

Who Is Responsible for Eradicating Bedbugs?

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While bedbugs have been mounting a comeback throughout New York City, the courts and the Legislature have struggled to catch up on the issue of liability for remediation. This article addresses the most frequently asked question in bedbug cases in residential apartments: Who pays?

The starting point for any discussion regarding conditions affecting the health or safety of an occupant of a New York City apartment always begins with the warranty of habitability provision found in Real Property Law §235-b, which states:

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 subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants or warrants.

In New York City, apartments are generally rentals, co-operatives, or condominiums. The law regarding each type of apartment is discussed below.

Rental Apartments

Because the warranty of habitability applies to leases, it obviously applies to rental apartments. The recent spate of bedbug cases—usually involving non-payment of rent and a counterclaim for breach of the warranty of habitability—has necessarily required courts to apply the warranty of habitability where a bedbug infestation has been found in a rental apartment.

The first proceeding in recent years to deal with a bedbug infestation and its relationship to the warranty of habitability was [Ludlow Properties v. Young](#), 4 Misc.3d 515, 780 N.Y.S.2d 853 (Civ. Ct. New York Co. 2004). In *Ludlow*, the Civil Court, "in an apparent case of first impression involving warranty of habitability due to bedbugs," held that the presence of bedbugs in the tenant's apartment, notwithstanding the landlord's diligent efforts at remediation, impacted upon tenant's health, safety and welfare. The court awarded the tenant a 45 percent rent abatement for a period of six months, granted the landlord a judgment of possession and a money judgment less the abatement. *Id.* at 517, 518.

Similarly, in *Grand Review LLC v. Moore*, NYLJ. Nov. 19, 2008, at 27, col. 1 (Civ. Ct. Queens Co.), the tenant's testimony at trial, as credited by the Civil Court, established that landlord made several attempts to eradicate the bedbug infestation, but that such attempts were insufficient. Accordingly, the court awarded tenant a 40 percent rent abatement in the amount of \$2,143.20, and granted the landlord a judgment of possession and a money judgment, less the abatement. See also, [Valoma v. G-Way Management, LLC](#), 2010 WL 4608696 (Civ. Ct. NY Co. 2010).

In [Bender v. Green](#), 24 Misc.3d 174, 874 N.Y.S.2d 786 (Civ. Ct. New York Co. 2009), the tenants also alleged a bedbug infestation in a non-payment proceeding. The Civil Court found that the trial evidence established that there were bedbugs in the subject apartment at some point during the relevant time period. The court held that "the evidence suggests that the bedbugs were introduced into the Subject Premises, through no fault of the Petitioner [landlord], and in all likelihood by the Respondents themselves." *Id.* The court further held that evidence established that landlord took prompt action to eradicate the bedbugs, including, but not limited to, making its exterminator available to tenants as they desired. *Id.* at 184-185.

Notwithstanding all of the foregoing, the court awarded tenants a 12 percent rent abatement in the sum of \$2,724.21 for the period of bedbug infestation, and held in relevant part:

RPL §235-b provides in pertinent part "[w]hen any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants or warrants (*id.*)."

Petitioner did not establish at trial that the presence of bedbugs was caused by any "misconduct" by Respondents.

There is nothing in the record to suggest that any deliberate or intentional act was done by Respondents which led to the presence of bedbugs in the Subject Premises, or even that Respondents were negligent in any manner....

The Court finds that neither party is the prevailing party entitled to legal fees. Petitioner is entitled to a final judgment in the amount of \$2,941.19. Issuance of the warrant is stayed five days for payment.

See also, *JWD & Sons, Ltd. v. Alexander*, 33 Misc.3d 1217(A), 2011 WL 5222829 (Table), 2011 N.Y. Slip Op. 51962 (Town Court, Westchester Co., Decided Sept. 28, 2011) (tenant's rent abatement as a result of bedbugs was limited to that portion of rent she paid during infestation. Tenant was not entitled to an abatement of rent paid by a government agency on her behalf).

The New York State Division of Housing and Community Renewal (DHCR) took a different approach in *Matter of 91-32/43 195th St. LLC*, DHCR Adm. Rev. Docket No. WD110043-RO, issued June 26, 2008. There, a tenant alleged a reduction in services based on a bedbug infestation throughout the apartment. Landlord had exterminated the apartment three times within the month before receiving tenant's complaint; in addition, landlord provided monthly extermination service. DHCR's inspection of the apartment found only evidence of bedbug infestation in a mattress and dead bedbugs in the bedroom of the complaining tenant. DHCR held that the presence of dead bedbugs suggested that landlord's extermination was effective. Further, DHCR held that the landlord was not responsible for a bedbug problem that existed solely in the tenant's personal property.

In *Joseph v. Apartment Management Associates, LLC*, 30 Misc.3d 142(A), 2011 N.Y. Slip Op. 50303(U) (2d, 11th and 13th Judicial Districts, App. Term 2011), plaintiff sued the landlord's managing agent in small claims court for \$5,000 for the loss of personal property as a result of an infestation of bedbugs in his apartment and was awarded \$3,342.83. The Appellate Term, Second Department, reversed the small claims judgment and held that plaintiff's right to recover, if any, stemmed from Multiple Dwelling Law §80(1) because the warranty of habitability does not provide for consequential damages, such as property damage. The Appellate Term further held that there was "insufficient proof to establish that defendant failed to act with reasonable diligence upon being advised by plaintiff of the bedbug infestation in [plaintiff's] apartment."

