Ejectment Granted

Co-op Cites 'Undesirable, Objectionable' Conduct

Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, analyze a recent case where the court upheld a residential co-op's termination of the lease of a shareholder who, over a twelve year period, "refused to remove a nuisance, repeatedly withheld rent without legal justification, and caused the co-op to engage in almost constant litigation."

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In a recent decision by New York County Supreme Court Justice Marylin G. Diamond in *1050 Tenants Corp. v. Lapidus*,[1] the court upheld a residential co-op's termination of the proprietary lease of Steven R. Lapidus and his wife Iris R. Lapidus (collectively "Lapidus") on the grounds of objectionable conduct making their tenancy undesirable, where, "over a twelve year period, the shareholder refused to remove a nuisance, repeatedly withheld rent without legal justification, and caused the co-op to engage in almost constant litigation." This article discusses the reasoning of that case (Rosenberg & Estis represented the co-op in the initial three underlying litigations against Lapidus which Justice Diamond recited and relied upon.)

Justice Diamond summarized a finding about Lapidus by the Civil Court (Martin Shulman, J.) in one of those prior cases as follows:

> . . . [T]he defendants [Lapidus] had acted with "obduracy" in that "Every conceivable motion was made to delay or derail the underlying proceeding," and that their aggressive tactics, which they were able to afford because Mr. Lapidus is an experienced real estate lawyer who could rely on the resources of his law firm to avoid incurring paying out-of-pocket legal expenses, were designed to "economically force the coop to its 'knees.'"[2]

As recited in Justice Diamond's decision, the circumstances of the termination of Lapidus' tenancy, and of the bringing of the lawsuit and the motions before the court, are as follows. Section 34(e) of the proprietary lease provides that it may be terminated and the lessees required to surrender their apartment if the co-op determines, upon the affirmative vote of both four-fifths of its board of directors and the holders of two-thirds or more of its shares, at meetings of both the directors and the shareholders, that "because of objectionable and undesirable" conduct on the part of the lessees, their tenancy is "undesirable." A resolution terminating Lapidus' tenancy on that ground was passed unanimously at a board of directors meeting and by the shareholders of 98 percent of the shares voting at a shareholders' meeting. Prior notice of both meetings was given to Lapidus and counsel represented Lapidus at those meetings. By notice dated May 27, 2005, the co-op terminated Lapidus' proprietary lease, effective June 15, 2005.

When Lapidus refused to vacate and surrender the apartment, the co-op brought an action for ejectment, use and occupancy and attorneys' fees. The co-op moved for summary judgment on all its causes of action. Lapidus cross-moved for summary judgment dismissing the complaint in its entirety. Those were the motions that Justice Diamond decided.

The court granted the co-op's motion for summary judgment for an order of ejectment. The court also granted the co-op

summary judgment for attorneys' fees, severing that cause of action and referring the issue of the reasonable fees and costs which the co-op incurred in the action through the date of eviction to a Special Referee to hear and report. The court stated that the co-op was not entitled to recover the expenses it allegedly incurred in preparing and conducting the special meetings at which the board and the shareholders voted to terminate Lapidus' tenancy.

The co-op had pleaded two causes of action for use and occupancy, one seeking it at a rate reflecting the fair market rental value of the apartment and an alternative cause of action seeking use and occupancy in an amount equal to the maintenance and additional rent normally due under the lease. The court granted the co-op summary judgment on the latter cause of action, and granted Lapidus summary judgment dismissing the former cause of action.

The lion's share of the court's decision was devoted to a narrative of the litigation history between the co-op and Lapidus and to a discussion of the co-op's claim for ejectment. According to the court, the record before it showed that "between 1993 and 2004, the co-op brought at least six non-payment proceedings in Civil Court against the defendants [Lapidus]" and that "[i]n each of these cases, the defendants [Lapidus] argued that they were justified in withholding their maintenance and were entitled to an abatement of their arrears because of inadequate conditions in their apartment and in the building."

The court's decision summarized the outcome of each proceeding. The parties settled two of the cases. In another case, the Civil Court (Marilyn Shafer, J.), by decision dated April 18, 1993, held Lapidus not entitled to any abatement and found Lapidus to be in arrears totaling approximately $43,834. Lapidus unsuccessfully appealed that decision. The co-op sought attorneys' fees at a separate hearing, based upon the court's direction that such a claim be severed from the claim for rent arrears. Lapidus argued that the attorneys' fees claim had not been properly severed and was thus lost. The Civil Court (Arlene H. Hahn, J.) rejected the argument, Lapidus appealed and the decision was affirmed. Lapidus also brought an unsuccessful Article 78 proceeding for a writ of prohibition against the court holding any attorneys' fees hearing.

