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COOPERATIVES AND CONDOMINIUMS

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Dealing With Bedbugs

Bedbugs are making a major resurgence in the United States. Through June 19, 2008, 8,840 bedbug complaints were filed with the New York City Department of Housing Preservation and Development (HPD) by rental tenants, compared with 6,889 in all of 2007, an increase estimated at 28.3 percent. HPD issued 2,757 bedbug violations in 2008, up from 2,008 in 2007, or an estimated increase of 37.3 percent.¹ Managers of co-op and condominium buildings report similar trends.²

After World War II, liberal use of the pesticide DDT nearly eradicated bedbugs in the United States. Their resurgence is attributed to increased international travel; restrictions on the use of DDT; and the difficulty in eradicating bedbugs. They are minuscule, hide in cracks, crevices and inside mattresses and pillows and go easily undetected. While there is a common misconception that bedbugs are attracted by unsanitary conditions, their sole objective is finding a feeding source—human blood. Although bedbug bites do not spread disease and are not fatal, they leave itchy red lesions on the skin and their nocturnal feeding habits are traumatic for victims.³

Bedbugs present a challenge for co-op and condominium boards: is the apartment owner or the board responsible for eradicating an infestation? This column addresses this novel issue and discusses cases in New York and other states dealing with damage to persons and property from bedbug infestations. This column also provides guidance to boards and managers in dealing with bedbug infestations in co-op and condominium buildings.

Proprietary Lease

The touchstone for board and shareholder responsibility in a co-op is the proprietary lease. Generally, tenant-shareholders are responsible for keeping the apartment interior in good repair while the co-op/lessor is responsible for keeping the building in good repair. Therefore, an apartment



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owner should be responsible for remediating a bedbug infestation within the apartment.

However, where multiple apartments are infested and it is difficult to identify the source, the infestation may become a board responsibility. Further, even where only a single apartment is infested, the protections afforded residential tenants by the warranty of habitability may obligate the board to remediate, unless the shareholder's personal property is demonstrably the source of infestation.

Warranty of Habitability

The warranty of habitability, codified in New York Real Property Law (RPL) §235-b, implies a nonwaivable warranty in every residential lease that the apartment is fit for human habitation and free of dangerous conditions detrimental to the health, life, or safety of its occupants.⁴ However, the warranty applies only to rental and co-op apartments—occupancies governed by a lease or lease equivalent—not condominiums.⁵ Co-op apartment ownership includes a proprietary lease; condominium unit owners receive a deed.

New York courts have granted tenants rent abatements for breach of the warranty for unremediated roach and mice infestations.⁶ Although we have found no New York case law addressing the warranty and bedbugs in co-op apartments, courts have held landlords responsible for bedbug infestations in rental apartments and hotels.

In one of New York's first bedbug cases, *Streep v. Simpson*,⁷ the landlord sued to recover rent from a tenant who abandoned an apartment, claiming a bedbug infestation. The landlord had hired an exterminator to remedy an infestation in the apartment below, but the infestation spread to defendant's apartment. Although *Streep* was decided before the warranty of habitability was codified, the court held the tenant was not obligated

to pay rent because the infestation constituted a constructive eviction.

In a 2004 case involving bedbugs and the warranty of habitability, *Ludlow Properties, LLC v. Young*,⁸ the court awarded a 45 percent rent abatement, holding that bedbugs are markedly worse than mice and roach infestations and constitute an intolerable condition, notwithstanding the landlord's effort to exterminate them. In *Jefferson House Associates LLC v. Boyle*,⁹ the court found a breach of the warranty and granted a rent abatement equal to the unpaid rent where a bedbug infestation plagued a rental tenant for almost two years.

Because courts have applied the warranty of habitability to rental tenants with bedbug infestations, it is likely they would reach the same result in co-op cases. Further, attorney's fees are recoverable where the judgment for breach of the warranty is substantially favorable to a tenant and, conversely, a co-op can recover fees if the warranty claim is denied or ruled insubstantial.¹⁰

However, courts should not find a breach of the warranty if the bedbug infestation is limited to one apartment and the tenant or shareholder brought the bedbugs into the apartment. RPL §235-b(1)¹¹ provides that if the condition at issue is caused by the tenant, the warranty is not breached. Therefore, if a co-op can dispositively show that the infestation originated from the shareholder's actions, no liability should be imposed.

Punitive Damages

In a 2008 case,¹² a mother and daughter sued for personal injuries sustained when they were bitten by bedbugs in a New York City hotel. Plaintiffs did not argue that the warranty of habitability was violated, but instead alleged negligence. The court denied defendant hotel's motion to dismiss the complaint, finding that material issues of fact regarding the hotel's constructive notice of bedbug infestation in other hotel rooms precluded a summary determination. However, the court summarily dismissed plaintiffs' punitive damage claim, holding that defendant's actions did not rise to the level of recklessness because it had contracted with a pest control specialist to remediate all vermin.

