Condo and Co-op Boards Beware — Discrimination in Housing

By Dennis Valet

Condominiums and cooperatives, especially high-end associations, are infamous for their lengthy, comprehensive, and often draconian purchase applications, by-laws, and house rules. In their quest to ensure that prospective new purchasers will be the proverbial "good neighbor" it is easy for a board of managers to inadvertently take discriminatory actions that expose the board to liability. This article examines some common issues a board of managers should consider when hiring an attorney to craft or review purchase applications, by-laws, and house rules that ensure compliance with ever-changing local, state, and federal discrimination laws.

Dennis Valet

Lawful source of income discrimination

New York City and Suffolk and Nassau counties have all enacted laws prohibiting discrimination on the basis of a resident's lawful source of income.[1] These laws make it illegal to discriminate based upon how an application will pay for their residence, so long as their source of income is legal. These laws bring into question the legality of applications which ask for employment history, a formerly critical piece of information relied upon by a board of managers in evaluating a potential purchaser. Asking for an applicant's employment status and history implies that only applicants who derive their income from gainful employment, in an industry acceptable to the board, will qualify, as opposed to applicants who derive their income from a source other than employment or unbecoming employment, such as housing vouchers or disability payments. When combined with disparate impact discrimination theories, a board that asks for employment history could potentially violate a lawful source of income discrimination law and expose the condominium or cooperative, including the individual board members to liability.

Pets, emotional support animals, and service animals

Residential condominiums and cooperatives are subject to the Federal Fair Housing Act (FHA) whereas commercial buildings are subject to the Federal Americans with Disabilities Act (ADA). These laws differ in how they treat emotional support animals[2]. Under the ADA, reasonable accommodations are not required for individuals with emotional support animals because only disabled individuals with a service animal are protected from discrimination. Current ADA rules limit service animals to dogs specifically trained to do work or perform certain tasks. The FHA, however, does not differentiate between emotional support animals and service animals in terms of the requirement to offer a disabled individual a reasonable accommodation.[3]

A board of managers that prohibits residents from keeping pets must be prepared to accept requests for reasonable accommodations made by individuals who are prescribed an emotional support animal to assist with a disability. While the ADA permits airlines to ban an emotional support peacock or hamster, the FHA requires a condominium or cooperative to make a reasonable accommodation for a disabled resident with an emotional support animal that meets current FHA rules and guidelines.

Parking spaces

It is common for a condominium or cooperative to assign a particular parking space to each unit, or to have rules prohibiting the reservation of certain spaces by residents (a/k/a first-come, first-serve). The Department of Housing and Urban Development has prosecuted condominiums who refuse to alter their parking rules to reasonably accommodate individuals who are disabled within the meaning of the FHA.[4] Courts within the Second Circuit have held that a reasonable accommodation can include the suspension of a "first-come first-serve policy," the assignment of parking spaces closer to the disabled individual's residence, and the repair of potholes in the parking lot.[5]

Rules specific to children

The FHA also prohibits discrimination based upon familial status, which generally refers to households with children under the age of 18.[6] By-laws and rules designed to regulate conduct within the association can often violate the FHA's familial status protected class. For example, a house rule stated, "Children under the age of 18 are not allowed in the pool or pool area at any time unless accompanied by their parents or legal guardian." A District Court held that this rule was facially discriminatory and was not enacted in the "least restrictive means to meet a compelling business necessity."[7] Similarly, at least one Federal District Court has held that house rules violate the FHA when they restrict children under 18 from using a clubhouse without adult supervision, restrict children under 12 from using a pool table, and require children under 18 to abide by a 10 p.m. curfew.[8]

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FOCUS ON REAL PROPERTY SPECIAL EDITION

Don't Slip Up Handling a Slip and Fall Deposition

By Kenneth J. Landau

The nature of the defect and other facts in a slip and fall case are very important to establish at the deposition. Focused questions and answers might serve as the basis for, or prevent summary judgment motions, or lead to a victory or a defense verdict at trial. Important facts about the happening of the accident and surrounding conditions must be explored at the deposition as this may be the only opportunity to investigate or establish these aspects of a case. Liability may be enhanced or diminished depending on the questions posed and the answers given at a deposition.

This checklist can also be utilized when you prepare a client to testify or question a witness in a slip and fall negligence case. At your initial meeting with a client, obtaining this information will also help you to properly evaluate a case and assist you in preparing for discovery and trial, and be of help in settlement negotiations. Questions should include the following.

Kenneth J. Landau

Place of accident

- Exact location, including distance from nearest landmarks, building line, streets, curbs.
- Weather conditions.
- Lighting conditions.
- Obstructions to view, including heavy pedestrian traffic or possible distractions, including construction.
- Street address and signage.

