

PENNISI, DANIELS & NORELLI, LLP

ATTORNEYS AT LAW

ALBERT F. PENNISI
FRED G. DANIELS*
GEORGE H. NORELLI
ROBERT J. CECERE*
ERIC T. TAVEL
LAUREN K. POPPER*#
DENISE M. MAY*

CAROLYN WILLIAMS+
MEREDITH E. UNGER
MICHAEL R. MARGOLIS*

SHERRIE A. TAYLOR Of Counsel

*Member of the N.Y. & N.J. Bar
+Member of the N.Y. & FLA Bar
#Member of the N.Y. & CONN Bar

97-77 QUEENS BOULEVARD
SUITE 620
REGO PARK, N.Y. 11374
718-459-6000
FAX 718-459-6875
ALT. FAX 718-459-9564

100 PAVONIA AVENUE, 6TH FLOOR
JERSEY CITY, N.J. 07310
(973) 350-0666

4/29/09

BEDBUGS – NEW YORK’S LATEST LITIGATION HOT TOPIC

They're back. After practically disappearing since the early 1900's, bedbugs are staging a comeback in apartments, hotels and homes throughout the United States. These blood-sucking creatures attack humans when we are asleep. Bedbugs inject a chemical into the body that numbs the area of their attack and then they suck their victim's blood without notice. The only signs victims that have of bedbugs presence are welts and blood-stained sheets in the morning waking hours.

The legal ramifications of the resurgence of bedbugs have yet to be completely realized; indeed, not until 2004 did a New York City Court first deal with the issue of bedbug infestation and the Warranty of Habitability. Since 2004, there have only been a few reported cases in New York directly ruling on the issue of bedbugs. These rulings raise issues of concern for landlords and hotel owners. That being said, there are steps that landlords and hotel owners can take to minimize their exposure to liability for bedbug infestation.

Re-emergence of Bedbug Infestations

In the early 1900's, the bedbug problem in the United States was considerable. However, with the advent of DDT, the number of bedbug-related incidents declined. However, in the recent few years, bedbugs have re-emerged as an infestation problem for Americans. Atlanta-based exterminator Orkin found that bedbug-related treatments increase 58 percent in 2003 and rose another 81 percent from 2003 to 2004.

There are many theories as to why bedbugs are re-emerging. One theory is the different extermination treatments used. Another theory is increased foreign travel. Bedbugs often travel from one place to another in luggage and clothing,

jumping off at homes and hotels. Making matters worse is the fact that bedbugs have been known to survive 500 days without feeding. So a bedbug can crawl into luggage, live there for a year and a half without feeding, and then crawl out of the luggage and into a home or hotel room, and infest the area with its offspring. It only takes one female bedbug to lead to a local infestation. A well-fed female can lay up to 500 eggs in a life time. Eggs generally hatch within six to 28 days.

Being bitten by a bedbug is not considered dangerous and has been compared to being bit by a mosquito. Like a mosquito bite, a bedbug bite usually only leads a small welt (less than one centimeter), with irritation and itching.

New York Caselaw

The reported cases involving bedbug come from the early 1900's and predate warranty of habitability. These early cases revolve around whether the presence of the bedbugs constituted a constructive eviction. The cases turn on the severity of the infestation.

In Jacobs v. Morand, 59 Misc. 200, 110 N.Y.S. 208 (App. Term, 1st Dept. 1908) the First Department held that premises overrun by bedbugs making it inconvenient and untenable did not constitute a constructive eviction. Moreover, the Court held that the tenant could have remedied the situation. Therefore, the tenant was not relieved of his common law duty to pay rent.

In Streep v. Simpson, 80 Misc. 666, 141 N.Y.S. 863 (App. Term, 2nd Dept. 1913) the Second Department held that where bedbugs constituted an insufferable nuisance, whose presence is nowise attributable to the tenant, causing substantial discomfort and severe inconvenience amounting to an intolerable state, the tenant was constructively evicted. The record showed that the bedbugs in his apartment migrated from the apartment below his. The Second Department found that the severe inconvenience suffered by the tenant was not caused by the actions of the tenant. Unlike Jacobs, the court in Streep found that the tenant could not remedy the problem. As such, the court found that the infestation warranted the application of the doctrine of constructive eviction.

In Michtom v. Miller, 178 N.Y.S. 395 (App. Term, 1st Dept. 1919) the Appellate Term held that the presence of bedbugs constituted a mere annoyance. After the tenant discovered bedbugs in his home, he complained to the landlord. The landlord then had the apartment exterminated. Upon inspection of the premises, the landlord found no bedbugs. The court held that the tenant failed to prove a condition justifying an abandonment of the premises.

