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Being a Marlboro Man In Your Own Home

Warren A. Estis and William J. Robbins of Rosenberg & Estis discuss the recent Appellate Term, First Department, decision in *Ewen v. Maccherone*, which addresses the issue of whether an apartment owner can be sued by a neighbor for secondhand smoke damage.

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As we all know, in recent years, more and more areas—from public transportation to office buildings to parks—have been declared "smoke-free." As far as smoking goes, though, is one's home still one's castle? Can you be the Marlboro man or woman in the confines of your own residence? A recent decision by the Appellate Term, First Department in *Ewen v. Maccherone*[1] addressed the issue of whether an apartment owner can be sued by his neighbor for secondhand smoke damage.

In *Ewen*, the plaintiffs, described as "the owners and residents of a luxury condominium unit," sued the individual occupant and corporate owner of the adjacent unit for negligence and private nuisance. They alleged that defendant Federico Maccherone and his guests smoked cigarettes in his unit and that secondhand smoke had "seeped in" through the walls into their apartment. They asserted that this condition was exacerbated by a "building-wide ventilation or 'odor migration' construction design problem." The complaint alleged that secondhand smoke filled the plaintiffs' kitchen, bedroom and living room, with the result that they often vacated their unit at night and had personal injuries.

The defendants made a pre-answer motion to dismiss. They argued that the complaint failed to state causes of action for negligence and nuisance, and that the plaintiffs had failed to join a necessary party, the condominium. They also asserted a defense based on documentary evidence, namely, that plaintiffs could not maintain the action because the condominium's declaration and by-laws did not prohibit smoking in the individual apartments.

As summarized in the Appellate Term decision, plaintiffs opposed the motion on the grounds that "smoking was not expressly permitted in individual units under the condominium rules, and that, even if it was determined that smoking was permitted, causes of action for nuisance and negligence were sufficiently pled." The Civil Court denied the motion to dismiss in its entirety. The Appellate Term reversed. The judges on the Appellate Term's panel were Justices Martin Shulman and Alexander W. Hunter, Jr.

The Appellate Term analyzed the nuisance and negligence claims individually, stating that despite having "significant similarities," they "constitute separate causes of action." Quoting the Court of Appeals decision in *Copart Industries Inc. v. Consolidated Edison Co. of New York Inc.*,[2] the court stated that the elements of a cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act."

However, quoting the Court of Appeals decision in *Nussbaum v. Lacopo*[3] (which itself quoted that court's 1876 decision in *Campbell v. Seaman*[4]), the court in *Ewen* noted that:

[N]ot every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage,

annoyance and inconvenience from each other… If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.[5]

The court considered the relevant question to be whether the defendants' use of their property constituted an unreasonable and continuous invasion of the plaintiffs' property rights.

The court concluded that the plaintiffs had failed to state a cause of action for private nuisance against their neighbors, reasoning as follows:

Defendants' conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them… Critically, defendants were not prohibited from smoking inside their apartment by any existing statute, condominium rule or bylaw. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences.[6]

The Appellate Term stated that the law of private nuisance "would be stretched beyond its breaking point" were the court to permit a means of recovering damages "when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building." The court continued:

Since there cannot be a substantially unreasonable interference by smoking inside the apartment, there could not be a private nuisance, even if plaintiffs were to show that they had suffered some damage, annoyance and injury.[7]

Recognizing that reasonable people might consider odors coming from a smoker's apartment to be annoying and uncomfortable, the court classified such odors as "but one of the annoyances one must endure in a multiple dwelling building…especially one which does not prohibit smoking building-wide." The Appellate Term recognized that there were "significant health hazards to non-smokers inherent in exposure to secondhand smoke." The court, however, concluded that:

[I]n the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militate against a private cause of action under these factual circumstances for secondhand smoke infiltration.[8]

The Appellate Term held that plaintiffs' negligence claim should have been dismissed "[f]or similar reasons" to those justifying dismissal of the cause of action for nuisance. The court stated that to make out a prima facie case of negligence by a property owner, the plaintiffs must show that the defendants owed a duty to plaintiff, breached that duty and that plaintiffs' injuries resulted from the breach. It emphasized that in the absence of any duty, the negligence claim must fail—and, according to the Appellate Term, that was precisely the situation in *Ewen*:

Here, since defendants did not have a duty to refrain from smoking inside their apartment or to avoid exposing their neighbor to secondhand smoke that unintentionally seeped into the neighbor's apartment, plaintiffs' negligence claim must fail.[9]

As to the issue of the condominium not having been named as a party defendant, the Appellate Term stated:

Incongruously, despite plaintiffs' repeated allegations in the complaint of the building-wide ventilation problem known to the condominium board, plaintiffs failed to fully pursue their ventilation complaints with the board, or to name the board as a necessary party to this action.[10]

The Court's Reasoning

The following are points to consider in reviewing the reasoning of the Appellate Term in *Ewen*:

As noted above, the Appellate Term stated definitively that there were no condominium rules or bylaws that prohibited smoking inside a unit or imposed any obligation on a unit owner to ensure that cigarette smoke did not travel from his unit to other units. The Appellate Term decision gave no more detail about the substance of the rules, regulations and bylaws—but the decision by the Civil Court, New York County (Anil C. Singh, J.) did.[11]

The Civil Court decision acknowledged that the bylaws, rules and regulations "on their face are silent regarding whether smoking is permitted or prohibited in individual units." However, the Civil Court viewed certain provisions in those documents as relevant to the issue.

