

Secondhand Smoke Cases Involving Tenants

Cases appear in chronological order

Donath v. Dadah, No. 91-CV179 (Worcester City Hous. Ct. Dept. 1991): A tenant sued her landlord for nuisance, breach of warranty of habitability, breach of the covenant of quiet enjoyment, negligence, battery and intentional infliction of emotional distress due to exposure to drifting tobacco smoke in her home coming from a nearby apartment. The case was settled for an undisclosed sum of money.¹

Fox Point Apt. v. Kippes, No. 92-6924, (Or. Dist. Ct. Lackamas County 1992): A nonsmoking tenant began to suffer health problems after her landlord moved a known smoker into the unit below hers. The nonsmoking tenant filed a suit against her landlord, alleging a breach of the covenant of quiet enjoyment and failure to fulfill the statutory duty to keep the premises habitable. The jury found a breach of habitability, reduced her rent by 50% and awarded an amount of money to cover her doctor's bill.²

Leichtman v. WLW Jacor Commc'ns, Inc., 92 Ohio App. 3d 232, 634 N.E.2d 697 (1994): An antismoking advocate appeared on a radio talk show to discuss smoking and one of the hosts repeatedly blew cigar smoke in his face. The plaintiff filed a battery claim. The court held that smoke as "particulate matter" is tangible and can make contact, and that on the facts of this case, purposefully blowing smoke in the plaintiff's face was sufficiently offensive to constitute a battery.

Dworkin v. Paley, 93 Ohio App. 3d 383, 638 N.E.2d 636 (1994): A tenant sued his landlord after she moved into the apartment below his and her tobacco smoke began infiltrating his apartment through the heating and cooling system. The tenant alleged his landlord breached the covenant of quiet enjoyment and failed to fulfill certain statutory duties imposed on landlords (including doing "whatever is reasonably necessary to put and keep the premises in a fit and habitable condition"). The trial court dismissed the suit, but the court of appeals reversed the dismissal, concluding that exposure to secondhand tobacco smoke could constitute a breach of the covenant of quiet enjoyment. The appellate court remanded the case for further proceedings after finding "the existence of general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."

Layon v. Jolley, No. NS004483 (Cal. Super. Ct. Los Angeles County 1996): The plaintiffs' condominium was above a garage where the defendants smoked

¹ Susan Schoenmarklin, Tobacco Control Legal Consortium, *Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009* (2009), at publichealthlawcenter.org/sites/default/files/resources/tclc-syn-condos-2009_0.pdf

² *Id.*

marijuana, cigarettes, and cigars. They sought an injunction prohibiting harassment after smoke began infiltrating their home. The court issued a restraining order, specifying, "Defendant must stay away from his garage while smoking."³

50-58 Gainsborough St. Realty Trust v. Haile, No. 98-02279 (Boston Hous. Ct. 1998), 12 TPLR 2.302 (1998): A tenant who lived in an apartment directly above a smoky bar withheld her rent and was sued by her landlord. She raised the defense of breach of covenant of quiet enjoyment. The Housing Court judge wrote that the amount of smoke from the bar had made the apartment "unfit for smokers and nonsmokers alike," and found that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below."⁴

Weil, Gotshal & Manges LLP v. Longstreet Associates, L.P., (N.Y., N.Y. Cty. June 12, 1998), 13.4 TPLR 3.188 (1998): A law firm in a New York City office building brought suit against its landlord and a tenant one floor below its offices. The law firm alleged that secondhand smoke from the neighboring tenant infiltrated its offices, causing some of the firm's employees "illness, discomfort, irritation and endangerment to their health and safety" and prevented some of their employees from being able to use or occupy their offices. The firm alleged breach of contract and constructive eviction against its landlord and failure to remedy a nuisance, trespass, and negligence against both defendants. The law firm later dropped the suit because the defendants agreed to remedy the smoke problem voluntarily.⁵

³ Schoenmarklin, *supra* note 2.

⁴ *Id.*

⁵ Utah Tobacco Prevention & Control Program. *Utah Secondhand Smoke Policy Implementation Guide: Multi-Unit Housing: May 2009*. 2009, p. 36. Available at www.tobaccofreeutah.org/pdfs/shsmultiple.pdf

In re U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998): An apartment tenant claiming that exposure to drifting tobacco smoke aggravated her respiratory condition filed two complaints under the Rehabilitation Act and the Fair Housing Act against her housing providers. The parties entered into a conciliation agreement that provided that the complex would gradually be brought smoke-free. New tenants were required to comply with the no-smoking policy, while current smoking tenants were asked to relocate to new units so that the plaintiff could move into a unit unaffected by smoke exposure. HUD approved this agreement.

U.S. v. Seattle Housing Authority, C01-1133L (W.D. Wa., 2002) (consent decree): The Department of Justice brought suit against a housing provider on behalf of an apartment tenant with a respiratory condition. The complaint alleged that the Seattle Housing Authority failed to provide her with a reasonable accommodation under the Fair Housing Act after making multiple requests to be moved into a new apartment unit unaffected by drifting tobacco smoke. The provider entered into a consent decree that provided the tenant with a smoke-free unit. Additionally, the provider also brought one of the buildings in the complex smoke-free and phased in a non-smoking policy in the remaining two buildings.

