

Real Prop. Law § 235-b: Implied Warranty of Habitability Held Applicable to Cooperative Housing

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Recommended Citation

Conners, Kerry B. (1981) "Real Prop. Law § 235-b: Implied Warranty of Habitability Held Applicable to Cooperative Housing," *St. John's Law Review*: Vol. 55 : No. 4 , Article 9.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol55/iss4/9>

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and character of the peremptory challenge. Since the peremptory challenge is a purely statutory right,¹¹⁰ however, it is suggested that this remedy properly should be addressed by the legislature rather than by the judiciary.¹¹¹

Ziporah J. Szydlo

REAL PROPERTY LAW

Real Prop. Law § 235-b: Implied warranty of habitability held applicable to cooperative housing

Section 235-b of the Real Property Law appends to residential leases an implied warranty that leased premises are fit for human habitation.¹¹² Although this warranty of habitability clearly applies

94th Cong., 2d Sess. 1 (1976). While the amendment did not pass, it reflects an acknowledgment by the Supreme Court that an excessive number of peremptory challenges may foster the creation of unrepresentative juries. For a discussion of the proposal see Note, *The Defendant's Right To Object To Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1774-76 (1979).

¹¹⁰ See note 64 *supra*.

¹¹¹ See note 92 and accompanying text *supra*.

¹¹² Section 235-b provides in part:

1. 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.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980-1981).

At early common law, a lease was viewed as a conveyance of an estate in real property. *Park West Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 322, 391 N.E.2d 1288, 1291, 418 N.Y.S.2d 310, 313, *cert. denied*, 444 U.S. 992 (1979); 2 R. POWELL, REAL PROPERTY ¶ 221[1] (P. Rohan ed. 1977); see, e.g., *Fowler v. Bott*, 6 Mass. 62, 67 (1809). The only defense to a nonpayment of rent action was the lessor's failure to provide for the quiet enjoyment of the lessee's land. 47 N.Y.2d at 322, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; L. JONES, LANDLORD AND TENANT § 364 (1906). Absent an express agreement requiring the landlord to make repairs, the tenant took the premises as he found them. *Franklin v. Brown*, 118 N.Y. 110, 115, 23 N.E. 126, 127 (1889); see Comment, *Landlord-Tenant—Caveat Emptor—Implied Warranty of Habitability in Residential Leases—Tonetti v. Penati*, 21 N.Y.L.F. 613, 616 (1976). Even with a repairs agreement, a breach of this duty was not a ground to withhold rent. 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; Comment, *supra*, at 616; see *Kaufman v. Tarulli*, 136 N.Y.S. 36, 36 (Sup. Ct. App. T. 1st Dep't 1912). Eventually, however, the lower

to the traditional landlord-tenant relationship,¹¹³ it is unsettled whether it also extends to a resident who owns shares in a cooperative corporation and pays a monthly maintenance fee under a proprietary lease.¹¹⁴ Recently, however, in *Suarez v. Rivercross Tenants' Corp.*,¹¹⁵ the Appellate Term, First Department, held that the implied warranty of habitability does apply in a cooperative

courts began to recognize an implied warranty of habitability in residential leases. *Tonetti v. Penati*, 48 App. Div. 2d 25, 30, 367 N.Y.S.2d 804, 808 (2d Dep't 1975); *see, e.g.*, *Kipsborough Realty Corp. v. Goldbetter*, 81 Misc. 2d 1054, 1057, 367 N.Y.S.2d 916, 920 (N.Y.C. Civ. Ct. N.Y. County 1975); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 999, 343 N.Y.S.2d 406, 410 (N.Y.C. Civ. Ct. N.Y. County 1973); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 21, 318 N.Y.S.2d 11, 18 (N.Y.C. Civ. Ct. N.Y. County 1971). Ultimately, in August 1975, the common law warranty of habitability was codified in section 235-b of the Real Property Law. *See Kaplan v. Coulston*, 85 Misc. 2d 745, 747, 381 N.Y.S.2d 634, 635 (N.Y.C. Civ. Ct. Bronx County 1976). *See generally* Comment, *An Assessment of the Impact of an Implied Warranty of Habitability in New York State*, 24 BUFFALO L. REV. 189, 189-201 (1974).

