Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

EDITORS
Magda L. Cruz
Aaron Shmulewitz
Kara I. Rakowski

FEBRUARY 2016 | VOLUME 34

INSIDE THIS ISSUE

ADMINSTRATIVE LAW UPDATE

DHCR NOTICE PERTAINING TO BUILDINGS THAT HAVE RECEIVED J-51 TAX BENEFITS

Recently, many owners of residential buildings have received a notice from the DHCR with respect to buildings that are receiving J-51 tax benefits. As a result of several court cases, including *Roberts v. Tishman Speyer*, the DHCR is notifying owners that all rental apartments in buildings that are receiving J-51 tax benefits must be treated as rent stabilized.

The DHCR notice provides that if a building is currently receiving a J-51 tax benefit, owners must:

- Notify the tenant that the unit is subject to rent stabilization;
- Provide a stabilized renewal lease; and
- Register the units as regulated.

There are many questions left unanswered by this notice and this new enforcement effort by the DHCR. For example, the notice only refers to current recipients of J-51 abatements, making no reference to buildings with expired abatements. The biggest issue left unanswered is, "How does an owner calculate and/or register the legal rent stabilized rent?"

It is our understanding that some owners of cooperative or condominium units in buildings that have received J-51's have also received the DHCR notice. This seems to be an error inasmuch as apartments that were deregulated during the J-51 tax abatement period due to a vacancy following the conversion of the building (and not due to luxury decontrol) are properly exempt. We suggest that even these erroneous notices be addressed, albeit in a different fashion.

continued on page 3

A SWITCH IN TIME SAVES FINE – LIMITING THE COST OF BUILDING AND FIRE DEPARTMENT VIOLATIONS

By Orie Shapiro

Contrary to forecasts, the change in mayoral administrations has not resulted in a reduction in the number of Department of Buildings ("DOB") and Fire Department ("FDNY") violations. The calendar at the Environmental Control Board ("ECB"), the City agency which adjudicates such violations, continues to grow at the same time that an owner's prospect of prevailing at this venue seems to shrink. This article will demonstrate that expeditious and expert handling of these matters will improve the odds of success, or at least limit potential costs and exposure to owners.

The following scenarios illustrate how the prompt correction of DOB and FDNY violations can eliminate or limit the likelihood or amounts of ECB and related fines:

1. Where owner learns of a complaint but cures the condition before the City is able to inspect the premises, it can prevent the issuance of a violation.

2. Even after the inspector issues a violation and sets a hearing date, in most instances, a hearing and fine could be avoided if owner corrects the condition to the issuing agency's satisfaction on or before the cure date set in the Notice of Violation ("NOV"). However, not every NOV contains a cure date. There are three classes of DOB violations — Class 1 (immediately hazardous); Class 2 (major), and Class 3 (lesser). DOB violations which are designated as Class 1 – "immediately hazardous" – do not contain a cure date. Similarly, some FDNY violations issued to repeat offenders are not given a cure option because of their recidivist nature.

3. Certain FDNY violations are subject to "mitigation." Where owner can show at the hearing that condition was corrected prior to the first hearing date, the Fire Department, at its discretion, can recommend that the penalty be reduced by approximately one half. The Administrative Law Judge will typically accept FDNY's recommendation. Again, only certain violations present such option.

4. Unless DOB violations are classified as "immediately hazardous," respondents are generally offered the ability to avoid a hearing if they stipulate to correct the condition within 75 days and pay a reduced fine (generally half of the standard amount).

5. It is advisable to certify correction as quickly as possible even if the classification of the violation prevents the administrative law judge from considering correction as a defense to the violation or a basis for reducing the fine. The filing can occur even before the hearing. Removal of ECB violations of record has two requirements: (a) payment of the ECB fine, and (b) DOB's acceptance of the Certificate of Correction. An owner who does not file a Certificate

of Correction is subject to additional violations and fines for failure to certify. Future violations carry more significant fines.

Therefore, it behooves the owner to file a certificate of correction as quickly as possible. This is accomplished by submitting the appropriate DOB form and a sworn statement that the condition has been corrected, buttressed by documentary proof. Although certification of correction is essentially a self-certification process, DOB has the right to audit. Filing a false certification could result in significant personal liability.

6. Class one immediately hazardous DOB violations are also subject to internal DOB civil penalties of $1,500 above and beyond any related ECB penalties. The DOB will generally not issue approvals of even the most unrelated job applications until its internal DOB penalties are satisfied. Under DOB procedure, an owner which immediately corrects a Class 1 violation to DOB's satisfaction, could avoid the imposition of internal civil penalties.

