the board, or to name the board as a necessary party to this action (see CPLR 1001[a], 3211[a][10]; Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Std. & App., 5 N.Y.3d 452, 805 N.Y.S.2d

32 Misc.3d 12, 927 N.Y.S.2d 274, 2011 N.Y. Slip Op. 21185 (Cite as: 32 Misc.3d 12, 927 N.Y.S.2d 274)

525, 839 N.E.2d 878 [2005]).

[5] For similar reasons, plaintiffs' negligence claim should have also been dismissed. "To make out a prima facie case of property owner negligence, plaintiffs must show that defendant[s] owner owed a duty to plaintiffs, defendant[s] breached such duty, and plaintiffs' injuries resulted from defendant[s'] breach" (Savage v. Desantis, 56 A.D.3d 1013, 1014, 868 N.Y.S.2d 787 [2008], lv. denied 12 N.Y.3d 709, 2009 WL 1259137 [2009]; see Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 424 N.E.2d 531 [1981]). In the absence of any duty, the negligence claim must fail (see Darby v. Compagnie Natl. Air France, 96 N.Y.2d 343, 347, 728 N.Y.S.2d 731, 753 N.E.2d 160 [2001]). Here, since defendants did not have a duty to refrain from smoking inside their apartment or to avoid exposing their neighbor to secondhand smoke that unintentionally seeped into the neighbor's apartment, plaintiffs' negligence claim must fail.

*278 In accordance with the foregoing, defendants' motion to dismiss the complaint should have been granted, since plaintiffs have not established any basis to impose tort liability upon the neighboring defendants.

We have considered and rejected defendants' remaining contentions as unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

N.Y.Sup.App.Term,2011. Ewen v. Maccherone 32 Misc.3d 12, 927 N.Y.S.2d 274, 2011 N.Y. Slip Op. 21185

END OF DOCUMENT





30 Misc.3d 1213(A), 924 N.Y.S.2d 312, 2011 WL 182091 (N.Y.Dist.Ct.), 2011 N.Y. Slip Op. 50054(U)

(Table, Text in WESTLAW), Unreported Disposition (Cite as: 30 Misc.3d 1213(A), 2011 WL 182091 (N.Y.Dist.Ct.))

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NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

District Court, Nassau County, New York.
UPPER EAST LEASE ASSOCIATES, LLC,
Plaintiff(s)

v.

Danielle CANNON, Defendant(s).

No. 44409/09. Jan. 20, 2011.

Maidenbaum & Associates, PLLC, Merrick, attorney for plaintiff.

Danielle Cannon, pro se, defendant.

MICHAEL A. CIAFFA, J.

*1 In modern high-rise apartment settings, a tenant's home is *not* the tenant's castle. Landlords of such dwellings have a corresponding duty to prevent one tenant's habits from materially interfering with another tenant's right to quiet enjoyment. When a tenant's smoking results in an intrusion of second-hand smoke into another tenant's apartment, and that tenant complains repeatedly, the landlord runs a financial risk if it fails to take appropriate action. This case involves such a situation. As explained below, the landlord's failure to take appropriate action, over a period of several months, to rectify a second-hand smoke nuisance, justifies a rent abatement, and excuses the tenant from any obligation to pay rent after her constructive eviction.

Plaintiff, Upper East Lease Associates, LLC, commenced this action against defendant Danielle Cannon seeking monetary damages for breach of a residential apartment lease. Defendant's answer and counterclaims include allegations that plaintiff "violated the warranty of habitability owed to defendant" (first affirmative defense), that plaintiff

"fail[ed] to address ... unsafe and intolerable conditions ..." (second affirmative defense), and that plaintiff deprived her of "the beneficial use and enjoyment of the leased premises" (id). As a consequence, defendant alleges that she was "forced to abandon the premises" and that she was "constructively evicted" (id). Defendant also asserts that plaintiff's wrongful acts and omissions "caused an intolerable nuisance to defendant" and breached her "right to quiet enjoyment of the premises" (third affirmative defense).

Defendant's counterclaims include allegations that plaintiff's breach of the warranty of habitability entitles her "to recover the rent already paid on the lease" (first counterclaim). A second counterclaim, specifically alleging a breach of the lease concerning second-hand smoke, seeks "thousands in dollars in damages to her property" (second counterclaim).

