

Board Members Beware Protect Yourself from Discrimination Claims

BY JENNIFER BAKER

As we enter the 21st Century, issues of equality continue to be a problem in the United States. As such, government has created a complex set of laws to protect people from discrimination, but the problem has still not gone away. The responsibility to treat prospective unit owners equally goes above the societal implications for board members and managing agents. If they are not careful to avoid acting in a way that might be viewed as discriminatory in a court of law, they risk lawsuits and severe legal penalties. It has been held that board members can be found personally liable under city, state and federal laws for discriminatory practices.

The New York City Human Rights Law prohibits discrimination on the basis of "actual or perceived race, color, national origin, sexual orientation, religion, disability, gender, marital status, alienage, citizenship status, age, lawful occupation, or because children may be, are, or will be in residence." Under this law, punitive damages of up to \$100,000 may be awarded.

In addition to the city's Human Rights Law, people claiming discrimination can sue under state and federal laws which utilize much the same language. The Federal Fair Housing Act protects from discrimination "on the basis of race, color, national origin, sex, religion, familial status and handicap or disability." Violation of this law can result in a fine of \$10,000 for a first-time offense, while compensatory damages may be as high as \$300,000. New York State's Human Rights Law names age and marital status as protected classes, in addition to those named by the Federal Fair Housing Act.

All of these laws state that people may not discriminate for any of the stated reasons by either refusing to rent or sell to a prospective buyer, by denying that housing is available, or by setting different terms or conditions for the sale or rental.

While compensatory damages may be covered by Directors' and Officers' insurance policies, punitive damages are not. It is therefore crucial that all apartment buildings take every effort possible to neither engage in discrim-

inatory practices nor conduct their admissions processes in a way that could be construed as such.

Biondi vs. Broome

In 1997 board members of the Beekman Hill House Corporation were found guilty of discrimination towards Shannon and Gregory Broome, an inter-racial couple who applied for admission to their building. The court ordered board president Nicholas Biondi to pay \$124,000 in punitive damages and the State Court of Appeals recently upheld that decision. (Other board members were also fined.) Because punitive damages are not coverable by insurance in New York, Biondi had to sell his own apartment to pay the damages out of his own pocket.

According to Biondi, the decision to deny admission to the Broomes was based on the advice of the building's attorney. "We listened to our lawyer, acted responsibly and in good faith." Obviously burned by his own situation, Biondi says the best advice he can give to board members is: "Resign. It's not worth it to be in a volunteer position that's this risky." While it's not necessary to take such drastic action, it is best to be sure that board members are prepared to possess the best possible defense against personal liability.

New York state is one of 23 states in which punitive damages cannot be covered by insurance and Biondi says that this is a serious problem for co-op boards. "There is no way to get indemnification. It's like buying a homeowner's insurance policy that doesn't cover fire."

Insurance Coverage

According to insurance broker Nancy Gelardi of Arthur J. Gallagher & Co., an international insurance brokerage firm based in Itasca, Illinois, "Directors' and Officers' insurance policies provide coverage for various negligent acts." Gelardi points out, however, "It is against public policy to provide coverage for punitive damages because punitive damages are intended by the court to be a punishment and therefore the guilty party is expected to pay the damages." Are all board members doomed? Gelardi says not to worry. Very few real estate cases result in the court award-

ing punitive damages. "You have to do something heinous for punitive damages to be awarded, such as gross negligence, or committing a willfully illegal act."

It is possible for New Yorkers to buy off-shore insurance from a broker in another country, such as Bermuda. Biondi himself suggests this option. Alleging that his building's insurance carrier had the chance to settle the case out of court but that it acted in its own interests by refusing to do so (ultimately resulting in the verdict against the board members and the punitive damages against them), he recommends board members "call [their] brokers and insist on off-shore punitive damage insurance."

Collecting damages from these providers can be difficult, however. The process of collecting money from an off-shore carrier is not governed by United States law, but by the laws of the country in which the carrier resides. And to collect the money, an individual must travel to the site of the off-shore carrier. These complications, Gelardi says, force board members to be very cautious. "People considering this type of insurance have to be really careful to find out if the off-shore policy will actually cover them at the time of loss."

Keep Admissions Fair

The only completely safe justification for a building to deny a prospective buyer's admission is for financial reasons; if the prospective buyer does not have sufficient money or credit to convince the board that they are financially stable enough to pay for the apartment.

Rosemary Paparo, director of management at Buchbinder and Warren, a property management company in Manhattan, says that management should keep an eye on admissions practices. Her company, in particular, doesn't "want the liability or the taint of a building that discriminates... We don't establish elaborate policies with buildings, we just tell them frankly that it is criminal to discriminate."

Stephen W. Birbach, chairman of Carlton Management in Queens, says that his buildings have prospective residents fill out a form that asks only basic questions, such as where they live, work, and how much money they make. In the past several years his buildings have only rejected one person for a reason that was not financial. He says his company tells its boards, "If you reject someone, you'd better have a really good reason. You can't be arbitrary and capricious." Birbach says that it is important for management companies to make sure that they are named in their buildings' Directors' and Officers' policies,

but that "if you don't discriminate, this is not a big problem."

Eric P. Gonchar and David Rothseld, partners at Manhattan law firm Kane Kessler, PC, recently gave a series of lectures on ways to avoid discrimination suits at all the buildings managed by Brown Harris Stevens, a property management company based in Manhattan. Gonchar says, "We strongly recommend that buildings strictly turn people down on an objective business purpose rather than a subjective one."

Admissions interviews are an opportunity for boards (or the admissions committee from the board) to meet with potential buyers. However, to protect themselves from discrimination claims, the interviews should be brief and business-like. Boards must be cautious about what they ask during the interview, limiting their questions to financial matters. By asking anything that could be construed as a personal question, boards risk being held liable for discrimination claims. And the questions that boards ask should be specific, because questions such as "Do you really think you can afford this?" can be interpreted as discriminatory.

All questions should relate to applicants' exact income, assets and credit ratings. If a board has learned that an applicant has a history of failing to pay their rent, of damaging property or conducting illegal activities in past residences, boards may inquire about this, and deny the application if convinced that the applicant will be financially unreliable or a destructive presence in the building.

Boards should also be careful not to suddenly change the conditions of sale (to the applicant's disadvantage) at any point during the application process. If the conditions of sale are inexplicably changed or the buyer is told that the housing is no longer available, it may appear that the board is attempting to dissuade the applicant from buying the apartment. This is a common, subtle discriminatory practice which current discrimination laws effectively combat, protecting most sellers from more blatant types of discrimination.

It is legal for a building to deny admission to someone who they feel will adversely affect the quality of life for other residents of the building; for example, a musician who might practice loudly and disrupt the atmosphere of the building. But the reasons for the denial should be carefully documented. Gonchar and Rothseld say that these reasons should not be kept