¹¹³ *See* note 112 *supra*; *cf.* *Tonetti v. Penati*, 48 App. Div. 2d 25, 30, 367 N.Y.S.2d 804, 808 (2d Dep't 1975) (common law warranty of habitability applied in conventional landlord-tenant context).

¹¹⁴ *Compare* *Laight Coop. Corp. v. Kenny*, 105 Misc. 2d 1001, 1003-04, 430 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. N.Y. County 1980) *and* *Hauptman v. 222 E. 80th St. Corp.*, 100 Misc. 2d 153, 155, 418 N.Y.S.2d 728, 730 (N.Y.C. Civ. Ct. N.Y. County 1979) (warranty of habitability applies to cooperatives) *with* *320 E. 57th Corp. v. DeLulio*, No. 59269/78 (N.Y.C. Civ. Ct. N.Y. County Jan. 10, 1979) *and* *158th St. Riverside Drive Co. v. Launay*, N.Y.L.J., Apr. 6, 1976, at 9, col. 2 (N.Y.C. Civ. Ct. N.Y. County) (no warranty of habitability for cooperatives).

In New York, a cooperative corporation is designed for the "rendering of mutual help and service to its members." *See* N.Y. COOP. CORP. LAW § 3(c) (McKinney Supp. 1980-1981). It is also defined as a "non-profit corporation, since its primary object is not to make profits . . . or to pay dividends . . . but to provide service and means whereby its members may have the economic advantage of cooperative action, including a reasonable and fair return for their product and service." N.Y. COOP. CORP. LAW § 3(d) (McKinney 1951); *see* *Vernon Manor Coop. Apts., Section I, Inc. v. Salatino*, 15 Misc. 2d 491, 494, 178 N.Y.S.2d 895, 899 (Westchester County Ct. 1958).

In cooperative housing, the cooperative corporation as an entity owns the apartment building. *See* *Carden Hall, Inc. v. George*, 56 Misc. 2d 865, 868, 290 N.Y.S.2d 430, 433 (Sup. Ct. Kings County 1968). Shares of the corporation are then sold according to the value of each apartment. *Susskind v. 1136 Tenants Corp.*, 43 Misc. 2d 588, 589-90, 251 N.Y.S.2d 321, 324-25 (N.Y.C. Civ. Ct. N.Y. County 1964); Comment, *Maintenance and Repairs of Cooperative Apartments: Rights and Remedies of Tenant-Shareholders*, 8 FORDHAM URB. L.J. 345, 360 (1980) [hereinafter cited as *Maintenance and Repairs*]. Purchase of these shares entitles the shareholder to either a long term or a renewable short term lease. 2 P. ROHAN & M. RESKIN, COOPERATIVE HOUSING LAW & PRACTICE § 1.02[3] (1981). This lease is known as a proprietary lease. 1 AMERICAN LAW OF PROPERTY § 3.10 (A. Casner ed. 1952). In addition to the purchase of shares in the cooperative corporation, the cooperator must pay a monthly "maintenance fee" covering the maintenance of the building, mortgage payments, and taxes. 4B R. POWELL, REAL PROPERTY ¶ 633.4[2] at 783-84 (P. Rohan ed. 1979); *Maintenance and Repairs, supra*, at 360. For a discussion of the legal structure of a cooperative see Note, *Cooperative Apartment Housing*, 61 HARV. L. REV. 1407, 1408-10 (1948).

¹¹⁵ 107 Misc. 2d 135, 438 N.Y.S.2d 164 (Sup. Ct. App. T. 1st Dep't 1981).

context, thus allowing proprietary tenants to recover damages from a cooperative corporation.¹¹⁶

In *Suarez*, the plaintiff, a proprietary lessee, complained to the management about a lack of heat in his apartment.¹¹⁷ When the problem persisted, the plaintiff obtained repairs of the malfunctioning air conditioning-heating units at his own expense and filed an action for damages in civil court, claiming that the cooperative corporation breached the implied warranty of habitability.¹¹⁸ Subsequently, the plaintiff moved for summary judgment with respect to all issues except damages.¹¹⁹ Asserting, *inter alia*, the inapplicability of section 235-b to cooperatives, the defendant cross-moved for summary judgment.¹²⁰ Both motions were denied.¹²¹

On appeal, the appellate term affirmed the denial of both summary judgment motions,¹²² but held that the warranty of habitability does apply to cooperatives.¹²³ The court observed that neither section 235-b nor its legislative history indicate whether the statute applies to cooperative tenants.¹²⁴ Nonetheless, it reasoned that statutes created for one purpose may, as a matter of public policy, be adapted to other needs.¹²⁵ Such "sound policy," the court stated, rendered section 235-b available to cooperative tenants since they are subject to eviction for nonpayment of maintenance

¹¹⁶ *Id.* at 139, 438 N.Y.S.2d at 167.