Trial of the action was held on January 7, 2011. An employee of building management, Shanique Sealy, gave testimony in support of plaintiff's claim for unpaid rent, late charges, and legal fees. Danielle Cannon testified regarding her defenses and counterclaims. Plaintiff's property manager, Joe Kross, was called as a rebuttal witness by plaintiff. Documentary exhibits were introduced by both sides.

Based upon the testimony and evidence submitted, the Court makes the following findings of fact and conclusions of law:

- 1. Pursuant to a written lease, defendant occupied apartment 18N at 215 East 96th Street between May 7, 2008, and February 4, 2009. The lease carried an expiration date of May 31, 2009. Monthly rent, due "on the first day of each month," was \$2.825.00.
- 2. In an addendum to the lease, headed "APARTMENT STANDARDS," the lease addressed the subject of "Second Hand Smoke." It

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provides, in part, as follows: Tenant acknowledges and understands that the State and City of New York have enacted legislation specifically recognizing the health dangers inherent in environmental tobacco smoke, commonly known as "second-hand smoke". Tenant further acknowledges and understands that causing the infiltration of second-hand smoke into the common areas of the Building and/ or into other apartments in the Building, may constitute a nuisance and health hazard and be a material infringement on the quiet enjoyment of the other tenants in the Building. For the foregoing reasons, Tenant acknowledges and agrees that the prevention by Tenant, its invitees and guests, of the infiltration of second-hand smoke into the common areas of the Building and/or into to other apartments in the Building is OF THE ESSENCE to this Lease, and Tenant covenants and agrees to take all measures necessary to minimize second-hand smoke from emanating from Tenant's apartment and infiltrating the common areas of the Building and/or into other apartments in the building.

- *2 3. The apartment immediately beneath defendant's apartment became occupied by a new tenant in September 2008. The new tenant's lease included the Second Hand Smoke addendum. The following month, defendant began complaining about second-hand smoke.
- 4. According to defendant's credible testimony, representatives of plaintiff confirmed and admitted that the new tenant was a smoker. The new tenant also had a guest who was a smoker.
- 5. The extent of the second-hand smoke problem varied from time to time. Sometimes it was sporadic, sometimes it was consistent. All in all, it was troublesome enough to constitute a "nuisance" within the meaning of the second-hand smoke addendum.
- 6. Nevertheless, plaintiff's witnesses gave credible testimony that they initially tried, in good faith, to rectify the nuisance. Plaintiff's actions included attempts at caulking and sealing around vents that

may have been conductors of cigarette smoke from the apartment below.

- 7. By November 2008, it was apparent to both plaintiff and defendant that these measures were ineffective. Defendant requested a different apartment. Aided by a leasing representative of the plaintiff (Nancy Bordan), defendant continued to press for an apartment transfer.
- 8. Plaintiff's rebuttal witness, Joe Kross, acknowledged at trial that apartment transfers could be approved "as necessary." However, according to defendant's credible testimony, the parties were not able to agree on the terms of the transfer. Defendant requested one month free rent. Plaintiff responded by seeking defendant's agreement to a new one year lease. Once the negotiations broke down, plaintiff withdrew its consent to the transfer. When December's rent came due, defendant paid it "under protest."
- 9. In the meantime, the second-hand smoke problem continued, unabated. Defendant did not pay January's rent.
- 10. Defendant continued to complain to building management. Sometime in January, representatives of the landlord visited defendant's apartment one morning, but they smelled nothing at the time. When no further action by the landlord appeared to be forthcoming, defendant decided to leave. She failed to pay the rent due on February 1, and she vacated her apartment on February 4, 2009. Defendant gave plaintiff very little prior notice before departing.
- 11. Under the circumstances presented, the parties' rights and obligations are governed by the provisions of the lease, judged together with the statutory implied warranty of habitability (RPL § 235-b). Recent caselaw, which the Court finds persuasive, recognizes that second-hand smoke "qualifies as a condition that invokes the protections of RPL § 235-b under the proper circumstances." *Poyck v. Bryant*, 13 Misc.3d 699, 702

(Table, Text in WESTLAW), Unreported Disposition

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(Civ Ct N.Y. Co.2006). "As such, it is axiomatic that second-hand smoke can be grounds for a constructive eviction." Id.

