

ANDERSON KILL CO-OP, CONDO & REAL ESTATE ADVISOR

Secondhand Smoke Liability after Connaught: Eased, but Not Naught

By Karol S. Robinson and Andrew B. Freedland

This spring, cooperative and condominium boards in the New York area received *some* measure of relief on the issue of liability for secondhand smoke infiltration within their buildings. In *Reinhard v. Connaught Tower Corp.* the Appellate Division of the New York Supreme Court, First Department unanimously reversed the lower court and vacated a 100% six-year maintenance abatement of \$120,944, plus attorney's fees, to the plaintiff shareholder, Susan Reinhard. Ms. Reinhard had sued her cooperative, Connaught Tower Corp., for, among other things, a complete maintenance abatement based upon her claim that infiltration of secondhand smoke into her apartment had rendered it uninhabitable. The lower court abatement was predicated on Ms. Reinhard's constructive eviction, the cooperative's breach of her warranty of habitability, and the cooperative's total breach of her lease.

In reversing the lower court decision, the Appellate Division found that the shareholder "failed to show that the odor of cigarettes ren-

dered [her] apartment uninhabitable, breached the proprietary lease, or caused plaintiff to be constructively evicted." The court also found that there was insufficient evidence showing that the smoke was present on a consistent basis or "sufficiently pervasive as to materially affect the health and safety of occupants" to find the cooperative liable.

While this is good news for cooperatives and condominiums, boards must continue to be mindful of the need to address secondhand smoke complaints. In overturning the lower court, the Appellate Division noted that the "finding of liability against Connaught, ...was not based on a fair interpretation of the evidence." So, under the appeals court decision, a case could still be maintained against a cooperative or condominium if supported by solid, reasonably weighed evidence. Boards must still be vigilant and must promptly respond to complaints regarding secondhand smoke conditions.

Karol S. Robinson is a shareholder in the New York office of Anderson Kill. Ms. Robinson practices cooperative, condominium, and real estate law with a focus on affordable housing, nonprofit organizations and general transactional work. Ms. Robinson has become known for her integrity and hands-on, direct working relationships with directors and agents for many of the firm's cooperative and condominium housing and not-for-profit clients, advising on day-to-day operational and corporate governance matters. (212) 278-1247 | ksrobinson@andersonkill.com

Andrew B. Freedland is a shareholder in Anderson Kill's New York office. Mr. Freedland concentrates his practice in real estate and cooperative and condominium law. Mr. Freedland's practice focuses on the representation and counseling of purchasers and sellers of commercial and residential real estate, lenders, condominiums, cooperatives and sponsors/developers. He is also counsel to numerous cooperative and condominium buildings throughout New York City. (212) 278-1083 | afreedland@andersonkill.com

What Steps Can a Board Take To Limit Its Liability?

As required by recently implemented city law (discussed below), boards must adopt a smoking policy, and should consider implementing a policy that either strictly regulates or bans smoking in their buildings. Boards may want to engage a consultant who can advise on ways to limit the flow of secondhand smoke between apartments. Boards should also educate management, staff, security and residents with respect to the legal requirements as well as the dangers and potential liability stemming from secondhand smoke infiltration. It's also advised to enlist the assistance of residents who are willing to report secondhand smoke odors and instruct management to maintain detailed logbooks of reported complaints.

If a resident does not comply with a board's established policy, the board must be willing to enforce the policy through a legal action. As evidenced by the ruling in a recent case, a board can successfully evict a shareholder for breach of an established smoking policy if the claim of breach is supported by sufficient evidence. In *175 Main Avenue Owners, Inc. v. Fitzgerald, et al.*, the cooperative successfully evicted respondents Fitzgerald and Shookster for violation of a proprietary lease provision prohibiting smoking in its building. Although there was no first-hand witness testimony, the board's case was supported by the testimony of 11 witnesses, including neighbors and an indoor environmental consultant, who testified as an expert witness regarding the results of "swipe tests" performed in and around the residents' unit. The cooperative's property manager also testified and presented a logbook of documented complaints from neighbors when smoke was smelled coming from the respondents' apartment. The court, noting that the testimony of each of the cooperative's witnesses was credible and not rebutted by the respondents, made a factual finding that the cooperative had established "by a fair preponderance of the evidence" that the respondents were in default of the proprietary lease provision prohibiting smoking in the cooperative.

It should be noted that in a recent decision, the court in the *175 Main Avenue Owners* case

ruled that the evicted shareholders must pay \$56,395 of the co-op's legal fees.

Recent Legislation in New York City

As the cases and legislation show, smoking remains a hot-button issue in New York City. In response, the city began trying to curtail the impact of secondhand smoke in 2002 when the Smoke-Free Air Act was adopted. That law banned smoking in common indoor areas of buildings with 10 or more dwelling units. Individual dwelling units and outdoor areas remained the only refuge for smokers.

Fast forward to 2017. The New York City Council adopted Local Law 147 requiring residential buildings within the city of New York to adopt a smoking policy for their respective buildings. Additionally, the city council adopted Local Law 141 extending the ban on smoking in common indoor areas to all residential buildings with less than 10 units.

Local Law 147 differs from prior legislation in that it does not prescribe what the smoking policy of a building must be, but instead requires that each building adopt a policy and notify all building residents of the policy. The policy must address all indoor and outdoor areas of the premises. Having said that, the rationale behind this law is to "encourage more buildings to adopt smoke-free policies," as Dr. Mary Bassett, Commissioner of the Department of Health and Hygiene, testified when the legislation was pending. This law is going to advance the trend of making buildings smoke free — and accelerate it — as buildings are required to adopt smoking policies by August 27, 2018. Residential landlords and cooperative and condominium boards have just a few short months to decide if they will simply adopt a policy that maintains the status quo or take the drastic step of banning smoking within individual dwelling units.

Cooperatives and condominiums that decide to maintain the status quo will be able to proceed with adopting a smoking policy and incorporating the policy into the building's house rules. The policy must be provided to all tenants or posted in a prominent location within the building. Additionally, the policy must be disclosed annually and upon any material change to the residents of the building.

However, cooperatives and condominiums that decide to ban smoking in all areas of their buildings, including individual dwelling units, will most likely need to amend the terms of their proprietary leases (cooperatives) or bylaws (condominiums). Such amendments require affirmative votes of a supermajority of the shareholders or unit owners. Amendments of this type frequently take a long time to garner the appropriate votes, so boards may want to start discussing such amendments with their constituents immediately.

Local Law 147 does excuse several groups of residents from the smoking policy. First, it will not affect a tenant during the term of his or her existing lease unless otherwise provided in the lease. This exception seems to be geared toward residential tenants renting un-

der one- or two-year leases; however, it does not exclude cooperative proprietary leases that frequently have terms of 30 or more years. The city council may have to revise this provision to clarify its applicability, as it's doubtful that such a consequence was intended. Additionally, rent-stabilized and rent-controlled tenants and their family members succeeding to their rights are exempt from complying with the smoking policy. Cooperatives and condominiums with rent-stabilized or rent-controlled tenants should take notice of this exemption.

It's too early to see how buildings will respond to Local Law 147. But it's only a matter of time before people start to consider smoking policies in determining where to buy apartments. ▲

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, 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.

© 2017 Anderson Kill P.C.

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