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THE HITS JUST KEEP ON COMING



By Sherwin Belkin

The City Council has proposed 18 new bills aimed squarely at the backs of property owners.

The bills are wide-ranging and address vacate orders, grounds for denying building permits, sanctions for errors in documents filed with the Department of Buildings, more specific and greater DOB review of tenant protection plans during construction, personal liability for false permits or plans, audits of process servers, inspections of vacant buildings before permits are issued, providing rent histories to regulated tenants, and audits of corrections of violations. Many of these bills come with significant monetary sanctions or preclusion from obtaining permits. While many of the bills seem aimed at

addressing real problems, many also seem to fall in the "Gotcha" category – as if hoping to find some easily correctable error and turning that into a vehicle for significant punitive sanction.

Two bills are particularly interesting.

One would require HPD to report on median market rates by community district and number of bedrooms and then mandate that the median market rent for a dwelling unit with the same number of bedrooms located in the same community district be set forth in any buyout offer made to a regulated tenant. The offer would then need to break down the number of months of such median market rent that such buyout amount would cover, calculated by dividing the value of

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such offer (or if such offer includes valuable consideration other than money, the value of the money portion of such offer) by such median market rate rent. The offer would be required to state that there is no guarantee that such person will be able to rent a dwelling unit in the same community district with the same number of bedrooms for such median market rent and that the number provided is calculated based solely upon such median market rent and does not include broker fees, security deposits or any other costs or fees associated with renting a dwelling unit.

The second notable bill would require owners to file buyout agreements with HPD or suffer monetary penalties. Of course, nothing is said as to why this information is needed by HPD, other than stating that HPD will report the filings to the Council and the Mayor.

The Council's last foray into buyout offers required a notice to tenants that they were not obligated to accept the offer, were still protected by rent regulations and that they could bar the owner from approaching the tenant for 180 days.

Having previously effectively slapped a gag order on owners communicating with their tenants, the Council now proposes to regulate the very content of the communications between the parties. Moreover, the doom and gloom language required by the Council seems intended to push regulated tenants into not accepting any such buyout offer. Finally, parties – both owners and tenants – often prefer that their agreements be confidential, rather than being forced into the public domain.

This sort of content censorship and deal disclosure is palpably unfair to property owners trying to negotiate legitimate business transactions. There is no law saying that when Macy's is advertising its Black Friday sales, Macy's also needs to remind customers that if they can wait until after Christmas they can buy it for a whole lot less. Saks doesn't have to tell customers "You don't have to buy it here because Lord & Taylor is closing its stores and has better sales." These bills just seem to be a continuation of the City finding the real estate industry to be a very easy target.

There is, undoubtedly, an affordable housing crisis in New York. But these steps seem ill advised. Buyouts are often an opportunity for tenants to obtain significant monies and upgrade their housing situations. Restricting conversation between owners and tenants will not end the crisis, will only make their relationships

more difficult, and can end up denying mutual benefits to the parties involved.

If the Council truly wishes to address the housing crisis in a manner that deals with the concerns of both tenants and the real estate industry, why not push the State to impose some form of means testing on tenants? Then, perhaps, regulated apartments would be occupied only by those truly in need of such subsidy.

Sherwin Belkin is a founding member of BBWG.

CONGRATULATIONS



The Firm is very pleased to announce that **Jay B. Solomon** has joined BBWG as a partner in the Litigation Department, from Klein & Solomon, LLP, where he was a founding partner and the firm's lead trial attorney since 1996. **Mr. Solomon**

has more than 30 years' experience litigating a broad range of complex commercial and real estate cases in State and Federal courts, including real property and contract disputes, landlord-tenant issues, tenant overcharge claims, foreclosures, co-op and condo disputes, lease work-outs, and corporate and partnership disputes. **Mr. Solomon** also has significant appellate experience, having argued numerous appeals before the Appellate Term, the Appellate Division and the Court of Appeals, where he has won two unanimous decisions. Additionally, **Mr. Solomon** is a certified instructor in commercial landlord-tenant law, and an arbitrator for the New York City Small Claims Court.



The Firm is also very happy to announce that **Christina Browne** has been named a partner in the Litigation Department. **Ms. Browne** joined BBWG in 2012 as an associate and has become a valued member of the Litigation

Department, concentrating on commercial and residential litigation matters.