- 12. While proof of a "single occurrance" plainly will not suffice, the key question typically will revolve around "whether or not the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction." Id. The Court's answer necessarily is fact-sensitive.
- *3 13. In addition to considering how the second-hand smoke condition affected the tenant's right to quiet enjoyment, the Court properly considers the actions or inaction of the landlord. Povck v. Bryant, supra, 13 Misc.3d at 705-6. Although a landlord may lack direct control over the actions of another tenant, courts have often applied the implied warranty of habitability to conditions beyond the landlord's direct control. Id. at 705. As recognized on Poyck, a tenant's smoking habits may give rise to a duty to act, to prevent "unreasonable interference" with the rights of other tenants. Id. at 706.
- 14. The foregoing logic applies, with even more force, to circumstances, like those presented, where the landlord's standard lease contains language recognizing the potential "nuisance" of second-hand smoke. There can be no doubt, under the language of the Addendum, that preventing infiltration of second-hand smoke into another tenant's apartment "IS OF THE ESSENCE of this Lease," and toward that end, the landlord had the power and duty to protect its tenants, when necessary, from second-hand smoke constituting "a nuisance," or a "health hazard."
- 15. No evidence was presented by defendant to the effect that her neighbor's smoking constituted a "health hazard." Nevertheless, it was enough of a "nuisance" to warrant action by the landlord. Without doubt, the landlord, at least initially, took generally appropriate actions to try to abate the nuisance. However, when those initial actions proved ineffective, the landlord was obligated to

take further steps to alleviate the condition, or to accommodate defendant in a different apartment.

- 16. Under the totality of the circumstances, the Court finds that plaintiff failed to fully meet its obligations, and that such a breach resulted in a constructive eviction of defendant as of February 4, 2009. The efforts plaintiff made to solve the problem were either too little, too late, or included unacceptable conditions. By reason thereof, plaintiff lost the right to pursue a claim for rent that accrued after defendant's departure. See Mayourian v. Tanaka, 188 Misc.2d 278 (App Term, 2d Dept 2001); US Bronsville II v. Nelson, 2004 N.Y. Slip Op 50466 (Civ Ct Kings Co.).
- 17. Furthermore, for the period of time defendant occupied the apartment while enduring the neighbor's second-hand smoke, an abatement of rent is warranted. See Park West Management Corp. v. Mitchell, 47 N.Y.2d 316 (1979). As Judge Fairgrieve has noted: "The duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition and the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted ... and the value of the premises during the period of the breach." Amerifirst Mortg. Corp. v. Green, 2005 N.Y. Slip Op 50805 (Dist Ct Nassau Co.), citing Park West Mgmt. Corp. v. Mitchell, supra; accord Regensburg v. Rzonca, 2007 N.Y. Slip Op 50109 (Dist Ct Suffolk Co.). "The damage award may take the form of a percentage reduction of the contracted-for rent ..." Regensburg v. Rzonca, supra. The fact that damages "are not susceptible to precise determination does not insulate the landlord from liability." Park West Mgmt. Corp. v. Mitchell, supra, 47 N.Y.2d at 329. Moreover, in ascertaining damages, "the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach, as well as the effectiveness of steps taken by the landlord to abate those condition." Regensburg v. Rzonca, supra.
 - *4 18. Application of these factors leads the

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Court to the following conclusion: beginning in October, 2008, the second-hand smoke nuisance warrants an increasing rent abatement percentage, from month to month. The Court finds that a 10% rent abatement for October 2008 (\$282.50) would fairly compensate defendant for the nuisance she initially suffered. But as time went on, and the condition persisted, it became apparent that the problem was continuing and could not easily be cured, thus warranting a 20% abatement for November 2008 (\$565.00), a 30% abatement for December 2008 (\$847.50), and a 40% abatement for January 2009 (\$1,130.00).

19. The Court accordingly finds that defendant proved her entitlement to rent offsets totaling \$2,825.00 as of the date of her departure. However, since defendant did not pay the rent that was due for January and February, 2009 (totaling \$5,750.00), the offsets left an indebtedness, for unpaid rent as of the date defendant departed, of \$2,825.00. Plaintiff having duly applied defendant's security deposit (\$2,825.00) to the claimed deficiency, the end result is that neither party owes the other anything under the lease.