The Civil Court (Martin Shulman, J.) held an attorneys' fees hearing and found, in a decision dated Oct. 3, 1996, that the co-op was entitled to attorneys' fees in the amount of $336,228, plus interest. Justice Diamond summarized a key point of that attorneys' fees decision as follows:

> In its decision, the court found that the defendants had engaged in "needless and groundless pretrial motion practice" before Judge Shafer and that the coop had achieved total victory and completely prevailed in the litigation with the exception of a few minor legal skirmishes.

On appeal, the attorneys' fees award was reduced to $216,000, plus interest. Ultimately, by stipulation between the parties dated April 25, 2000, Lapidus agreed to, and did, pay approximately $328,000 in attorneys' fees arising out of the non-payment proceeding brought before Judge Shafer.

In 1995, the co-op brought another non-payment proceeding against Lapidus for approximately $55,680. After holding a trial which followed what the court characterized as "extensive motion practice," the Civil Court (Howard Malatzky, J.) awarded the co-op a judgment in the amount of $55,681.81. The court found Lapidus entitled to a rent abatement of $3,340.91. Thereafter, the court awarded the co-op $15,226.18 for pre-judgment interest and $115,000 in attorneys' fees (which fees were reduced on appeal to $75,000).

In 1999, the co-op brought another non-payment proceeding. It was settled by a stipulation, dated April 20, 1999, in which Lapidus acknowledged owing maintenance and other charges in the amount of approximately $16,100 and the co-op agreed to credit Lapidus' account in the amount of $10,000 for repairs in the apartment. In the stipulation, Lapidus agreed not subsequently to withhold maintenance until after having first complied with certain specified procedures.

In 2004, the co-op brought "yet another non- payment proceeding against the defendants [Lapidus]." The Civil Court (Gerald Lebovits, J.) found that Lapidus had failed to follow the procedure set forth in the April 30, 1999 stipulation and, on Sept. 2, 2005, issued a judgment against Lapidus in the amount of $62,380.

There was also prior Supreme Court litigation involving the co-op and Lapidus. The tenant in the apartment below Lapidus brought a nuisance action against Lapidus and the co-op claiming that the water-cooled air conditioning system which Lapidus had installed in Lapidus' apartment without prior permission had caused water to leak into his apartment, resulting in substantial property damage. The parties entered into a stipulation of settlement, so-ordered by the court, which required that Lapidus disconnect the two air-conditioning units in Lapidus' apartment from the building's water supply and then cap the water supply and the return piping at their respective risers. Thereafter, on the co-op's motions, the court twice found Lapidus in contempt in failing to comply with the so-ordered stipulation of settlement. The Supreme Court vacated the stipulation, issued a permanent injunction directing Lapidus to remove the air-conditioning system from the apartment and awarded the co-op attorneys' fees, disbursements and other costs incurred in that action.

This was the background on which the co-op premised the termination of Lapidus' proprietary lease for undesirable,

objectionable conduct. The court stated that its review of that termination is governed by the principles set forth in *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*[3] and *40 West 67th Street v. Pullman.*[4] It stated those principles as follows:

> In *Levandusky*, the Court of Appeals held that a cooperative corporation's promulgation and implementation of by-laws, proprietary lease provisions and policies is governed by the "business judgment rule," which limits a court's inquiry to whether the challenged actions were (1) authorized, (2) taken in good faith and (3) in furtherance of the corporation's legitimate interests . . . In *Pullman*, the Court of Appeals ruled that the business judgment rule was applicable to decisions by a co-op to terminate a tenancy because the tenant had engaged in objectionable conduct making his or her tenancy undesirable.[5]

Lapidus argued that the termination was unauthorized because the conduct on which it was based is not the type of objectionable conduct that falls within the scope of section 34(e) of Lapidus' proprietary lease. Lapidus relied on a parenthetical statement in that section providing that to repeatedly violate or disregard the house rules or to permit a person of immoral character to enter or remain in the building "shall be deemed to be objectionable or undesirable conduct." Lapidus asserted that this parenthetical statement was an exclusive definition of what constituted objectionable or undesirable conduct under section 34(e). The court rejected that argument.

