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. Managers of co-op and condominium buildings report similar trends. Bedbugs present a challenge for co-op and condominium boards: is the apartment owner or the manager responsible for bedbugs? However, courts have held landlords responsible for bedbug infestations in rental apartments and the warranty and bedbugs in co-op and condominium units. For instance, a New York court recently ruled that bedbugs are marked 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, 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.

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)(1) provides that if the condition at issue is caused by the tenant, the warranty is not breached. Therefore, if a co-op can dispositive show that the infestation originated from the shareholder’s actions, no liability should be imposed.

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 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 provides that if the condition at issue is caused by the tenant, the warranty is not breached. Therefore, if a co-op can dispositive show that the infestation originated from the shareholder’s actions, no liability should be imposed.

Punitive Damages

In a 2003 Illinois case, Mathias v. Accor Economy Lodging Inc., 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.

BY RICHARD SIEGLER AND EVA TALEL

Dealing With Bedbugs

Richard Siegler and Eva Talel
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 Gazo 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.20

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, inappropiate extermination techniques, such as using a so-called rodent bomb, can spread infestation to other units in the building.23 In addition, a board may wish to arrange for extermination services to maintain the building’s reputation. Protective purchase or rental contracts 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,24 where a seller of a 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 units. 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.”25 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.26 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.”27 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.

4. RPL §235-b provides, in part,
   (1) Any agreement by a lessee or tenant of a dwelling...covenants and warranties.
   (2) Any agreement by a lessee or tenant of a dwelling...covenants and warranties.

11. supra note 4.
17. See Residential Board of Managers of Century Condominium v. RABL 979 (1st Dept. 2003) (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 not dismiss its motion to dismiss that count at all, if no supporting evidence was presented.)
19. 1 RPL §466.
22. Stern, supra note 3.

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