LANDLORD-TENANT

Judge Faults Procedure For Terminating Tenancy

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In 1990, in *Levandusky v. One Fifth Avenue Apartment Corp.*,[1] the Court of Appeals held that the business judgment rule is the proper standard of judicial review of decisions made by a cooperative governing board. In 2003, in *40 West 67th Street Corporation v. Pullman*,[2] that court held the business judgment rule is applicable to the termination of a tenant-shareholder's tenancy just as it is to decision-making of less significant impact by cooperative boards, but cautioned that, where termination is involved, there must be "heightened vigilance" that the *Levandusky* test is satisfied.

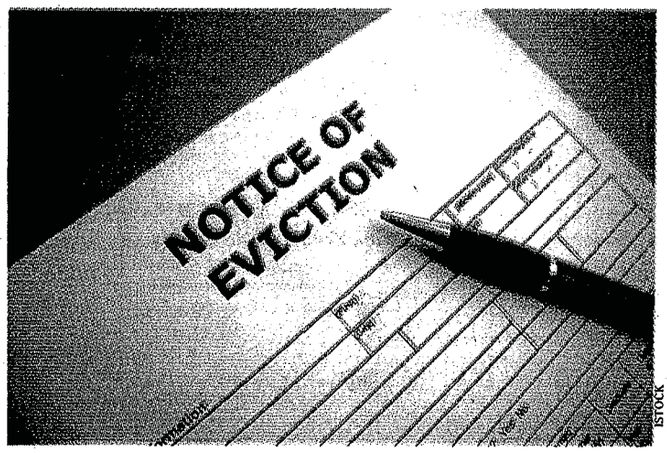
A recent decision by Judge Shlomo S. Hagler of the Civil Court, New York County, in *F.T. Apartments Corp. v. Barbara L.*,[3] denying a co-op's motion for summary judgment in a holdover proceeding, addressed what the court characterized as the novel issue of:

> whether the gap of more than three years from the time petitioner provided respondent with the only direct notice of her alleged objectionable conduct to the date of notice of termination deprives respondent [of] appropriate "notice and opportunity to be heard" as contemplated in *Pullman* to satisfy the "heightened vigilance" in examining whether the board's action meets the *Levandusky* test.[4]

In *F.T. Apartments*, the petitioner was the landlord and lessor of a New York City cooperative building, and the respondent a long-term tenant-lessee of a cooperative apartment there. In or about 2004, the landlord received written complaints from the shareholder living directly below the tenant of the tenant's "erratic behavior, overflow of water, and noise."

Rather than notifying or forwarding those complaints directly to the tenant, the landlord "usually only informed [tenant's] cousin...[but] to no avail." On one occasion, the landlord also notified the tenant's brother, who was living in California.

In only one letter, dated July 12, 2004, actually sent to the tenant, did the landlord, through its counsel, notify her of the allegation that she was breaching her lease due to objectionable conduct and that the cooperative would "reluctantly" terminate her lease if the situation did not change. The letter further stated that if she did not respond immediately, the cooperative board "has indicated that it will hold a meeting for the specific purpose of terminating your tenancy at the building because it is undesirable."



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Paragraph 31(f) of the lease, as quoted in the *F.T. Apartments* decision, provided for termination based on undesirability as follows:

> If at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its then Board of Directors, at a meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the apartment, *repeated after written notice* from Lessor, the tenancy of the lessee is undesirable. (Emphasis added by the court).[5]

Approximately six months after that letter to the tenant, the landlord's agent sent a letter, dated Jan. 13, 2005, to the tenant's cousin asking him to intervene and to have the tenant "see a professional before the co-op has to incur additional legal fees." More than a year and a half after that, by letter dated Aug. 27, 2006, the landlord's agent sent another letter to the cousin expressing the view that the tenant needed medical attention and should not be alone in the apartment. The landlord's counsel sent a final letter, dated Feb. 8, 2007, to the tenant's cousin reiterating the position in his 2004 letter that the board had authorized him "to begin the process to hold [the tenant] in default of the proprietary lease" and that the cousin's "immediate attention to the situation is requested."

On Aug. 30, 2007, which the court described as being "three years from the only time petitioner notified respondent of her alleged 'objectionable conduct'," the board of the cooperative held a meeting and voted to terminate the tenancy. The tenant had not been notified in advance of the meeting. A notice of termination was subsequently served on the tenant, terminating her tenancy effective Sept. 15, 2007, based on paragraph 31(f) of the lease, on the grounds it was undesirable.

In or about December 2007, the landlord commenced a holdover proceeding and the tenant interposed what the court described as "an unintelligible answer to the petition." On Sept. 5, 2008, the commissioner of social services of the City of New York initiated an Article 81 proceeding under the Mental Hygiene Law for appointment of a guardian for the tenant. After a hearing, a guardian was appointed. The court granted a TRO enjoining the landlord from prosecuting the holdover proceeding for a 60-day period after qualification of the guardian.