20. Finally, defendant's remaining counterclaim for property damage was properly dismissed at trial and is found to be legally meritless. To the extent such damages involved clothing she intended to sell on eBay, any damage to that business is not recoverable under the circumstances presented. In any event, a breach of the warranty of habitability does not permit a tenant to recover damages to personal property. *See Couri v. Westchester Country Club*, 186 A.D.2d 712 (2d Dept 1992).

21. Accordingly, except to the extent indicated above, all claims and counterclaims are DIS-MISSED, without costs and disbursements to either side.

SO ORDERED.

N.Y.Dist.Ct.,2011.

Upper East Lease Associates, LLC v. Cannon

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East End Temple v Silverman 199 A.D.2d 94, 605 N.Y.S.2d 56 N.Y.A.D.,1993.

199 A.D.2d 94, 605 N.Y.S.2d 56, 1993 WL 518376

East End Temple, Respondent,

v.

Linda Silverman, Also Known as Linda Baker, Appellant.

Supreme Court, Appellate Division, First Department, New York

(December 14, 1993)

CITE TITLE AS: East End Temple v Silverman

Order and judgment (one paper), Supreme Court, New York County (Alfred Toker, J.), entered on or about August 26, 1992, which inter alia, granted plaintiff landlord's motion for summary judgment and declared that the landlord was entitled to possession of the subject apartment, and an order of the Supreme Court, New York County (Diane A. Lebedeff, J.), entered January 20, 1993, which dismissed the defendant's counterclaims for constructive eviction and intentional infliction of emotional distress, unanimously affirmed, with costs. Primary residence is "an ongoing, substantial, physical nexus with the [stabilized] premises for actual living purposes" (Emay Props. Corp. v Norton, 136 Misc 2d 127, 129).Rent Stabilization Code (9 NYCRR) § 2524.4 (c) allows a landlord to refuse to renew a stabilized tenant's lease if the tenant does not occupy the premises as the primary residence. The evidence, including defendant's own testimony and her extrajudicial testimony contained in the mortgage application for a New Jersey residential property, clearly demonstrates that the tenant did not maintain an ongoing, substantial, physical nexus with the subject premises.

The defendant tenant's claim of a constructive eviction is without merit. The defendant tenant's own

testimony reflects that a one time occurrence of smoke prompted her to vacate her apartment. This single day of inconvenience does not amount to a substantial and material deprivation of use and enjoyment of the premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83). Further, the tenant did not abandon possession of the apartment because of the building's allegedly deteriorating condition. She and her husband stayed in the apartment "from time to time" before the day of the smoke condition.

It is also clear that the allegedly deteriorating conditions in the building and the smoke condition did not cause the defendant mental anguish (see, Couri v Westchester Country Club, 186 AD2d 712, 715,lv dismissed in part and denied in *95 part81 NY2d 912). The defendant, who returned to the apartment from time to time before the single day of inconvenience, presented no proof of injury.

Defendant tenant's claim that a procedural error was committed by granting the landlord a judgment of possession where such relief was not sought in the landlord's complaint is without merit. The court was free to grant any type of relief within its jurisdiction appropriate to the proof whether or not expressly demanded (43 NY Jur 2d, Declaratory Judgments, §58).

Concur--Ellerin, J. P., Kupferman, Rubin and Nardelli, JJ.

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N.Y.A.D.,1993.

East End Temple v Silverman 199 A.D.2d 94, 605 N.Y.S.2d 566021993 WL 518376999, 605 N.Y.S.2d 566021993 WL 518376999

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(Cite as: 81 A.D.2d 760, 439 N.Y.S.2d 360)

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Board of Managers of Vil. House v Frazier 81 A.D.2d 760, 439 N.Y.S.2d 360 N.Y.A.D.,1981.

81 A.D.2d 760, 439 N.Y.S.2d 360

Board of Managers of Village House, Respondent-Appellant,

v.

