

## Reversal of Second Hand Smoke Ruling Offers Landlords and Co-op Boards a Huge Sigh of Relief

By Robert J. Braverman

The reversal of a 2016 ruling with respect to a liability for second hand smoke has prompted a huge sigh of relief from building owners and co-op boards. The Appellate Division, First Department, which has jurisdiction over Manhattan and the Bronx, on May 4, 2017 reversed a finding in which Connaught Tower Corporation, a co-op on East 54<sup>th</sup> Street, was found liable for breach of its proprietary lease with the plaintiff, Susan Reinhard due to the presence of second hand smoke that was allegedly infiltrating her apartment.



The sweeping language in the original 2016 decision by Justice Arthur Engoron sent shockwaves through the residential real estate industry. Justice Engoron found that the co-op breached the statutory warranty of habitability owed to Ms. Reinhard and that Ms. Reinhard had been constructively evicted from her apartment.

Justice Engoron further held that building owners “must either provide a smoke-free apartment... by excluding smokers from their buildings, which might decrease...the rents they could charge; or must smoke-proof their buildings, which...could be mind-bogglingly expensive; or must completely forego rent payments.”

In finding for Ms. Reinhard, the lower court awarded her a full maintenance abatement from June 2007 through May 2015 in the amount of over \$120,000; interest at the annual rate of 9% on that amount and the amount of her attorneys’ fees.

On appeal, the Appellate Division reversed the decision holding that the finding of liability “was not based on a fair interpretation of the evidence...which failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants.” The five Judge appellate panel seemed particularly concerned with the lower court’s finding of liability in view of the fact that the plaintiff didn’t even live in the apartment, but rather, resided in Connecticut. As a result, the Court dismissed the complaint and remanded the matter back to the lower court for a determination of attorneys’ fees that Ms. Reinhard was found to be liable to the co-op for.

While the negative health effects created by second hand smoke ought to be taken very seriously and building owners and co-op and condominium boards ought to be free to ban or restrict smoking in their building, the finding of liability under the facts of the Reinhard case seemed overly draconian and, if affirmed, would have potentially opened a flood gate of litigation. With hopefully healthy lungs, landlords and co-op boards should be able to breathe a huge sigh of relief with respect to their potential liability for second hand smoke.