CELEBRATING 30 YEARS WITH NEW BEGINNINGS: A MESSAGE FROM THE CO-MANAGING PARTNERS

In 2019 Belkin Burden Wenig & Goldman LLP will be celebrating its 30th anniversary serving the real estate industry. We are very proud and thankful to all of our clients who have put their confidence and trust in us. We deeply value these relationships and look forward to continuing to provide the diverse and multi-faceted real estate representation to owners, developers, cooperative and condominium boards, and commercial tenants that has helped us grow from our four founding partners in 1989-- Sherwin Belkin, Joseph Burden, Howard Wenig and Jeffrey L. Goldman--to 50 lawyers strong. This has been accomplished by the dedication and hard work of our partners and associates, many of whom have been honored as Super Lawyers, with our firm recognized in the October 2018 edition of The Real Deal as one of "NYC's Biggest Real Estate Law Firms".

As we look forward to 2019, we see various challenges facing our clients and the real estate industry. With the recent shift in control of both houses of the New York State Legislature, interest rates continuing to creep up, and substantial sums of money chasing a constantly shrinking pool of investment properties, 2019 will require clients not only to be discerning in their investment choices, but also well-counseled and guided through a variety of complicated and cutting-edge real estate issues. With our talented group of transactional, litigation, administrative and appellate attorneys, BBWG will continue to be there for you.

2019 also marks a year of new management and new beginnings at BBWG. We want to thank Howard Wenig for the past 20 years of his adroit leadership as managing partner steering BBWG through unprecedented growth during a continually changing economy. We are honored to follow Howard and lead the firm as its new co-managing partners. Please keep an eye out for our new multimedia platform with an interactive website that will improve our ability to communicate quickly to our clients and the real estate industry all legal and legislative changes and updates.

We hope to continue to earn your trust and confidence each and every day in 2019, and beyond, and are thankful for your belief in us and our counsel. Wishing you and your families a prosperous and healthy New Year.

Sincerely,



Dan Altman and Jeffrey L. Goldman

WHAT AN OWNER SHOULD KNOW IF ITS BUILDING IS ON THE NYC PILOT PROGRAM LIST



By Kara I. Rakowski

New York City's new anti-harassment Pilot Program (Local Law 1 of 2018) became effective on September 28, 2018. This law expands the universe of properties that require

the issuance of a Certificate of No Harassment ("CONH") by the New York City Department of Housing Preservation and Development ("HPD") as a prerequisite to the issuance of permits by the New York City Department of Buildings ("DOB") for what the law defines as "Covered Work".

On October 12, 2018 the Pilot Program List (the "List") was issued, initially containing over 1,000 properties that are subject to the Pilot Program (the "Program"). The issuance of the List has left owners that are subject to the Program with many unanswered questions. While the Program is extremely convoluted, this article sets forth a brief summary to assist owners in understanding what they need to know about the applicability of the Program to their buildings and evaluating what, if anything, can be done about it.

By way of background, a building may be included on the List based on the following criteria: (1) the building was subject to a full vacate order within the five years prior to July 24, 2018, or (2) the building was an active participant in HPD's Alternative Enforcement Program for more than four months since February 2016, or (3) a final determination of harassment at the building has been made by either the State Division of Housing and Community Renewal ("DHCR") or a court, or (4) the building is located in one of the special community districts or a re-zoned district identified in the law and having a requisite "score" on HPD's Building Qualification Index (the "BQI"). (Unfortunately, the BQI has caused great confusion as the scores are not public and the method for HPD's calculation of the scores is still a mystery.) HPD is required to add new buildings to the List that are identified as meeting 1-3 of the above criteria within thirty (30) days after such building is identified.

Inclusion of a building on the List requires the owner to apply for and obtain a CONH from HPD as a prerequisite for obtaining DOB permits for "covered categories of work." There are some

exemptions, and under limited circumstances an owner may be entitled to a waiver. The process for obtaining a CONH is estimated at approximately nine to twelve months, and the penalties for a denial are drastic. If after a hearing there is a determination that harassment has occurred during the 5-year inquiry period (i.e., dating back five years from the date the application for the CONH was filed), then the application will be denied and the owner will be prohibited from re-filing for the CONH for five years from the date of denial (during which time no permit may be issued for Covered Work). Alternatively, if an owner does not want to wait five years to re-file for a CONH, the owner has the option to take the "Cure". The "Cure" requires that the owner enter into a Regulatory and Affordable Housing Agreement with HPD and the creation of affordable housing in perpetuity in the same community district equal to either 25% of the existing residential floor area of the building to be altered or 20% of the total floor area of a new building to be built.

