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Expert Analysis

Overcoming Limitations of Condo Boards In Dealing With Unruly Residents

By **Bruce A. Cholst**

And **Mary L. Kosmark**

Many residents of co-op and condo buildings know all too well that one troublesome inhabitant can poison the well of communal life. Co-op boards are well-equipped with legal remedies to address the issue of chronic misconduct by tenant-shareholders, their guests or sub-tenants. Condo boards, however, are relatively powerless in this respect. This article introduces a new antidote which under proper circumstances could empower condo boards in their dealings with recalcitrant residents.

Lives necessarily become interdependent when hundreds of people reside under a common roof and share facilities day in and day out in a self-contained building. This social intimacy requires that each individual resident lives within a framework of established rules and regulations. In such a closely knit community, any departure from these social norms by even one resident adversely affects every other resident's quality of life. Such a disruption inevitably upsets the community's equilibrium and results in discord throughout the building.

Co-ops and Condos

Co-op boards, as landlords, have the power to evict obstreperous tenant-shareholders. Virtually every proprietary lease and occupancy agreement authorizes termination of a tenancy and initiation of holdover proceedings on the grounds of illicit activity or violation of the co-op's rules by any occupant. The vast majority of proprietary leases and occupancy agreements also contain a process for termination of the tenancy and eviction of all occupants from their apartment on the ground of chronic "objectionable conduct" by the tenant-shareholder, his guests or sub-tenants, followed by the co-op's cancellation of the tenant-shareholder's stock certificate and re-sale of the stock and lease on his behalf.

Since condominium ownership is a form of fee ownership of property and not a leasehold interest, condo boards are not in a landlord-tenant relationship with their unit owners.[1] Moreover, inasmuch as a condo board lacks even a scintilla of title to or possessory interest in the constituent units of its association, it lacks standing to maintain an ejectment action against a unit owner.[2] Accordingly, condo boards do not have the inherent power to evict unit owners or expel them from the community no matter how egregious their misconduct may be.

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To be sure, condo boards are not completely without legal remedy against problem unit owners. The Condominium Act authorizes maintenance of an injunction action to enforce a condominium's rules against non-compliant unit owners.[3] Moreover, most condominium bylaws authorize imposition of fines against unit owners for violation of house rules. However, as a practical matter each of these is a flawed remedy.

Judges have proven all too reluctant to issue injunctive relief with respect to what they perceive to be petty annoyances, notwithstanding their disruptive impact upon an entire community. Even when injunctive relief is granted, as a practical matter, court orders often do not deter defiant personalities. Moreover, defiant unit owners tend to ignore fines, particularly as there is no immediate consequence for failing to pay such a penalty. The only means of enforcing fines is commencing a plenary collection action or, assuming the condo's bylaw language so permits, filing a lien by virtue of the non-payment and then foreclosing on the lien. Either of these proceedings is prohibitively expensive and protracted. Without a reliably effective enforcement remedy such as eviction, condo boards are ill-equipped to deal with difficult unit owners.

Proposed Antidote

The proposed antidote to this lack of an effective enforcement remedy embraces the concept now in use in the co-op context of expelling "bad apples" from the community and terminating occupancy of their units by reason of their repeated "objectionable conduct," as validated by the Court of Appeals in the classic case of *40 West 67th Street v. Pullman*.[4] The process for terminating a tenancy on the basis of the board's and/or shareholders' conclusion that the tenant-shareholder or occupants of his apartment had engaged in chronic "objectionable conduct" has always been a staple of co-op proprietary leases.

However, this remedy was rarely utilized prior to the *Pullman* decision because conventional wisdom dictated that Real Property Actions and Proceedings Law (RPAPL) Section 711 required a judicial ratification as to the "objectionable" nature of the offending conduct. The *Pullman* Court decreed that, in the absence of bad faith or deviation from the prescribed process, a determination by the board (or shareholders if the lease provision so requires) of objectionable conduct is sufficient in and of itself to satisfy the requirements of RPAPL Section 711.[5]

Thus, courts have sanctioned the notion of banishing discordant residents from a community upon proper good faith adjudication by their peers that their conduct is "objectionable." However, since the principle of lease termination on grounds of objectionable conduct is predicated upon existence of a landlord-tenant relationship, and, as noted, there is no such relationship or other basis for ejecting a problem unit owner, the *Pullman* doctrine cannot be directly applied to a condominium setting. The proposed remedy seeks to borrow from the objectionable conduct eviction concept of expelling problem residents while avoiding the legal constraints presented by the absence of a leasehold interest in condominium ownership.

Basically, the proposal envisions an amendment to condominium bylaws (or insertion of a

BRUCE A. CHOLST *and* MARY L. KOSMARK *are partners at Rosen Livingston & Cholst LLP.* ELLIOT COZ*, an associate at the firm, assisted with the preparation of this article.*

provision in bylaws for newly created condos) compelling a unit owner's sale of his unit(s) to the board of managers or its designee for fair market value as determined by a panel of appraisers (less the aggregate of all liens and judgments of record against the owner, which would be paid by purchaser) upon a finding by super majority vote of both the board and the unit owners that his occupancy or that of his guests or tenants, repeated after written notice, is "objectionable."