7. Prompt correction of conditions is particularly important where owner is accused of converting a Class A apartment into transient use or permitting such transient use. This type of violation is issued with alarming frequency in this "Airbnb era." Generally, if the NOV cites more than one such unlawfully occupied or converted apartment in the building, DOB may seek additional (draconian) daily penalties of $1,000 a day until the condition is corrected. The daily penalties are capped at $45,000. In such instance, it is obvious that the faster the condition is corrected, and the necessarily filings are made and approved, the less the owner's exposure would be.

8. In addition, the City's full throttle attack against unlawful short-term occupancy also includes not only DOB, but FDNY violations as well. The City has contended, and judges have found, that even if only one apartment in the building is unlawfully occupied on a short term basis, the owner is required to provide fire safety measures, such as a sprinkler system and an alarm system, etc., such as required in hotels and other buildings lawfully operated for short term occupancy. The City has been relentless in its pursuit of such offenses and was pressured at a recent City Council hearing to do even more in this regard. So, again, the faster the owner corrects the condition, the less liability it will face down the road.

In sum, an owner who moves promptly to rectify conditions can limit the scope of its liability which at ECB is a victory in and of itself.

Orie Shapiro is a partner in BBWG's Administrative Department. For more information about addressing DOB and Fire Code violations please contact Mr. Shapiro at oshapiro@bbwg.com.

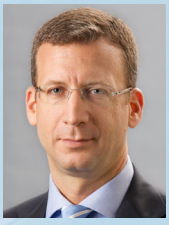
DHCR NOTICE PERTAINING TO BUILDINGS THAT HAVE RECEIVED J-51 TAX BENEFITS

continued from page 1

These issues are complex and fact-specific and do not apply uniformly to all buildings. However, failure to comply with these new requirements may result in significant penalties if not addressed.

If you are currently receiving J-51 benefits OR if you have received tax benefits in the past and have deregulated apartment units, we strongly urge you to reach out and contact Martin Heistein (mheistein@bbwg.com) or Sherwin Belkin (sbelkin@bbwg.com) or any of the other partners at BBWG.

ALEXA ENGLANDER AND **VLADIMIR FAVILUKIS**, OF BBWG'S ADMINISTRATIVE DEPARTMENT, AND **LAWRENCE T. SHEPPS** OF BBWG'S TRANSACTIONAL DEPARTMENT, WERE ELEVATED TO PARTNER, EFFECTIVE JANUARY 1, 2016.



3

WHAT TYPE OF CASE CAN A PROPERTY OWNER BRING AGAINST A TENANT WHEN A LEASE HAS EXPIRED AND THE TENANT REMAINS IN POSSESSION OF THE APARTMENT?