Description of accident

- Path the plaintiff followed up to the place of the accident.
- Where was plaintiff was looking just before the accident and what did he or she see.
- Was there an alternate way to reach destination.
- Was there an alternate path, or safer path around defect.
- Why did they not see the defect, including possible distractions.
- Detailed description of the defect, including size, dimensions, depth.
- Position of and any warnings given by any fellow pedestrians.
- How and where they fell and came to rest after the accident.
- Parts of the body in contact with the ground and position on the ground.
- Damage to clothing.
- Bruising or bleeding to their body.
- Personal distractions, such as using a cell phone, earphones or headsets.
- Weather conditions and lighting and position of sun.
- Were they wearing glasses, or do they have vision problems.
- Were they carrying any items, bags or packages.
- Destination — time due there.
- Had they passed over that area before.
- When they last passed over it, and had they frequently passed over that area, prior problems they noticed, if any, with that area.
- Witnesses to their fall.
- Eyewitnesses to the accident.
- Notice witnesses as to the defect.
- Any photos taken at the time of the accident by cell phones of the parties, by passersby or surveillance cameras.
- Statements to first responders at scene, including police officers or other responders (or witnesses).
- Were they suffering from any disability or had they consumed any alcohol or medication (learning about medication can lead to questioning

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Americans with Disabilities Act and Commercial Website Compliance (Continued from page 4)

law and regulation to catch up with new developments in technology. While the Second Circuit has not explicitly ruled on the issue, case examples exist in both the Southern District and Eastern District of New York where such lawsuits are allowed to move forward in what will likely be a costly litigation.

Without further regulatory action, these lawsuits are sure to increase. Many corporate entities will be forced to comply via litigation. For example, "[t]he [Hobby Lobby] website was found to be inaccessible, and the court agreed that for 20 years the DOJ has been saying that the ADA applies to private websites that are public accommodations. Therefore, Hobby Lobby's website should comply." Netflix was sued for failing to provide closed captioning. What about schools and government websites? Both Massachusetts Institute of Technology (MIT) and Harvard University were sued by the National Association for the Deaf after its success in the aforementioned Netflix lawsuit. Attorneys must advise their clients of the need to comply with the Americans with Disabilities Act within their facilities and on the web. Not only does this issue provide for an interesting academic discussion but it presents a major concern to the legal community as to the validity of some of these lawsuits[10] and the breadth of the ADA and its amendments.

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[1] *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *10 (S.D.N.Y. Dec. 20, 2017); see also *Andrews v. Blick Art Materials*, LLC, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (J. Weinstein).

[2] H.R. Rep. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

[3] *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) (citing 42 U.S.C. § 12101(b)(1)).

[4] Elisa Edelberg, *What the Winn-Dixie Case Means for the Future of Web Accessibility*, 3 Play Media (January 4, 2018), https://www.3playmedia.com/2017/09/27/what-the-winn-dixie-case-means-for-the-future-of-web-accessibility/.

[5] *Nat'l Fed'n of the Blind v. Target Corp.* ("*Target*"), 452 F. Supp. 2d 1148, 953 (N.D. Cal. 2006) (citations omitted); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017).

[6] Alison Frankel, *Will Trump DOJ side with disabled plaintiffs in ADA website suits*, Reuters (October 19, 2017), https://www.reuters.com/article/legal-us-otc-ada/will-trump-doj-side-with-disabled-plaintiffs-in-ada-website-suits-idUSKBN1CO2WJ.

[7] *Target*, 452 F. Supp. 2d at 955 (citation omitted).

[8] See, e.g., *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong., 2d Sess. 65–010 (2000) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); 75 Fed. Reg. 43460–01 (July 6, 2010) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations.").

[9] *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations* ("*NOPR*"), 75 Fed. Reg. 43460–01, 2010 WL 2888003 (July 26, 2010).

[10] See, e.g., Dave Biscobing, *Judge tosses ADA serial suer's case out of federal court, sanctions attorneys*, ABC 15 (October 14, 2016), https://www.abc15.com/news/local-news/investigations/judge-tosses-ada-serial-suers-case-out-of-federal-court-sanctions-attorneys.

