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Pierre Debbas, Partner
Romer Debbas



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hat rights does a board have to penalize unit-owners for alteration policy violations when enforcement has been lax in the past?

BACKSTORY Our firm represents a high-end condominium building in the West Village that was

converted in the mid-1990s, and each floor is designated as one or two loft units. Once the board of managers

was elected, the members drafted their own alteration agreement without the guidance of legal counsel. Shortly thereafter, the unit-owner of the penthouse unit wanted to remodel his entire unit, which included removing the flooring and installing new flooring. The board approved the alterations, but did not monitor or properly assess the unit-owner's alteration plans.

Once the alterations were completed, the unit-owner below the penthouse unit (on the third floor) started to hear a significant increase in noise coming from the

penthouse unit and could hear every footstep taken in the penthouse. This led to the children in the third-floor apartment developing a sleeping disorder.

It turns out that when the penthouse was renovated, the unit-owner removed an essential material from the flooring that masks any sound coming from that unit. The board did not have its engineer/architect review the alteration plans and confirm that the plans were up to code; nor did the alteration agreement properly address this issue and any recourse the board may have.



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The third-floor unit-owners and penthouse unit-owners entered into a short agreement that the penthouse unit would install proper soundproofing within three months.

Six years later, the issue had not been resolved, and the penthouse unit-owner had entered into a contract to sell his unit for over \$14 million. The third-floor unit-owner threatened to sue the board, claiming this was an issue for the board to address. Meanwhile, the board was contemplating whether to withhold issuing the waiver of right of first refusal. The reason would be that the unit-owner was in violation of the bylaws of the condominium, since he did not complete its alterations in accordance with the code of the New York City Department of Buildings (DOB), and that the alterations were causing an unreasonable disturbance with other unit-owners.

COMMENT The issue at hand was whether the board members had the right to withhold issuing the waiver of right of first refusal on this premise and even if it did, what course of action would it take against the penthouse unit-owner or prospective purchaser? Could they require the unit-owner to tear up the flooring and reinstall the soundproofing materials prior to closing? Could they impose a penalty against the penthouse unit-owner for the monetary sum required to remedy this situation, and if so, would the new purchaser of the unit be prevented from residing in the unit (while paying interest on his or her loan, common charges, and real estate taxes) while the work was done? Would a court rule in favor of the building's architect in rendering an expert opinion that the flooring is not up to DOB code, or would it rule in favor of the penthouse unit-owner's architect, who insisted

that the flooring is up to DOB code and does not require additional soundproofing materials?

From a practical standpoint, exercising any of these options would have resulted in the board being called in as a defendant

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TO FIND A LEAK AT A FIFTH AVENUE CO-OP, THE BOARD ASKED ME IF THEY COULD BREAK INTO A CELEBRITY'S \$10 MILLION UNIT AFTER HE REFUSED ACCESS. THE ANSWER: YES.

in a very expensive and time-consuming lawsuit. The board could have made an argument that the unit-owner was in violation of the bylaws, but unfortunately the board's mistake had been not enforcing this provision years before and also not having a proper alteration agreement. The latter would give it leverage in making a demand for the penthouse unit-owner to incur the expense of reinstalling the soundproofing materials. The board ended up entering into an agreement (prior to closing) with the purchaser of the penthouse that it would remedy this issue within six months of closing. The flooring was never replaced; however, at the suggestion of the building's architect, a soundproofing material was placed underneath every carpet in the penthouse to, at minimum, reduce the noise being transmitted to the third floor. ■



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