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CO-OPS

The Co-op Lease: Areas of Concern and The New CNYC Form of Proprietary Lease

By Andrew P. Brucker

The basic rules of living in a cooperative housing development are set forth in the lease between the tenant/shareholder (hereinafter, the "shareholder") and the cooperative corporation. This lease, often called a "proprietary lease" or an "occupancy agreement," serves as an outline of the obligations and responsibilities of the shareholder to the cooperative corporation and the other shareholders. It also outlines the obligations of the corporation to the shareholder.

However, due to the unique owner/lessee position that a shareholder in a cooperative holds, the lease does much more than simply outline the shareholder's behavior as a tenant; it also describes a shareholder's obligations as an "owner" of the apartment, i.e., under what terms he may sell or sublease his apartment. Thus, the lease is the most important document that exists for a shareholder, and should be reviewed by the cooperative corporation on a regular basis. Unfortunately, some cooperatives continue to use the original lease found in the offering plan, for no one has accepted the task of reviewing it. It is incumbent on the cooperative's counsel to recommend such review.

Can an old lease still be efficient? Certainly, yet this ignores the reality of life. The original lease was written by the sponsor, who probably never lived in the building and whose only objective was to entice people to buy units in the building. In addition, most leases are 30 to 50 years old, and the fact is that times change. For example, more often than ever, shareholders use their homes as an office, and this might affect the living conditions of others. A lease written three or four decades ago simply did not anticipate changes in our society.

With this as a background, the Council of New York Cooperatives has been hard at work developing a Form of Proprietary Lease, which has finally been released. It would be naïve to believe that a co-op would totally discard its lease and adopt the CNYC form. Most co-op boards will seek to make a few significant changes, for anything more would confuse their shareholders and complicate matters. But the CNYC form is a valuable tool that can serve as a road map as one reviews the intricacies of the proprietary lease. The following is a short discussion of a few significant points that should be reviewed, and an analysis of treatment of the issues by the CNYC form.

Use and Occupancy of the Unit

Perhaps the one single provision of a co-op lease that causes the most confusion and debate is the so-called "use" clause. Most leases state that the unit may be used by the shareholder and his or her immediate family. This sounds sim-

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ple, but there is a question that must be resolved: Does "and" mean "and," or does "and" mean "or"? In other words, if the shareholder moves out of the co-op, can a member of his/her immediate family then move in?

Consider two extreme examples. In one situation, a couple moves to Florida, and their child (who never lived in the unit) moves in. In the other situation, a husband and wife have lived together in a unit for 20 years, and now the couple agree to a trial separation, and the husband (the sole shareholder) moves out, allowing his wife to stay in the apartment. Should the co-op have a right to reject the proposed arrangements? Should the co-op treat these two family members the same? At least one court has held that "and" means "or," believing that the unit may be used by the unit owner's family *even if* the shareholder is not in (nor has ever been in) the unit. See *Fifth 912 Corporation Inc. v. Krupinski*, Sup. Ct., N.Y. Co., NYLJ, 9/24/96. In that case a man bought a cooperative and informed the board that he and his wife would live in the apartment. He never did, but his daughter and son-in-law did. The co-op attempted to terminate the lease, and lost. Thus, in our two examples, the court would allow both the separated wife and the problem daughter the absolute right to use the unit. I believe the court was incorrect.

This issue goes to the heart of what co-ops are all about (and is, in fact, the best and worse aspect of co-ops). Co-op boards can deny the purchase of a unit by someone who it believes will be a bad neighbor or a belligerent shareholder. The concept of picking only nice neighbors is enticing to anyone living in a multiple dwelling. This having been said, if a board has approved one person (the shareholder) to be a neighbor, why should it be forced to accept another whom the board members do not even know?

The CNYC form seems to handle this issue in an effective manner. It states that the unit should be used by "the Tenant-Shareholder and Tenant-Shareholders Family who reside concurrently with the Tenant-Shareholder." One would hope that this language is clear and not open to interpretation. Interestingly, the CNYC form defines "family" to include not only children, parents, etc., but also either tenant's spouse, or "one additional adult." This may complicate matters, for this language might bestow on a paying subtenant (who lives with shareholder, but has no other relation with them) the same status as a spouse or a life partner. Caution is called for, since this might have an impact on other provisions of the lease (e.g., flip taxes).

Late Fees and Fines

The power of the board of directors to fine defaulting shareholders, and charge late fees to those tenants who do not pay their maintenance in a timely manner, has been a topic of much discussion. One might assume that a board is empowered to create fines for lease violations, but this may not be true. At least one court (*Sweetman v. Board of Managers of Plymouth Village Condo.*, 1998 WL 1112655, April 3, 1998) indicates that while the power to fine may be implied, "the better practice would be to expressly enumerate this power." This is a position I would strongly endorse.

The same theory has been applied to late fees. In a recent case, the court reiterated the rule that late fees must be specifically authorized in the lease, and held that a flat fee enacted by the board (as part of its house rules) for late payments was invalid. See *North Broadway Estates, Ltd. v. Schmoldt*, 559 N.Y.S.2d 457 (July 6, 1990).