Paris B. Frazier, Appellant-Respondent, and Arthur Bressan et al., Respondents Supreme Court, Appellate Division, First Department, New York

May 7, 1981

CITE TITLE AS: Board of Managers of Vil. House v Frazier

Order and judgment (one paper), Supreme Court, New York County, entered August 27, 1980 which (1) granted plaintiff's motion for summary judgment and a permanent injunction enjoining defendants Arthur Bressan (Bressan) and Victoria Young (Young) from occupying or otherwise utilizing Apartment Unit 3C of plaintiff condominium until they execute a lease in strict conformity with the condominium by-laws and section 339-o of the Real Property Law; (2) enjoined defendant Paris B. Frazier (Frazier) from leasing or otherwise permitting the occupancy of Unit 3C by the defendants Bressan and Young or any other person or entity other than in strict conformity with the by-laws of the plaintiff and section 339-o of the Real Property law; (3) directed an assessment of attorney's fees against defendant Frazier and denied Frazier's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for summary judgment dismissing Frazier's counterclaims, unanimously modified, on the law and the facts, only to the extent of adding a provision permitting *761 Frazier to allow guests to stay in his apartment, and granting plaintiff's motion for summary judgment dismissing defendant's counterclaim, and otherwise affirmed, without costs.

The order appealed from properly prohibited defendant Frazier from subleasing his condominium apartment except in strict conformity with the condominium by-laws and section 339-o of the Real Property Law. As held in the companion action (Frazier v Board of Managers of Vil. House, 80 AD2d 1003), Frazier purported to sublease and permitted occupancy of the apartment without complying with the rules of the condominium which obligated the condominium apartment owner to execute an appropriate lease and offer the board of managers a 30-day right of first refusal. The record is clear that defendant has violated the by-laws on a number of occasions, most recently with respect to Bressan and Young, and that plaintiff is entitled to a permanent injunction enjoining Frazier from leasing or otherwise permitting the occupancy of the apartment by defendants Bressan and Young or any other person without executing a lease in strict conformity with the by-laws of the condominium and section 339-o of the Real Property Law. However, the third decretal paragraph of the order appealed from is so phrased as to make it appear that Frazier is not entitled to have guests stay in the apartment unit. There are no restrictions in the by-laws against having guests reside ins such units so long as they are truly guests. Accordingly, the third decretal paragraph of the order appealed from should be modified to provide that the injunction does not prohibit guests as occupants. The order appealed from denies plaintiff's motion to dismiss Frazier's counterclaims. However, these counterclaims are substantially the same as the complaint in the companion action (Frazier v Board of Managers of Vil. House, 80 AD2d 1003) which we have dismissed. Accordingly, the order should be modified to grant plaintiff's motion to dismiss defendants' counterclaims on this action, and we so direct.

Concur -- Murphy, P. J., Sandler, Sullivan and Fein, JJ.

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(Cite as: 81 A.D.2d 760, 439 N.Y.S.2d 360)

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N.Y.A.D.,1981. BOARD OF MANAGERS OF VILLAGE HOUSE V FRAZIER 81 A.D.2d 760, 439 N.Y.S.2d 360602

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Adam Leitman Bailey, P.C. serves as general counsel to over 250 cooperative and condominium buildings in New York City and its attorneys have been on the forefront of many of the legal issues confronting cooperatives and condominiums for over a generation. Adam Leitman Bailey, P.C. was built to serve the needs of cooperative and condominiums by hiring the best attorneys for every issue where a building may require counsel. Besides our general corporate representation, Adam Leitman Bailey, P.C. has revolutionized the condominium/cooperative representation using our progressive methods such as:

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- Inventing and devising an agreement/process to quicken foreclosure process to either get common charges paid or the property into new unit owners hands.
- Lowering expenses by negotiating better contracts, mortgage refinance terms, credit line acquisitions;
- Seizing upon new laws that allow savings for using certain materials or standards;
- Ensuring that both the building and the board are adequately protected using our insurance attorneys combined 60 plus years of insurance experience;
- Revising and upgrading outdated corporate documents inhibiting a building's effectiveness in governing itself and its residents' conduct;
- Creating offering plans, bylaws and house rules that anticipate and prevent problems as well as provide for a amicable and smooth process for governance.

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Client satisfaction starts with our customer service. Our AV-rated and award winning law firm responds to all emails and phone calls within 24 hours. Upon request, we provide you with weekly or daily updates of all of your pending matters. Almost all of our attorneys live in the metropolitan New York City area, enabling them to attend building meetings and be available at your convenience. This responsiveness and hands on attentiveness allows us to prevent costly litigation by pinpointing potential issues before they become serious problems.