¹¹⁷ *Id.* at 135, 438 N.Y.S.2d at 165. The plaintiff alleged that the room temperature, on occasion, was less than 40°F. and that he was forced to vacate his apartment. *Id.* at 136, 438 N.Y.S.2d at 165.

¹¹⁸ *Id.* The plaintiff claimed damages for, *inter alia*, the cost of repairs and for pain and suffering. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* In addition to asserting the inapplicability of section 235-b to cooperatives, the defendant claimed that it promptly had acted to fix the plaintiff's malfunctioning heaters. *Id.* Indeed, the defendant insisted that, in response to the plaintiff's complaints, it had sent a contractor to inspect the bulky heating units. *Id.* The defendant further stated that replacement parts were ordered and that, subsequently, the units were operable. *Id.*

¹²¹ *Id.*

¹²² *Id.* Justices Tierney and Riccobono concurred in the unauthored majority opinion. Justice Asch concurred in a separate opinion.

¹²³ *Id.* at 139, 438 N.Y.S.2d at 167. According to the majority, the lower court "implicitly recognized the applicability of . . . [section 235-b] to proprietary tenancies." *Id.* at 136-37, 438 N.Y.S.2d at 165-66. In his concurrence, however, Justice Asch stated that "no implication can be gleaned from the order on appeal as to whether Special Term was of the opinion that the statute did or did not apply to cooperative corporations." *Id.* at 140-41, 438 N.Y.S.2d at 168 (Asch, J., concurring).

¹²⁴ *Id.* at 138-39, 438 N.Y.S.2d at 167.

¹²⁵ *Id.* at 139, 438 N.Y.S.2d at 167.

fees and "other delinquencies."¹²⁶

Justice Asch, concurring only in the denial of the plaintiff's motion for summary judgment, asserted that section 235-b is not necessary in the cooperative context, wherein proprietary tenants enjoy a fiduciary relationship with their cooperative corporations in addition to rights unavailable to conventional tenants.¹²⁷ The concurrence further argued that the impact of an implied warranty of habitability would vary across the wide spectrum of cooperative housing arrangements and, therefore, should not be enforced absent an express legislative "mandate."¹²⁸

It is submitted that the *Suarez* court's application of section 235-b to cooperatives is in accord with legislative design.¹²⁹ This

¹²⁶ *Id.* Although the majority applied section 235-b in the cooperative context, it was troubled by the proprietary aspect of cooperative tenancies. Indeed, the majority acknowledged that while some courts have viewed proprietary leases as traditional landlord-tenant leases, others have called the relationship *sui generis*, or unique, since some elements of the cooperative arrangement are treated as real property and others as personal property. *Id.* at 137-38, 438 N.Y.S.2d at 166. Compare *Hauptman v. 222 E. 80 St. Corp.*, 100 Misc. 2d 153, 154, 418 N.Y.S.2d 728, 729 (N.Y.C. Civ. Ct. N.Y. County 1979) (proprietary lease viewed as traditional landlord-tenant lease) with *State Tax Comm'n v. Shor*, 84 Misc. 2d 161, 163-64, 378 N.Y.S.2d 222, 224 (Sup. Ct. N.Y. County 1975), *aff'd*, 53 App. Div. 2d 814, 385 N.Y.S.2d 290 (1st Dep't 1976), *aff'd*, 43 N.Y.2d 151, 371 N.E.2d 523, 400 N.Y.S.2d 805 (1977) (proprietary lease viewed as *sui generis*). Although the *Suarez* majority recognized that a tenant who buys stock in a cooperative is like the traditional shareholder of a business corporation and, therefore, application of section 235-b effectively would permit stockholders to sue themselves, the court stated that such a result was analogous to giving a shareholder "in *General Motors* the right to sue that corporation if he purchased a defective vehicle." 107 Misc. 2d at 139, 438 N.Y.S.2d at 167. Objecting to the majority's analogy, Justice Asch stated that, unlike *General Motors*, a cooperative corporation is a non-profit entity which does not "exploit sales potential among shareholders and non-shareholders alike." *Id.* at 143, 438 N.Y.S.2d at 169. (Asch, J., concurring). Moreover, the concurrence observed that at issue was whether a proprietary tenant may assert section 235-b, not whether he may sue the cooperative corporation. *Id.* (Asch, J., concurring).