Babbitt v. Superior Court, E033448, 2004 WL 1068817 (Cal. Ct. App. May 13, 2004): While deciding that it was not in a position to rule conclusively on the matter, a California court appeared sympathetic to a tenant's claim for negligence and nuisance against his cigar-smoking neighbor. The court wrote that "[i]ntrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions" and that "the dangers of 'secondhand smoke' are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court."

Heck v. Whitehurst Co., 2004-Ohio-4366 (Ohio Ct. App. Aug. 20, 2004): A tenant in Ohio notified his landlord that drifting tobacco smoke was infiltrating his apartment and requested the landlord remedy the problem. When his landlord failed to resolve the issue after several months of waiting, the tenant filed a rent abatement action. The court determined that cigarette smoke was infiltrating the plaintiff's apartment and that the landlord had not made the repairs necessary to keep the apartment in a fit and habitable condition. The lease was terminated and the plaintiff was awarded a 50% rent reduction.

Donnelly v. Cohasset Hous. Auth., 62 Mass. App. Ct. 1104, 815 N.E.2d 1103 (2004): A tenant filed suit against the housing authority that operated her apartment complex, claiming that it failed to respond to her complaints regarding a neighbor's drifting tobacco smoke that entered her apartment and caused her health problems. She alleged breach of the covenant of quiet enjoyment, breach of contract, and negligence. A Massachusetts Superior Court judge entered summary

judgment for the defendant on each of the counts in the plaintiff's complaint. However, a Massachusetts appellate court reversed the orders of summary judgment on these three claims as genuine issues of material fact were found to exist.

Herbert Paul, CPA, PC v. 370 Lex, L.L.C., 7 Misc. 3d 747, 794 N.Y.S.2d 869 (Sup. Ct. 2005): A commercial tenant brought suit against its landlord, managing agent, and a neighboring tenant, alleging breach of the covenant of quiet enjoyment, statutory violations of the New York City Smoke-Free Air act, and nuisance as result of tobacco smoke infiltrating its suite from the adjoining unit. The court ruled that the plaintiff "demonstrated that there are issues of fact for trial on the cause of action for breach of the covenant of quiet enjoyment," and that the neighboring tenant "may be liable to plaintiff for a private nuisance" but the landlord and managing agent are not.

Harwood Capital Corp. v. Carey, No. 05-SP-00187 (Boston Hous. Ct. June 8, 2005): The defendants in this case were tenants who smoked 40-60 cigarettes per day inside their condominium. Both tenants worked from home. When neighbors complained to the smokers' landlord, the landlord brought a suit to evict the tenants for breach of contract based on a lease provision that prohibited tenants from creating a nuisance. The jury found that level of drifting tobacco smoke constituted a nuisance sufficient to allow a termination of the lease.⁶

Merrill v. Bosser No. 05-4239 COCE 53 (Fla. 17th Cir. Ct. Broward County 2005): A Florida condominium owner was found liable for trespass, breach of covenant of quiet enjoyment, and private nuisance after excessive secondhand smoke regularly seeped into neighboring units. Plaintiff installed air purifiers in her home and the condominium association installed a mechanical fan, neither of which resolved the problem. Plaintiff and her family had recurring illnesses as a result of the tobacco smoke, and had to vacate their condominium on several occasions. The Florida court found the present case to be similar to *Haile* (above) where secondhand smoke can be considered a breach of the covenant of quiet enjoyment.

Duntley v. Barr, 10 Misc. 3d 206, 805 N.Y.S.2d 503 (City Ct. 2005): The plaintiff brought suit against his neighbor for monetary damages allegedly caused by tobacco smoke drifting from the defendant's apartment. The court held that "the plaintiff . . . has established his cause of action, against defendant, for private nuisance, created by the defendant through her actions of smoking, for which she is now liable for damages sustained by the plaintiff" and ordered the defendant to reimburse the plaintiff for the cost of an air purification system.

Poyck v. Bryant, 13 Misc. 3d 699, 820 N.Y.S.2d 774 (Civ. Ct. 2006): a New York landlord ignored multiple requests for accommodation from a family suffering from

⁶ *Id.* Search for *Harwood Capital Corp. v. Carey* at www.mass.gov/courts/index.html.

exposure to drifting tobacco smoke. The family eventually abandoned the apartment. When the landlord sued for rent, the family raised the defense of constructive eviction. The court said “in the context of implied habitability, secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, excessive noise and water leaks and extreme dust penetration.” The court found that triable issues of fact existed regarding whether in this case exposure to drifting tobacco smoke breached the warranty of implied habitability, and denied the landlord’s motion to dismiss.

