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CLIENT ADVISORY

JULY 2022

COURT SUSTAINS SOME CLAIMS, REJECTS OTHERS IN LAWSUIT AGAINST NEIGHBORS AND COOPERATIVE ALLEGING NOISE AND STOMPING

Co-op and condo boards and landlords often receive complaints from residents about excessive noise or vibration caused by the residents of an adjoining apartment. Sometimes a friendly request to keep the noise down, or a stern warning from management, is sufficient to address the problem. In more serious cases, the situation can wind up in court, as in **O'Hara v Board of Directors of Park Avenue & Seventy-Seventh Street Corp., 2022 N.Y. App. Div. LEXIS 3781, 2022 N.Y. Slip Op. 03872 (1st Dep't June 14, 2022).**

The plaintiffs in this action alleged that "unreasonable noise and stomping" by children living in the cooperative apartment above theirs "adversely affected [one of the plaintiffs'] health and created structural cracks in the walls and ceiling of their unit." They further alleged that the Board of Directors failed to investigate and address the noise and structural damage.

The court held that plaintiffs had a potentially valid claim for nuisance against the upstairs neighbors, based on their allegations of unreasonable noise and physical damage. However, the court rejected plaintiffs' claim against the neighbors for breach of their proprietary lease, because nothing in the neighbors' lease indicated that other tenant-shareholders were intended to be third-party beneficiaries.

Plaintiffs also sued the cooperative board for allegedly failing to investigate their noise complaints. The court rejected plaintiffs' claim for breach of fiduciary duty based on this alleged failure, even though plaintiffs alleged they were being treated differently from other shareholders, because plaintiffs did not "allege that, in refusing to investigate, the directors were acting outside their official capacity."

However, plaintiffs were allowed to proceed with a claim that the Cooperative breached plaintiffs' proprietary lease, which requires the Cooperative to "maintain all structural parts of the building, including the apartment's walls and ceiling." The Cooperative sought to rely on an exculpatory provision of the lease, which absolves the Cooperative from responsibility for acts by other shareholders. Rejecting this argument, the court observed that any owner of a multiple dwelling in New York City has a non-delegable duty under the Administrative Code to maintain the building in good repair. This duty applies regardless of who or what caused damage to the structural elements of the building. However, the court agreed with the Cooperative that the same exculpatory provision required dismissal of plaintiffs' claims against the Cooperative predicated upon excessive noise from the upstairs apartment, to which the Administrative Code provision did not apply.

Plaintiffs also asserted claims against the Cooperative for breach of the warranty of habitability and warranty of quiet enjoyment. These claims were dismissed with respect to the noise issue, because "the allegations concerning the noise do not establish that the noise was so excessive that it deprived plaintiffs of the essential functions of a residence." With respect to the property damage issue, though, "the allegations concerning the Co-op defendants' refusal to repair the structural cracks in the ceiling and walls state[d] a claim for breach of the warranty [of habitability], since structural cracks could give rise to a hazardous condition of the building."

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COURT UPHOLDS PLEADING OF CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN DISPUTE BETWEEN NEIGHBORS IN A CO-OP

In another case involving a dispute between occupants of neighboring apartments in a cooperative, an appellate court has held that tenant-shareholders pleaded a legally sufficient claim against their neighbor for the tort of "intentional infliction of emotional distress." **Silverman v. Power Towers Tenants Corp., 2022 N.Y. App. Div. LEXIS 3494, 2022 N.Y. Slip Op. 03581 (1st Dep't June 2, 2022).**

This holding was based on claims alleging "a three-year pattern of conduct" involving "a deliberate, systematic, and malicious campaign of harassment and intimidation" by a neighbor. The neighbor's wrongful conduct included, among other things, "obtaining unauthorized access to [a party's] private Instagram account, accosting her in building common areas and yelling at her, taking photographs of her without permission, and making false noise complaints against her to the co-op." This behavior allegedly "constituted a concerted effort to pressure the co-op to terminate their proprietary lease and have [one of them] evicted." The court concluded that "[t]hese allegations, considered cumulatively, are on a par with those that have been found to satisfy the outrageousness requirement necessary to plead intentional infliction of emotional distress."

The court also held that if these allegations were proven, they could also support a claim for a permanent injunction, because the neighbor "has continued to violate [the] right to quiet and peaceful use of the apartment and that monetary damages would be insufficient to redress the serious and irreparable harm that would flow from the use of [the claimant's] home." However, the court dismissed another claim alleging negligent (as opposed to intentional) infliction of emotional distress, holding that there was no legally sufficient relationship between the parties as required to support this type of claim.

BOARD'S DECISION TO ASSESS UNIT OWNERS, AS AUTHORIZED BY GOVERNING DOCUMENTS, IS PROTECTED BY BUSINESS JUDGMENT RULE

The Board of Managers of a condominium voted to assess all unit owners to fund needed repairs to the building and replenish a capital reserve. The assessment applied to both residential and commercial units. Defendant, which owned four commercial units, did not pay the assessment. The condominium filed common charges liens against these units and moved to foreclose on the liens.

Defendant challenged the assessment arguing that it was inappropriate to impose the same assessment on commercial units as residential units. The court rejected the challenge, finding that "the board had acted within the scope of its authority and was entitled to the protection of the business judgment rule." Significantly, "[t]he condominium's declaration and by-laws authorized the board to make repairs and to replenish the reserve fund, and the board presented evidence that the assessment was necessary to achieve those aims." Moreover, "[th]e board also provided evidence that calculation and apportionment of the assessment was done in a way consistent with the declaration and by-laws, and that both these governing documents allowed the assessment to be levied against the commercial as well as the resident unit owners."

Because the Board's decision to impose the assessment was protected by the business judgment rule, it could only be overturned based on a showing of fraud, self-dealing, or another breach of fiduciary duty. Here, the defendant made no such showing, so the assessment was upheld. **Baxter Street Condominium v. LPS Baxter Holding Co., LLC, 2022 N.Y. App. Div. LEXIS 3388, 2022 N.Y. Slip Op. 03470 (1st Dep't May 31, 2022)**.