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## COOPERATIVES AND CONDOMINIUMS

BY RICHARD SIEGLER AND EVA TALEL

### *Non-Residential Occupancy*

**A** PROBLEM FIRST addressed in this column in 1986<sup>1</sup> and which continues to vex boards and managers of co-op and condominium apartment buildings is the non-residential use of apartments. The proprietary lease in a co-op, and the bylaws in a condominium, generally limit occupancies to residential uses. Where an apartment is used for a non-residential purpose, the quiet enjoyment of other owners may be impaired. Further, building traffic may increase, creating security issues and heightening the board's exposure to liability for acts of the invitees of the non-residential users.

This column examines recent case law — much of which arises in the landlord-tenant context without co-ops actually being involved. The cases are instructive as to what boards can do to halt non-residential uses and suggests due diligence steps that boards can take to ensure that such uses are not commenced without, or do not exceed the scope of, board consent. And, if commenced without such board consent, that such uses are promptly halted.

#### Board Remedies

A co-op board's ultimate enforcement tool for non-residential apartment use is termination of the shareholder's proprietary lease. In *Sirianni v. Rafaloff*,<sup>2</sup> the lessees operated a business out of their apartment. After receiving complaints from other shareholders, the board inspected the apartment, confirmed the business use and issued a notice to cure. The shareholders failed to discontinue the business use and the co-op commenced



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a proceeding to terminate the lease. Notwithstanding the shareholders' racial discrimination claims, the Appellate Division, Second Department affirmed the order directing summary termination of the tenancy, holding that the operation of a business was a valid reason for terminating a tenancy, and dismissed the breach of fiduciary duty claim against the board under the business judgment rule. A condominium board would seek injunctive relief to restrain the unit owner from the impermissible occupancy.<sup>3</sup> Therefore, if a board can demonstrate that the proprietary lease or condominium by-laws have been violated by the non-residential use of an apartment, the shareholder's tenancy may be terminated and the condominium owner enjoined from such use.

#### Waiver

However, a board's enforcement rights may be lost if they are not vigilantly pursued. Notwithstanding non-waiver and merger clauses in proprietary leases or condominium by-laws, a board that consents to or is aware of and acquiesces in a nonresidential use may lose the ability to terminate the offending co-op tenancy or enjoin the unit owner's prohibited use. In *Simon & Son Upholstery Inc. v. 601 West Associates LLC*,<sup>4</sup> the tenant's lease with the landlord's predecessor permitted the premises to be used for manufacturing furniture and provided for elevator service to the premises during normal business hours. Subsequently, the tenant began using the apartment as a photo studio. Although no

express consent to this use was given, the predecessor landlord: accepted payments from the studio for after-hours elevator use; provided parking for the studio; approved renovations and used the premises in a sales brochure. When the new landlord sought to curtail after-hours elevator use, the Appellate Division, First Department found for the tenant. Relying on the course of dealing between the parties, the court held that the predecessor landlord was fully apprised and involved in the use of the premises as a studio and the new landlord was aware of the studio use when it purchased the premises. Therefore, the "reasonable expectations of both parties under the original lease were supplanted by subsequent action."<sup>5</sup> The tenant was, however, proscribed from using the premises for private parties, since consent to a de facto catering hall use was never given by either landlord, either explicitly or implicitly.

However, in *Jeppaul Garage Corp. v. Presbyterian Hospital*,<sup>6</sup> where the landlord accepted late rental payments from the tenant and later refused to permit the tenant to renew the lease because the tenant had violated its terms by failing to pay rent timely, the Court of Appeals found no waiver. The lease contained a clear non-waiver clause and acceptance of late rent payments was not inconsistent with a refusal to renew a lease. And, in *Sirianni*<sup>7</sup> — where the tenants' nonresidential use had been ongoing since 1980 but was not brought to the board's attention until 1997 — the court did not discuss and apparently did not consider waiver to be an issue since the board took immediate action to terminate the lease upon learning of the business use.<sup>8</sup>

