LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

An ALM Publication

Volume 29, Number 5 • March 2013

The Obligation to Permit Pets Notwithstanding No-Pet Provisions

By Alexander Lycoyannis

Generally, courts will enforce prohibitions on maintaining pets contained in residential and proprietary leases or condominium and cooperative house rules. However, exceptions arise from the provisions of the federal Fair Housing Act (FHA), the New York State Human Rights Law (NYSHRL) and the New York City Humans Rights Law (NYCHRL), which, under certain circumstances, require landlords and boards to permit residents with disabilities to keep pets. As one court put it, "the legislative advances protecting the disabled … require the no-pet clause to bow upon proof of a specific, particularized need to keep a dog, which need arises out of the handicap." *Oceangate Associates Starrett Systems, Inc. v. Dopico*, 109 Misc.2d 774, 441 N.Y.S.2d 34 (Civ. Ct. Kings Cty 1981).

'Reasonable Accommodations'

Under the aforesaid statutes, landlords and condominium and cooperative boards must make "reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford the handicapped individual an equal opportunity to use and enjoy a dwelling." *Hubbard v. Samson Management Corp.*, 994 F.Supp. 187, 189-190 (S.D.N.Y. 1998) (citations and internal brackets omitted). Whether a particular accommodation is required is "highly fact-specific, requiring case-by-case determination." *Id.* at 190. If a court finds that a reasonable accommodation should have been but was not offered, the court may award compensatory and/or punitive damages, attorneys' fees and appropriate injunctive relief. *See* 42 U.S.C.A. § 3613(c); *Mozaffari v. New York State Division of Human Rights*, 63 A.D.3d 643, 881 N.Y.S.2d 437 (1st Dep't 2009).

Where, in the face of a no-pets rule, a disabled building resident seeks to maintain a pet, he or she must establish: 1) a disability; 2) that he or she is otherwise qualified for residency; 3) the necessity to keep the pet in order to use and enjoy the apartment; and 4) that reasonable accommodations can be made to allow the resident to maintain the pet. *See Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879, 879 N.Y.S.2d 197 (2d Dep't 2009).

Case Law

Most of the reported cases applying this test turn on whether the pet is necessary for the use and enjoyment of the apartment; those cases usually hold that the resident has failed to satisfy the necessary burden.

For example, in *Kennedy Street Quad, Ltd. v. Nathanson, supra*, two proprietary shareholders acquired a dog in violation of their co-op's "no dogs" policy. Both of the tenants suffered from kidney problems and depression, and, at a hearing before the New York State Division of Human Rights (DHR), presented evidence from physicians and a psychologist demonstrating that maintaining the dog helped to ameliorate their symptoms of depression. DHR found that the co-op discriminated against the tenants in the terms, conditions, and privileges of their housing on the basis of their disabilities and that they should be permitted to maintain the dog as a reasonable accommodation for such disabilities. Further, DHR awarded the tenants $7,500 in compensatory damages against the co-op. However, the Appellate Division reversed, finding that the tenants did not satisfy the necessary legal standard:

Here, the complainants sub-

Alexander Lycoyannis is a partner at the Manhattan real estate law firm of Rosenberg & Estis, P.C.

> mitted evidence that the dog helped them with their symptoms of depression. Nonetheless, they failed to present any medical or psychological evidence to demonstrate that the dog was actually necessary in order for them to enjoy the apartment. Accordingly, the SDHR's determination was not supported by substantial evidence. (citations omitted).

In *Landmark Properties v. Olivo*, 5 Misc.3d 18, 783 N.Y.S.2d 745 (App. T. 9th/10th Jud. Dist. 2004), the court upheld a judgment of possession issued in favor of the landlord on the basis of the tenant's violation of the "no-pet" clause in his lease, and rejected the tenant's claim that he was entitled to maintain a dog as a reasonable accommodation under the FHA. The court held that the tenant failed to establish both that he had a disability and that the dog was necessary for him to use and enjoy his apartment:

> The court properly found that tenant Olivo failed to establish that he was entitled to keep a dog for therapeutic reasons as a reasonable accommodation pursuant to the Fair Housing Act (42 USC § 3601 *et seq*.), as he failed to introduce sufficient evidence to establish his handicap and the necessity of keeping a dog to use and enjoy the apartment …
>
> … [The] tenant … submitted only the ambiguous statement of his physician that depressed people may benefit from having pets and notes from his medical records that he was anxious about possibly losing his dog. Furthermore, even assuming *arguendo* that tenant Olivo's anxiety, depression and physical ailments as described in the record constitute a 'physical or mental impairment which substantially limits one or more of [his] major life activities,' the record is not sufficient to demon-strate that keeping a dog would in fact be necessary to his enjoyment of the subject premises.

5 Misc.3d at 20-21; *see also 105 Northgate Cooperative v. Donaldson*, 54 A.D.3d 414, 863 N.Y.S.2d 469 (2d Dep't 2008); *One Overlook Avenue Corp. v. New York State Division of Human Rights*, 8 A.D.3d 286, 777 N.Y.S.2d 696 (2d Dep't 2004).

On the other hand, in *Mozaffari v. New York State Division of Human Rights, supra*, the Appellate Division upheld DHR's ruling that the tenant was disabled under the NYSHRL and that the landlord should have provided the reasonable accommodation requested by the tenant in order to afford her an equal opportunity to use and enjoy her apartment:

> The Commissioner's findings that Schatz was disabled within the meaning of Executive Law § 292(21) and that petitioner Mozaffari failed to provide the reasonable accommodation she requested to afford her an equal opportunity to use and enjoy her apartment are supported by sufficient evidence on the record considered as a whole and are therefore conclusive. Contrary to petitioner Mozaffari's argument that Schatz did not adequately inform him of or document her need for a hearing dog, by letter dated August 18, 2005, Schatz's attorney informed petitioner that Schatz was suffering from a hearing disability and that she needed a service animal at her apartment in connection with that disability. Attached to the attorney's letter was a letter dated February 22, 2005 from an otologist stating, based upon his examination of Schatz, that she had bilateral hearing loss and would benefit from a hearing dog"

(citations and internal quotation marks omitted).

Further, the court upheld the tenant's claim for damages based on mental anguish, but reduced the amount of the award from $10,000 to $1,000. *Id.*, 881 N.Y.S.2d at 438-39.

Conclusion

As the foregoing cases demonstrate, while exceptions to no-pet rules on the basis of disability are not easy to obtain from the courts, landlords and boards need to take requests for such exceptions seriously. The failure to do so, and a later finding that a request for a pet was wrongly denied, could result in the imposition of monetary liability pursuant to the FHA, NYSHRL and/or NYCHRL. When considering a request to waive a no-pet rule by reason of an alleged disability, landlords and boards would be well-advised to not only seek corroborating medical documentation from the requesting party, but to retain their own medical consultants for an independent evaluation.

—❖—