COVID-19 and Apartment Complexes

Why the Unregulated Use of Gyms and Common Areas Could Make Landlords Begin to Sweat

By Izik Gutkin

With COVID-19, our lives have changed immeasurably, both in the United States and abroad. As a corollary, lawmakers at the local, state, and federal levels have considered and enacted policies to address the problems that exist in the world that we now find ourselves living in. For example, the Equal Employment Opportunity Commission recently issued landmark guidelines establishing that employers can mandate that their employees be vaccinated, subject to limited circumstances related to religious beliefs and employee health.[1] However, many other avenues for potential liability remain inconclusive at the moment, setting the stage for what could be a year of landmark court decisions in 2021. One such area that is relatively unclear is the liability of a landlord for a residential apartment complex in the event its tenants or visitors contract COVID-19 and sue the landlord for failing to enact sufficient safety measures to protect them.

There is scant case law on point to which landlords can reference in order to understand their potential liability if a resident were to contract COVID-19. Consequently, there is a dearth of information that would enable landlords to make well-grounded and educated decisions as to the measures they must take to 1) protect their tenants, and 2) reduce exposure to potential lawsuits from tenants who catch the coronavirus. However, by considering the limited legal authority that exists, we can predict a landlord's liability in such a circumstance, and perhaps consider ways in which a landlord can mitigate potential liability.

In particular, the use of gym facilities operated by residential apartment complexes, for which there is some general guidance, offers a crucial and interesting starting point for this discussion. On Aug. 27, 2020, Gov. Phil Murphy enacted Executive Order 181, which mandated that all "health clubs" in New Jersey, including "gyms and fitness centers," could reopen if such institutions adopted certain policies, "*at minimum*." While the laundry list of policies is certainly expansive, it includes: 1) gyms could reopen with certain limitations on occupancy; 2) gym-goers make reservations to limit the number of in-person interactions; 3) gyms sanitize equipment regularly and provide sanitization materials to gym users; and 4) importantly, that the gyms "[r]equire workers and customers to wear cloth face coverings while in the indoor portion of the premises, except where doing so would inhibit that individual's health or where the individual is under two years of age."[2] The executive order also requires gyms to decline entry to those who refuse to abide by the mask-wearing policy unless wearing a mask would pose a risk to that individual's safety, in which case "neither the business nor its staff shall require the individual to produce medical documentation verifying the stated condition."[3]

While Executive Order 181 failed to specify that the requirements listed therein would apply to gyms and fitness centers specifically located with residential complexes or cooperatives, any ambiguity as to whether the order did not

apply to such establishments was clarified with the introduction of Administrative Order No. 2020-21 on Sept. 5, 2020. In this order, Patrick J. Callahan, the State Director of Emergency Management for New Jersey, confirmed that "[h]ealth club facilities located in hotels, motels, condominiums, cooperatives, corporate offices, or other business facilities may open their indoor premises, *but those that are open to the public, and not only to guests, residents, and employees*, must conform to the provisions of Paragraph 1 of Executive Order No. 181 (2020)[.]" (Emphasis added). As such, Administrative Order No. 2020-21 clearly demarcated that residential complexes could be required to enforce certain safety measures in gyms, and presumably in other areas, if they are open to the public.

However, there remains no guidance on the potential liability of a residential complex to residents or others in the event of a COVID outbreak at their remaining facilities. To predict the potential liability, we can turn to the limited relevant case law. In *Snyder v. I. Jay Realty Co.*[4] *Snyder* a negligence suit was brought against a commercial tenant and landlord by a plaintiff who was injured on a platform on the premises that he alleged was negligently constructed. Relying on the Appellate Division's holding in *Hedges v. Housing Authority of Atlantic City*,[5] the New Jersey Court held "that a landlord who negligently fails to provide a passageway that is safe in the dark, may absolve himself from liability by lighting the passageway so that its use becomes safe."[6] In so holding, the Court essentially explained that if the landlord is aware of a danger, the landlord has a duty to make the danger known to others, or to eradicate the danger.

