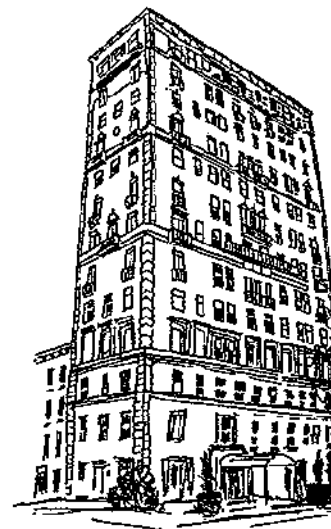


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The Great Co-op Secret



Why Are You Doing This?

At some point in the process of buying a cooperative apartment in New York City, the average co-op buyer will have one of those cartoon bubbles above his or her head that asks: "why am I doing this?" Co-op boards seem to be more impossible than ever to deal with and the process, from board application--to approval--to setting a mutually convenient closing date with the managing agent--just takes too long. The conclusion, therefore, would appear to be that buying a condo is preferred because of the streamlined purchase process (condo Boards only have a right of first refusal). That being said, there is one advantage to owning a co-op that I think is extremely important, but doesn't get a lot of coverage: the relationship between the cooperative corporation and the shareholder of a co-op (that is, the co-op unit owner) is that of landlord and tenant.

How the Landlord-Tenant Relationship Arises

To review briefly: when you purchase a co-op you are actually purchasing shares in a cooperative corporation; you are not purchasing real estate as in condo ownership. Connected to your share ownership is the right to occupy a particular apartment in the building which is owned by the cooperative corporation pursuant to the terms of a

document called a proprietary lease. This document, which governs all aspects of your occupancy and, in most cases, your ownership of your cooperative apartment, is a residential lease like any other residential lease. As a result, your leasehold is governed by the laws applicable to residential leases in New York. Now here's the big difference between coops and condos: the landlord-tenant law of New York applies to co-ops but does not apply to condos. Why is that fact so important?

Significance of the Landlord-Tenant Relationship

To begin with, residential landlord-tenant law, to a great extent, exists to protect the tenant from landlord abuses. Accordingly, the tenant-shareholder of a co-op finds him or herself looking to a set of laws and rules that tend to favor the tenant. Here's a rule to keep in mind about apartment ownership: The Rule of One. Simply stated, when you own an apartment (whether co-op or condo) and you have a problem that only affects your apartment, no one cares but you. In those situations where it's you against the indifference of the co-op board, the managing agent and/or the other tenant-shareholders, you can look to the tenant protection laws as a sword (and as a shield) to make the board pay attention to, and act on, your particular situation. Although a condo Board of Managers has a fiduciary obligation to its unit owners to maintain the common areas of the condominium, the law affords less protection to condo owners. In essence, the rule of one has a greater negative impact on a condo owner than on a co-op owner.

Keeping the Interest of the Co-op Board

The security blanket of the landlord-tenant laws has another benefit for co-op owners. In many instances, the cooperative corporation (through its Board of Directors) must remain a party to disputes between individual lessee unit owners. The cooperative corporation, as lessor, can have a contractual obligation pursuant to the proprietary lease, to resolve conflicts between unit owners.

An example: Let's say that one unit owner likes to play his or her stereo at unreasonably high volume levels in the wee small hours. Despite numerous requests from the unit owner next door, the other unit owner refuses to lower the stereo volume or to play music at reasonable times. A Unit owner, as provided in most proprietary leases, is entitled to a right of "quiet enjoyment", which means if you pay your maintenance on time and aren't otherwise in default under the terms of your proprietary lease, you're entitled to occupancy of your unit without interference from the landlord or anyone else. Accordingly, the cooperative corporation would have to get involved in the dispute if you claimed your right of quiet enjoyment was being disturbed by your neighbor. It's the co-op's obligation to make sure that your right of quiet enjoyment is not diminished by a selfish neighbor. Although a condo

board would probably intervene in an attempt to resolve the problem, the condo board does not have the same obligation to resolve disputes of this nature between unit owners. Now, let's say that you bring the noise problem to the attention of the co-op board and the board (forgive me) turns a deaf ear. Then what happens? This is where the Great Co-op Secret kicks in.