However, in a 2003 Illinois case, *Mathias v. Accor Economy Lodging Inc.*,¹³ a federal appellate court upheld a jury verdict against a hotel for \$5,000 in compensatory and \$186,000 in punitive damages. The court held the hotel was grossly negligent in repeatedly failing to address the known presence of bedbugs, as a result of which plaintiffs sustained personal injury.

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Condominiums

That the warranty of habitability does not apply to condominiums should not preclude unit owners from obtaining relief for bedbug infestation. The New York City Housing Maintenance Code (HMC) sets minimum standards for health and safety in residences and provides that “[w]hen any premises is subject to infestation by rodents or insects... the owner or occupant in control shall apply continuous eradication methods.”¹⁴ In *Gazdo Properties Corp. v. Lava et al.*,¹⁵ the court held that HMC violations must be corrected by the unit owner, not the board of managers. However, in *Smith v. Parkchester North Condominium*,¹⁶ a unit owner whose apartment had water leaks sued the condominium for violating the HMC. The court held that because the leaks entered the unit through common elements, remediating the leak was the condominium’s responsibility. Further, where a board violates its bylaw repair obligations and its actions are deemed so egregious that they may not be protected by the business judgment rule, the condominium can incur liability for failing to remediate.¹⁷

Like a co-op building, if multiple condominium units are infested or the infestation originates in a common element, the board should be responsible for eradication. However, unlike a co-op building, if the infestation is limited to a single condominium unit, eradication is the responsibility of the unit owner because the warranty of habitability imposes no duty on the board of managers to remediate.

Nonetheless, the modern practice is for condominium buildings to take responsibility for extermination of infestations, and with good reason. First, if unit owners are responsible for extermination, they will likely shop around and each may use a different extermination service; this may result in different remediation outcomes. Further, inappropriate extermination techniques, such as using a so-called rodent bomb, can spread infestation to other units in the building.¹⁸ In addition, a board may wish to arrange for extermination services to maintain the building’s reputation. Prospective purchasers may be discouraged from purchasing in a building where bedbug and rodent infestations are permitted to spread among units because centralized board oversight is absent. Lastly, boards may wish to assume the cost of extermination to avoid the potentially greater cost of litigation with impacted unit owners.

Disclosure

A co-op or condominium apartment purchaser likely wishes to know of prior bedbug infestation, but does the seller have an obligation to disclose such information? Under New York’s Property Condition Disclosure Act,¹⁹ a seller of residential real property must disclose certain information, including prior insect or pest infestation, before signing a contract of sale. However, this law does not apply to co-op or condominium apartments. Instead, the common-law doctrine of caveat emptor applies, which does not place any affirmative obligation on the seller to disclose prior infestations. However, “if a prospective buyer asks a specific question about whether the apartment has had bedbugs, the seller has an obligation to answer honestly.”²⁰ If the broker knows of the infestation, the broker has an affirmative obligation to tell the prospective purchaser; however, the seller does not have a duty to tell the broker of a prior infestation.

Eradication and Prevention

Boards should take precautions to prevent bedbug infestations. First, occupants should be informed to immediately report a bedbug sighting to the resident manager and managing agent. Unlike other pests, a bedbug problem explodes exponentially if it is not dealt with immediately and bedbugs can quickly spread from one apartment to another. Further, occupants should be advised that encasements to protect mattresses and box springs from bedbug infestations are available which retain the mattress’ comfort but keep bedbugs out.²¹ Occupants should also be discouraged from purchasing used mattresses, box springs and furniture.

Once an infestation has occurred, there are several eradication methods that may be preferable to conventional pesticide treatments, which may be ineffective. The key to a successful outcome is using an exterminator experienced in bedbug eradication techniques. One of the newest treatments, Cryonite, is advertised as a “green” solution “that’s safe for people with sensitive skin, allergies, asthma, medical conditions, babies, young children, the elderly, even pets.”²² Cryonite uses pressurized carbon dioxide vapor, which enters cracks, crevices and the like and exterminates bedbugs by freezing their fluid, killing them instantly. Another treatment considered effective involves heating and maintaining a temperature of at least one hundred forty degrees in the affected room or apartment for two hours.

Although there is no direct New York case law on the subject, it is probable that a co-op board is responsible for eradicating a bedbug infestation even if it is limited to a single apartment, provided that the source of the infestation is not the owner’s personal property.