Several years later in Hancock Construction Co. v. Bassinger, 198 N.Y.S. 614 (App. Term, 1st Dept., 1923), the Appellate Term found that despite the fact that the bedbugs in the apartment could be controlled by a tenant, the tenant could

not be compelled to pay rent for an apartment which he could not occupy. In Hancock Construction, the tenant was inundated with bedbugs. He vacated the premises and paid no rent for the last four months remaining on his lease. Here, in contrast to Michtcom, the court found that because the tenant could not 'pull down the walls or the ceilings, he and his family ought not to be compelled to pay rent for an apartment in which they could not live. The Appellate Term held the aggravated condition of bedbugs, so numerous that they could not be exterminated, constituted constructive eviction.

Recent Developments

In a case of first impression, Ludlow Properties v. Young, New York City Civil Court Judge Cyril K. Bedford ruled in 2004 that bedbug infestation is an intolerable condition that breaches the warranty of habitability. In the case of Ludlow Properties v. Young, the plaintiff commenced nonpayment proceedings against a tenant. In response, the defendant asserted a breach of warranty of habitability defense based on the presence of bedbugs in his apartment. The court found that the tenant was entitled to an abatement based upon the implied warranty of habitability pursuant to the Real Property Law 235-b, which protects against conditions that materially affect the health and safety of tenants. Specifically, RPL section 235-b provides, in relevant part, that:

“In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.”

In Ludlow Properties, the tenant was able to show through his graphic testimony how the presence of bedbugs affected his health, safety and welfare. Notably, the court distinguished between bedbugs and other vermin, like mice and roaches. The court found that the presence of roaches and mice, while offensive, does not constitute constructive eviction. The presence of bedbugs, however justified a finding of constructive eviction because vermin such as mice and roaches, unlike bedbugs, do not have the same effect on one's life. The court distinguished between bedbugs and other types of vermin, noting that 'bedbugs feed upon one's blood in hoards while one is sleeping, thus turning a night's

sleep into a hellish experience.' Judge Bedford found that the bedbug infestation created a breach of the warranty of habitability, in spite of the owner's repeated attempts to get rid of them. The judge awarded Mr. Young a rent abatement of 45 percent for each of the six months during which he was plagued by the bugs. Judge Bedford reasoned that "In this case, the bedbugs did not constitute mere annoyance, but constituted an intolerable condition, notwithstanding the landlord's efforts to exterminate them.'

Beyond the realm of rental landlord-tenant cases, bedbugs have recently been the issue of negligence claims in hotel situations where guests have been bitten by bedbugs infesting the guestrooms.

In Mathias v. Accor Economy Lodging Inc., 347 F3d 672 (2003), Judge Richard A. Posner, of the U.S. Court of Appeals for the Seventh Circuit, upheld an enormous punitive damage award against Motel 6 because of bedbug infestation. The plaintiffs were guests of the hotel who suffered multiple bites from bedbugs. In Mathias, the motel operator knew of a bedbug infestation for over two years, but rather than fixing the problem, attempted to conceal the infestation and actively misled guests about the condition.

A jury awarded each plaintiff \$5,000 in compensatory damages and \$186,000 in punitive damages. The Seventh Circuit upheld the punitive damages award, finding that the defendant's conduct in concealing the infestation was both willful and wanton. The motel operator hired an exterminator, who recommended a complete spraying of each and every room in the hotel because of the complete infestation at the hotel. The motel manager refused to shut down the hotel for the extermination and continued to put people in rooms, even though he knew the rooms were infested with bedbugs. Judge Posner found that the motel's failure to 'warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and possibly battery as well.'

In a ruling of first impression in New York, a Manhattan judge in Grogan v. Gamber Corp. 19 Misc3d 798 (Sup Ct, NY Co. 2008) dismissed a request for punitive damages in a bedbug case. However, the judge, Supreme Court Justice Judith J. Gische, let go forward the negligence claims of two Maryland tourists for bites they sustained during a two-night stay at the theater district's Milford Plaza.

The tourists were seeking \$2 million in compensatory damages and an unspecified amount of punitive damages. In rejecting their request for punitive damages, Justice Gische referred to a New York City Department of Health pamphlet in ruling that the tourists had failed 'to raise a triable issue of fact whether bedbugs are anything more than a nuisance.' In ruling out punitive damages, Justice Gische distinguished the Mathias case inasmuch in the Mathias case, the Motel 6 operator was aware of the presence of bedbugs but decided not to lay out \$500 to fumigate the premises, and instead offered guests a refund if they complained of bedbugs bites. The Milford Plaza, in contrast, had

under contract a pest control company, PAC Extermination Services, which was also sued in the case. Evidence in the case showed that three weeks before the Grogans' stay, the hotel had asked PAC to exterminate bedbugs in two rooms near the room reserved by the Grogans.

Gottlieb v. Green, __NYS2d ____, WL513566 (NYC Civ. Ct. March 2009) involved a nonpayment proceeding wherein the tenants alleged a breach of the Warranty of Habitability due to the persistent presence of bedbugs. After trial the court found that at some point in time the premises was infested with bedbugs. However, the court also found that the evidenced appeared to establish that the bedbugs were introduced by the tenants who had suffered a bedbug infestation in their prior apartment which they had just moved from. The court determined that there was no negligence or deliberate acts on the part of the tenants that resulted in the present infestation.