Thus, the inclusion of a building in the Program and on the List has potential long-term ramifications which could affect the development, financing, sale and value of a building. Thus, prospective purchasers of properties are strongly urged to perform thorough due diligence prior to contract. In addition, owners or managing agents with buildings in one of the identified community districts or with buildings that have participated in the Alternative Enforcement Program for at least four months since February 2016, or were subject to a full vacate order during the last five years, or were the subject of a final determination of harassment by DHCR or a court, should check the List to see if it contains any of their building addresses. An owner with a building on the List should determine the reason therefor, and verify that its placement on the List is correct. If the building is in one of the special community districts, attempts should be made to determine the building's BQI and the criteria HPD used to determine the score. If the building is not scored (because it is not in one of the special community districts) then the owner should verify that the building meets one of the three other criteria for being included on the List. Any error found in placing a building on the List could be used to challenge the placement.

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Owners must use caution in rushing to file their applications for CONH. If time permits, owners should determine whether a building's placement on the List is correct before filing for a CONH. Notably, since information as to scoring is not publicly available, it could take months to obtain this information. However, the penalty for a finding of harassment under the Program is quite significant. Owners should consult with legal counsel to review each of their buildings separately to determine whether they should wait to obtain the information prior to

filing for a CONH, identify issues that may result in a denial of a CONH, and determine the best time for filing an application for a CONH for the particular building.

This article was written by Kara I Rakowski, Co-Head of BBWG's Administrative Department. For more information regarding the Pilot Program and/or Certificates of No Harassment, Ms. Rakowski may be contacted at Karakowski@bbwg.com.

BBWG IN THE NEWS

Founding partner **Sherwin Belkin** was quoted in an article discussing the array of new laws proposed by the City Council imposing onerous new obligations on property owners, in citybizlist.com on November 30. **Mr. Belkin** was also quoted extensively in a December 5 article in [Real Estate Weekly](http://RealEstateWeekly.com) online decrying the new proposed legislation. (An expanded discussion by **Mr. Belkin** of those new laws appears above in this newsletter.) **Mr. Belkin** also appeared on NY1's "Inside City Hall" program on December 20th discussing potential changes in rent regulations.

Transactional Department head **Daniel T. Altman's** and partner **Lawrence T. Shepps'** representation of Riverside Church on its \$47 million purchase of a dormitory building in Upper Manhattan from Union Theological Seminary was cited as the largest New York City deal of the week in law360.com on October 22.

Martin Heistein, co-chair of the Firm's Administrative Law Department, was a guest speaker at a seminar hosted by the real estate brokerage firm March & Millichap on November 29. **Mr. Heistein** lectured on various rent regulatory, leasing and landlord-tenant issues.

Kara Rakowski, co-chair of the Firm's Administrative Law Department, authored an article on illegal short term rentals and the City's new legislation requiring online listing sites to disclose host information, in the November/December edition of MGMT Mann Report Management.

In addition, **Ms. Rakowski** and **Magda Cruz**, a partner in the Firm's Litigation and Appeals Departments, are included in Crain's 2nd annual Notable Women In Law list.

Stephen Tretola, a partner in the Firm's Transactional Department, represented Muss Development on the leasing of 44,000 square feet in a Forest Hills office building to the United Federation of Teachers; the lease is for 20 years with an aggregate value of \$40 million. The deal was featured in Crain's New York Business on November 8. **Mr. Tretola** and Transactional associate **Nicki Neidich** also handled the \$68.6 million sale of a package of nine Brooklyn properties for Maimonides Medical Center and its Research & Development Foundation, which closed on November 29. The transaction is featured in the December 3 Commercial Observer and in The Real Deal on December 10.

Litigation Department partner **Brian Epstein** will be a featured speaker on a panel on *Litigation Practice in Housing Court* to be presented by the New York City Bar Association on January 15.

Intern **Kayla Laskin** was recognized for her note "Is AirBnB Polluting The Big Apple? The Impact of Regulating The Short-Term Rental Service in New York City" by the St. John's University School of Law Journal For Civil Rights and Economic Development; the note is to be published in a forthcoming issue.

DISPELLING MISCONCEPTIONS ABOUT SIDEWALKS: CLARIFYING A “GREY” AREA



By Robert Jacobs

After a falling piece of terra cotta killed a pedestrian on a sidewalk in 1980, the City enacted Local Law 10, mandating a five-year façade inspection cycle of buildings of six or more stories. Extended by Local Law 11 in 1998, the law is now known as the Façade Inspection & Safety Program. As a byproduct of these laws, sidewalk sheds have become a common and lamentable, albeit necessary, fixture of the City streetscape. Furthermore, the recent surge in construction projects, and the need to protect pedestrians below them, has caused an additional increase in sidewalk sheds, exacerbating what many believe is a growing blight of planks and metal piping framing our streets.