Lapidus also asserted that, as a matter of public policy, the co-op should not be allowed to terminate a tenancy based on objectionable or undesirable conduct where the conduct only involved a tenant's attempt to obtain habitable conditions in an apartment and building through the use of the courts. Justice Diamond also rejected that argument, characterizing the record instead as follows:

> . . . [F]or more than a decade, the defendants repeatedly withheld maintenance, which led to almost constant and unsuccessful litigation with the co-op. In addition, the defendants' unreasonable refusal to eliminate, at little cost, the leakage from their air conditioner which was causing damage to the apartment below and the ensuing litigation unnecessarily burdened the co-op with yet additional litigation.[6]

The court stated that Lapidus had not cited any authority which suggested it was against public policy for a co-op to terminate a shareholder's tenancy as undesirable under such circumstances.

Another argument raised by Lapidus was that the shareholder vote on the resolution terminating the tenancy was illegal because the board had agreed that the co-op would indemnify and hold harmless, against any claims Lapidus might thereafter make, any shareholder who voted in favor of the resolution. Lapidus asserted that the agreement violated Business Corporation Law Section 609(e), which provides that a shareholder "shall not sell his vote or issue a proxy to vote to any person for any sum of money or anything of value." The court rejected Lapidus' argument. The court concluded that a shareholder "does not profit from being indemnified against any claim arising out of his or her vote and, by offering such indemnification, the Board did not provide an incentive to vote in favor of the resolution . . . [but] merely eliminated a disincentive."

Having concluded that the termination of Lapidus' tenancy was within the scope of section 34(e) of the proprietary lease and not in violation of either public policy or the Business Corporation Law section cited by Lapidus, the court found that the first prong of the business judgment rule (i.e., authorized action) was satisfied. The court also found that the other two prongs of the business judgment rule were satisfied.

As to the issue of good faith, Lapidus argued that the co-op had acted in bad faith and in a discriminatory manner by using Lapidus' installation of an air conditioner as a basis for terminating the lease when other apartments in the building had also installed air conditioners without permission. The court rejected that argument, noting that regardless of what other tenants might have done, it was "entirely proper" for the co-op to partially base its decision to terminate Lapidus' lease on the refusal to remove the air conditioner when it caused water damage in the apartment below, when Lapidus' conduct exposed the co-op to litigation and when Lapidus failed to comply with the stipulation of settlement concerning the air conditioner.

Lapidus also argued that since the co-op had suggested that it might rent Lapidus' apartment at a fair market price in excess of the monthly maintenance, the co-op's termination of Lapidus' lease was a bad faith attempt to obtain the apartment in order to increase the building's revenue. The court, however, concluded that there was nothing in the record indicating that the co-op's reason for terminating Lapidus' lease had anything to do with increasing the building's revenue.

As to the issue of whether the lease termination was undertaken in furtherance of the co-op's legitimate interests, the court noted that Lapidus had not asserted any arguments on this issue other than those arguments addressed to the other prongs of the business judgment rule. The court noted that those arguments could be interpreted as suggesting that the lease termination was not for legitimate interests, but that the court, in any event, had rejected those arguments.

Therefore, the court found that the lease termination was undertaken in furtherance of the co-op's legitimate interests. Having concluded that "all three prongs of the business judgment rule [were] satisfied," the court held that it was "required to defer to the decision of the co-op to terminate the defendants' tenancy."

The court also rejected two procedural arguments that Lapidus made against the co-op's ejectment claim. Lapidus asserted that the claim was barred by the six year statute of limitations for breach of contract because many of the grounds for termination occurred more than six years prior to the commencement of the action. The court disagreed, holding that the ejectment claim was based on the resolution finding Lapidus to be undesirable tenants, not based on Lapidus' breach of contract. Therefore, the ejectment cause of action accrued when the lease was terminated on June 15, 2005, and was timely.

Lapidus also argued that, by continuing the 2004 non-payment proceeding after the termination of the lease on June 15, 2005 and obtaining a money judgment including rent through the beginning of September 2005, the co-op waived its right to bring the ejectment action. The court rejected that argument, pointing out that, where a non-payment proceeding is brought prior to a landlord's decision to terminate a lease, "there is nothing inconsistent about the landlord's attempt to terminate the tenancy while continuing the non-payment proceeding." The court noted that there was no evidence that the co-op had made any representation or asserted any argument in the non-payment proceeding suggesting that the lease was still in effect; quite the contrary, it had advised Judge Lebovits of its decision to terminate Lapidus' tenancy.

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Endnotes:

1. NYLJ, May 15, 2006, p. 18, col. 1 (Sup. Ct. N.Y. Co.).

2. Id.

3. 75 N.Y. 2d 530, 554 N.Y.S.2d 807 (1990).

4. 100 N.Y.2d 147, 760 N.Y.S. 2d 745 (2003).

5. NYLJ, May 15, 2006, p. 18, at col. 2.

6. Id., at col. 3.