Once title to the affected unit(s) is obtained in this fashion, the board or its designee would have standing to maintain an ejectment action to obtain legal possession in the event of the unit owner's refusal to voluntarily vacate. This bylaw provision would be enforceable by injunction, as objectionable conduct constitutes irreparable harm to the community at large. The proposed bylaw amendment language contains an attorney fee provision such that fees and disbursements incurred in connection with such an ejectment action would be recoverable. To the extent the condominium's offering plan requires approval of the sponsor, holders of unsold units or commercial unit owners for bylaw amendments, these groups would be in a position to veto the proposal. Such a veto might be averted by exempting them from the amendment's application.

The proposed amendment language gives the board the option to designate a purchaser of its own choice for the offending unit owner's unit in its place. This feature allows the board to avoid incurring acquisition costs while still exercising control through its choice of a nominee over who actually replaces the objectionable unit owner in the community.

It is submitted that the concept of a forced sale of an objectionable owner's condo unit in this manner would, if embedded in a prospectively applied bylaw amendment, withstand judicial scrutiny. Title companies who have been informally consulted are receptive to this proposal.

As already noted, the principle in general has been blessed by the Court of Appeals. Courts routinely uphold restrictive provisions in co-op and condo governing documents on the theory that purchasers have notice of and voluntarily embrace such constraints when they buy into the building.[6] Since the proposed bylaw amendment would by its terms apply only to subsequent purchasers and would be recorded in the county clerk's office against each unit's tax lot, each such purchaser would take title with notice of the provision.

Application to prospective purchasers only is also necessary to avoid breaching preexisting covenants as to title to the units. Of course, developers sponsoring new condo conversion plans can insert this bylaw provision de novo so that its provisions are binding on all purchasers.

Due Process Implications

Due process considerations were taken into account when formulating the proposal. Under the proposal, the objectionable conduct provision is not triggered unless and until the unit owner has repeated his offense after having received prior written notice of its intolerable nature. A forced conveyance of the unit occurs only after super majorities of both the board of managers and unit owners have determined that his conduct is "objectionable."

The unit owner is afforded an opportunity to attend each meeting with counsel and present evidence on his own behalf. He is also permitted to designate one member of the three-person team of appraisers who will determine fair market value, the other being selected by the board and the third (potential "tie breaker") being jointly appointed by the other appraisers. Appraisal costs (up to $2,000 per panel member) are borne by the board of managers whose choice it was to initiate the process.

The proposed bylaw amendment contemplates the boards being authorized under the unit owner's power of attorney to ministerially effect the unit transfer upon the appraisers' determination of fair market value. Thus, any board adopting this amendment would need to ensure that its standard form unit owner power of attorney contains such authorization, and modify the language on a prospective basis if the current form does not convey such authority.

This remedy is clearly not appropriate for every objectionable conduct situation in every condominium. Obviously, it is a heavy hammer and therefore should not be used to punish trivial offenses. Moreover, there are several cautionary points that every condo board should consider before embracing this measure. First, even if a nominee were located to fund the unit purchase, the legal and appraisal costs entailed in this process could be significant. Second, inasmuch as this is a "cutting edge" proposal, its impact on marketability of units in any condominium that adopts the amendment and lenders' reaction thereto is unclear. However, the prospect of objectionable conduct evictions does not appear to have impacted either the co-op market or lenders' willingness to finance the purchase of co-op units. Finally, enactment and enforcement of this process could prove politically explosive within the community.

Conclusion

Notwithstanding these considerations, the concept of a forced buy back of residential units upon determination that the owner's occupancy is "objectionable" offers condo boards a potent option for addressing serious situations for which they are currently ill equipped. Even if this weapon is not actually utilized, the mere presence of such a sword in its arsenal might well help a condo board deter objectionable conduct.

1. *Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383, 385-87 (1st Dept. 1993); see N.Y. Real Prop. Law §§339-g and 339-o (McKinney 2011).

2. Cf. *Jannace v. Nelson, L.P.*, 256 A.D.2d 385 (2d Dept. 1998) (a plaintiff requires some form of ownership and possessory rights in the subject real property in order to have standing for a cause of action to recover possession of that real property); cf. *Trustees of Sustentation Fund of Refm. Episcopal Church v. Hoosac School*, 192 A.D. 742 (3d Dept., 1920) (a plaintiff initiating the ejectment action must have some form of title or interest in the subject real property in order to maintain the action); cf. *Schick v. Wolf*, 207 A.D. 652 (4th Dept. 1924) (a plaintiff setting forth an ejectment action must show superior title as well as right to possession of the subject property in order to maintain the action); cf. *New York City Economic Dev. Corp. v. Corn Exch., LLC*, 21 Misc.3d 286 (Sup. Ct. N.Y. Co. 2008) (a plaintiff must have legal title or ownership interest with a present or immediate right of possession to have standing for ejectment); cf. 90 N.Y. Jur. 2d Real Property—Possessory Actions §336.

3. N.Y. Real Prop. Law §339-j.

4. 100 N.Y.2d 147 (2003).

5. *Pullman*, 100 N.Y.2d at 154-55.

6. *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 536-37 (1990); *Pullman*, 100 N.Y.2d at 155-58; see *Weisner v. 791 Park Ave. Corp.*, 6 N.Y.2d 426 (1959); *Hoffman v. 345 E. 73 St. Owners Corp.*, 186 A.D.2d 507, 509 (1st Dept. 1992); *Cannon Point N. v. Abeles*, 160 Misc. 2d 30, 32 (1st Dept. 1993); see also *W.O.R.C. Realty Corp. v. Carr*, 177 Misc.2d 148 (Sup. Ct.Suffolk Co., 1998).