¹²⁷ 107 Misc. 2d at 141-43, 438 N.Y.S.2d at 168-69 (Asch, J., concurring). Justice Asch did not elaborate upon the "arsenal of rights" available to proprietary tenants. *Id.* at 143, 438 N.Y.S.2d at 169 (Asch, J., concurring).

¹²⁸ *Id.* at 143-44, 438 N.Y.S.2d at 169 (Asch, J., concurring). A final argument proffered by Justice Asch was that the prohibition against waiver of the warranty of habitability, contained in subsection 2 of section 235-b, weighed against extending application of the statute to cooperatives. *Id.* at 144, 438 N.Y.S.2d at 169-70 (Asch, J., concurring). Justice Asch stated that in light of the "equity interest of cooperative shareholders . . . they may arrange as between themselves to take responsibility for renovating and upgrading an existing structure to the extent of making it habitable." *Id.* (Asch, J., concurring). Under section 235-b(2), noted Justice Asch, such arrangements would be illegal. *Id.* at 144, 438 N.Y.S.2d at 170 (Asch, J., concurring); see N.Y. REAL PROP. LAW § 235-b(2) (McKinney Supp. 1980-1981).

¹²⁹ It is submitted that the *Suarez* court has adopted the most logical interpretation of section 235-b. To restrict application of the statute would be to ignore the plain meaning of

implied warranty of habitability, a codification of common law doctrine, ensures tenants the right to occupy dwellings at least fit for human habitation.¹³⁰ This remedy developed primarily because a tight housing market left tenants unable to negotiate lease terms.¹³¹ Similarly, cooperative tenants have little bargaining power in today's competitive housing market despite their ownership of corporate shares.¹³² Concededly, cooperative tenants elect

the statutory words "every . . . lease or rental agreement for residential premises," made by a "landlord or lessor." N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980-1981) (emphasis added); see *Laight Coop. Corp. v. Kenny*, 105 Misc. 2d 1001, 1003, 430 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. N.Y. County 1980); *Hauptman v. 222 E. 80th St. Corp.*, 100 Misc. 2d 153, 155, 418 N.Y.S.2d 728, 730 (N.Y.C. Civ. Ct. N.Y. County 1979); *Maintenance and Repairs*, *supra* note 114, at 370. *But see* 158th St. Riverside Drive Co. v. Launay, N.Y.L.J., Apr. 6, 1976, at 9, col. 2 (N.Y.C. Civ. Ct. N.Y. County). Generally, when interpreting a statute every word must be given effect. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. C. Sands 1973). In addition, several New York courts have construed section 235-b liberally. *E.g.*, *Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327, 391 N.E.2d 1288, 1294, 418 N.Y.S.2d 310, 316, *cert. denied*, 444 U.S. 992 (1979); *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 814, 386 N.Y.S.2d 733, 734 (N.Y.C. Civ. Ct. N.Y. County 1976); see *The Survey*, 54 ST. JOHN'S L. REV. 194, 195 (1979). The cooperative corporation, owner of the apartment building and recipient of the maintenance payments, see note 114 *supra*, is undeniably a "lessor" even if it is not a "landlord" in the traditional sense. See *Esplanade Gardens v. Reed*, N.Y.L.J., May 9, 1979, at 13, col. 3 (N.Y.C. Civ. Ct. N.Y. County); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980-1981). Similarly, if section 235-b contemplated merely rental tenants, it would not have been necessary to supply the alternative phrasing "tenants or residents." N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980-1981).

It is submitted that even if section 235-b were strictly construed, the courts could fashion an identical remedy for cooperative tenants at common law. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). In *Javins*, one of the leading cases that developed the warranty of habitability for landlord and tenants at common law, the court's rationale emphasized a tenant's lack of "leverage to enforce demands for better housing." 428 F.2d at 1079.