Litigation

As one of New York's premier real estate litigation firms, Adam Leitman Bailey, P.C. has participated and prevailed in some of the most important condominium and cooperative cases of the new millennium, as reflected in numerous published and unpublished decisions on novel legal issues. Our attorneys' impressive success record in hundreds of trials places the firm's performance among the very best in the profession.

Among these cases we have achieved the following results:

- In Lorne v. 50 Madison, making new law, the Appellate Division found condominium boards not liable for repairing newly constructed building and that the obligation to repair remains with Sponsor.
- In *Sky View Parc v. Onex Real Estate*, Adam Leitman Bailey P.C. reached the largest settlement in condominium history, awarding the contract vendees millions of dollars.
- In 40 West 67th Street v. Pullman, Adam Leitman Bailey P.C. concluded a case and settled outstanding issues where a shareholder was evicted from its cooperative for bad behavior.
- In 710 Park Avenue v. Feld, the courts determined whether a board of directors could restrict whether a shareholder could run for the board of directors based on educational requirements.
- In *Sinensky v. Rokowsky*, the Appellate Division determined whether an applicant/non-shareholder has the standing to sue a board of directors for discrimination.
- In *Kahn v. 230-79 Equity*, the Appellate Term determined a cooperative's liability for making repairs to a unit.
- In *Anonymous v. 812 Fifth Avenue*, Adam Leitman Bailey, P.C. prevailed in obtaining the return of a down payment for a rejected cooperative purchaser.

Collections/Unpaid Common Charges/Maintenance/Foreclosures

Adam Leitman Bailey, P.C. provides one of the most outstanding cooperative landlord-tenant practices and condominium collection practices in New York City. Adam Leitman Bailey, P.C is one of four law firms with cooperative landlord-tenant practices in the entire state of New York to earn an AV® Martindale-Hubbell Rating and is the only law firm in the State of New York to have both an AV Rating and a lawyer with a Super Lawyer ranking. Adam Leitman Bailey, P.C. is the only law firm in New York City with cooperative landlord-tenant practice attorneys named by the internationally esteemed Chambers and Partners among "New York's Leading Real Estate Lawyers. Chambers & Partners noted that Adam Leitman Bailey makes his "debut in the rankings following enthusiastic praise for his expertise in landlord and tenant litigation. A tenacious and confident litigator who is quick-witted in court and respected by the judges."

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The collective experience of our team has been responsible for winning landmark decisions in cooperative landlord-tenant law and condominium unpaid common charges cases. Our attorneys have won over a thousand cases in housing court, including over 250 appellate court cases, many at the highest court, The Court of Appeals. Besides participating in some of the most important landlord-tenant decisions during the past decade, our attorneys have written some 90 books on landlord-tenant law, including encyclopedias and the Housing Court Reporter, a twenty-five year collection, organization, and analysis of over 50,000 landlord-tenant cases used by most regular housing court practitioners and all landlord-tenant judges.

On the forefront of condominium foreclosure litigation, we invented a plan and devised an agreement to either get unpaid common charges paid or to push the foreclosure process to save months and even years in the foreclosure process to get the unit into a paying owner's hands and the chance of redeeming any equity in the home to pay outstanding common charges.

Awards, Rankings and Honors

Our successes have led to the highest honors and awards from the bar and ranking organizations. We are the only cooperative condominium law firm under 30 attorneys that has received and AV® Martindale-Hubbell rating, Super Lawyers honors and selection into the Registry of Preeminent Lawyers. In addition, our success as cooperative and condominium general counsel earned our firm recognition in "Who's Who in Real Estate" by Habitat Magazine.

During the past three years, the internationally esteemed Chambers & Partners repeatedly selected Mr. Bailey as one of New York's Leading Real Estate lawyers, hailing Mr. Bailey as a "tenacious and confident litigator who is quick-witted in court and respected by the judges." Chambers & Partners noted that Bailey is "an extraordinary practitioner who gets great results" quoting a client on Mr. Bailey's "ability to anticipate things before they happen."