Despite the tenant's role in the bedbug infestation, the court held that RPL section 235-b (Warranty of Habitability) essentially makes a landlord strictly liable for conditions in the premises and is responsible for taking reasonable action to eliminate the condition. Accordingly, the court found that the presence of bedbugs in the apartment did constitute a breach of the warranty of habitability. Based upon all of the facts and evidence of this case, the court awarded the tenants a 12% rent abatement for the period of infestation.

In DHCR proceeding - Matter of 91-31/04 195th St., LLC; DCHR Dckt. No. WD 110043 RO – (2008) the Tenant complained of bedbugs and Owner responded by exterminating the premises on three separate occasions. After extermination, the tenant filed a decrease in services complaint with DHCR. DHCR inspected the apartment and found evidence of bedbug infestation in the mattress and dead bedbugs in the bedroom but no evidence of infestation in the walls, floors, cabinets, closets and entrance of the apartment. DHCR denied the tenant's complaint holding that the finding of dead bedbugs supported the conclusion that the Owner's extermination services were effective and Owner could not be held responsible for an infestation problem that existed solely in the personal property of the tenant's household.

In Zayas v. Franklin Plaza, New York City Civil Court, Index No. 3316/08 (4/13/09 NYLJ) the tenant in a Mitchell-Lama cooperative development - sued her landlord for damages arising from a bedbug infestation. The tenant testified that she orally notified the landlord that her apartment was infested with bedbugs. The landlord advised her that there was nothing the landlord could do about the infestation. Tenant then testified as to all of the steps she took during 2008, including the retention of a professional exterminator, to remedy the infestation; however the bedbugs kept coming back. Tenant attributed the ongoing problem with an infestation in the apartment next to hers and below hers. Tenant then testified that she had to discard personal property and incurred extermination costs in the

sum of \$3,994.66 and had medical costs of approximately \$320.00.

The landlord testified that the shareholders were responsible for remedying bedbug infestation and, in support of that testimony, Landlord introduced a letter from Department of Housing, Preservation & Development which opined that the development was a cooperative development and as such, each shareholder was responsible for extermination of bedbugs in their apartment unit.

The court recognized that generally bedbug infestation is raised as a means for a tenant to obtain a rent abatement based upon a breach of the warranty of habitability, or as a claim of constructive eviction. However, in this case the tenant's claim sounded in negligence seeking recovery for loss of property and medical treatment. The Court found that the HPD letter providing that each shareholder is responsible for extermination in his/her own apartment unit did not provide the landlord with a safe harbor. Inasmuch as the testimony in this case indicated that there was a building-wide bedbug infestation problem, the court found that section 78(1) of the Multiple Dwelling Law was triggered. MDL section 78(1) provides:

“Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest. Any such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four.”

Inasmuch as MDL section 78(1) imposes a non-delegable duty upon the cooperative corporation, as landlord, to maintain the building in good repair and the court found on this record that the Cooperative had breached that duty of care. While the Cooperative was put on notice of the bedbug infestation, the Cooperative took no steps to remedy the condition.

Thus, the court awarded tenant a money judgment to compensate her for loss of property and medical treatment; however, the court refused to award her extermination monies inasmuch as each shareholder in Cooperative is responsible to exterminate his/her own unit.

Cooperative Apartment Situations

As of this writing, other than the Zayas v. Franklin Plaza case discussed above which involved a Mitchell Lama cooperative, no reported case involving bedbugs in a cooperative apartment situation could be located. Given the unique nature of cooperatives, holdings of the cases above dealing with rental property cannot be applied to cooperative apartments in precisely the same way. While the warranty

of habitability is implied in a proprietary lease as well as a rental lease, in cooperative apartment cases, the courts routinely balance the interests of the apartment occupant as a lessee with being a shareholder of the collective ownership. Moreover, if the shareholder does not occupy the apartment, then the warranty of habitability is not an available defense.

Thus, the issue of whether extermination services relating to bedbug infestation within a shareholders apartment is the sole responsibility of the shareholder or of the Cooperative generally seemingly remains undecided by the Courts. The reason for this is most probably due to the fact that a Cooperative's governing documents often resolve the issue. A proprietary lease and/or House Rules may make it the shareholder's responsibility to exterminate for any bug infestation located within the shareholder's apartment. If the infestation migrates to another shareholder's apartment – who will be responsible for the extermination services – the shareholder within whose apartment the infestation originated? Each individual shareholder? Or will the Cooperative generally bear any responsibility? In Zayas v. Franklin Plaza the Court used the fact that there seemed to be a building wide infestation problem to trigger the applicability of MDL section 78(1) which imposes a non-delegable duty upon the cooperative corporation, as landlord, to maintain the building in good repair.

A court may, under facts similar to those in Zavas v. Franklin Plaza, apply MDL section 78(1) to a Board of Directors of a Condominium.