This article attempts to dispel some misconceptions about sidewalks in New York City and to clarify an owner’s obligations with respect to sidewalk sheds, both with regard to the requirements to install such a shed, or as a party subjected to the unwanted presence of a shed, outside its building.

A sidewalk shed (sometimes referred to as a sidewalk bridge) is a covered passageway erected on the sidewalk to safeguard pedestrians while crossing in front of or under a construction site. The shed itself is made of metal piping and plywood. Scaffolding may extend above the shed when access to the façade above is required for restoration or construction purposes.

However, before discussing the rights and obligations of parties with respect to the installation of sidewalk sheds, a discussion about sidewalks, in general, is in order.

As a rule, sidewalks are not within the property line of the buildings they abut. As defined in Section 4-10 of the New York City Traffic Rules, the sidewalk is that portion of a street, whether paved or unpaved, between the curb and the adjacent property line intended for use by pedestrians. As such, sidewalks are part of the street bed and owned by the City.

Notwithstanding this fact, the owner of the building, or tenant of a storefront, abutting such sidewalk has certain legal obligations.

For instance, as of 2003, Section 16-123 of the Administrative Code (the “Administrative Code”) requires owners, lessees, tenants, or other persons having control of any building abutting a paved sidewalk to cause snow and ice to be removed therefrom within four hours after the snow ceases to fall. Moreover, Section 7-210 of the Administrative Code obligates the owner of real property abutting a sidewalk to maintain the sidewalk in a reasonably safe manner, and imposes liability on such an owner for any injury to property or person proximately caused by the failure to so maintain the sidewalk. To that end, Section 19-152 of the Administrative Code requires owners to install, construct, repave, reconstruct and repair the sidewalk flags abutting their property.

It is perhaps these provisions that have led owners to believe that they “own” the sidewalks in front of their buildings and, thus, have legal control over the installation of sidewalk sheds thereon. Unfortunately, that is not the case.

Under the New York City Building Code (the “Building Code”), an owner performing work on its property that requires sidewalk protection has to extend that sidewalk protection onto the sidewalk in front of adjacent properties. For example, pursuant to Section 3307.6.3 of the 2014 Building Code, where the sidewalk shed is to protect against unenclosed façade work or equipment higher than 100 feet, the shed has to protect the full length of the sidewalk in front of the work site plus an additional 20 feet on each side. As a result, the sidewalk shed has to extend 20 feet onto the sidewalk of the adjacent owners.

Section 3307.6.4 of the Building Code provides certain requirements for the installation of sidewalk sheds. First and foremost, sidewalk sheds require a permit from the DOB. The sidewalk shed plans must be drafted by a licensed design professional and approved by a DOB plans examiner. The shed plans must provide for illumination by overhead lighting. Electrical permits are required for the lighting fixtures and only a licensed electrician may install the electrical work. The underside of the shed must be illuminated at all times during the day and night and inspected daily to ensure the lights are working. They

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must be designed as “heavy duty” structures with a live load of at least 300 lbs. per sq. ft. and meet the performance standards established in Section 3307.6.5 of the Building Code. All sheds erected after July 1, 2013 must be painted hunter green. In addition, they must be at least eight feet in height and not interfere with adjacent show windows or means of ingress and egress. This arguably protects tall commercial storefront windows from blockage.

However, the Building Code is silent on the rights of adjacent owners with respect to the placement of such sidewalk sheds; moreover, the Code does not require that adjacent owners consent to their installation or be a party to the permit application. In addition, unlike demolition and excavation activities, no notice is even required in advance of the sidewalk shed installation.

As a result, some property owners, once they obtain a permit, cause a sidewalk shed to be installed and extended onto the sidewalk in front of adjacent property without seeking permission, sometimes without notice to the adjacent property owner.

Understandably, adjacent property owners have on occasion resisted such installations, especially in view of the fact that such property owners are liable for municipal violations if the shed damages the sidewalk and also potentially liable if someone slips and falls because of a neighbor’s defective shed.

In such situations, when access is resisted by the adjacent property owner, the shed-installing property owner may be compelled to commence a special proceeding for an order of access pursuant to Section 881 of the Real Property Actions and Proceedings Law (“RPAPL”). Section 881 allows owners who seek to make improvements or repairs to their building to enter upon the premises of adjacent property owners where permission to enter has been denied and the adjacent property is so situated that such improvements or repairs cannot be made without entering such premises. The Court has the power to grant a license to the owner performing the work to enter upon adjacent property. Section 881 further provides that such license shall be granted upon such terms as justice requires and that the licensee shall be liable to the adjacent property owner for actual damages occurring as a result of the entry.