Turning to the area of a landlord's liability in a residential setting, the Appellate Division in *Dwyer v. Skyline Apartments, Inc.* held that while the duty of a landlord "is not to insure the safety of tenants," landlords nonetheless have a duty "to exercise reasonable care," and the landlord can therefore be found "liable only for injurious consequences to a tenant by reason of defects 'of which he has knowledge or of defects which have existed for so long a time that…he had both an opportunity to discover and to remedy.'"[7] It is also well-settled that this duty of reasonable care necessarily extends to common areas of the residential complex that are under the landlord's control.[8]

Additionally, our courts have even held landlords liable for the foreseeable conduct of third parties that is injurious to residents in certain circumstances. In particular, the New Jersey Supreme Court held that landlords have a duty "to take reasonable measures to safeguard tenants from foreseeable criminal conduct," and, if the landlord fails to do so, "[a] residential tenant can recover damages from his landlord upon proper proof that the latter unreasonably enhanced the risk of loss due to theft by failing to supply adequate locks to safeguard the tenant's premises after suitable notice of the defect."[9] In *Braitman*, the Court also acknowledged the reality that, at least in the context of willful criminal activity, changes in societal patterns could impact the Court's assessment of liability for landlords. Specifically, the Court explained that "the depressing specter of rising crime rates in…urban areas may soon call for reconsideration of the general principle that the mere relationship of landlord and tenant imposes no duty on the landlord to safeguard the tenant from crime."[10] The Court based this guidance on several reasons, including that "[m]any prospective tenants undoubtedly consider the landlord's security measures in selecting apartments, particularly in middle and upper income complexes;" "the growing threat which crime poses to the urban dweller and the increasing reliance which must be placed upon multiple dwellings to meet contemporary housing needs[.]"[11] The Court found further validation by acknowledging that "present and future living patterns" could justify a more expansive duty for landlords, whether by reason of the "frank recognition that the landlord is in a superior position to take the necessary precautions,…or [perhaps because] the concept of an implied warranty of habitability of residential premises… is flexible enough to encompass appropriate security devices[.]"[12]The Court again instructed that while "the landlord is [not] an insurer of the security of the tenant's property," the landlord "should [nonetheless] take those measures of protection which are within his power to take and which will reduce the risk of criminals robbing tenants."[13]

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Undoubtedly, while the current status of liability for landlords to tenants and others in residential apartment complexes is not definitive, it is clear that we now live in extraordinary times. By extension, because the Court has acknowledged that the respective liability of landlords is ever-evolving, such liability could presumably be extended to meet the risks posed to tenants by COVID-19, or by any other illnesses or safety hazards that could come about in the future.[14] Landlords will likely never be required to absolutely ensure the health and safety of their tenants. However, it would nonetheless be prudent for landlords to develop and enforce comprehensive and strict health and safety measures in times of crisis, such as the present, to mitigate their exposure to potential liability that could arise from their failure to impose

any measures, imposition of merely lax measures, or from their failure to enforce measures that are actually in place.

Thus, while none of the executive or administrative orders currently enacted by the state of New Jersey mandate the implementation of health and safety measures throughout common areas or for amenities used in residential complexes, this is not alone dispositive as to whether a residential landlord could be found liable for the damages of tenants and others in the common areas of the complex. Presumably, based on the relevant case law, landlords could nonetheless be liable under a theory of negligence in the event of an outbreak if tenants or visitors were to sue the landlord for failing to exercise reasonable care by enforcing mask-wearing and other safety measures in those common areas given that we currently face a widespread public health crisis.[15]

That being said, there are very real practical concerns for prospective litigants. In the few cases that have been brought against businesses by plaintiffs alleging negligence that resulted in their exposure to and contraction of COVID-19, the Courts have largely dismissed these matters due to the problems plaintiffs face in establishing that a business's negligence was the cause of their catching the virus, and because in the vast majority of cases, the plaintiff's injuries were largely de minimis.[16] These are certainly considerations that prospective plaintiffs would need to take into account when seeking to recover against residential complexes.

