REAL ESTATE

New Statute – Residential Rentals must be Code Compliant Or Face Premises Liability Exposure

By Andrew Lieb

As of November 29, 2017, new section 235-bb of the Real Property Law protects tenants from illegally converted dwellings in all residential leases entered on or after such date. Specifically, section 235-bb states as follows:

Certificates of Occupancy; Required Disclosure to Tenant.

• Prior to executing a residential lease or rental agreement with a tenant, the owner of real property consisting of three or fewer rental units shall provide conspicuous notice in bold face type as to whether a certificate of occupancy, if such certificate is required by law, is currently valid for the dwelling unit subject to the lease or rental agreement. Owners who provide the tenant with an actual copy of the valid certificate of occupancy shall be deemed to have complied with the requirements of this subdivision.

• Any agreement by a lessee or tenant of premises for dwelling purposes waiving or modifying his or her rights as set forth in this section shall be void as contrary to public policy.

Real Property Law §235-bb was introduced by way of Senate Bill S6636. The bill's justification is that "[s]ome tenants may assume that when a landlord is offering a place to rent, that those housing accommodations are safe and up to code" and the Bill's purpose or general idea is "to help reduce the incidence of illegal conversions by requiring landlords to disclose to tenants that a certificate of occupancy is current and valid for the property being rented" according to the bill jacket.

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A cursory reading of the new statute results in a minimal new requirement for attorneys to advise their landlord-clients to provide a copy of their certificate of occupancy together with their lease when renting property. Yet, it will not be that simple. The statute, together with its justification and purpose, makes clear that the certificate of occupancy presented with the lease must be "current" and "valid" for the specific unit being rented. Therefore, landlord's counsel must now ascertain the validity of the certificate of occupancy prior to preparing a residential lease or, instead, provide their landlord-client with a detailed informed consent letter to cover counsel from exposure stemming from a non-compliant structure.

To illustrate, a landlord who puts up a wall to separate a junior 4 one-bedroom apartment into a two-bedroom apartment cannot comply with the statute by simply providing the one-bedroom certificate of occupancy to their prospective tenant because the certificate of occupancy would not be for a "current" and "valid" structure. The same holds true for additional bedrooms and bathrooms in the unit and the like. Beyond prohibiting rentals with non-conforming modifications to their structure, the statute also prohibits renting a non-conforming unit in the first place, such as a basement apartment or illegal cottage. As a result, this statute will impact large swaths of downstate New York from Manhattan to Suffolk County where illegally converted apartments are rampant.

While the statute has no penalty provision on its face, its impact will be huge. For starters, a statute that is malum prohibitum renders a lease illegal and unenforceable where the primary purpose of the statute is to protect the public health and safety and this statute expressly states that its justification is to address tenant's false assumptions about whether a housing accommodation is "safe." *Benjamin v. Koeppel*, 85 NY2d 549, 553 (1995). As a result, a lease that violates RPL §235-bb is void. Further, where injury is caused by and within property violating RPL §235-bb, a claim for negligence per se or even a case of absolute liability will exist. *Van Gaasbeck v. Webatuck Central School Dist. No. 1*, 21 NY2d 239, 243-6 (1967) [violations of municipal code, without violation of state statute, only creates evidence of negligence. *Elliot v. City of New York*, 95 NY2d 730, 733 (2001)]. As to whether the premises liability suit will concern absolute liability or negligence per se, the same is an open question for our courts. Regardless, case law is clear that it will, at the least, constitute negligence per se. Whether absolute liability (negligence without the defense of contributory negligence) is appropriate will turn on the issue of whether the definite class of tenants of one-to-three-unit properties are incapable of avoiding injury to the degree that a worker is deemed incapable with respect to issues of worker safety. For that matter, workers and tenants are equivalent in bargaining power with reference to employers and landlords. Yet, this issue will be one of first impression when the case is brought so it remains unknown what the applicable standard is for premises liability claims resulting from injuries on property existing in violation of RPL §235-bb.

Either way, learned counsel should appreciate the exorbitant risk this new statute will place on landlords; a risk only magnified by the likelihood that a property insurance carrier will disclaim coverage for such a claim. *Hermitage Ins. Co. v. LaFleur*, 100 AD3d 426, 426-7 (1st Dept. 2012). In all, plaintiff's personally injury counsel must be well versed real estate counsel if they plan to bring a meritorious premises liability claim in the era of RPL §235-bb.

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