In granting such licenses, Courts have struggled with the issue of when a license fee should be paid to the party subjected to the unwanted shed on the sidewalk in front of its building.

By way of illustration, *Ponito Residence LLC v. 12th St. Apt. Corp.*, 959 N.Y.S.2d 376 (2012) involved a dispute between the owner of a townhouse and an abutting building owned as a co-op (the “Co-op”). The Co-op, without the permission of the adjacent owner, had installed a sidewalk shed in contemplation of performing a building-wide window replacement project, which shed extended onto the sidewalk in front of the townhouse. When the Co-op failed to start the work promptly, the townhouse owner commenced an action for an order mandating the removal of the sidewalk shed from its property. The Court converted the injunction action into a Section 881 proceeding and granted a license to the Co-op to maintain the shed on the abutter’s property. The Court ordered a license fee because the Co-op had substantially delayed in its project— 18 months had passed and no work had commenced yet.

However, in another case, the Court declined to order a license fee because the party that installed the sidewalk shed had “acted in good faith and erected the sidewalk shed not because it simply wished to perform repairs, but because it was required to do so.” The Court further noted that the placement of a shed, as required by the DOB Code, on a public sidewalk did not entitle the complaining owner to a license fee unless it could demonstrate a compensable loss with respect to the use and enjoyment of its property, which it did not according to the Court’s ruling. See *22 Irving Place Corp. v. 30 Irving LLC*, 60 N.Y.S.3d 640 (2017).

Therefore, it cannot be assumed that a license fee will be ordered by a Court to be paid to the party subjected to the unwanted sidewalk shed on its property; the result varies on a case-by-case basis.

While the consent of the neighboring property owner is not required, the installation of a shed without reaching out to the abutter could result in litigation. A party requiring extension of a sidewalk bridge onto an adjacent property should consider reaching out to the neighbor prior to installing the shed to see if a consensual license agreement can be entered into. This helps preserve good neighborly relations and avoids a possible Court proceeding. In addition, the project will tend to go smoother when the abutters are not adversaries in Court. Moreover, a party resisting access today could need access from the abutter when the tables are turned in the future.

This article was written by Robert Jacobs, a partner in the Transactional Department at BBWG, who can be reached at rjacobs@bbwg.com.

WON'T YOU PLEASE BE MY BOARDER?



By Orie Shapiro

Much has been written about the City's full throttle attempts to thwart AirBnB-type transient occupancy in multiple dwellings. The City has promulgated regulations and commenced numerous judicial and

administrative proceedings seeking to eradicate short term rentals by enforcing the requirement that Class A multiple dwelling units be occupied for a permanent residential purpose, i.e., a period of thirty or more days.

However, the reader may be less familiar with an exception to the general prohibition of short term occupancy set forth in Multiple Dwelling Law ("MDL") section 4(8)(a)(1)(A)—if the short term renter lives "within the household of the permanent occupant . . . , [by virtue of being] house guests or lawful boarders, roomers or lodgers," such occupancy "shall not be deemed to be inconsistent with the occupancy of such dwelling for permanent residence purposes."

Four years ago, the OATH Hearing Division (previously known as, and still commonly referred to as, ECB) in *NYC v. Abe Carrey*, reaffirmed that a tourist's occupancy of an apartment for fewer than thirty days while a permanent resident is present is consistent with permanent residential purposes if the guest lives within the household of the permanent occupant.

Subsequent OATH cases routinely distinguished the Carrey decision, invariably finding insufficient documentation that the transient occupant was living within the household. In refusing to broadly apply the boarder exception, OATH considered such factors as whether the short term occupants were assigned to space containing separate bathrooms, kitchenette facilities, entrances and key locking devices, which would essentially transform the area into a separate unit.

In a case which I recently handled, however, the OATH hearing officer (and, ultimately, OATH's Appeal Unit) applied the MDL exception. OATH accepted testimony that a permanent tenant lived in the one-bedroom apartment throughout the duration of the short term occupancy, and thus dismissed the violation.

Although the DOB argued on appeal that the hearing officer improperly credited the witness's testimony over that of the issuing officer, OATH recognized that findings of credibility should rest with the hearing officer and that DOB did not cross-examine the respondent's witness or directly refute her testimony about contemporaneous occupancy.