¹³⁰ See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079-80 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Tonetti v. Penati*, 48 App. Div. 2d 25, 29, 367 N.Y.S.2d 804, 807 (2d Dep't 1975). In *Javins*, the District of Columbia Circuit Court of Appeals addressed the issue whether housing code violations relieve the tenant of his obligation to pay rent. 428 F.2d at 1072. After noting its approval of the trend among courts to view leases as contracts, *id.* at 1075, the court stated that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition." *Id.* at 1077.

¹³¹ See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). Governor Carey, in approving section 235-b stated that "[t]o a very large extent, the doctrine of caveat lessee still prevails and requires a tenant to take the premises as they are and assume all risks as to their condition. . . . By one large step this bill moves the law of landlord and tenant into the twentieth century." Governor's Memorandum on Approval of ch. 597, N.Y. Laws (Aug. 1, 1975), *reprinted in* [1975] N.Y. Laws 1760 (McKinney). Senator Barclay, the Senate sponsor of the bill, noted that the "contractual relationship between the two parties will be changed to put the tenant in parity legally with the landlord." 1975 N.Y. SEN. J. 7766-76.

¹³² See *Maintenance and Repairs*, *supra* note 114, at 366; N.Y. Times, Mar. 4, 1979,

the corporation's board of directors.¹³³ The import of this power, however, is slight. Indeed, fellow cooperators whose apartments are not in need of repair may be hesitant to support an aggrieved tenant when the repairs will increase their own monthly fees.¹³⁴ It is submitted, therefore, that the *Suarez* holding will compel cooperative corporations to maintain their apartments in habitable condition.

It is suggested that the requirements of habitability in section 235-b should apply to all forms of leased housing. Nevertheless, while the *Suarez* decision is sound, the unique nature of cooperative housing should compel courts to limit application of traditional landlord-tenant remedies to cases in which no adequate remedy exists within the corporate structure.¹³⁵ Moreover, it is

§ 8, at 1, col. 3.

¹³³ N.Y. COOP. CORP. LAW § 60 (McKinney Supp. 1980-1981).

¹³⁴ The concurrence in *Suarez* argued that the fiduciary duty owed by the board of directors to the cooperative corporation, see *Maintenance and Repairs*, *supra* note 114, at 368, creates a remedy that dispels the need for the warranty of habitability. 107 Misc. 2d at 143, 438 N.Y.S.2d at 169 (Asch, J., concurring). It is suggested, however, that the fiduciary duty will not always be an effective remedy for a complaining cooperative tenant. The directors are fiduciaries to the shareholders as a group—in the form of the cooperative corporation. Therefore, a costly expenditure to improve one apartment may not be in the best interests of the rest of the shareholders or the corporation.

The plight of the cooperative tenant without the aid of section 235-b can be analogized to that of a minority shareholder in a corporation with only a few shareholders. Both of these types of shareholders are without sufficient bargaining power to effect changes. The cooperative tenant, however, may be even more powerless than the minority shareholder. Although a controlling shareholder may owe a fiduciary duty to minority shareholders, *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 108-12, 460 P.2d 464, 471-74, 81 Cal. Rptr. 592, 599-602 (1969) (en banc), there rarely will be a majority shareholder in a cooperative because shares are distributed only to the extent of the value of the apartments. See *Susskind v. 1136 Tenants Corp.*, 43 Misc. 2d 588, 589-90, 251 N.Y.S.2d 321, 324-25 (N.Y.C. Civ. Ct. N.Y. County 1964). Consequently, the lone cooperator whose needs do not coincide with the best interests of the corporation may be without remedy. See *Maintenance and Repairs*, *supra* note 114, at 345. In addition, the shares of stock in both cases may not realize their fair market value when the frustrated shareholder tries to sell. This would appear to be especially true of the cooperative shareholder if the purchaser were to investigate why the apartment was for sale. See P. ROHAN & M. RESKIN, *supra* note 114, at § 7.03[3].

