Warranty of Habitability

Secondhand Smoke Could Cause Breach

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In a recent decision by New York County Civil Court Judge Shlomo S. Hagler in *Poyck v. Bryant*,[1] the court determined what it labeled the "nove lissue" of "whether secondhand smoke emanating from a neighbor gives rise to a breach of the implied warranty of habitability and a constructive eviction under the realities of modern urban dwelling." Pursuant to §235-b of the Real Property Law (RPL), a warranty of habitability is implied in leases for residential premises. The court held "as a matter of law that secondhand smoke qualifies as a condition that invokes the protection of RPL §235-b under the proper circumstances" and, as such, "it is axiomatic that secondhand smoke can be grounds for a constructive eviction." This article discusses the court's reasoning and some of the case authority on which it relied.

The plaintiff in *Poyck* was the owner and lessor of condominium unit #5D at 22 West 15th Street, New York, New York. The lawsuit was a plenary action to collect rent and late charges. The defendants-tenants (the "Bryants") had allegedly moved into the apartment in 1998, and vacated at the end of August 2001, in the middle of a two-year term extending from Jan. 1, 2001 through Dec. 31, 2002. They left because of incessant secondhand smoke which, they claimed, penetrated into their apartment as a result of new neighbors who had moved into apartment #5C, next door, and constantly smoked in that apartment and in the common fifth floor hallway.

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When the problem arose, the Bryants had complained to the building superintendent, who allegedly spoke to the next door neighbors—but to no avail. Mr. Bryant then sent a letter to his landlord Mr. Poyck, Mr. Poyck's attorney-in-fact and the superintendent asking their help in remedying the problem and advising them that "[f]ailing that, we must consider finding a healthier living situation."

As quoted in the court's decision, the letter specified preventive efforts the Bryants had taken, namely, sealing their apartment door with weather-stripping and a draft barrier, and operating air filters around the clock, but stated that they could "still smell the smoke from 5C in our apartment." The letter emphasized that more than just unpleasant odors was involved:

> [This] represents an ongoing health hazard for my wife who is recovering from her second cancer surgery and who is extremely allergic to tobacco smoke.[2]

According to the court's recital of the "[u]ncontroverted [f]acts," notwithstanding this history, "the landlord took no action to curtail their neighbors' smoking that was invading the Bryants' home." Approximately a month after sending the above-quoted letter, the Bryants "decided to vacate the subject premises due to the incessant secondhand smoke" and notified the landlord by another letter of their decision.

The tenants' answer to the landlord's complaint included affirmative defenses and counterclaims for breach of the warranty of habitability and constructive eviction due to that secondhand smoke. Plaintiff moved for summary judgment striking and/or dismissing those affirmative defenses and counterclaims. Concluding that there were disputed issues of fact as to whether the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction, the court denied the plaintiff's motion.[3]

Thus, this case is important because it establishes, apparently for the first time, that secondhand smoke is a condition which potentially could be a breach of the warranty of habitability and cause a constructive eviction. Given the procedural posture of the case, however, the court did not make a finding as to whether, on the particular facts before it, there actually had been a breach of the implied warranty of habitability and/or a constructive eviction.

The court began its analysis with a discussion of the doctrine of the implied warranty of habitability embodied in RPL §235-b. That statute, enacted in 1975, provides in relevant part that:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subject to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

The court referred to the Court of Appeals decision in *Park West Management Corp. v. Mitchell*[4] as "the landmark case...[which] defined the history and parameters of RPL §235-b or the implied warranty of habitability." Judge Hagler emphasized that, according to that case, landlords must warrant against both latent and patent conditions, and that conditions "occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster" are all within the scope of the warranty.

The court also cited the 1995 Court of Appeals decision in *Solow v. Wellner*[5] as establishing the proposition that RPL §235-b was intended to provide "an objective, uniform standard for essential functions" that a residence is supposed to provide. The *Solow* case involved consolidated, nonpayment proceedings arising out of what, in the words of the Court of Appeals, was "a pervasive rent strike" in "a uniquely designed building on Manhattan's 'fashionable' Upper East Side," namely, 265 East 66th Street. The Court of Appeals rejected the tenants' contention that the landlord of a luxury apartment building should be held to a higher standard of performance as to the warranty of habitability than the owner of a less fancy building. The Court of Appeals in *Solow* concluded that RPL §235-b was not meant to create "an individualized subjective standard dependent on the specific terms of each lease."

The court in *Poyck* stated that "there appears to be no reported case dealing with secondhand smoke in the context of implied warranty of habitability." It did note the case of *Bender v. Niebel*,[6] where the Appellate Term reversed the dismissal of a warranty of habitability claim. There, the tenants had listed in a bill of particulars the landlords' cigarette smoke as among the items allegedly supporting that claim. Judge Hagler commented, however, that while that case had "some precedential value, it did not directly deal with the single issue of secondhand smoke emanating from neighbors as opposed to the landlords themselves."

In concluding that secondhand smoke qualified as a condition to which RPL §235-b is pertinent, the *Poyck* court listed "the more common conditions" which give rise to claims of breach of the warranty of habitability, such as "noxious odors, smoke odors, chemical fumes, excessive noise and water leaks and extreme dust penetration." Referring to government declarations that "there is a substantial body of scientific research that breathing secondhand smoke poses a significant health hazard," Judge Hagler stated that secondhand smoke is "just as insidious and invasive" as these conditions.

According to the court, the "gravamen" of the landlord's summary judgment motion was that "he cannot be held liable for the actions of third parties beyond his control, such as the neighbors in unit 5C." The court characterized that argument as "misplaced" since the Court of Appeals had "clearly stated" in the *Park West Management* case that the acts of third parties are within the scope of a landlord's responsibility pursuant to RPL §235-b.