It noted that the documents expressly prohibited smoking only in specific public areas of the building, and regarded that as "impl[ying] that smoking is allowed in private areas, such as individual units." The Civil Court, however, also quoted the following provisions of paragraph 11 of the condominium's rules and regulations:

No Unit Owner shall make or permit any disturbing or objectionable noises, odors or activity in the Building, or do or permit anything to be done therein, which will interfere with the rights, comforts or conveniences of other Unit Owners or their tenants or occupants.[12]

The Civil Court stated its view that such language "implies that smoking is not allowed in individual units if secondhand smoke invades other units…" The Civil Court reasoned that these various provisions created an ambiguity such that the documentary evidence did not conclusively establish a defense to plaintiffs' claim as a matter of law—but the Appellate Term implicitly rejected that analysis.

What does seem clear from the contrary conclusions reached by the Appellate Term and the Civil Court is that if a condominium intends to bar smoking in individual units, or to create a duty to prevent infiltration of secondhand smoke from one apartment to another, it should expressly so state. It should not rely on inferences that might or might not be held to be properly drawn from language that does not expressly address the issue.

Presumably, the Appellate Term would have ruled differently in *Ewen* if there had been a condominium bylaw, rule or regulation expressly barring smoking in individual units or expressly creating a duty to avoid the spread of smoke from one unit to another. Indeed, in *Ewen*, after stating that odor from smoke is an annoyance that has to be endured in a multiple dwelling, especially one which does not prohibit smoking building-wide, the Appellate Term cited, introduced by the "cf." (i.e., "compare") signal, a case, *Upper East Lease Associates LLC v. Cannon*,[13] where there was a lease provision that created such a duty, and the court granted a tenant suffering from secondhand smoke relief against the landlord.

In *Upper East Lease Associates*, the landlord brought an action against the defendant tenant for unpaid rent for time the defendant had occupied her apartment and for rent that accrued after she had vacated the apartment prior to expiration of the lease. The tenant had stopped paying rent, and subsequently left the apartment, because of a secondhand smoke problem from the apartment immediately below. When sued, the tenant asserted, among other things, affirmative defenses based on that condition Including breach of the warranty of habitability and constructive eviction.

In the defendant tenant's lease, as well as in that of the tenant in the apartment below, there was an addendum which expressly addressed the issue of secondhand smoke. It provided in relevant part that:

Tenant further acknowledges and understands that causing the infiltration of second-hand smoke into the common areas of the Building and/or into other apartments in the Building, may constitute a nuisance and health hazard and be a material infringement on the quiet enjoyment of the other tenants in the Building… Tenant acknowledges and agrees that the prevention by Tenant, its invitees and guests, of the infiltration of second-hand smoke into the common areas of the Building and/or into other apartments in the Building is OF THE ESSENCE to this Lease, and Tenant covenants and agrees to take all measures necessary to minimize second-hand smoke from emanating from Tenant's apartment and infiltrating the common areas of the Building and/or into other apartments in the Building" (emphasis in original).[14]

The Nassau County District Court (Michael A. Ciaffa, J.) held that the secondhand smoke problem "was troublesome enough to constitute a 'nuisance' within the meaning of the second-hand smoke addendum." Quoting *Poyck v. Bryant*[15] (a case also cited by the Appellate Term in *Ewen*), the court stated that:

Recent caselaw, which the Court finds persuasive, recognizes that second-hand smoke "qualifies as a condition that invokes the protections of RPL §235(b) [the statutory implied warranty of habitability] under the proper circumstances." [citation omitted]. As such, it is axiomatic that second-hand smoke can be grounds for a constructive eviction.[16]

Again relying on *Poyck,* the court continued that the key question revolves around whether the second-hand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction—and that the answer "necessarily is fact-sensitive." On the facts before it, the court held that the second-hand smoke "was enough of a 'nuisance' to warrant action by the landlord" but that the landlord, after having taken initial action, "failed to fully meet its obligations." Accordingly, the court held that the landlord "lost the right to pursue a claim for rent that accrued after defendant's departure." The court also awarded the defendant tenant an abatement of rent for the period of time she occupied the apartment while enduring the second-hand smoke, with the abatement percentage increasing from month to month as the condition persisted.