Real Estate Weekly noted that "Adam Leitman Bailey has made a name for himself with his success winning cases in the courtroom," and that he is famous for his "condominium representation." The New York Real Estate Journal declared Mr. Bailey to be "one of New York's best real estate attorneys." The New York Times praised his "novel" strategy in one case and remarked that in another "Bailey fought on... grinding through excruciating detail and obscure Perry Mason moments." "After Mr. Bailey's firm used a forgotten statute to prevail in a landmark federal case, the Wall Street Journal quoted a prominent New York developer's attorney calling the holding a "game changer" affecting real estate nationwide. Dateline NBC referred to Mr. Bailey as "aggressive, tenacious and smart" in asking Mr. Bailey to share his negotiating secrets on its nationally syndicated television program.

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HDAM LEITMAN BAILEY

Actively at the helm of the law firm he built from scratch, Adam Leitman Bailey, Esq. practices residential and commercial real estate law. Among New York's most successful and prominent real estate attorneys, Mr. Bailey has been identified among the top five percent of attorneys in the New York area, and named a Super Lawyer by Law & Politics magazine and honored with Martindale-Hubbell "AV" Preeminent rating. During the past four years, the internationally esteemed Chambers & Partners repeatedly selected Mr. Bailey as one of New York's Leading Real Estate lawyers, hailing Mr. Bailey as a "tenacious and confident litigator who is quick-witted in court and respected by the judges", and noting that Bailey is "an extraordinary practitioner who gets great results" quoting a client on Mr. Bailey's "ability to anticipate things before they happen."

Real Estate Weekly recognized that "Adam Leitman Bailey has made a name for himself with his success winning cases in the courtroom." That same newspaper called Mr. Bailey "famous" for his "condominium, foreclosure and tenant representation," and compared his real estate practice to Apple's business. New York Real Estate Journal declared Mr. Bailey to be "one of New York's best real estate attorneys." The New York Times referred to his legal strategy and legislation proposed in one case as "novel," in addition to remarking on how in another case "Adam Leitman Bailey fought on...grinding through excruciating detail and obscure Perry Mason moments." After Mr. Bailey's firm used a forgotten statute to prevail in a landmark case, the Wall Street Journal quoted a prominent New York developer's attorney who called the holding a "game changer" affecting real estate nationwide. In another case hailed as "the city's largest condo refund ever" (Curbed NY) involving "a settlement likely to send shivers through the ranks of the city's condo developers" (the New York Post), the settlement he received was the largest condominium settlement in history for one building and the largest government grant (\$21 million) for a cooperative in New York history.

Dateline NBC referred to Mr. Bailey as "aggressive, tenacious and smart" in asking him to share his negotiating secrets on its nationally syndicated television program. Mr. Bailey's American advocacy has prevailed in numerous important trials and cases before various courts and trial venues, including Housing, Civil, and New York State Supreme and Federal Courts, as well as various New York Appellate tribunals. Such cases have included:

- Lorne v. 50 Madison Avenue LLC, an Appellate Division decision that finds responsibility for repairs of newly constructed buildings remains with Sponsor instead of Condo Board:
- Hartman v. Goldman, an adverse possession case of first impression before New York's Appellate Division;

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- 542 East 14th Street v. Lee, a case of first impression before New York's Appellate Division defining expansion of rent regulation law for non-primary residence cases;
- Interstate Land Sales Full Disclosure Act Cases, turning to a forgotten federal statute called the Interstate Land Sales Full Disclosure Act, he creatively discovered a way to void the contracts of sales for buildings over 100 units resulting in hundreds of settlement and court victories.
- Rivas v. McDonnell, a noteworthy Appellate Division decision involving an interpretation of the recording statute;
- Sky View Parc Purchasers Association, et al. v. FTC Residential Company II, L.P., the largest condominium settlement in New York history;
- Trump SoHo, where Adam Leitman Bailey prevailed in a settlement providing millions of dollars to clients based on fraud claims under the Federal Securities Law:

Mr. Bailey has successfully defended a number of the leading title companies and lenders in the nation, and prevailed in numerous trials and settlements involving commercial and residential building owners and tenants, real estate developers, real estate brokerages, insurance companies and cooperative and condominium boards. In addition, Mr. Bailey has favorably represented a number of tenant and homeowner associations and commercial and residential tenants, garnering for these persons and associations many millions of dollars in compensation and rent abatements. For clients facing landlords who leave buildings in disrepair, Mr. Bailey has an unusually successful track record of getting those residential towers, apartments, and stores repaired and all services restored.

