

HABITAT Case Watch

AUGUST 8, 2023

Dope, Dogs, and Noise

Case Summary and Takeaway

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BOARD OF MGRS. OF THE CHARLESTON CONDOMINIUM V. LANNY OPPENHEIM, JUDITH ZARUCKI

WHAT HAPPENED Beginning in 2018, the board of the The Charleston Condominium, a 191-unit, 21-story building at 225 East 34th St., began communicating (through counsel) with apartment owner Judith Zarucki about bylaw and house rule violations. Specifically, the board alleged that Zarucki had been causing offensive odors by smoking marijuana, keeping too many pets and allowing them to roam off-leash in the building and causing excessive noise. For a period of time the nuisances and violations stopped, but they started up again in June 2019, with the board receiving 50 complaints over a six-month period about noise and marijuana odor. The complaints continued and Zarucki was fined \$13,600 for the bylaw and house rules violations. Finally, in 2020 the condo filed suit.

IN COURT The Charleston sought to prohibit Zarucki from smoking marijuana (or allowing it to be smoked) in her apartment, from being excessively noisy and from keeping pets in her unit. She did not appear or oppose the motion, and in 2021 the court granted Charleston's demands with respect to smoking and noise, but not to pets. Then, in 2022, the board and Zarucki executed a settlement agreement that for a "probationary" period of 18 months she would not permit marijuana smoking in her apartment; she would not have any more animals in her unit other

than the current cat and two dogs which she would not allow to roam unaccompanied or to urinate or defecate in any common area of the condo; and she would not create disturbing and loud noises.

Despite Zarucki's agreement, her troublesome behavior continued. In 2023 the Charleston went back to court, seeking contempt sanctions for violating the 2021 court order and the 2022 settlement agreement. In support, Charleston again provided written affidavits from building employees alleging that they smelled marijuana (and that the smell seemed stronger near Zarucki's door), from the managing agent regarding incidents when the police were called to her apartment due to loud yelling and banging, and from an employee claiming that he saw defendant Zarucki drop drug paraphernalia in the service elevator. Zarucki denied all of the allegations relating to marijuana odors and stated that Charleston's other complaints were too vague to justify holding her in contempt.

COUNSEL *For the Charleston Condominium Board* TRACY PETERSON, PETER SALZLER Braverman Greenspun / *For Judith Zarucki* SERGE JOSEPH, DANIEL NAKOS Himmelstein, McConnell, Gribben & Joseph / JUDGE Mary V. Rosado

YOU NEED TO KNOW To find a party in contempt, the complaining party must show, by "clear and convincing

evidence", that (i) the court order in effect established a clear mandate; (ii) that the order was disobeyed; (iii) that the violator knew about the court order; and (iv) the complainant was prejudiced by the violation. The "clear and convincing evidence" standard requires the party to produce evidence making it "highly probable" that what they claim really happened.

The court ruled that Charleston had not met that burden. The affidavits from the doormen reporting the smell could not definitively place it within Zarucki's unit, and the odor complaints took place over a series of months. Other claims regarding violations of the pet limits were also deemed unduly vague. In sum, the court held that the violations and evidence presented were neither so severe nor specific as to constitute "clear and convincing evidence" warranting a contempt finding. And if the Charleston wished to pursue the motion, the court stated, the witnesses who submitted affidavits would need to testify.

TAKEAWAY We strongly recommend that when seeking injunctive relief (or contempt) against an owner, you must be prepared to present live witnesses at any court hearing, especially if you expect opposition. Written affidavits cannot be cross-examined by a defendant. The court is unlikely to grant relief based solely on affidavit evidence unless the defendant fails to appear at all. ■