



HOROWITZ v. 1025 FIFTH AVENUE CORP.

How Much Power?

BY ANDREW BRUCKER

PERHAPS NO ISSUE in co-op and condo law is more litigated than the question of how much power is vested in the board of directors. An ancillary issue quite often found in the annals of court decisions is whether a board can change long-standing policies. The decision in *Horowitz v. 1025 Fifth Ave. Corp.*, a case that was recently handed down, seems to address some of these issues, but we will have to wait and see how other courts apply its findings.

At 1025 Fifth Avenue, the board of directors passed a rule over a decade ago that new tenants could no longer install

window air-conditioners and limited air-conditioning units to those which would be installed through the wall. For aesthetic reasons, the units would be flush to the exterior wall, so they would not protrude from the building's exterior.

A tenant-shareholder who had just purchased Apartment 12B made a request to install this type of air-conditioner, and was granted permission. The only problem was that his neighbor downstairs (in 11B) had an awning which was installed just below 12B's window. Thus, in order to install the through-the-wall air-conditioner, the awning would have to be removed. It had been put up about 50 years before.

Although there was no specific ban on awnings (and, in fact, a number of tenant-shareholders had awnings similar to the one in question), the proprietary lease stated that the use of the terrace was subject to "all applicable provisions of this lease." Later, the lease stated that the "house rules may regulate and control the use of any roof or terrace..." The house rules specifically noted that "no awning... shall be used except such as shall be approved in writing by the [board]."

The board of directors sent a notice to the tenant-shareholder of 11B and informed him that the awning would have to be

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removed. The 11B shareholder refused to comply with the board's request and brought an action against the board. The action in *Horowitz v. 1025 Fifth Ave. Corp.* requested that the court make three determinations: that (1) the shareholder had to have a license to maintain the awning under the proprietary lease, (2) the board be permanently prevented from interfering with his use of the awning, and (3) all other tenant-shareholders who had awnings could keep them.

The court decided that the tenant-shareholder was right, and that he could keep his awning. However, on appeal, the decision was overturned, and the board was found to be right. The appellate division stated that "irrespective of whether it was permissible at the time it was installed, the cooperative's house rules presently prohibit the awning."

More often than not, in these types of cases, the tenant-shareholder will claim that the cooperative has waived its right because it has not objected in the past. However, the appellate division answered this defense, stating that "the cooperative's right to require [the awning's] removal is preserved by the non-waiver provision in the proprietary lease." Thus, even though the awning had been on the terrace for decades, the fact that the board had never objected does not prevent the board from objecting at this time.

The appellate division also concluded that there was no basis for the court's interference in the management prerogative of the board, citing perhaps the most important case in cooperative and condominium housing law, *Levandusky v. One Fifth Ave. Corp.* This case is known for its carefully crafted and insightful pronouncement of the "business judgment rule."

The proprietary lease (or, in some cooperatives, the occupancy agreement) is the document which essentially controls and limits the rights and obligations of the tenant-shareholder in a cooperative apartment unit. For example, the very basic and essential issues involving the use of the apartment are found here. Thus, the questions of who can use the apartment (and for what purpose), who is responsible for repairs, and the rights for subletting are in the lease. The lease often requires that the board consent before an action is taken by the tenant-shareholder (example: alterations and subletting often need consent).

But, equally importantly, the lease typically contains a provision that

grants the board the very broad power to create rules and regulations for the use of the apartment and the building itself. These are referred to as the house rules.

Although very broad powers are assigned, are these rights unfettered? Can the board make any rules it wants? This has been the question that has confronted courts for decades. However, though the court decisions sometimes seem to be inconsistent, there are a number of rules that a board should follow so as to assure the enforceability of their rules and decisions.

The court, in the now-famous *Pullman* case (involving a cooperative's right to terminate a lease based on the tenant-shareholder's objectionable behavior) has stated that, in reviewing cases, there will be two levels of review: one when the cooperative seeks to terminate the lease and one when it simply asks the court to enforce its rules. The court stated that when there was a risk that the lease would be terminated, the court should exercise a heightened vigilance in assessing the board's exercise of business judgment.

The practical side to the *Horowitz* decision is simple: boards must be careful when enacting and enforcing rules. Any house rule should be properly enacted. There should be a formal vote at a board meeting, and the results specifically noted in the minutes of the board. Every change should be communicated to the shareholders. It would not be far-fetched for a judge to invalidate a house rule because the tenant-shareholder knew nothing about it.

A house rule should also be applicable to all shareholders. A rule which only applies to one particular tenant-shareholder (though not specifically named), or a rule which is selectively enforced, might be seen in an unfavorable light by a judge. In fact, the court in *Horowitz* specifically noted that the awning rule applied to the tenants generally. A board should always consider the theory behind *Levandusky*, which applied the business judgment rule to cooperatives and protected the board's decisions from constant review by the courts. As long as the board acted for the purposes of the cooperative, within the scope of its authority, and in good faith, the rule will stand. (The one exception to this rule is when the lease provides that the board's consent shall not be unreasonably withheld.)

A house rule must also promote the lawful and legitimate interests of the cooperative. To this end, it might be

advisable for the board to include in the board minutes the purpose of the change. Furthermore, any advice from architects, managers, or other professionals might be referenced in the minutes (and a report or opinion might be annexed).

These concerns are equally applicable when the board is asked to consent to a request by a shareholder. A rule or a consent (or refusal to give one) are both decisions of the board, and the business judgment rule would be applicable to either. Therefore, the question of "good faith" may arise, and it is wise to take this into account. For example, if three consecutive bathroom alterations were approved, all having been made by board members, and a tenant-shareholder's request for consent for a similar alteration is then denied, a judge would undoubtedly admonish the board for its lack of good faith.

The board of a cooperative must be ever cognizant of the fact that its decisions may be questioned and possibly litigated. A respect for formalities often goes a long way toward preventing, or winning, a litigation. Likewise, careful consideration of the reasons for, and the true affects of, any board decision prior to such decision being made must be made by each director. **H**