Mr. Bailey has also applied his expertise in closing various real estate deals and commercial leases. He has been named to the Board of Editors for Commercial Leasing Law & Strategy and has a regular real estate column in the New York Law Journal. Bailey's lease drafting skills received national attention when BlumbergExcelsior, the nation's leading form distributor responsible for over 70 percent of the residential leases signed in the United States, tapped Bailey to draft a new set of New York City, State and national residential and office leases for purchase nationwide. BlumbergExcelsior's principal remarked that Bailey's lease drafting skills were "remarkable." While almost all New York property owners utilize his leases for residential purposes, his commercial leasing ideas and strategies are commonly a part of the entire national commercial leasing scene and have been included in "The Insider's Best Commercial Lease Clauses," published by the Vendome Group.

His success as cooperative and condominium general counsel earned Mr. Bailey recognition in "Who's Who in Real Estate" by Habitat Magazine. As an assistant adjunct professor at New York University, Mr. Bailey teaches commercial and residential landlord-tenant law. In 2011, Mr. Bailey took on the role of author to guide first-time home buyers through the purchase process. John Wiley and Sons published his first book, Finding the Uncommon Deal: A Top New York Lawyer Explains How to Buy a Home for the Lowest Possible Price which became a number one New York Times bestseller and is available for purchase worldwide. This past year, Mr. Bailey was elected a Fellow of the American College of Real Estate Lawyers (ACREL) where he serves on the Insurance and Title Insurance committees and the American College of Mortgage Attorneys (ACMA).

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John M. Desiderio has been a practicing attorney in New York City for over forty years. His practice is concentrated in cooperative/condominium representation, real estate litigation, title litigation, mortgage foreclosures, and antitrust and trade regulation. Mr. Desiderio has published articles on issues involving real estate law, antitrust law and condominium and cooperative matters.

Mr. Desiderio received his A.B. degree from Fordham College in 1963, an LL.B. degree from the University of Pennsylvania Law School in 1966, and an LL.M. degree from New York University School of Law in 1969. He served as a Captain in U.S. Army Intelligence from 1966 to 1968.

From 1969 to 1980, Mr. Desiderio was an Assistant New York State Attorney General under Attorneys General Louis Lefkowitz and Robert Abrams, and from 1972 to 1980 he served as Chief of the Attorney General's Anti-Monopolies (now Antitrust) Bureau.

Mr. Desiderio entered private practice in 1981 and represented clients in antitrust, RICO, real estate, and general civil litigation. From 1989 to February 1999, he was a member of the firm of Bass & Ullman, P.C.

He has extensive experience in conducting and defending depositions and in Email: jdesiderio@alblawfirm.com conducting trials and arguing appeals in both New York State and federal courts. In addition to his many court appearances within New York State, Mr. Desiderio has appeared in and argued matters in the federal courts in Atlanta, Birmingham, Chicago, Hartford, Knoxville, Los Angeles, Newark, Philadelphia, San Francisco, and Washington, D.C., and he has appeared in and argued, pro hac vice, at both the trial court and appellate levels in the courts of the State of Illinois.

> Mr. Desiderio's reported cases include Nutritional Health Alliance v. Food and Drug Administration, 318 F3d 92 (2d Cir.2003); Million Gold Realty Co. v. SE&K Corp., 4 AD3d 196, 772 NYS2d 271 (1st Dept. 2004); Anthony Gangi v. Solgar Co., Inc., 267 AD2d 350, 699 NYS2d 922 (2d Dept. 1999); Alleghany Pharmacal Corporation, et al v. Parbel of Florida, Inc., 226 AD2d 104, 640 NYS2d 507 (1st Dept. 1996); Shulton, Inc. v. Optel Corporation, et al, 698 F. Supp. 61 (D.N.J. 1988); Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx, 1985-2 Trade Cas. (CCH) 66,768 (S.D.N.Y. 1985).

> Mr. Desiderio's has published articles on issues involving real estate law, antitrust law, and food and drug law.

> John M. Desiderio is rated by Martindale-Hubbell as "AV Preeminent" signifying the "Highest Possible Rating in Both Legal Ability and Ethical Standards." Mr. Desiderio has been rated "AV Preeminent" by Martindale-Hubbell for over 25 years.

> In 2008, Mr. Desiderio was elected to the Board of Governors of the prestigious Columbus Citizens Foundation, Inc., the leading Italian American charitable foundation in the United States.