Vacating Orders of Filiation and Acknowledgments of Paternity (Continued from page 15)

K-R., 48 A.D.3d 683, 850 N.Y.S.2d 919 (2008). In *Danielle M*, the Appellate Division Second Department reversed the Nassau County Family Court which had dismissed the paternity petition. The Appellate Division Second Department stated "Contrary to the Family Court determination, a prior Acknowledgment of Paternity made in accordance with Family Court Act Section 516-a does not serve as an insuperable bar to a claim by one who is a stranger to the acknowledgment (See *Matter of Tyrone G. v. Fifi N.*, 189 A.D.2d 8, 14, 594 N.Y.S.2d 224 (1993), particularly where, as here, the male signatory of the acknowledgment dies prior to the commencement of the paternity proceeding (cf. Family Court Act Section 516-a [b][ii] [where signatory of acknowledgment dies, a proceeding to challenge the acknowledgment may still be commenced "by any of the persons authorized by (Family Court Act Article 5) to commence paternity proceedings"]. Said matter was remanded back to the Family Court for further proceedings.

In the matter of *Fidel A. v. Sharon N.*, 71 A.D.3d 437, 894 N.Y.S.2d 753 (2010), the Appellate Division First Department sustained an Order of the Bronx County Family Court, which granted the motion of Wayne N. to dismiss the petition of Fidel A. on the grounds of Equitable Estoppel. The Appellate Division First Department stated that even though the DNA tests showed Fidel A. to be the biological father of the child, the child knew Wayne N. as her father and Wayne N. had established a close parental relationship with the child. The Appellate Division further held that based on equitable estoppel, it was not in the child's best interest and would be detrimental to the child to allow Fidel A. to establish paternity.

Another interesting case regarding the issue of vacating an Acknowledgment of Paternity was the Queens County case of *Derrick H. v. Martha J.*, 82 A.D.3d 1236, 922 N.Y.S.2d 83 (2011). In *Martha J.*, the petitioner father sought to vacate an Acknowledgment of Paternity on the basis of mistake of fact. Petitioner father testified that he and the child's mother had engaged in a sexual relationship during the time of conception. Petitioner father further testified that he signed the Acknowledgment of Paternity as the child's mother told him that he was the child's father. Petitioner testified that he subsequently learned from respondent mother's family that respondent mother had another sexual partner during the time of conception. Respondent mother did not deny having another sexual partner during said relevant period. Respondent mother testified at the trial that she had told petitioner that he was not the child's father prior to the petitioner signing the Acknowledgment of Paternity. The Family Queens County Family Court found credible the testimony of petitioner that respondent had told him that he was the child's father. However, the Queens County Family Court held that petitioner was equitably estopped from denying paternity. The Appellate Department Second Department reversed the Queens County Family Court. The Appellate Department held that in this case, no parental child relationship existed as petitioner had only spent limited time with the child who was only three years old. The Appellate Department Second Department further held that ordering a DNA test to determine paternity in this matter would not be contrary to the child's best interest. Said matter was remanded to the Queens County Family Court for further proceedings.

In the Matter of *Dwayne J.B. v. Santos H.*, 89 A.D.3d 838, 932 N.Y.S.2d 378 (2011) the Appellate Division Second Department reversed the Nassau County Family Court, which had dismissed petitioner's paternity petition. The Family Court dismissed the paternity petition holding that petitioner lacked standing as the mother had submitted an Acknowledgment of Paternity to the court signed by her and another man. The Appellate Division Second Department held that as the petitioner was a stranger to the Acknowledgment of Paternity, the prior Acknowledgment of Paternity does not serve as an insuperable bar to his claim. Said matter was remanded to the Nassau County Family Court for further proceedings.

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Beware Discrimination (Continued from page 12)

Cooperative leases

Because residents in a cooperative are parties to a lease, a board of managers of a cooperative must ensure compliance with lease disclosure requirements. Real Property Law §231-A(1) requires that "every residential lease shall provide conspicuous notice in bold face type as to the existence or non-existence of a maintained and operative sprinkler system in the leased premises." As a further example, cooperatives in New York City may be required to provide a bedbug infestation history disclosure.[9]

Boards of managers are encouraged to have their purchase applications, bylaws, and house rules reviewed regularly to ensure compliance with rapidly evolving anti-discrimination laws. What was legal yesterday may not be legal tomorrow.

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[1] Currently, Westchester County's source of income discrimination law exempts co-ops and condominiums.

[2] State and local laws may not differentiate between residential and commercial with respect to emotional support animals.

[3] *See* FHEO Notice: FHEO-2013-01.

[4] HUD v. Avatar Properties, Inc., FHEO No. 01-14-0195-8.

[5] *Reyes v. Fairfield Properties*, 661 F.Supp.2d 249 (EDNY 2009).

[6] There are statutory exceptions for specialized communities, such as 55 or older communities, among others.

[7] *Iniestra v. Cliff Warren Investments, Inc.*, 886 F.Supp.2d 1161 (C.D.Cal. 2012).

[8] *Pack v. Fort Washington II*, 689 F.Supp.2d 1237 (E.D.Cal. 2009).

[9] NY ADC §27-2018.1.