Thus, a permanent occupant who is willing to withstand the inconvenience, risks, and uncertainties of sharing space with strangers may be able to avoid the draconian penalties typically assessed in transient occupancy cases. However, one must be mindful that in the overwhelming number of OATH cases, the tribunal has held that the standard of proving "living within the household" was not met. So when delving into this area, beware the "boarder patrol".

This article was written by Orie Shapiro, a partner in BBWG's Administrative Law department. For more information, Mr. Shapiro can be reached at oshapiro@bbwg.com.

NEWS FLASH

In December, 2018, the New York City Department of Housing Preservation and Development (HPD) went live with its bedbug reporting portal. The portal is located at <https://hpdcrmportal.dynamics365portals.us/>. Owners of buildings of three or more units that have not yet submitted their information into the portal must do so by January 31, 2019, and must either post the report generated from the portal in the lobby of the building or distribute it to all tenants. Accessing and navigating the HPD portal is relatively easy. For more information, members of CHIP can check the October and December 2018 issues of the New York Housing Journal at <https://chipnyc.org/index.php/component/users/?view=login&Itemid=101>.

If you have any questions about legal obligations involving bedbug disclosure and related issues, please contact partner Martin Meltzer at mmeltzer@bbwg.com.

HOW AN OWNER'S RIGHTS ARE AFFECTED WHEN A TENANT FILES BANKRUPTCY



By S. Stewart Smith

Often, the bane of an owner's existence occurs when its tenant files for bankruptcy. The filing for protection from creditors pursuant to the United States Bankruptcy Code unleashes a plethora of issues affecting an owner's rights to recover possession of the leasehold property as well as its ability to recover rental payments owed both prior and subsequent to such filing.

The Automatic Stay

Once a bankruptcy is filed, all of the debtor/tenant's property becomes property of the "bankruptcy estate," which is administered by a trustee or the debtor as a "debtor-in-possession." Upon filing for bankruptcy, an "order for relief" is issued, which, pursuant to the Bankruptcy Code, imposes an automatic stay prohibiting creditors from taking any action which would affect property of the bankruptcy estate. This includes, but is not limited to, any action to collect a debt, including rent owed by the debtor. As such, any pending non-payment or holdover actions, or administrative proceedings, commenced by the owner which may affect the debtor/tenant's interest in the subject property are prohibited from going forward, unless leave is granted by the Bankruptcy Court.

Recovery of Rent

In order to collect rent arrears that were due at the time of the bankruptcy filing, an owner is required to file a proof of claim by a specified date (the "bar date") detailing the amount owed, the nature of the claim, the basis thereof, and the period for which it is owed. Documents substantiating the claim must be attached to the proof of claim at the time of filing.

Various claims are assigned differing priorities with a corresponding likelihood of receiving payment.

Funds owed by the debtor as of the commencement of the bankruptcy case are considered "pre-petition" [prior to filing for bankruptcy] claims. These pre-petition claims may only be

recovered, with limited exception, by filing a "proof of claim" and awaiting distribution either pursuant to a plan of reorganization or upon liquidation and distribution of the bankruptcy estate. An owner's claims for pre-petition rent are deemed to be "general unsecured claims", which have the lowest priority and, as such, are the least likely to be paid in full, if at all, at the conclusion of the bankruptcy case.

Rent which becomes due after the bankruptcy is filed and prior to the conclusion of the bankruptcy case is deemed to be an "administrative claim", so called because it is incurred in the administration and/or preservation of the bankruptcy estate.

In assessing an administrative claim, a significant factor is the Bankruptcy Code's consideration of the value of the goods or services as opposed to the amount specified in a contract or agreement. Therefore, even if allowed as an administrative claim, the amount of rent specified in the lease and the "fair value" may not be one and the same. In determining the administrative claim, the Court will not only look to comparable rents for similarly situated property, but will also look to the debtor's actual use, partial use, or non-use of the subject premises. Additionally, unless the Court orders otherwise, administrative claims are generally paid out at the end of the case, either pursuant to a plan of reorganization or upon liquidation and distribution of the assets of the bankruptcy estate.

In addition, if the debtor/tenant defaults in its post-petition payments, the creditor-landlord may petition the Court for an order compelling the debtor to become current on its obligations and/or move to have the automatic stay vacated in order to allow the landlord to pursue its rights and remedies under State law.

The highest priority claim is the "secured claim" where a lien or other security is placed or pledged to a specific asset (e.g., a security deposit securing the tenant's lease).