Taken together, *Simon & Son*, *Jeppaul* and *Sirianni* teach that mere acceptance of rent or maintenance payments from a tenant or unit owner making nonresidential use of an apartment should not defeat a board's right to terminate the tenancy or halt the use.<sup>9</sup> However, when a board is aware of, acquiesces or is actively involved in and aids the non-residential use, the right to halt the use may be defeated, notwithstanding a non-waiver clause

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in the lease. These holdings also suggest that a board need not act as a "police officer," or conduct inspections to ensure that apartment use is proper. However, boards must be responsive and vigilant when complaints of nonresidential use are made and be careful not to get involved in or be permissive of a tenant's nonresidential uses.

## Consent

When a co-op consents to a nonresidential use, that consent will be enforced. In *Dinicu v. Groff*,<sup>10</sup> the co-op refused to execute an application for an amended certificate of occupancy to reflect the plaintiff's joint residential and commercial use of the premises, although required to do so by the proprietary lease. As a result, there was a technical defect in the commercial occupancy of the premises. New York City Department of Buildings violations were issued and plaintiff was forced to vacate the premises and relocate, at great financial cost. The Appellate Division, First Department, held that the co-op, having breached its contract to execute the application and legalize plaintiff's commercial occupancy, was liable for damages for the tenant's inability to use the co-op for commercial purposes. The court rejected the co-op's assertion of the business judgment rule as a defense, holding that the business judgment rule is not a defense to a breach of contract claim.<sup>11</sup>

In *Schultz v. 400 Coop. Corp.*,<sup>12</sup> the co-op board consented to the shareholders' use of the premises as a residence instead of a professional unit, provided that an amended certificate of occupancy was obtained at the shareholders' sole cost and expense. The shareholders changed the use of the premises and then demanded that the co-op reduce their monthly maintenance charges to reflect the residential rather than commercial use by reducing the shares allocated to their unit. The Appellate Division, First Department, rejected the shareholders' claim, holding that the co-op's consent was limited to permitting a change of use; that consent did not state or suggest that a change in plaintiffs' share allocation would accompany a change in use.

*Dinicu* and *Schultz* establish that a co-op's consent to a use, once given, will not be permitted to be withdrawn with impunity. The business judgment rule will not protect a board from liability for breach of its promised consent. However, so long as the terms of a board's consent are clear, courts will not enlarge the scope of that board's consent.

## Compliance With Laws

Non-residential use of an apartment may violate the zoning regulations applicable to the building. For example, the applicable zon-

ing may limit occupancies to only residential or may permit non-residential uses only on ground floor space. Proprietary leases and condominium by-laws, either explicitly or implicitly, require that apartment owners comply with all applicable local laws (which would include zoning) with respect to the use of an apartment. New York City enforcement of zoning regulations is usually a matter for the Department of Buildings, which responds to complaints and will inspect and issue violations against premises found to be in violation of zoning regulations. Indeed, in *Dinicu v. Groff*,<sup>13</sup> the procuring cause for plaintiff's relocation from the premises was zoning violations issued by the Department of Buildings based on complaints of neighboring shareholders.

Zoning violations may also form the basis for the termination of a tenancy for non-residential use or, in the case of a condominium, enjoining the unpermitted use.<sup>14</sup> The co-op or condominium should be treated as an "aggrieved person" with standing to seek judicial relief for zoning violations because it is adversely affected by and has sustained special damage — different from that sustained by the community in general — as a result of a use that violates the zoning resolution.<sup>15</sup>

However, a board's right to terminate a tenancy or enjoin a use based on zoning violations may be waived by a board's conduct. Where a board knows of or closes its eyes to an illegal occupancy, it may be precluded from terminating the tenancy. In *111 on 11 Realty Corp. v. Norton*,<sup>16</sup> the landlord leased premises with the understanding, knowledge and consent that the tenant would convert the premises into residential units, even though the lease was a commercial one that prohibited residential occupancy and the zoning resolution limited occupancy to commercial use. When the landlord sought, among other things, to evict the tenant for its residential use in violation of the zoning resolution, the court held that by the landlord's knowledge of and consent to the residential occupancy, he had waived his right to object to the use of the premises in violation of the lease clause or the zoning resolution.<sup>17</sup>