In addition to *Upper East Lease Associates* and *Poyck*, the Appellate Term in *Ewen* cited two other decisions that dealt with second-hand smoke, *Herbert Paul, CPA, P.C. v. 370 Lex, L.L.C.*[17] and *Duntley v. Barr*.[18] In *Herbert Paul*, plaintiff-tenant, which occupied office space, sued the building owner, the managing agent and the occupant of the adjoining office suite based on second-hand smoke infiltration. Plaintiff claimed that he ultimately was forced to move to new offices in another building because of that condition. The landlord and managing agent moved for summary judgment. The Supreme Court, New York County (Richard F. Braun, J.) held there were issues of fact for trial on the cause of action for breach of the covenant of quiet enjoyment. It dismissed the cause of action based on statutory provisions. (The *Ewen* court cited *Herbert Paul* for the proposition that there is no private cause of action under Public Health Law Article 13-E for smoking in public areas).[19]

In *Herbert Paul*, plaintiff had also pleaded a third cause of action for nuisance against all the defendants. The court dismissed that cause of action against the landlord and managing agent. It stated that those defendants "did not create the smoke infiltration condition…and they gave up control of the premises to [the individual] defendant…by leasing possession thereof to him." However, the court stated that the individual defendant "may be liable to plaintiff for a private nuisance." A rider paragraph in the individual defendant's lease provided that he would not allow any unusual or obnoxious odors to emanate from his suite, and, if such a condition was not corrected within five days after the landlord sent him notice to do so, the landlord could treat that failure as a material default under the lease.

In *Duntley*, the plaintiff tenant sued the defendant for damages allegedly caused by defendant's smoking in her adjoining apparent. The City Court of Syracuse (David S. Gideon, J.) held that plaintiff had established a cause of action against defendant for private nuisance. In doing so, the court relied on a provision in defendant's lease that the defendant would not "do or permit anything that would interfere with the rights, comforts or conveniences of other Tenants." The damages were limited to the cost of air purification equipment purchased by plaintiff. The court declined, for lack of proof, to award any monetary damages to the plaintiff for medical expenses allegedly incurred as a direct result of defendant's actions.

The Appellate Term in *Ewen* cited *Duntley*, introduced by a "cf." signal, after its statement that in the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militated against a private cause of action for second-hand smoke infiltration under the factual circumstances before the court in *Ewen*. The *Ewen* court did not explain how the circumstances in *Duntley* differed from the circumstances in *Ewen*.

Conclusion

In short, except for *Ewen*, the cases discussed here that specifically address the issue of secondhand smoke are all at the trial court level. As an Appellate Term, First Department decision, *Ewen* is of controlling authority only as to the Civil Court, New York County and Bronx County. In any event, these cases reflect fact-specific treatment of the issue of suing a neighbor for secondhand smoke infiltration. Therefore, it is impossible to generalize as to whether a Marlboro man or woman can smoke in the confines of his or her home without being liable to a neighbor. Without doubt, though, the very fact that the question is even asked reflects a seismic change from the days when the Marlboro man, larger than life, ceaselessly blew perfect smoke rings over Times Square.

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Endnotes:

1. —N.Y.S.2d—, 2011 WL 2088967, 2011 N.Y. Slip Op. 21185 (A.T. 1st Dept. 2011).

2. 41 N.Y.2d 564, 394 N.Y.S.2d 169 (1977).

3. 27 N.Y.2d 311, 315, 317 N.Y.S.2d 347, 351(1970).

4. 63 N.Y. 568, 577 (1876).

5. 2011 WL 2088967 at *1.

6. Id. at *2.

7. Id.

8. Id.

9. Id. at *3.

10. Id. at *2.

11. 25 Misc.3d 1235(A), 900 N.Y.S.2d 772, 2009 WL 4432449 (Civ. Ct. N.Y. Co. 2009).

12. 2009 WL 4432449 at *1.

13. 30 Misc.3d 1213(A), 924 N.Y.S.2d 312, 2011 WL 182091 (Dist. Ct. Nassau Co. 2011).

14. 2011 WL 182091 at *2.

15. 13 Misc.3d 699, 820 N.Y.S.2d 774 (Civ. Ct. N.Y. Co. 2006). In an earlier column, we discussed the decision by the Civil Court (Shlomo S. Hagler, J.) in *Poyck v. Bryant*. See Warren A. Estis and William J. Robbins, "Warranty of Habitability: Secondhand Smoke Could Cause Breach," NYLJ, Oct. 4, 2006, p. 5, col. 2.

16. 2011 WL 182091 at *3, quoting 13 Misc.3d at 702, 820 N.Y.S.2d at 777.

17. 7 Misc.3d 747, 794 N.Y.S.2d 869 (Sup. Ct. N.Y. Co. 2005).

18. 10 Misc.3d 206, 805 N.Y.S.2d 503 (City Ct. Syracuse 2005).

19. Public Health Law Article 13-E regulates smoking in certain public areas. The court in *Herbert Paul* also discussed §17-504[b] of the Administrative Code of the City of New York—and found no claim against defendants based thereon—because that provision was in effect during the time period relevant to the case. However, that section was repealed effective March 30, 2003.

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