New York City Co-Op Board Gets No Deference in *Kotler* – It May Be Time to Amend Your Proprietary Lease

Legal Alert
May 3, 2021

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You are a responsible member of the board of directors of a fashionable cooperative apartment building in New York City. You have been doing this for a long time and are genuinely dedicated to protecting the interests of your fellow tenants and shareholders. You and your fellow board members have been trusted with upholding the building's standards, cleanliness and decorum. Each time a potential purchaser shows up and submits a board package for you to review, you examine it carefully to determine whether the applicant is suited to be a tenant and shareholder in your building. You take your role seriously.

A tenant shareholder has died. Her will left the apartment to her son, who has submitted a transfer application for your review. Since you have lived in the building for many years, you know the son fairly well. You know that he has never held a steady job. You have good reason to suspect, but cannot prove, that he has a substance problem. You recall that, when he lived in the building with his mother, he had friends visit him whom you thought were unsavory. Thanks to several trust funds set up for his benefit, however, he is well provided for and, at least on paper, appears able to afford to pay the maintenance. Your inclination, and that of your fellow board members who also know him, is that this is not the sort of person with whom you would like to share your living space. You would like to reject his application.

NYC Co-Op Board Rules

The law in New York City gives a co-op board wide deference in accepting or rejecting applications from potential transferees, holding that consent to transfer *can* be arbitrarily denied.[1] In fact, many New York City proprietary lease forms provide that the board may withhold its consent "for any reason or for no reason."

[2]

But not so fast. If, however, your proprietary lease form dates back to the 1970's, as many, if not most, still do, you may have a provision such as this one to contend with:

In the event the Lessee shall die during the term of this lease, consent shall not be unreasonably withheld to any assignment or transfer of this lease and the appurtenant stock by bequest or by assignment by the administrator or executor of the Lessee, provided that such legatee or assignee shall be a financially responsible member of the Lessee's family.

While the board may believe, in utmost good faith, that it is in the best interests of the building that the application be denied, this language may prevent that from happening. In the recent case of *Kotler v. 979 Corp.*,[3] the New York Appellate Division, First Department, found that in place of the usual deference accorded to co-op boards, this language compels the imposition of a "heightened standard of reasonableness." In practical terms, this means that the burden is on the board to "reasonably show that the proposed transferee . . . was not 'financially responsible.'"[4] The *Kotler* court tested the applicant's "financial responsibility" by evaluating whether the applicant had sufficient assets and income to pay the maintenance on the apartment. Finding that the applicant did, the court affirmed the lower court's ruling in the applicant's favor.[5]

The Impact of *Kotler*

Does this mean that the hypothetical trust fund baby ne'er-do-well with a potential drug habit and rowdy friends must be approved for tenancy and ownership? Maybe. The reach of the *Kotler* decision, including the possibility that the boards operating under this and similar clauses may only ask if the transferee can afford to pay the rent, has not been tested. To be sure, the best way to ensure that such a challenge does not arise is to amend your proprietary lease to eliminate the language that might compel it. Newer lease forms have limited the applicability of the "reasonableness" standard to a transfer to a "financially responsible" spouse or a person having an adult relationship with the transferor equivalent to that of a spouse. Others, including children, must pass muster under the normal New York City standard by which a board can deny its consent "for any reason or for no reason."

Conclusion

Amending your building's proprietary lease, which normally requires a super-majority vote of the shareholders, is not always easy and most often has to wait until the annual shareholders' meeting. The decision in the *Kotler* case and its potential implications may have made the task of convincing shareholders to approve such an amendment a bit simpler.

[1] *Weisner v. 791 Park Ave. Corp*., 6 N.Y. 2d 426 (1959). A co-op board may not, however, withhold its consent if its decision is predicated on race, national origin, religion, familial status of or sexual preference. *Robinson v. 12 Lofts Realty, Inc*., 610 F.2d 1032 (2d Cir. 1979); Admin Code, City of New York §§ 8-107(5), 8-108 and 8-108.1.

[2] *See Chappell v. Trump Plaza Owners, Inc*., No. 102282/11, 2011 WL 5024488 (N.Y. Sup. Ct. Oct. 03, 2011).

[3] 191 A.D.3d 473 (1st Dep't 2021).

[4] *Id*.

[5] *Id*.