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New York's Cooperative & Condominium Community

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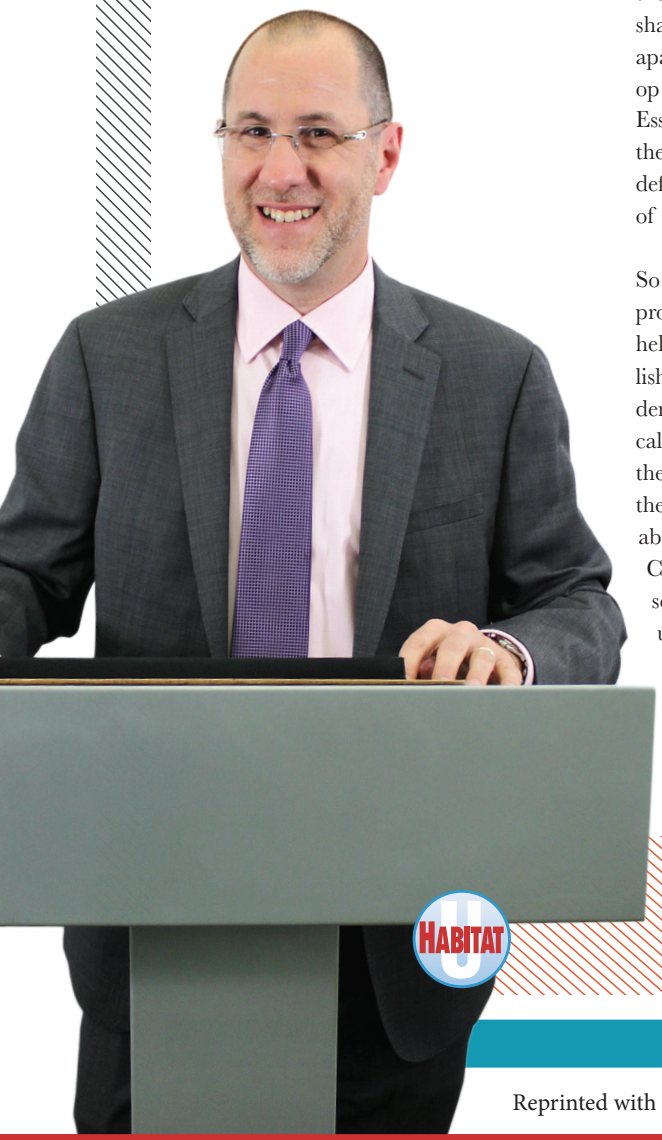
When the building needs fixing…

PROPRIETARY LEASE

THE SOUND OF SILENCE IS NOT GUARANTEED

There's a provision in the proprietary lease which pledges to shareholders that, upon complying with the obligations under the proprietary lease, they're entitled to the "quiet enjoyment" of their apartment. It's important to note that the covenant of quiet enjoyment is very closely related to the covenant implied by law known as the warranty of habitability applicable to all landlord-tenant relationships, regardless of whether or not it's actually in the proprietary lease.



Ironically, the covenant of quiet enjoyment does not mean that the shareholder is entitled to peace and quiet and absolute silence. Instead, it means that, as long as the shareholder is paying his maintenance on time – and that's a key point – and otherwise complying with the provisions of the proprietary lease, the shareholder is entitled to use and enjoy the apartment without interference from the co-op or anyone else, including other residents. Essentially, the premises must be suitable for the intended purposes, not perfect, but free of defects which would deprive the shareholder of the use and enjoyment of the apartment.

So what happens when someone thinks this provision is being violated? The courts have held that in order for a shareholder to establish a cause of action, the shareholder must demonstrate that he or she has been what's called "constructively evicted." According to the courts, there must be an actual ouster, either total or partial; there must have been an abandonment of the premises by the tenant. Constructive eviction means essentially that some event has deprived the shareholder the use of the premises, which compelled the shareholder to vacate the apartment.

Note, it doesn't have to be that the shareholder is prevented from using the entire apartment. It could just be one room, or only at certain times. Often, in these instances, shareholders will withhold maintenance. However, what they don't realize is that if they do this they can't claim breach of the covenant of quiet enjoyment, as a shareholder's ability to invoke this covenant is predicated on the shareholder paying all of his or her maintenance. This is because the law provides that a shareholder's failure to pay maintenance constitutes an election of remedies, which overrides his right to quiet enjoyment. Keep in mind that if the shareholder does this and is in the wrong, he also potentially risks actual eviction. So a word of caution to shareholders who think they should stop paying their maintenance until the constructive eviction issue they're alleging is resolved.

There are many examples of conditions that a shareholder might try to claim as a breach of the quiet enjoyment provision. One would be building noise issues – not noise from a shareholder, but noise from the physical building. As I said earlier, the quiet in the covenant of quiet enjoyment does not mean without a sound, as in a library. If the co-op's boiler or elevator is causing routine loud noises, the shareholder cannot invoke the covenant of quiet enjoyment.

Shareholders often get upset when building repairs cause a lot of noise. In a 2005 case, a shareholder claimed that repairs to the building's exterior caused him to essentially be evicted from his outdoor terrace area. Fortunately, the court held that alterations to leased premises do not amount to a case of constructive eviction. That's because when the shareholder enters into a proprietary lease with the co-op, the shareholder has basically acknowledged that the co-op has the CONT...

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responsibility to make repairs to the building and essentially has consented to these repairs being made, regardless of how noisy they are.

One co-op board actually seized part of a shareholder's private roof terrace, declaring it to be common property. This court held that this was a legitimate case of constructive eviction because the board took away something that was the shareholder's. The key here is that the area seized was actually part of the shareholder's leased space. If he's entitled to exclusive possession, you can't just take it away.

In summary, the co-op should make sure all residents can get the benefits of their proprietary lease without unreasonable interference that violates other provisions of the lease and the law. Boards should take shareholder complaints about these issues seriously and not avoid them.