The lesson is clear: Unless a provision for fines or late fees are included in the lease, charging tenants for these defaults will be close to impossible. In addition, any late fee provision must be specific in authorizing a late fee for *any sums* due the co-op. Language in a lease that authorizes late fees if *rent* is overdue may be problematic. Such language may not permit a late fee when rent (or maintenance) is paid, but other fees (e.g., washing machine fee, etc.) to the co-op are outstanding. It is incredible how many leases have no provision for fines or late fees, and how many managers and boards wish they did. The CNYC form envisions "charges and fees" and does an effective job in attempting to broadly define such fees. I strongly suggest that such a provision be included in every lease. I agree with the suggestion by some attorneys that such charges must still be reasonable in nature and if the board adopts high fees that would be considered punitive, a court might not permit such fees.

Objectionable Conduct

No issue directly affects the shareholders on a personal level more than the treatment of "problem tenants." A shareholder's life can be made into a living hell by a neighbor who disturbs the shareholder's sleep each night. Every lease seems to have a provision that states that "objectionable conduct" is a default under the lease. Yet this language is so vague as to render this provision ineffective. It prompts more questions than answers. Can an "alternative lifestyle" be considered objectionable? Is one domestic verbal battle (albeit at 3 a.m.) a default? It is advisable to carefully scrutinize this provision and if this language stands alone, we believe that a change should be made.

The CNYC form has attempted to remedy the problem by defining objectionable conduct to include conduct that "permits or tolerates a dangerous condition or dangerous or disruptive person" to be in the building or the unit. This is certainly an improvement. I recently suggested to a client that the definition of objectionable conduct include "conduct which on three separate occasions, during any six-month period, has resulted in either (i) written complaints to the board

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Andrew P. Brucker practices law at Schechter & Brucker, P.C., in New York City. This article is adapted from one that recently appeared in the New York Law Journal.

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and/or management by at least three different shareholders, or (ii) intervention by the police department."

Will this impress the court? Does this somehow turn what typically is a subjective issue into an objective issue? It is unclear but it may be worth the effort, for too often we have seen shareholders remain in possession after months of disruptive behavior.

Sale of Units

The general rule (standard in co-op leases) is that any transfer of the unit is subject to the consent of the board, even a testamentary bequest of the unit. One aspect of this issue involves the delicate situation when a shareholder dies and bequeaths the unit to his or her spouse (or life partner). The CNYC form (and many leases) state that such consent shall not be unreasonably withheld if the assignment is to a "financially responsible" spouse or significant other. However, this is troubling.

For example, assume a husband (who is the shareholder) and wife live in a unit for 30 years and the husband dies leaving the widow (who has no income) the unit in his will. Since his costly illness has drained most of their funds, she has a modest net worth. Is there anyone who believes that the widow should *not* be allowed to live out her final years in the unit? Without question, most boards would allow her to stay, but should the board even be given the power to reject her? Perhaps the more humane approach is to simply allow the assignment to the spouse (or life partner) who lived in the unit with the deceased shareholder.

Subletting

Subletting is a constant issue with which co-op boards must contend. Typically, boards must consent to subletting, and often approval is requested when there is a conventional subletting, i.e., when the owner leaves and a sublessee moves in, paying the owner a sum each month. But every so often a shareholder leaves and a *relative* moves in. When management or counsel to the co-op speaks with the sublessee (or his/her attorney) in order to remind them that consent is required, it is not surprising to hear "This is not a sublet. No money is changing hands."

This is a common mistake, and rather than debate this issue, the CNYC form takes a straightforward and logical approach to the problem. It simply states "Subletting shall include the occupancy of the apartment by any person not authorized to occupy the apartment, *whether or not any rent is paid by the occupant.*" [Emphasis added.] This plain language approach to this problem is to be commended.

Many boards have instituted sublet fees, which are payable if and when a sublet is permitted by the board. A board typically considers this within its power, for if a sublet must be approved by a board, why should that board not be permitted to establish certain terms and conditions, including payment of a fee? One court that dealt with this issue surprised many when it found that "since the By-laws and Proprietary Lease contained no specific authority for the imposition of a surcharge" the sublet fee enacted by the board was invalid. See *Zimiles v. Hotel Des Artistes Inc.*, 627 N.Y.S.2d 382, June 8, 1995. I'm not convinced that the court was correct, but nevertheless co-ops should be advised that the lease must contain specific language that allows the board to grant or withhold consent to such subletting, for any or no reason, and on any terms and conditions it may determine, including the imposition of a subletting fee.

A Living Document

It is clear that the proprietary lease is a living document intended to govern the relations between the cooperative and the tenant/shareholders for many years, and must be reviewed every so often. Times change, laws change and the needs of the cooperatives and their shareholders change. A careful review of the lease by the board every decade is advisable, and what experience has shown to be the major points of contention, such as those discussed previouosly, is an appropriate starting point for any such review.

The CNYC form has attempted to deal with many of these issues, and has done so effectively. However, as every board and every co-op has different needs, any analysis of the lease should be made under the learned eye of the cooperative's attorney.

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