Furthermore, the *Poyck* court continued, "[t]he courts have continuously held that the implied warranty of habitability can apply to conditions beyond a landlord's control." In support of that proposition, the court cited the following cases: *Elkman v. Southgate Owners Corp.*,[7] *Sargent Realty Corp. v. Vizzini*,[8] *Quasha v. Third Colony Corp.*[9] and *Solomon v. Brandy*.[10]

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In *Elkman*, proprietary lessees of a cooperative apartment brought an action against the cooperative apartment corporation for, among other things, breach of the implied warranty of habitability "in connection with an alleged noxious odor condition emanating from a retail fish store in an adjacent building neither owned or controlled by defendant cooperative apartment corporation." The Appellate Division held that the IAS court had properly denied partial summary judgment on the cause of action alleging breach of the implied warranty of habitability because discovery was incomplete and material issues of fact existed. The court thus recognized that the circumstances at issue might constitute a breach of the implied warranty of habitability.

In *Sargent*, the court found that there had been a breach of the warranty of habitability as to an apartment where the landlord had allowed flooding into that apartment from an upstairs apartment to persist, there being four such floods. In *Quasha*, the court held that since, under certain circumstances, "noise from without a tenant's apartment has been found to amount to a breach of [the] warranty [of habitability]," the complaint had stated a claim for breach of that warranty sufficient to withstand a motion to dismiss where it alleged excessive noise emanating from an adjacent apartment "in the form of boisterous parties, barking dogs and flushing toilets, among other things."

In *Solomon*, the tenant asserted a breach of warranty of habitability claim based on the contention that he had no water in his bathroom or kitchen for a three month period. Landlord's response to this claim was that "there was a problematic tenant in the building causing problems that necessitated shutting off the water in apartments on the 'B' line." Noting that "the warranty of habitability can apply to conditions resulting from events beyond a landlord's control," the court rejected the landlord's response as a defense against the breach of warranty claim.

The *Poyck* court not only found the landlord's assertion of non-liability for the actions of third parties beyond his control to be contrary to law, but Judge Hagler also emphasized that the landlord had "failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition." The court suggested various steps that the landlord might have taken, such as asking the board of managers of the condominium to stop the neighbors from smoking in the hallway and elevator or taking "preventive care to properly ventilate unit 5C [the neighbors' apartment] so that the secondhand smoke did not seep into the Bryants' apartment."

The court pointed out that RPL §339-b(1)(i) mandates that condominium by-laws restrict the use and maintenance of units and common elements such as hallways and elevators so as to "prevent unreasonable interference with the use of respective units and of the common elements by several unit owners." Accordingly, the court commented, the "board of managers and even the landlord could have commenced an action for damages or injunctive relief for non-compliance with the by-laws and decisions of the board of managers pursuant to the Condominium Act."

Neither the landlord nor the Bryants had asserted claims against the condominium's board of managers. The *Poyck* court attributed that omission to the fact that "the implied warranty of habitability pursuant to RPL §235-b does not apply to the relationship between the board of managers of a condominium and an individual unit owner." In support of that conclusion, the court cited *Frisch v. Bellmarc Management, Inc.*,[11] where the Appellate Division, First Department, noting the absence of a landlord-tenant relationship between a condominium unit owner and the condominium board of managers, had expressly held "that the warranty of habitability of Real Property Law §235-b does not apply to an individual unit within a condominium." (By contrast, the *Frisch* court stated, it "is clear that tenant-shareholders in a cooperative can rely on section 235-b in actions against the cooperative corporation.")

In short, the *Poyck* case is noteworthy as reflecting the impact on a basic legal doctrine (warranty of habitability) of the significant change in society's attitude toward smoking since the days of the Marlboro Man. It is also an example, as Judge Hagler seems pointedly to suggest at the outset of his decision, of the law necessarily taking an activist stance because of another, and not very admirable, reality of modern urban dwelling, i.e., the demise of the "Golden Rule," that "general principle of ethics which essentially admonishes neighbors as follows: What is hateful to you, do not do to your neighbor."[12]

1. NYLJ, Sept. 1, 2006, p. 22, col. 1 (Civ. Ct. N.Y. Co.).
2. Id., at col. 4.
3. The motion which the court decided by its decision and order which appeared in the Sept. 1, 2006 Law Journal was actually a motion, pursuant to CPLR §§2221(e) and 3212, to renew the landlord's prior motion for summary judgment striking and/or dismissing the defendants' affirmative defenses and counterclaims for breach of the warranty of habitability and constructive eviction. The court had denied that prior motion on procedural grounds.
4. 47 N.Y.2d 316, 418 N.Y.S.2d 310 (1979).
5. 86 N.Y.2d 582, 635 N.Y.S.2d 132 (1995).
6. 11 Misc.3d 136(A), 816 N.Y.S.2d 693 (App Term 2d & 11th Jud Dists 2006).
7. 233 A.D.2d 104, 649 N.Y.S.2d 138 (1st Dep't 1996).
8. 101 Misc.2d 763, 421 N.Y.S.2d 963 (Civ. Ct. N.Y. Co. 1979).
9. NYLJ, Oct. 10, 1990, p. 22, col. 2, 18 HCR 473 (Sup. Ct. N.Y. Co.).
10. NYLJ, Sept. 7, 1994, p. 22, col. 6, 22 HCR 523 (Civ. Ct. Bronx Co.).
11. 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993).
12. NYLJ, Sept. 1, 2006, p. 22, at col. 3.