

ANDERSON KILL Co-Op, Condo & Real Estate Advisor

Enforcing the Rules: The Case of the Jacuzziectomy

By Alan M. Goldberg and Bruce A. Cholst

When a condo or co-op resident openly defies board policy, the board is faced with a predicament: Does it stand down to avoid controversy? Or litigate to preserve the integrity of its regulations? Our cooperative board client, who requested anonymity for this article, chose to defend the board's building ban against Jacuzzis in the face of a shareholder's direct challenge in order to set a precedent for future compliance.

In the case, which was adjudicated in Nassau County Supreme Court, Anderson Kill P.C. shareholder Bruce A. Cholst and Alan M. Goldberg who is of counsel to the firm successfully represented the co-op in an action for declaratory judgment, a permanent injunction, and money damages for a breach of fiduciary duty in connection with a tenant-shareholder's unauthorized apartment renovation. The

tenant-shareholder in question — who was also a board member — initiated his massive apartment renovation without any prior discussion, much less submission of plans to the board or management. When management became aware of his unauthorized construction, it requested plans. The plans submitted by the tenant-shareholder omitted any reference to a hydrotherapy tub/Jacuzzi. After the Jacuzzi was fully installed, the tenant-shareholder advised management and his colleagues on the board of its existence and claimed to have “inadvertently” left off mention of the Jacuzzi in the plans he submitted.

The board thereafter approved the tenant-shareholder's plans with the specific exception of the Jacuzzi and demanded its immediate removal. The board then enacted a new house rule generally banning installation of Jacuzzis throughout the community.

Alan M. Goldberg is an attorney in Anderson Kill's New York office and his practice focuses primarily on cooperative and condominium litigation and corporate governance, commercial litigation and statutory discrimination litigation. Mr. Goldberg handles all stages of litigation, including mediation, arbitration, trial and appeal.

(212) 278-1082 | agoldberg@andersonkill.com

Bruce A. Cholst is a shareholder in Anderson Kill's New York office concentrating his practice in real estate, litigation and cooperative and condominium law. Mr. Cholst represents cooperative and condominium clients in complex sponsor defect and sponsor arrears litigation, shareholder controversies, commercial and residential nonpayment actions, foreclosure suits, vendor claims and board election disputes. He also counsels clients on corporate and governance issues and negotiates their commercial leases and management contracts.

(212) 278-1086 | bcholst@andersonkill.com

The Board Commences Suit

Following the tenant-shareholder's adamant refusal to dismantle the Jacuzzi, the board commenced suit both on the basis of unapproved installation and on the continuing violation of the newly enacted house rule. Its claim for breach of fiduciary duty was predicated on the bad faith nature of the tenant-shareholder's conduct in first concealing the Jacuzzi, and then flouting the board's directive to remove the offending appliance, particularly in view of his status as a board member who should have known better.

The Tenant-Shareholder's Counterclaims

The tenant-shareholder responded to this suit by counterclaiming against the board, and by also suing individual board members and the co-op's managing agent, engineering firm and architect (both of whom recommended against approval of the Jacuzzi). He asserted claims for fraud, breach of fiduciary duty, and abuse of process.

The tenant-shareholder's proprietary lease provided that the co-op could not "unreasonably" withhold consent or delay in responding to his proposed apartment alterations. Our

firm argued that the board's refusal to permit use of the Jacuzzi, as well as its community-wide ban on Jacuzzis, were not "unreasonable" in light of the enhanced risk of impact on neighboring shareholders that the use of Jacuzzis presents. The court agreed, embracing testimony by the co-op's engineering firm and architect to the effect that an operating Jacuzzi raises the specter of water damage, structural damage, and enhanced noise levels for neighboring residents.

In addition to granting our motion for summary judgment and dismissing the tenant-shareholder's broad counterclaims, the court directed the tenant-shareholder to remove the Jacuzzi, set a hearing date for determination of legal fees and monetary damages due the co-op from the tenant-shareholder by reason of breach of fiduciary duty. The court accepted our argument that board members are held to a high standard of good faith in their dealings with fellow board members and in their compliance with building rules. Prior to the hearing, the co-op reached a settlement whereby he paid a large portion of the co-op's attorneys' fees and removed the Jacuzzi. This is believed to be a novel ruling for board members' liability for violating building rules. ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.

The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

©2016 Anderson Kill P.C.

New York, NY • Philadelphia, PA • Stamford, CT • Washington, DC • Newark, NJ • Los Angeles, CA