Therefore, not only does the classification of the claim affect the likelihood of payment, but it in many instances, determines if, when, and how much of the rental arrears will be satisfied.

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Can The Lease Be Terminated?

An owner does not have the ability to terminate a lease after its tenant files bankruptcy. Any provision in a lease providing for termination in the event the tenant files is unenforceable as a matter of law. As stated above, a lease may only be terminated by the owner under State law in the post-petition period if the Bankruptcy Court grants relief from the automatic stay for the owner to pursue its rights in State Court.

Within the time periods specified below, a debtor/tenant can: (a) reject the lease; (b) assume the lease (ratify the lease) and keep operating its business out of the space; or (c) assume and assign the lease to another entity, even notwithstanding that the lease may have a no-assignment clause.

In determining whether to reject, assume, or assign a lease for non-residential property, debtor/tenants normally consider several factors such as: (1) whether the business at the particular location is profitable or desirable; (2) whether rent is below or above the market rate; (3) whether it intends to continue operations or to wind down its business; (4) whether the rent is a drain on the estate; and (5) whether the assignment of the lease to a proposed assignee is likely to generate significant funds for the estate.

If the leasehold is for residential property, and the tenant has filed bankruptcy under chapter 7 of the Bankruptcy Code (liquidation), the tenant has 60 days from filing to assume or reject the lease. This time may be extended only by the Court upon notice and hearing.

Where the tenant's lease is for residential property and the tenant has filed a petition to reorganize his or her estate under Chapter 11 or 13 of the Bankruptcy Code, the tenant has until the plan of reorganization has been confirmed by the Court to assume or reject the lease. However, upon the landlord's request, the Court may order the tenant to assume or reject the lease within a specified period of time.

In a Chapter 11 case, a non-residential debtor/tenant has an initial period of 120 days to decide whether it will assume or reject the lease. However, the debtor may apply for additional time, up to 90 days, in order to make a determination on its leases. The Court cannot grant any further extensions beyond this additional 90-day period without the owner's consent.

If a debtor/tenant either assumes, or assumes and assigns, the lease, it must cure all arrears including pre-petition obligations and rental arrears. In the event that the debtor intends to assume and assign the lease, it must provide adequate assurance that the assignee has the ability to perform all of the tenant's obligations under the lease. If the assignee cannot provide adequate assurance that it has the financial wherewithal to perform under the lease, the owner would have grounds to object to the assignment.

If the debtor rejects the lease, the owner will be entitled to file a rejection claim, based on a formula in the Bankruptcy Code and to be paid out at the same percentage as other general unsecured creditors.

It must be noted that neither the debtor/tenant nor the Court may change the material terms of the lease to be assumed or assigned, except that in certain circumstances the use provision of the lease may be liberally construed or even disregarded, provided that the proposed use of the subject premises is allowed under State law.

Any time a lease is rejected, assumed, or assumed and assigned, approval of the Court is required.

The above is a brief overview of an owner's rights when its tenant files for bankruptcy protection and is by no means a thorough analysis of the various issues and circumstances that such proceedings entail. Competent counsel should be consulted by an owner faced with a tenant bankruptcy.

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CO-OP | CONDO CORNER



By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or (ashmulewitz@bbwg.com).

MECHANICS LIEN FILED AGAINST CONDO'S COMMON ELEMENTS DISCHARGED PURSUANT TO RPL §339-L

Board of Managers of The St. Tropez Condominium v. Central Construction Management, LLC (Supreme Court, New York County)

COMMENT | That statute was intended precisely for this purpose.

CO-OP NOT LIABLE TO APARTMENT PURCHASER FOR DEFECTS IN APARTMENT THAT OCCURRED PRE-PURCHASE

Johnson v. Levin, 1150 Fifth Avenue Owners Corp. (Appellate Division, 1st Department)

COMMENT | The Court held that the co-op owed no fiduciary duty regarding items that occurred before the purchaser became a shareholder, and that the purchaser could have, but failed to, inquire into facts he was aware of involving the seller's alterations. Caveat emptor.

HDFC SHAREHOLDER CANNOT ENJOIN HDFC FROM NEGOTIATING EXTENSION WITH HPD

Scher v. Turin Housing Development Fund Company (Supreme Court, New York County)

COMMENT | The Court's analysis was that a balancing of the equities favored the HDFC: one shareholder's desire to sell his apartment at market prices was outweighed by the interest of all other shareholders to enjoy the financial stability and affordable apartments that continuing in the HDFC program would bring.