Christiansen v. Heritage Hills 1 Condominium Owners Ass’n, No. 06CV1256 (Col. Dist. Ct. Jefferson County 2006): Plaintiffs filed suit against their condominium association requesting declaratory and injunctive relief, claiming that the association’s smoke-free amendment was void as an unreasonable restriction. The court concluded that the passage of the amendment to the association’s declaration was “proper, reasonable, made in good faith and not arbitrary or capricious,” and that plaintiffs did not “establish that the amendment violate[d] public policy or otherwise abrogate[d] a constitutional right.”⁷

Poses v. Dale, No. 100295/2011 (N.Y. Sup. Ct. N.Y. County 2011): A New York couple filed suit against their neighbors, complaining that “foul and noxious odors” from cigar smoke were infiltrating their apartment. The parties reached a settlement agreement that prohibited the defendants from smoking cigars in their apartment or in the common areas of the building. The agreement further stipulated that the defendants will be liable to the plaintiffs in the amount of \$2,000 for each time the settlement is breached, with an additional \$1,500 penalty for failing to pay within 15 days of the breach.⁸

Reinhard v. Connaught Tower Corp., 2011 WL 6119800: A tenant in a residential cooperative building in New York filed suit against her cooperative corporation and the president of the Board of Directors for their failure to remedy the issue of tobacco smoke seeping into her apartment. In ruling on the corporation’s motions for summary judgment, the court concluded that “there are issues of fact as to whether the secondhand smoke within [the plaintiff’s] apartment was so pervasive as to breach the implied warranty of habitability and cause a constructive eviction,” as well as for the plaintiff’s claims of negligence and breach of contract, and allowed the case to move forward.

Upper E. Lease Associates, LLC v. Cannon, 30 Misc. 3d 1213(A), 924 N.Y.S.2d 312 (Dist. Ct. 2011) aff’d, 37 Misc. 3d 136(A), 961 N.Y.S.2d 362 (App. Term 2012): The defendant in this case complained repeatedly to her landlord about tobacco smoking infiltrating her apartment, and the problem was not dealt with

⁷ Order of Judgment available at <http://www.tobaccocontrolaws.org/litigation/decisions/us-20061107-christiansen-v-heritage-hills>.

⁸ Available at decisions.courts.state.ny.us/fcas/fcas_docs/2011feb/3001002952011001sciv.pdf.

sufficiently. After several months of inaction by her landlord, she decided to vacate her apartment. She was sued for breaching her lease by failing to pay her rent. She raised several affirmative defenses, including violations of the implied warranty of habitability, failure to address unsafe and intolerable conditions, and a breach of the covenant of quiet enjoyment. The court held that the tobacco smoke in this case constituted a nuisance and her landlord's failure to abate a known nuisance was a breach of the implied warranty of habitability, and resulted in the defendant's constructive eviction.

Matarese v. Archstone Pentagon City, 795 F. Supp. 2d 402, 434–36 (E.D. Va. 2011), *aff'd in part, vacated in part on other grounds*, 468 Fed. Appx. 283 (4th Cir. 2012): An apartment tenant brought action under the Fair Housing Act and the Virginia Fair Housing Law. The court held that although the plaintiff failed to prove that her breathing was substantially impaired by the paint, mold, and smoke in her apartment complex, her housing provider nonetheless discriminated against her because the building management regarded her as disabled. The defendants were found to have violated multiple provisions of the Fair Housing Act. She was awarded compensatory and punitive damages.

Chauncey v. Bella Palermo Homeowners' Association, No. 30-2011-00461681 (Orange County Sup. Ct. 2013): The plaintiffs sued their homeowners association (HOA), the company that managed their condominium complex, the tenants in the neighboring unit, and the unit's owner after repeatedly complaining about tobacco smoke infiltrating their condominium from the adjoining unit. The jury found all of the defendants negligent, and the HOA and management company were also found liable for breach of contract based on a nuisance provision in the covenants, conditions & restrictions (CC&Rs) of the property that required the HOA to ensure that tenants were not deprived of the right to quiet enjoyment of their units.⁹

Birke v. Oakwood Worldwide, B234296, 2013 WL 2322888 (Cal. Ct. App. May 29, 2013): A father sued the company that managed his apartment complex on behalf of his 5-year-old asthmatic daughter, alleging a nuisance claim for the provider's failure to limit exposure to tobacco smoke in the outdoor common areas of the apartment complex. The trial judge dismissed the lawsuit, but on appeal the appellate court wrote that "[i]n our view, these allegations are sufficient to withstand a demurrer to the nuisance cause of action" and reversed and remanded for further proceedings in order to determine whether the management company failed in its duty to maintain the premises in safe condition. On remand, the court determined that the plaintiff failed to carry her burden of proof, and the appellate court affirmed.

⁹ Marilyn Kalfus, *Secondhand Smoke Lawsuit: Family Wins Judgement Against Landlord, Smoking Neighbors*, Huffington Post, March 3, 2013, at www.huffingtonpost.com/2013/03/14/secondhand-smoke-lawsuit_n_2870345.html. See www.occourts.org to find and purchase the verdict.