Notwithstanding the hurdles faced by plaintiffs in COVID-19 negligence cases, it would be unrealistic to assume that the judiciary would find residential complexes owe no duty to enforce health and safety measures for those tenants whose use and enjoyment of common facilities is being harmed by the disregard of public health guidelines by other tenants. This is particularly so with respect to those tenants who are either elderly or who suffer from underlying health conditions, and whose risk of serious illness and/or death from COVID-19 is much greater than the average person. While any restrictions placed by the landlord on its tenants could infringe on their incidental right to use the common areas, such as gyms, such restrictions would assuredly be permissible to prevent harm to the health and safety of tenants.[17] Thus, without speculating as to the breadth and scope of potential damages in negligence lawsuits brought by tenants and others against residential landlords in these lawsuits, it would be prudent for residential landlords to adopt sufficient health and safety protocols, and to enforce those protocols to the extent needed to ensure compliance, to confirm that their tenants remain safe, and to limit their legal exposure in the months and years to come. ⚖

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Endnotes

1. *See* EEOC guidelines, Section K.
2. *See* Executive Order 181, 1(P).
3. *Ibid*.
4. 30 N.J. 303 (1959).
5. 21 N.J. Super. 167, 170 (App. Div. 1952),
6. *Snyder*, 30 N.J. at 315–16.
7. 123 N.J. Super. 48, 52–53 (App. Div.), *aff'd*, 63 N.J. 577 (1973) (quoting *Francisco v. Miller*, 14 N.J. Super. 290, 296 (App.Div.1951)).
8. *See Inganamort v. Merker*, 148 N.J. Super. 506, 509, 372 A.2d 1168, 1170 (Ch. Div. 1977) ("the landlord who retains control of…common areas and passageways must exercise reasonable care to assure the safety of these areas," while at the same time ensuring that the landlord does not "deny to…tenants rights which are incidental to their leasehold."); *Terrey v. Sheridan Gardens, Inc.*, 163 N.J. Super. 404, 407 (App. Div. 1978) ("[a] landlord is not an insurer for the safety of his tenants, but he is under a legal duty to maintain a common stairway under his control reasonably fit for use by occupants of the premises and by others lawfully thereon."). In *Inganamort*, the Chancery Court likened the common areas in an apartment complex to "quasi-public streets which must necessarily be utilized by the tenants for communications of mutual interest," thereby holding that a landlord is without the power to prohibit a tenant's use of these areas, which is "an incidental right of a tenancy in an apartment complex," "unless it can be demonstrated that the [use of the area] is being effected in such a way as to endanger the health and safety of the tenants." 148 N.J. Super. At 509–10.
9. *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 382–83 (1975).
10. *Id*. at 387.
11. *Ibid*.
12. *Id*. at 387-88.
13. *Id*. at 387–88.
14. *See Braitman*, 68 N.J. at 382–83.
15. *See Snyder*, 30 N.J. at 315–16; Dwyer, 123 N.J. Super. at 52–53; *Inganamort*, 148 N.J. Super. at 509-10.
16. *See* Amanda Bronstad*, Passengers' COVID-19 Lawsuits Stresses Hurdles for Proving Causation, Damages*, Law.com (Sept. 8, 2020), law.com/2020/09/08/new-waters-for-the-law-dismissal-of-cruise-passengers-covid-19-lawsuits-stresses-hurdles-for-proving-causation-damages/; Debra Cassens Weiss, *Causation is an issue in suits against cruise lines by passengers who contracted COVID-19*, ABA Journal (Sept. 11, 2020), abajournal.com/news/article/causation-an-issue-in-suits-against-cruise-lines-by-passengers-who-contracted-covid-19.
17. *See Inganimort*, 148 N.J. Super. At 509–10.