CO-OP SHAREHOLDER CAN BE SUED BY DOWNSTAIRS NEIGHBOR FOR NEGLIGENCE IN INSTALLATION OF NEW FLOOR

Constantiner v. The Sovereign Apartments, Inc. (Appellate Division, 1st Department)

COMMENT | Questions of fact precluded summary judgment dismissing the complaint—the shareholder exerted some level of control over the floor installation.

CO-OP CAN BE SUED BY APARTMENT'S SUBTENANT FOR PERSONAL INJURIES SUFFERED BY CHILD FROM INGESTING LEAD PAINT CHIPS

N.A. v. Hillcrest Owners Association, Inc. (Appellate Division, 2nd Department)

COMMENT | The co-op, as property owner, was held liable under City law. The apartment's shareholder was held not liable to the co-op under the indemnity provisions of the proprietary lease, which was deemed to be overly broad in that it did not account for negligence by the co-op.

HDFC CO-OP ACTED UNREASONABLY IN DECLINING CONSENT TO TRANSFER TO DECEASED SHAREHOLDER'S DAUGHTER

601 West 136 Street HDFC v. Tsiropoulos (Appellate Term, 1st Department)

COMMENT | The Court found the daughter to be financially responsible even though she failed to submit her tax returns to the Board for review. Query the degree to which a sympathetic plaintiff made the difference in this decision; it could just as easily have gone the other way.

CONDO AND MANAGING AGENT CAN BE SUED FOR WATER DAMAGE ARISING FROM BURST PIPE

Ko v. Lee, Wisteria Tower Condominium (Supreme Court, Queens County)

COMMENT | Questions of fact precluded summary judgment to dismiss the complaint, including regarding the liability of the Unit Owner based on his defective thermostat.

PROPRIETARY LEASE CLAUSE REQUIRING SHAREHOLDER TO PAY CO-OP'S LEGAL FEES EVEN IF CO-OP IS IN DEFAULT IS UNCONSCIONABLE AND UNENFORCEABLE

Krodel v. Amalgamated Dwellings Inc. (Appellate Division, 1st Department)

COMMENT | The Court emphasized fundamental fairness, and stated that such clauses, if not struck down, would chill challenges to Boards. This is a very important and potentially far-reaching decision.

INDIVIDUAL CONDO BOARD MEMBERS CANNOT BE SUED OVER DECISION TO REPLACE BUILDING ROOF

345 East 50th Street LLC v. The Board of Managers of M At Beekman Condominium (Appellate Division, 1st Department)

COMMENT | The Court held that the decision was protected by the business judgment rule, since the Board members were not motivated by self-interest, and didn't obtain any personal benefit from the decision.

CO-OP APARTMENT PURCHASERS CANNOT SUE SPONSOR OR SELLING AGENT OVER 33% DISCREPANCY IN APARTMENT'S FLOOR AREA

Von Ancken v. 7 East 14 LLC (Appellate Division, 1st Department)

COMMENT | The contract said that the apartment was being bought "as is", and the purchaser had the opportunity (and, per the Court, the obligation) to inspect and measure before signing the contract. As with another case above, caveat emptor.

CO-OP SHAREHOLDER ENTITLED TO ABATEMENT FOR LEAKS AND MOLD, BUT REDUCED SUBSTANTIALLY DUE TO HER DENIAL OF ACCESS; ATTORNEY FEES DENIED FOR SAME REASON

DeSocio v. 136 E. 56th St. Owners, Inc. (Civil Court, New York County)

COMMENT | The Court noted that the abatement should have been 100% for 11 years, but was reduced to two years, with partial abatement for two more years.

SUCCESSFUL BIDDER AT CO-OP FORECLOSURE SALE CANNOT SUE CO-OP, MANAGING AGENT OR FORECLOSING BANK FOR CO-OP'S DECLINATION OF CONSENT

Zazzarino v. 13-21 East 22nd Street Residence Corp. (Supreme Court, New York County)

COMMENT | The decision contains a detailed analysis of all relevant factors for all causes of action.

CO-OP SHAREHOLDER ENTITLED TO EXCLUSIVE USE OF TERRACE AREA OUTSIDE PENTHOUSE APARTMENT; SHAREHOLDER AWARDED ATTORNEYS FEES

Huyck v. 171 Tenants Corp. (Supreme Court, New York County)

COMMENT | In its lengthy decision on the frequently-litigated issue of outdoor rights, the Court emphasized that the parties' course of conduct since the 1999 purchase recognized the shareholder's exclusive rights, and that intermittent access by other building residents was insufficient to defeat such exclusivity.



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