Ultimately, petitioner moved for summary judgment. The court began its analysis with a discussion of three cases delineating the applicability of the business judgment rule to co-op board decisions, i.e., the Court of Appeals decisions in *Levandusky* and *Pullman* and a 2009 Appellate Division, First Department decision in *Trump Plaza Owners Inc. v. Weitzner*.[6]

In *Levandusky*, the Court of Appeals enunciated the following standard:

> So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's.[7]

In other words, as long as that three-part test was satisfied, the court should defer to a cooperative board's determination.

The board decision involved in *Levandusky* was a "stop work" order issued with respect to certain kitchen renovations. In *Pullman*, the board conduct being reviewed by the court was of much more significant impact on the tenant-shareholder. It was the exercise of the cooperative's "agreed upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct."

In *Pullman*, the proprietary lease contained a provision authorizing termination of the tenancy if the cooperative by a two-thirds vote of shareholders determined that "because of objectionable conduct on the part of the Lessee...the tenancy of the Lessee is undesirable." Following timely notice, a special meeting of sharehold-

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ers was held. Pullman was notified of the meeting but chose not to attend. A resolution was approved by the requisite percentage specifying how Pullman's continued tenancy was objectionable and directing the board to terminate his proprietary lease and cancel his shares. Pursuant to the resolution, the board sent Pullman a notice of termination.

Real Property Actions and Proceedings Law §711(1) provides in relevant part that a proceeding to recover possession based on lease termination pursuant to a provision permitting termination if the tenant is deemed objectionable "shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable." In *Pullman*, the Court of Appeals found consistency between that statute and the business judgment rule by the following analysis:

> [I]n this context, the competent evidence that is the evidence for the shareholder vote will be reviewed under the business judgment rule, which means courts will normally defer to that vote and the shareholders' stated findings as competent evidence that the tenant is indeed objectionable under the statute.[8]

The Court of Appeals in *Pullman* recognized, however, that, despite this deferential standard, there were instances when courts should undertake review of board decisions. The court specified that:

> To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purposes, or (3) in bad faith.[9]

As Judge Hagler pointed out in discussing the *Pullman* case in *F.T. Apartments*, the Court of Appeals in *Pullman* had expressly noted that the tenant-shareholder "had notice and the opportunity to be heard" and concluded by stating that "[w]hen dealing, however, with termination, courts must exercise a heightened vigilance in examining whether the board's action meets the *Levandusky* test."[10]

As characterized by the court in *F.T. Apartments*, the decision of the Appellate Division, First Department in *Trump Plaza Owners Inc. v. Weitzner*[11] was an "expansion of the *Levandusky* test" insofar as it "held that a cooperative board of directors alone may terminate the tenancy of a shareholder-tenant based on 'objectionable conduct' without a shareholder vote that had occurred in *Pullman*."[12]

As summarized by Judge Hagler, the "facts and procedural history of *Weitzner*" included the following. The cooperative sent the shareholder a letter dated Oct. 29, 2002 notifying her that she was engaging in specific objectionable conduct and that if she did not cease such conduct the cooperative would terminate her tenancy based on that conduct. Thereafter, the board received a letter from a neighbor complaining about the tenant. On March 11, 2003, the board voted to hold a special meeting to vote on whether to terminate the shareholder's tenancy. The board also voted that prior to the special meeting, it would invite the shareholder and her counsel and the complainant and his counsel to meet with a subcommittee of the board and its counsel to address the various complaints.

The board's counsel sent a letter to the shareholder's counsel requesting a meeting as soon as possible to give her an opportunity to respond to the complaints. On March 19, 2003, the shareholder's counsel responded by letter indicating that the shareholder's response to the complaints was outlined in his prior correspondence and declining the meeting with the board's subcommittee. On April 8, 2003, the special meeting was held pursuant to notice, and the board adopted resolutions that the shareholder's conduct was objectionable and voted to terminate her tenancy. Thereafter, a notice of termination was served terminating her tenancy effective April 30, 2003.

The co-op then commenced an action in Supreme Court for, among other things, termination of the lease and ejectment. On appeal from an order of the Supreme Court which had granted the tenant's motion to dismiss to the extent of dismissing, without prejudice, plaintiff's causes of action other than those for injunctive relief and attorney's fees, the Appellate Division reinstated the dismissed causes of action and remanded.[13] In its decision, the Appellate Division, citing *Levandusky* and *Pullman*, found that "in voting to terminate the tenant's lease, the cooperative board acted for the purposes of the cooperative, within the scope of its authority, and in good faith." On a subsequent appeal, after remand and Supreme Court's denial of cross-motions for summary judgment, the Appellate Division in its 2009 decision, reiterated that finding.[14]

Based on *Levandusky* and its progeny, the court in *F.T. Apartments* emphasized a due process element to the business judgment rule as applied to co-op board decisions:

> Implicit in this business judgment rule is that the cooperative must insure at the very least that the shareholder is provided with due process prior to the termination.... The Court of Appeals [in *Pullman*] inferred that such due process requirements are satisfied when the cooperative minimally provides the shareholder with notice and opportunity to be heard.[15]

The court continued:

> The facts underlying the recent Appellate Division ruling in *Weitzner* reflect the emphasis in guaranteeing the shareholder's fundamental due process rights.... It appears that, while the shareholder may not have a right to be present during the actual deliberations and vote of the cooperative board, she does have to be timely informed of the allegations and an opportunity to be heard to respond to the complaints.[16]

Judge Hagler concluded that in *F.T. Apartments* the cooperative had "failed to satisfy these minimal due process requirements." The tenant-shareholder "was not timely provided with an opportunity to be heard to respond to the complaints prior to or at the special meeting." Moreover, the court concluded, she "was not timely informed of the allegations of her objectionable conduct."

The court held that the letters that the cooperative had sent to the tenant-shareholder's cousin and brother did not comply with the lease's notice provision and there was "no evidence on this record indicating that respondent tenant-shareholder either designated the above individuals for service of notices or created an agency relationship." Citing *Maurillo v. Park Slope U-Haul*,[17] the court pointed out that under most circumstances, intra-familial activity alone would not give rise to an agency relationship. Accordingly, the court concluded, these letters could not serve as adequate written notice of objectionable conduct pursuant to paragraph 31(f) of the lease.

As for the one letter sent directly to the tenant-shareholder in July 2004, that, too, the court held, was ineffective as a predicate notice. The court cited various cases in which courts had determined that notices became "stale" after the passage of sufficient time and could not be utilized as a predicate notice for the commencement of an eviction proceeding.[18] In the *F.T. Apartments* case, the court held that, "given the lapse of more than three years" between that one letter directly to the tenant and service of the notice of termination, "petitioner's notice of alleged objectionable conduct to respondent was 'stale' and ineffective."

In short, the *F.T. Apartments* decision is an illustrative example of the cautionary language from *Pullman* itself that "[w]hile deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations." Here, the court did not opine on the board's determination that the tenant-shareholder's conduct was objectionable. It did refuse, however, to rubber stamp the procedure adopted by the board in its effort to terminate the tenancy.

1. 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990).
2. 100 N.Y.2d 147, 760 N.Y.S.2d 745 (2003).
3. NYLJ, July 15, 2009, at p. 27, col. 1, 2009 WL 1886891 (Civ. Ct. N.Y. Co.).
4. Id. at col. 2.
5. Id. at col. 1.
6. 61 AD 3d 480, 877 N.Y.S.2d 271 (1st Dept. 2009).
7. 75 N.Y.2d at 538, 554 N.Y.S.2d at 812.
8. 100 N.Y.2d at 155, 760 N.Y.S.2d at 751.
9. Id.
10. 100 N.Y.2d at 156, 158, 760 N.Y.S.2d at 752, 753.
11. 61 AD 3d 480, 877 N.Y.S.2d 271 (1st Dep't 2009).
12. NYLJ, July 15, 2009, at p. 27, col. 2. It should be noted that in *Weitzner*, the lease

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clause authorizing termination based on objectionable conduct provided for a vote of two-thirds of the Board of Directors. The comparable clause in *Pullman* provided for a vote of the stockholders.

13. The Supreme Court decision is at 16 Misc.3d 1115(A), 847 N.Y.S.2d 899 (Sup. Ct. N.Y. Co. 2007). The Appellate Division decision is at 47 AD 3d 525, 849 N.Y.S.2d 554 (1st Dept. 2008).

14. The Supreme Court decision is at 2008 WL 3243810 (Sup. Ct. N.Y. Co. 2008). The cite for the Appellate Division decision is at footnote 6, supra.

15. NYLJ, July 15, 2009, at p. 27, col. 3.

16. Id. at cols. 3-4.

17. 194 A.D.2d 142, 606 N.Y.S.2d 243 (2nd Dept. 1993).

18. The cases cited by the court are *Shaw v. Castiglioni-Spalten*, NYLJ, May 14, 2003, p. 21, col. 6 (Civ. Ct. N.Y. Co.); *South Shore Estates Inc. v. Olsen*, NYLJ, March 14, 2001, p. 20, col. 3 (Civ. Ct. N.Y. Co.); *Goldstein v. Simensky*, NYLJ, Jan. 13, 1989, p. 21, col. 2 (App. T. 1st Dep't); *Raffone v. Schreiber*, 18 Misc.3d 925, 850 N.Y.S.2d 851 (Civ. Ct. N.Y. Co. 2008); and *Mau v. Stapleton*, 136 Misc.2d 793, 519 N.Y.S.2d 178 (Civ. Ct. Kings Co. 1987).