Cooperatives

Cooperative apartments are also governed by a lease, most commonly known as a proprietary lease, and, similar to rental apartments, are also governed by the warranty of habitability. See, *Suarez v. Rivercross Tenants' Corp.*, 107 Misc.2d 135, 139, 438 N.Y.S.2d 164 (1st Dept. 1981). Most proprietary leases provide that the shareholder is responsible for conditions within the unit and that the cooperative is responsible for conditions outside the four walls of the apartment.

In *Zayas v. Franklin Plaza*, 23 Misc.3d 1104(A), 881 N.Y.S.2d 368 (Civ. Ct. New York Co. 2009), a tenant in a Mitchell-Lama cooperative development sued her landlord in negligence for loss of property and medical expenses arising from a bedbug infestation. The tenant testified that for over two years, she took steps to eradicate the bedbug infestation from her apartment but to no avail. In defense, the cooperative asserted that it could not be held responsible for tenant's loss because "shareholders of the Mitchell-Lama apartment units were responsible for remedying bedbug infestation." *Id.* In support of this position, the cooperative introduced a letter from the Department of Housing Preservation and Development which stated:

Franklin Plaza is a co-operative development and as such, each shareholder is responsible for the extermination of the bed bugs in their apartment unit. After a licensed exterminator completes a program of bedbug eradication at the shareholder's cost, Franklin Plaza will be responsible for a one time fogging of the apartment unit at the landlord's cost.

The Civil Court rejected the cooperative's position, holding that "HPD's letter opining that each shareholder at Franklin Plaza is responsible for the extermination does not provide the cooperative corporation with a safe harbor." *Id.* The court held:

Generally, a shareholder of a cooperative is responsible for maintaining the apartment in good repair and would be responsible for extermination within the apartment. However, this claim for damages is predicated upon claimant's credible and undisputed testimony that there was a building-wide bed-bug infestation. Section 78(1) of the Multiple Dwelling Law imposes a non-delegable duty upon the cooperative corporation, as landlord, to maintain the building in good repair.

Defendant was on notice of the bed-bug infestation and took no steps to remedy the conditions.

See also, the unreported decision *Mutual Redevelopment Houses Inc. v. Morgan Kennedy and New York City Human Resources Administration/Department of Social Services-Adult Protective Service*, (Sup. Ct. New York Co. 2009).

Condominiums

A condominium unit owner owns his or her unit outright, and is not a party to a lease. Accordingly, courts have held that the warranty of habitability does not apply to condominium units. See, *Linden v. Lloyd's Planning Service Inc.*, 299 A.D.2d 217 (1st Dept. 2002). Notwithstanding the foregoing, pursuant to the New York City Housing Maintenance Code, "[w]hen any premises is subject to infestation by rodents or insects...owner or occupant in control shall apply continuous eradication methods." Administrative Code 27-2003 and 27-2018(b).

Courts have held that if a defective condition exists solely in a unit then it is the responsibility of the unit owner to correct same; if a defect is building wide and/or the result of a faulty common element, then it is the responsibility of the condominium board. See, *Kandell v. Saunders III*, 224 A.D.2d 185, 186, 637 N.Y.S.2d 114 (1st Dept. 1996); see also, *Smith v. Parkchester North Condominium*, 163 Misc.2d 66, 619 N.Y.S.2d 523 (Civ. Ct. New York Co. 1994).

Accordingly, it can be fairly assumed that if a bedbug infestation is limited to one unit then, similar to a cooperative, it will most likely be that unit owner's responsibility. However, if the unit owner can show that the bedbugs originated from common elements and/or is a building-wide infestation, the burden will shift to the condominium board.

Legislative Action

On Aug. 30, 2010, the New York City Council enacted §27-2018.1 of the Administrative Code of the City of New York, captioned "Notice of Bedbug Infestation History." Section 27-2018.1 requires an owner to furnish to a tenant entering into a new lease a notice setting forth the bedbug infestation history, if any, for the subject premises and the building for the previous year. If an owner fails to provide the notice, the tenant may file a complaint with DHCR.

The notice form, created by DHCR, asks the landlord/owner of the apartment to furnish the potential tenant with, inter alia, the following information:

- A history of any bedbug infestation within the past year in the building and apartment; and
- The location of any infestation in the building and apartment which has or has not been eradicated and/or whether eradication measures were undertaken.

As of the date of this writing, the courts have not issued any published decisions regarding §27-2018.1.

The new law leaves many questions unanswered. For example, the terms "infestation" and "eradication" are not defined. Moreover, it is not clear if §27-2018.1 applies to proprietary leases and cooperative or condominium subleases; if so, how can the owner of an individual unit have knowledge as to building conditions or conditions in other units?

It appears that bedbugs are, unfortunately, here to stay, thus giving the courts plenty of opportunities to sort things out.

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