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Condo eviction defenses: What is germane?

By Adam B. Whiteman

Introduction

In an article published in January's issue of Real Property ("*Is a failure to repair common elements germane to a forcible entry and detainer suit brought by a condo association against a unit owner?*" Vol. 58, No. 6), I examined a decision issued by the Second District (*Spanish Court Two Condominium Association v. Lisa Carlson*, 2012 IL. App. (2d) 110473) allowing a condo owner to interpose claims that the association breached a duty to repair common elements as a defense to an eviction case brought against the unit owner by the association for failure to pay assessments.

The key statutory provision in analyzing the defenses that can be raised to a condominium eviction case is found in 735 ILCS 5/9-106 of the Forcible Entry and Detainer Act (FED) which states, in relevant part, "no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise." I criticized the *Spanish Court* decision for being overly inclusive in determining what defenses would be "germane" to a condo eviction case.

A recent ruling issued by the First District in *Gotham Lofts Condominium Assocation v. Kaider*, 2013 IL App (1st) 120400, presents a far better approach to the matter and, consistent with what I had suggested in my previous article, holds that the question of whether the owner cured the default in payment of his assessment shortage is essentially the only germane defense in the context of a condo eviction case.

The Gotham Lofts decision

In *Gotham Lofts*, an Association won a judgment of possession against a condo owner's unit because of his failure to pay assessments for common expenses. The Association then leased the premises out to a third party. However, the Association's property manager failed to collect rent from the tenant. The Association then filed a motion to extend the order permitting it to continue to lease the property to collect rent for the purpose of recovering unpaid assessments. The court granted the extension, but the unit owner subsequently filed a motion to vacate the extension order and put him back in possession. The trial court granted the unit owner's motion and found that the Association "had a duty to exercise its right to lease out defendant's property in a reasonable manner, and that plaintiff was liable for the negligence of its agent...in failing to collect rent from the tenant."

On appeal, the court explained that under 735 ILCS 5/9-111, "a condo association that prevails in a forcible entry and detainer action against an owner over unpaid assessments is entitled to possession of the owner's property until the owner files a motion to vacate the judgment of possession." ¶10. The court then highlighted key language in the statute which states that the key issue that the court must decide in considering such a motion is whether "the default in

payment of the proportionate share of expenses has been cured." (745 ILCS 5/9-111(a)).

In light of the provision of section 9-111, the court in *Gotham Lofts* determined that the trial court erred in permitting the questions regarding the association's liability for its negligence in collecting rents in deciding whether the unit owner should be put back in possession. The court determined such questions were "collateral to the issue of possession and should not have been reached by the trial court." ¶16.

In evaluating what matters could be raised by a unit owner in post judgment eviction proceedings, the court turned to Section 9-106. Unlike *Spanish Court*, the court examined the meaning of the phrase "the distinctive purpose of the proceeding" when attempting to discern the meaning of the word "germane". The court then explained that the phrase distinctive purpose of the proceeding "refers to the limited nature of a forcible entry and detainer action, which is 'to adjudicate the parties' rights to possession of the premises, and, therefore such proceedings should not be burdened by matters not directly related directly to the issue of which party is entitled to possession." *Gotham Lofts*, ¶16. The court then elucidated as follows:

> The only purpose of a hearing on a motion to vacate the judgment of possession is to answer two factual questions: (1) whether "the default in the payment of the proportionate share of expenses has been cured," and (2) whether the premises are currently leased to a tenant.

Gotham Lofts, ¶16.

Finally, the court determined that issues regarding the association's negligence in collecting rents "are not germane to possession" and advised that such a claim should be pursued in a collateral action.

Proposed Fix

In light of the conflict now existing between the districts on the question of what defenses are germane in a condo eviction matter, the time is ripe for a legislative fix. There is currently a proposal floating around which would amend Section 9-106 to say that matters relating to repairs and maintenance are not germane defenses to a condo eviction case. This amendment, however, is too limited in scope. The problems created by the *Spanish Court* decision are likely to expand into other areas beyond the association's failure to repair. If this happens, then the expedited nature of the eviction statute will be completely defeated.

A proper amendment should define the word germane as it would apply in both condo eviction and post judgment settings. Thus, the statute should incorporate the language used by the *Gotham Lofts* decision which is that for purposes of a condo eviction matter, the only issues that are germane are (1) whether the default in the payment of the proportionate share of expenses has been cured and (2) whether the premises are currently leased to a tenant. ■

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Member Comments

Adam:
While in agreement with the Gotham court's approach, the statute itself makes the status of default in payment of the proportionate share of expenses the key issue to be considered when an ousted owner seeks to vacatte the order of possession. That alone would require the court's inquiry into the limited area of what has been done to cure. Certainly, without the unecessary finding of neglegence. Collateral??

— Richard Caifano on February 25, 2013

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