¹³⁵ Prior to *Suarez*, New York courts had extended to the cooperative corporation the right to bring a summary proceeding when maintenance fees were unpaid. *E.g.*, 1990 Seventh Ave. Coop. Corp. v. Edwards, 133 Misc. 831, 831, 234 N.Y.S. 82, 82 (Sup. Ct. App. T. 1st Dep't 1929) (per curiam); *Forest Park Coop.*, Section I v. Berg, N.Y.L.J., Jan. 16, 1980, at 14, col. 3 (N.Y.C. Civ. Ct. Queens County); *Esplanade Gardens v. Reed*, N.Y.L.J., May 9, 1979, at 13, col. 3 (N.Y.C. Civ. Ct. N.Y. County). One case did not allow the cooperative corporation to bring a summary proceeding, but it was overruled in dicta by the appellate term. *Earl W. Jimerson Hous. Co. v. Butler*, 97 Misc. 2d 563, 567, 412 N.Y.S.2d 560, 563 (N.Y.C. Civ. Ct. Kings County 1978), *rev'd on other grounds*, 102 Misc. 2d 423, 425 N.Y.S.2d 924 (Sup. Ct. App. T. 2d Dep't 1979); *Lehner & Sweet, Conversions of Residential*

submitted that a uniform cooperative law, encompassing the applicable landlord-tenant statutes, would serve to identify remedies which properly may be employed by cooperative tenants.¹³⁶

Kerry B. Connors

DEVELOPMENTS IN NEW YORK LAW

District Attorney's office automatically disqualified when attorney in office had counseled defendant previously in same case

An attorney is confronted with a conflict of interest when after counseling a criminal defendant he joins the staff of the prosecuting District Attorney.¹³⁷ To neutralize this conflict and avoid dis-

Cooperatives, Lofts, N.Y.L.J., Dec. 24, 1980, at 1, col. 3. It is suggested that the result in *Suarez* has helped balance the respective rights and remedies of the cooperative lessor and lessee by affording the lessee a defense to such proceedings. See *Laight Coop. Corp. v. Kenny*, 105 Misc. 2d 1001, 1003-04, 430 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. N.Y. County 1980); *Lehner & Sweet*, *supra*, at 6, col. 2.

In *Bourgeois v. Tangerine Realty Corp.*, 63 Misc. 2d 468, 312 N.Y.S.2d 232 (N.Y.C. Civ. Ct. N.Y. County 1970), however, the court held that cooperative shareholders could not bring a special proceeding under section 778 of article 7-A of the Real Property Actions and Proceedings Law. 63 Misc. 2d at 469, 312 N.Y.S.2d at 233. This proceedings allows tenants to move rent deposits from the possession of the landlord to a third party to be used for building repairs. See RPAPL § 778 (1979). In section 778, however, the statutory language was not alternatively worded as in section 235-b, rather it merely said "tenants," *id.*, which the court distinguished from tenant-shareholders. 63 Misc. 2d at 469, 312 N.Y.S.2d at 233. A statute which gives tenants the right to recover attorney's fees might not be appropriate in the cooperative setting. See N.Y. REAL PROP. LAW § 234 (McKinney Supp. 1980-1981). Indeed, the scheme of monetary distribution provided for by such a statute might better be decided by shareholders with equity interests. Moreover, it is suggested that section 235-b was not intended to apply to the condominium form of housing. In a cooperative, the resident occupies his apartment under a proprietary lease, but the individual condominium apartments are owned by the dwellers themselves. See *P. ROHAN & M. RESKIN*, *supra* note 114, § 1.02[3]. The absence of a lease in the condominium form of housing would seem to take such housing out of the scope of section 235-b.

¹³⁶ See *Rohan, Cooperative Housing: An Appraisal of Residential Controls and Enforcement Procedures*, 18 STAN. L. REV. 1323, 1337 (1966).

¹³⁷ See *People v. DeFreese*, 71 App. Div. 2d 689, 690, 418 N.Y.S.2d 959, 961 (2d Dep't 1979). The Code of Professional Responsibility requires an attorney to "preserve the confidences and secrets of a client." ABA CODE OF PROFESSIONAL RESPONSIBILITY (THE CODE), Canon 4 (1979). Thus, an attorney has a duty to a client to avoid employment which might compromise those confidences. *Cardinale v. Golinello*, 43 N.Y.2d 288, 294-95, 372 N.E.2d 26, 30, 401 N.Y.S.2d 191, 195 (1977). The proper functioning of the legal system requires this strict loyalty to the client, THE CODE, EC 4-1, and mandates that it continue after the attorney-client relationship terminates. THE CODE, EC 4-6. In addition, the Code prohibits even the appearance of improper conduct on the part of an attorney. THE CODE, Canon 9. It has been stated with respect to an attorney's responsibility that "confidence is reposed in him;