CASE NOTES

Evicting a Serial Subletter

BY DALE J. DEGENSHEIN

CAN A CO-OP SHAREHOLDER who repeatedly rents an apartment to short-term guests be evicted based on objectionable conduct? The court considered this question in *340 East 93rd Street Corp. vs. Kasachkoff*.

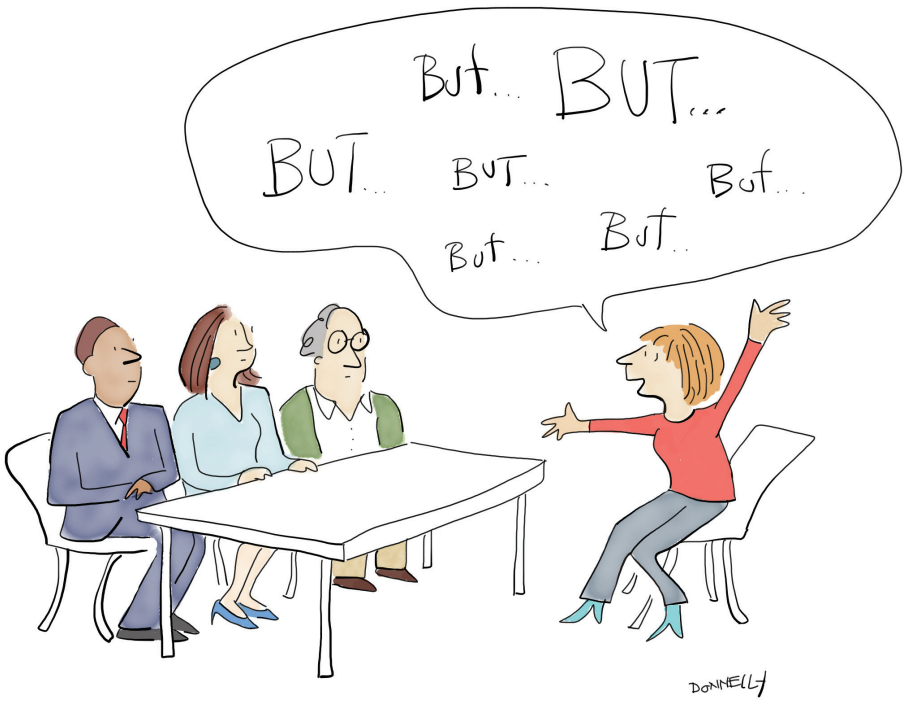
Alisa Kasachkoff owned the shares allocated to Apartments 7L, 7M, and 7H at 340 East 93rd Street in Manhattan. After she repeatedly rented apartment 7H to short-term visitors, the co-op board terminated her tenancy based upon an alleged violation of the proprietary lease.

At court, there were discussions of the applicable statute, which provides that a landlord (the co-op, in this case) must demonstrate objectionable conduct to the satisfaction of the court. However, in the landmark case of *40 West 67th Street Corp. vs. Pullman*, New York's highest court determined that in a co-op the court should defer to the co-op board's determination of whether the shareholder engaged in objectionable conduct.

The proprietary lease in this co-op provided that a "yes" vote by two-thirds of the board was sufficient to end a tenancy based on objectionable conduct. A vote of shareholders was not required, as it is in some buildings.

Kasachkoff argued that the holding in *Pullman* did not apply. She claimed that the shareholder in that case was not a long-time shareholder, as she was, and that his misconduct was egregious. Further, in *Pullman*, it was the shareholders – not the board – who were obligated to vote against the tenancy.

The court here held that Kasachkoff's arguments ignored the basic rule established by the *Pullman* court – that a board's decision to end a lease can be challenged only if the tenant-shareholder can demonstrate that the board violated the Business Judgement Rule by acting outside the scope of its authority, in a way that did not legitimately further the corporate purpose, or in bad faith.



Under that test, Kasachkoff alleged that the board acted outside the scope of its authority because two members of the board were real estate brokers, at least one of whom advertised listings in the building. She argued that another board member – the president – was conflicted because he denied Kasachkoff's request to sublet.

The court was not swayed, however. The board vote was unanimous – seven in favor of terminating Kasachkoff's lease, none opposed. Even if the president and the brokers abstained, there would still have been enough votes to terminate the lease. As to the board president, the court noted that there was no allegation that his refusal to permit her to sublet was improper.

Kasachkoff next claimed that the board's decision to evict her did not further the corporate purpose. She argued that because she was willing to take action at her own expense to evict her subtenants and list apartment 7H for sale, the board should not have acted. She also insisted that she would get a better price for the apartment than the cooperative would.

However, the court noted, Kasachkoff's last-minute offer to evict her subtenants did nothing to address her repeated rentals of the apartment without approval. Further, speculation about the price has no bearing. Kasachkoff's final argument – that the board had acted in bad faith – was similarly unpersuasive. Her allegations were speculative and not specifically related to the issues. The court explained that *Pullman* did not contemplate that *any* bad faith by the board would allow a shareholder

to prove this element; rather the bad faith had to be in the context of the decision to terminate the lease based on objectionable conduct. The court awarded possession of the apartment to the cooperative.

Reading the Ruling

The *Pullman* case is now 15 years old. While we have seen some successful challenges to a board's determination to terminate a proprietary lease based on objectionable conduct, such successes are rare.

A charge of objectionable conduct is a powerful weapon in a board's arsenal, although experience has demonstrated that most boards will turn to it only reluctantly. Notices must be sent. Upon receipt, shareholders are well-advised to try and open a dialogue with the board or managing agent so that the situation does not escalate. If it does, a meeting will be held, and the shareholder will be invited to address the board or shareholders, depending on the lease terms, Finally, there will be a vote as to whether to terminate that shareholder's lease.

It sounds as if in this case, the shareholder had received warnings but did not agree to address her behavior until it was too late. ■

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