Conclusion

Bedbugs are not life threatening; however, courts consider them an intolerable condition. In addition to the nocturnal anxiety and bites they inflict, eradicating bedbugs can be difficult. Although there is no direct New York case law on the subject, it is probable that a co-op board is responsible for eradicating a bedbug infestation even if it is limited to a single apartment, provided that the source of the infestation is not the owner’s personal property. Infestation of multiple apartments will likely trigger a co-op and condominium board’s duty to eradicate the problem. In a condominium building, if a single-unit infestation spreads from building common elements, the board is likely responsible to eradicate the problem. Boards and managers should make serious efforts to educate building occupants about prevention of bedbug infestations and to report the problem to building management as soon as it is discovered; managers should engage experienced extermination professionals as soon as they have notice of a problem. Failure to address bedbug infestations can expose boards to liability

for damages and attorney’s fees and repeated and continuous failures to address infestations may warrant punitive damage awards. Bedbugs can affect buildings regardless of the wealth or prestige of its occupants. It is important for boards to act expeditiously because bedbug infestations can escalate quickly, making eradication more difficult, expensive and disruptive to the co-op and condominium community.



1. “Bed Bugs Biology and Management,” Harvard School of Public Health available at <http://www.hsph.harvard.edu/bedbugs/>; E.B. Solomont, “Bedbugs Emerge as New Area of Housing Law,” *The New York Sun*, Sept. 26, 2008.

2. Sewell Chan, “Everything You Need to Know About Bedbugs but Were Afraid to Ask,” *N.Y. Times*, Oct. 15, 2006. See also Douglas Stern, “A Serious Problem for Boards and Homeowners,” *The Cooperator: The Co-op & Condo Monthly*, April 2008.

3. Chan, *supra*. See also Andrew Jacobs, “Just Try to Sleep Tight. The Bedbugs Are Back,” *N.Y. Times*, Nov. 27, 2005.

4. RPL §235-b provides, in part:

(1) In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

(2) Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

5. *Frisch v. Bellmarc Management Inc.*, 190 AD2d 383 (1st Dept. 1993); *Accord, Linden v. Lloyd’s Planning Service Inc.*, 299 AD2d 217 (1st Dept. 2002).

6. Richard Stiegler and Eva Talel, “The Warranty of Habitability, 2006,” *NYLJ* May 3, 2006, p. 3, col. 1. See also, *Kennart Realty v. Alhalabi*, *NYLJ*, Dec. 19, 1994 at p. 32, col.1 (City Ct. of Yonkers, Westchester Co.) (persistent rat infestation warranted a 100 percent rent abatement); *Northwood Village v. Curet*, *NYLJ*, Nov. 27, 1998 at p. 1, col.1 (2nd Jud. Dept. Suffolk Co.) (100 percent rent abatement for landlord’s failure, inter alia, to cure vermin and rodent infestation).

7. 80 Misc 666. (N.Y. Supp. App. Term 1913).

8. 4 Misc3d 515 (Civ. Ct. N.Y. Co. 2004).

9. 6 Misc3d 1029 (N.Y. Just. Ct. 2005).

10. Richard Stiegler and Eva Talel, “Another Look at the Warranty of Habitability,” *NYLJ* March 3, 2004, p. 3, col. 1.

11. *Supra*, note 4.

12. *Grogan v. Gamber Corp.*, 19 Misc3d 798 (N.Y. Sup. Ct. 2008).

13. 347 F.3d 672 (7th Cir. 2003). See also, Richard Stiegler and Eva Talel, “Another Look at the Warranty of Habitability,” *supra* note 10; *Minjak Co. v. Randolph*, 140 AD2d 245 (1st Dept. 1988) (sustaining a punitive damage award where landlord of rental building displayed a wanton disregard for the safety of others in performing stair demolition: steps were removed and no warning sign posted); *Schimmel v. Ritz Tower Inc.*, *NYLJ*, Feb. 9, 2000, at p. 28, col.6 (Sup. Ct. N.Y. Co.), appeals withdrawn, 274 AD2d 979 (1st Dept. 2000) (It is important to note that while the court denied the motion to dismiss the plaintiff’s punitive damage count, the court also held that the co-op could renew its motion to dismiss that count at trial, if no supporting evidence was presented.)

14. Administrative Code §§27-2003 and 27-2018(b).

15. 149 Misc2d 828 (Civ. Ct. 1991).

16. 163 Misc2d 66 (Civ. Ct. 1994).

17. See *Residential Board of Managers of Century Condominium v. Berman* 213 AD2d 206 (1st Dept. 1995) See also, Stiegler and Talel, *supra* note 10.

18. Jacobs, *supra* note 3.

19. RPL §465.

20. Jay Romano, “Q&A: Bedbugs: To Tell Or Not to Tell?,” *N.Y. Times*, Jan. 20, 2008.

21. “Don’t Let the Bedbugs Bite,” *New York Apartment Law Insider*, December 2006.

22. Stern, *supra* note 2.