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Court Allows Day Care In Residential Co-op

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Cooperative apartment proprietary leases typically contain a restrictive covenant limiting the use of the apartment to residential use. The courts have generally enforced such lease restrictions on the use of premises for residential use only.[1] In the June 2014 decision of Judge Timmie Erin Elsner in *Walden Gardens v. Burns*,[2] however, the Civil Court, Bronx County held that a provision in the subject proprietary lease which required the premises to be used solely for residential use was void and unenforceable to the extent that the premises was used as a "group family day care home" pursuant to Social Services Law Section 390.

Background

The facts as recited by the court in *Walden Gardens* are as follows: The landlord was a Mitchell-Lama housing company organized under the provisions of Article II of the Private Housing Finance Law. The tenant, Amesha Burns, was the shareholder and proprietary lessee of Apartment 15G in the building located at 3800 Waldo Avenue in the Bronx. The tenant had occupied the premises as tenant-shareholder since 2004. Since December 2009, the tenant had been a "group family day care provider" licensed by the New York State Office of Children and Family Services to provide care for children in the premises.

On Oct. 5, 2011, the landlord served tenant and her two family members, who also resided in the apartment (collectively, respondents) with a notice to cure, alleging that the tenant (1) had been using the apartment as a "day care business" in violation of the proprietary lease which restricted the use of the premises to residential use only, and (2) failed to amend her annual family income affidavit to reflect her actual income and the actual members of her household. According to the landlord, the tenant failed to cure the defaults and, on Nov. 3, 2011, the landlord served respondents with a notice of termination.

On or about Dec. 9, 2011, the landlord commenced a summary holdover proceeding against respondents in the Civil Court, Bronx County. Both landlord and respondents moved for summary judgment with respect to the issue of respondents' use of the premises as a group family day care. The landlord maintained that the respondents' use of the apartment as a day care facility violated the restrictive covenant in the proprietary lease limiting the use of the apartment to residential use. The respondents maintained that use of the apartment for a group family day care facility does not violate the proprietary lease.

By decision dated June 5, 2014, Elsner granted respondents summary judgment and dismissed that portion of the petition relating to the use of the premises as a day care business as being a violation of the proprietary lease. Elsner found that "the proprietary lease for the cooperative herein, which requires the premises to be used solely for residential use, is unenforceable and is void as against the strong public policy of this state as it relates to Social Services Law Section 390."

Public Policy

Elsner observed that Social Services Law Section 390(1)(d) defines a "group family day care home" as "a program caring for children for more than three hours per day per child in which childcare is provided in a family home for seven to twelve children of all ages." The court went on to discuss a series of decisions in which courts, based on public policy concerns, have refused to enforce residential use restrictions contained in both government regulations and in private contracts based on public policy.

> Bronx County has now ruled, as a matter of public policy, that restrictive covenants in proprietary leases limiting occupancy to residential use are unenforceable with respect to the operation of a licensed "group family day care home"

The court cited to the Court of Appeals' decision in *Crane Neck Assn. v. NYC/Long Island County Services Group*[3] in which the Court of Appeals concluded that a restrictive covenant in a deed allowing only single family dwellings could not be enforced against a group home for mentally disabled adults. In so holding, the court in *Crane* stated:

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> this court has long recognized that the state's interest in protecting the general good of the public through social welfare legislation is paramount to the interests of parties under private contracts, and the state may impair such contracts by subsequent legislation or regulation so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose.[4]

Elsner then cited to *People v. Clarkstown*,[5] in which the Appellate Division, Second Department, citing the state Legislature's recognition of the critical shortage of child day care facilities, struck down local zoning laws establishing stricter standards and restrictions for the operation of "family day care homes." The Appellate Division determined that the state Legislature had superceded the authority of local governments to regulate group day care facilities.

Elsner placed the greatest reliance on the 1998 decision of the Appellate Division, Second Department in *Quinones v. Bd. of Mgrs. of Regalwalk Condominium I*.[6] In *Quinones*, the plaintiffs were the owners of a condominium unit who operated a group family day care therein. The condominium board demanded that the unit owners discontinue the day care's operation, based on a provision of the condominium's declaration which limited the use of condominium units to residential occupancy. The unit owners commenced an action against the condominium board for a declaratory judgment that the unit owners were entitled to operate a group family day care home in their unit, and moved for a preliminary injunction enjoining the board from interfering with the day care home's operation.