The Warranty of Habitability

Implied into every residential lease is a warranty on the part of the landlord known as the warranty of habitability. This warranty is set forth in Section 235-b of the Real Property Law of New York and provides, in pertinent part, as follows:

"1. 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, 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 and warranties..." (subparagraphs 2. and 3. omitted)

Background

When the warranty statute was enacted many years ago, the intent of the law was to protect tenants from deleterious living conditions such as a lack of heat or hot water, a threat to physical safety, rodent infestation and other serious threats to "human habitation". If a breach of the warranty was identified by a court, the court had the power to abate the rent to compensate the tenant for the lack of services complained of. New York, as many of you know, is a complex place with complex scenarios. Over the years, the warranty has been applied to a myriad of unpleasant conditions such as cases involving noise, water damage, fire damage, toxic conditions such as mold and a new resident of New York City apartments: bedbugs. Loss of personal property (like a water-soaked Persian rug) is not recoverable under the statute. Not all tenant complaints will necessarily result in an abatement of rent or maintenance. The failure to provide luxury services will not constitute a breach of the warranty of habitability (but may constitute a breach of the lease on other grounds).

The Warranty's Significance to Co-ops: An antidote for the "Rule of One".

The warranty is important to co-op owners as a co-op unit owner could seek an abatement of his or her maintenance if the co-op failed to provide the services stated

in the proprietary lease or failed to cure a condition or make a repair that threatens the co-op unit owner's health or safety. Should you assert a breach of the warranty of habitability if you cannot resolve a dispute with your co-op Board which relates to the failure to provide services or cure a dangerous or bothersome condition? Obviously, there is no "yes" or "no" answer to this question. Each situation must be evaluated in light of the particular facts and circumstances and an owner should always consult his or her attorney when a serious dispute arises. Some co-op boards deal with unit owner complaints expeditiously, other boards need to be prodded into action. If a co-op board or its managing agent is ignoring a serious problem (such as lack of heat or hot water, water infiltration or excessive noise conditions) and litigation can not be avoided to resolve matters, the co-op unit owner should take comfort in the fact that the warranty is there to protect the tenant-shareholder's rights.

How do Warranty of Habitability Claims Come to a Head?

In most cases, disputes between the co-op board and the co-op unit owner come to a head when the tenant withholds maintenance as a result of the co-op's alleged failure to provide services or cure a particular condition. When the co-op board deems the situation incapable of resolution without litigation, it will generally commence a non-payment proceeding in the landlord-tenant part of the New York City Civil Court. In many cases, the tenant will assert as an affirmative defense to the co-op's petition that the co-op breached the warranty of habitability by failing to provide services or make necessary repairs. The co-op unit owner will ask the court for an abatement of the withheld maintenance and the co-op will ask the court for a money judgment equal to the maintenance owed, plus interest and costs. Should a co-op unit owner withhold maintenance if the board is ignoring the co-op unit owner's specific problem? My very strong opinion is as follows: a co-op unit owner should never withhold maintenance or take any other action which may result in the commencement of litigation without first consulting with counsel. Litigation is always more costly and time consuming than you are anticipating--don't go there unless there's no other choice.

Residential Reality: The Warranty of Habitability is a Real Protection for the Co-op Owner

As mentioned, the warranty is only available to co-op unit owners. Condo unit owners must seek out other remedies, such as breach of fiduciary duty by the Board of Managers to deal with a building-wide problem. In my opinion, the condo owner does not have a remedy with the same fire power as that of the warranty of habitability. I call the warranty of habitability the great co-op secret because very few coop unit owners think of themselves as tenants akin to their brothers and sisters in

rental buildings. I would bet that an even smaller percentage of co-op unit owners have ever heard of the warranty. Whenever a tenant-shareholder legitimately raises the sword of the warranty, the co-op board, through its managing agent or counsel, almost always will attempt to address the unit owner's concerns. Managing Agents and attorneys understand that if the co-op board does not deal fairly with the coop unit owner, when the co-op owner legitimately asserts a breach of the warranty of habitability, a court may award a maintenance abatement as a result of the failure of the co-op to provide services or make repairs. As co-op Boards live in fear of setting the dreaded "bad precedent" which could impact other residents in the building, most boards will try in good faith to resolve a dispute before a third party gets involved.

I consider the warranty of habitability to be the number one tool in the co-op unit owner's remedy tool box.

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