Immediate Action Is a Must When Addressing Issues Related to Mold

COUNSEL'S CORNER



By: Kenneth J. Finger,
Carl L. Finger and
Daniel S. Finger,
Finger & Finger, Chief Counsel,
Building & Realty Institute (BRI)

WHITE PLAINS – Mold.

This is an issue that has plagued both apartment owners and cooperative and condominium boards alike in recent years. The general consensus is that immediate action is required to eliminate and/or remediate any problems of mold and mildew.

What action, how soon and the responsible party are questions that do not necessarily have clear cut answers. Similarly, the actual health risks that mold poses have not been clearly established. One thing is for certain, however, this is an issue that cannot be ignored.

Tenants have raised this in non-payment of rent cases as a defense for breach of the warranty of habitability. Its ultimate success as a counterclaim, on the other hand, is not quite as clear. In Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 649 N.Y.S.2d 138 (1st Dept. 1996), the Court held that where Plaintiff's claim for breach of the warranty of habitability, under Real Property Law §235-b, seeks to recover damages for personal injuries, such damages are not recoverable for such a breach. This only seems to demonstrate that it is improper to bring such a claim as a counterclaim in a landlord-tenant action such as one for non-payment of rent.

One would presumably still be able to assert this as a defense (as stated for breach of warranty of habitability) however. Under this logic, in order to properly pursue such damages, the correct forum is for the suffering party to bring a personal injury action to attempt to collect such damages.

In Litwack v. Plaza Realty Investors, Inc., 12/1/2004 N.Y.L.J. 23, (col. 1), the Court (citing amongst other cases the Elkman case) held:

The branch of the motion for summary judgment, dismissing the negligence claim based on a lack of notice, is denied. A landlord has a duty to maintain the premises in a reasonably safe condition. See Chapman v. Silber, 97 NY2d 9, 19 (2001). A landlord may be liable for a "failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs." Id. at 19. Thus, to be held liable, the landlord must have actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, the landlord should have corrected it. See Putnam v. Stout, 38 NY2d 607, 612 (1976).

Under this rationale, a landlord should not ignore claims of mold, mildew and similar issues, but rather they should be addressed as soon as possible to negate any claims of notice and/or the health problems and other issues that arise out of their neglect.

The Co-op and Condo Scenario

It should also be noted that for these purposes residents of cooperatives and condominiums stand in the shoes of tenants. They may provide notice of these issues to the managing agents similar to how tenants provide notice to their landlords. For this reason it is incumbent on the managing agent to address these issues as they arise just as the burden falls on the landlords. Failure to properly address such issues can not only result in personal injury actions but also the withholding of rent, maintenance and/or common charges and abatements of those monies.

In analyzing how much abate a court may award in such cases, the Court held in 360 WEST 51st STREET v. CORNELL, N.Y.L.J. 9/6/2005, "If a violation of the warranty of habitability caused a tenant to vacate the premises, the court may award a 100 percent abatement for that period of time when the tenant was out of possession. Mayourian v. Tanaka, NYLJ, April 4, 2001 at 23, col. 1 (A.T. 9th and 10th Jud. Dists.), 2001 WL 766153." This emphasizes not only the importance of these issues but also that these issues must be viewed on a case-by-case basis. This Court further emphasized that the courts have allowed such recoveries in cases involving health hazards similar to this and even in situations where no medical treatment was required.

In conclusion, apartment owners and cooperative and condominium boards should take notice of any complaints regarding mold, mildew and related issues expeditiously to negate both potential personal injury claims, as well as potential breach of warranty of habitability claims.

"…Apartment Owners and Cooperative and Condominium Boards should take notice of any complaints regarding mold, mildew and related issues expeditiously… to negate both potential personal injury claims, as well as potential breach of warranty of habitability claims."

Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J. Finger is Chief Counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

Property Management Group Announces Its 2007 Strategies

Continued from page 1

David Amster, ACMA's chairman. "We've also continued to examine additional methods that will help us further serve our clients. But now, we want to explore even more ways we can serve our clients, as well as help our members to better run their businesses."

Amster added that the group's Mar. 9 Board of Directors' meeting was scheduled to address those issues.

The current benefits of membership in ACMA include:

- •Meetings
- •Seminars
- Bulletin Services, Including Monthly Mailings
- A Monthly Newspaper
- An Annual Directory
- Lobbying and Legislative Services
- A "Hot-Line and Referral" System through the BRI

Background

ACMA was formed in 1986. In 1995, the organization released its Code of Ethics. The code contains guidelines that help define and enforce "the highest standards of ethical and professional conduct, both amongst property managers and in their relationships with their clients, suppliers and service firms."

"We've always been proud to emphasize the code, the efforts associated with it and the members of the association who strive to provide clients with the highest level of professional service," Amster said.

From 1998 to 2000, ACMA, in cooperation with the BRI, offered a certification program for its members.

"Those are the types of programs we are once again exploring," Amster said. "Any program that can help our property manager membership and the membership's clients, as well as the realty industry, will be discussed by our group in the weeks ahead."