The Supreme Court, Richmond County granted the unit owners' motion for a preliminary injunction and the Appellate Division, Second Department affirmed. The Appellate Division, relying on the Court of Appeals' rationale in *Crane*, ruled that "as a matter of public policy, the board is prohibited from enforcing the condominium declaration to bar the use of the plaintiffs' unit as a group family day care home."[7] In so ruling, the Appellate Division stated:

> as early as 1969, the New York Legislature recognized the serious shortage of child-care facilities throughout New York State, and declared its policy to encourage the provision of such facilities….Given that the clear intent of [Social Services Law §390] is to expand the availability and accessibility of such day care facilities, which remain in short supply in the state, and to remove impediments to such expansion, and that the condominium declaration here, like the restrictive covenant in *Crown Neck Assn. v. New York City/Long Is. County Servs. Group*…'pose the same deterrent to the effective implementation of the state policy as the local laws and ordinances,' we find that Social Services Law §390(12) applies to the restriction here contained in the condominium declaration. Thus, the board may not enforce such restriction against the plaintiffs….[8]

Other Courts

Elsner further observed that since the time *Quinones* was decided, several other courts have determined that residential use prohibitions are not enforceable with respect to the use of residential premises as a group family day care facility. In *Marick Real Estate v. Ramirez*,[9] the Appellate Term, Second Department held that the petition failed to state a cause of action where it alleged that the rent-stabilized tenant's use of the premises as a family day care center violated a residential use restriction in the lease. In *Alpha Dynamics v. Martinez*,[10] the Civil Court, Bronx County held that the Social Services Law prohibited the landlord from maintaining an action against a Section 8 tenant who chose to run a home-based day care facility.

The court discussed a series of decisions in which courts, based on public policy concerns, have refused to enforce residential use restrictions contained in both government regulations and in private contracts based on public policy.

Elsner further observed that although there were no reported cases applying Social Services Law §390 to co-ops, and that co-ops are structurally "different" from the condominium at issue in *Quinones*, they were sufficiently similar "in that they both have boards comprised of owners and shareholders, respectively, that govern the administration and regulation of the property" and that "[b]oth condominium owners and cooperators relinquish a degree of freedom and rights for the greater good of the building."

Elsner also noted that several courts have relied on public policy considerations in preempting restrictive covenants contained in cooperative apartment proprietary leases. Among other decisions, Elsner cited to *Mitchell Gardens No. 1 Cooperative v. Cataldo*,[11] in which the court found that "co-ops are included within the purview of Real Property Law Section 235-f" and therefore certain provisions of the proprietary lease that were inconsistent with the statute were unenforceable. The court also cited to *Seward Park Housing v. Cohen*,[12] where the Appellate Division, First Department held that a no-pet covenant in a proprietary lease was unenforceable after three months of obvious pet ownership.

Thus, Elsner concluded that "the proprietary lease for the cooperative herein, which requires the premises to be used solely for residential use, is unenforceable and is void as against the strong public policy of this state as it relates to Social Services Law Section 390." As such, because it was undisputed that respondent was a properly licensed day care facility, the court granted the respondents' motion for partial summary judgment and dismissed that portion of the petition relating to the use of the premises as a day care business as being a violation of the proprietary lease.

Conclusion

In a case of first impression in the First Department, the Civil Court, Bronx County has now ruled, as a matter of public policy, that restrictive covenants in proprietary leases limiting occupancy to residential use are unenforceable with respect to the operation of a licensed "group family day care home" under Social Services Law Section 390. Since this issue has not yet come before the Appellate Term or Appellate Division in the First Department, it remains to be seen whether this ruling will be upheld.

1. See e.g. *Horowitz v. Rogers*, Index No. 11935/87 (Sup. Ct. N.Y. Co. 1998).
2. NYLJ, June 11, 2014, 1202658580989 (Civ. Ct. Bronx Co.).
3. 61 N.Y.2d 154 (1984).
4. Id. at 167.
5. 160 A.D.2d 17 (2d Dept. 1990).
6. 242 A.D.2d 52 (2d Dept. 1998).
7. Id. at 55.
8. Id. at 56-7.
9. 11 Misc.3d 42 (App. Term 2d Dept. 2005).
10. NYLJ, May 11, 2005, p. 22 (Civ. Ct. Bronx Co.).
11. 175 Misc.2d 493 (App. Term. 2d Dept. 1997).
12. 287 A.D.2d 157 (1st Dept. 2001).