The proprietary lease, condominium bylaws and the law give boards powerful weapons with which to halt non-residential uses of apartments. However, those rights may be lost by those boards who are not vigilant in objecting to the use and pursuing that legal remedy. First, documentation should be clear as to permitted use, changes in use and who is financially responsible for any associated costs. Boards act at their peril if they turn a blind eye to an unpermitted use and may well lose the right to object to it. Shareholder, unit owner or employee reports of unpermitted uses or uses that exceed the scope of board consent should be investigated and rectified promptly,

by appropriate legal action under the proprietary lease (notice to cure) or condominium by-laws (injunctive relief). If the activity is not discontinued, a court proceeding should be instituted promptly. Use it or lose it is the guiding principle for halting unconsented to non-residential uses.

(1) See generally, Siegler, Richard, "Non-residential Use of Co-op Apartments," NYLJ, June 4, 1986, p. 1, col. 1.

(2) 284 AD2d 447 (2nd Dept. 2001).

(3) N.Y. Real Prop. Law §339-k (McKinney 1989).

(4) 268 AD2d 359 (1st Dept. 2000).

(5) *Id.*

(6) 61 NY2d 442, 462 NE2d 1176 (1984).

(7) *Id.* at note 3.

(8) See also *Rossi v. Simms*, 119 AD2d 137 (1st Dept. 1986) holding that a concession enjoyed by a prior tenant cannot be deemed a waiver of a co-op's right to seek a professional use surcharge from a new tenant, when the lease expressly negates any such waiver.

(9) See also *Rasic v. Roberts*, 277 AD2d 120 (1st Dept. 2000) (holding that by accepting payments from an individual whom the co-op believed was residing in the apartment illegally, the co-op did not waive the right to enforce the lease's occupancy requirements and seek the occupant's eviction).

(10) 257 AD2d 218 (1st Dept. 1999).

(11) See also 625 *West End, Inc. v. Howard*, 2001 WL 1682615, 2001 NY Slip Op 40496U (1st Dept. 2001) (holding that a landlord's eviction claim against a tenant for using an apartment for residential use when the certificate of occupancy only permitted a doctor's office was premature because even if there were a violation the landlord would be required to demonstrate that the certificate of occupancy was incapable of being amended so as to legalize the residential occupancy).

(12) 292 AD2d 16 (1st Dept. 2002).

(13) *Id.* at note 12.

(14) The Appellate Division, First Department, has also ruled that a co-op may seek to enjoin shareholder conduct that violates the applicable New York City Building Code provisions, regardless of whether the Department of Buildings has made a determination to that effect. In *1050 Tenants Corp. v. Lapidus*, 289 AD2d 145 (1st Dept. 2001) the lessees installed an air conditioning unit in their co-op apartment which repeatedly leaked into the apartment below and was in violation of the building code. The court relied on the "compliance with laws" provision of the lease and held that the co-op's action for an injunction requiring removal of the unit was well-founded, notwithstanding that the agency charged with enforcing the building code (the Department of Buildings) had found no violation.

(15) See *Matter of Dairylea Coop. v. Walkley*, 38 NY2d 6, 11, 474 N.Y.S. 2d 272 (1975); *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 742, 395 N.Y.S. 2d 428 (1977); *Matter of Douglaston Civic Assn. v. Galvin*, 36 N.Y.2d 1, 5, 364 N.Y.S. 2d 830 (1974).

(16) *Id.* at, 189 Misc2d 389,396, 732 N.Y.S. 2d 840 (N.Y. City Civ. Ct. 2001).

(17) See also *Sol Apfel, Inc. v. Kocher*, 272 AD 758, 70 N.Y.S.2d 138 (1st Dept. 1947).

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