By Martin Meltzer

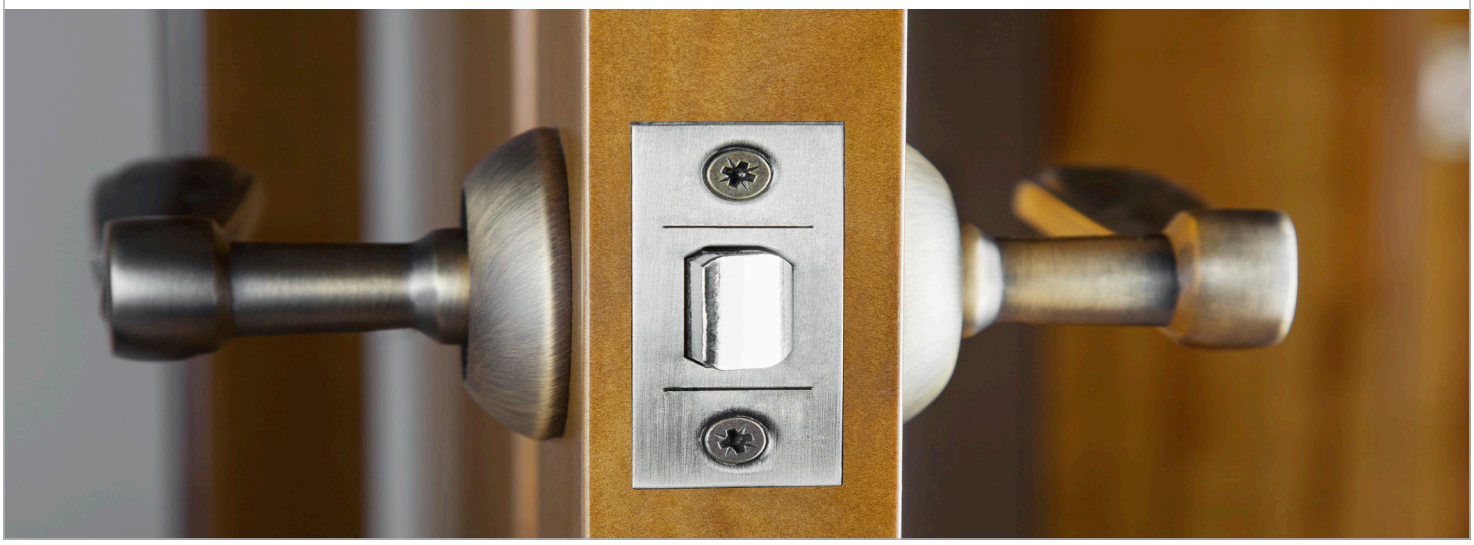
Often, clients ask us to start nonpayment proceedings against tenants who reside in apartments subject to rent stabilization or apartments that have been deregulated after a lease has expired or a tenant has not returned a signed renewal lease offer. In these instances, tenants have remained in possession even though there is no signed lease. Often in these situations the tenants have also not paid rent. In such circumstances it is important to be able to gather the facts and analyze what type of case to bring for the owner.

Appellate case law allows for an owner to bring a nonpayment case against a tenant who resides in a rent stabilized unit or deregulated unit after the lease has expired. There are court decisions from the 1980's that say otherwise, but the current law allows for the nonpayment proceeding to be brought.

The owner is allowed to also bring a holdover as; a lease expiration holdover; a month-to-month holdover; or failure to renew lease holdover, depending on the circumstances. With a lease expiration holdover in a deregulated apartment where the tenant has not paid rent after the lease expiration date, the owner is permitted to bring the case by filing a holdover petition. No predicate notice is required. A month-to month holdover situation with a deregulated apartment arises when an owner, after the expiration of the lease, accepts money from the tenant for the period after the lease expires. In this circumstance, the owner must serve a predicate notice called a thirty day notice of termination. In the third scenario, a failure to renew holdover, with a rent stabilized unit where the owner has timely offered a renewal lease to the tenant and the tenant has not returned the renewal lease to the owner within the sixty day required time allotment, the owner is required to serve a predicate fifteen day notice of termination. After its expiration a holdover petition is filed with the court.

It is important to gather the facts before an owner decides whether to bring a nonpayment or holdover proceeding. If you have a situation where a tenant's lease has expired and/or owes rent it is suggested to speak with your attorney to determine what the best, most practical, efficient and cost effective course of action is.

Martin Meltzer is a partner at BBWG and is the head of the nonpayment department. Mr. Meltzer can be reached at mmeltzer@bbwg.com or (212) 867-4466.



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.

CO-OP SHAREHOLDER LIABLE FOR FLOODING CAUSED BY CLOGGED TERRACE DRAIN

71st Street Lexington Corp. v. Waitman, Supreme Court, New York County

COMMENT | The Court held that since clearing the terrace drain was his obligation under the proprietary lease, the shareholder was responsible for all damage that "flowed" therefrom.

CONDO ENTITLED TO LATE FEES ON UNPAID COMMON CHARGES, BUT ONLY IN AMOUNTS PERMITTED BY BYLAWS, TO BE SET BY REFEREE

Board of Managers of The Park Avenue Court Condominium v. Sandler, Supreme Court, New York County

COMMENT | The Court ruled that late fees exceeding 50% of monthly common charges were unreasonable and confiscatory, and unenforceable even if the bylaws authorized the Board to set such an alternate late charge policy.

UNAUTHORIZED DOG STAYS — DEFECTIVE PREDICATE NOTICE, LATE COMMENCEMENT OF HOLDOVER, FATAL UNDER NYC PET LAW

2328 Newkirk Ave. Corp. v. Dames, Civil Court, Kings County, Landlord & Tenant Part

COMMENT | While involving a rent-stabilized tenant, this holding is instructive to co-op Boards. Strict adherence to the very tight timeframes and procedures mandated by the Pet Law is necessary to even hope to succeed; it's very easy to fail.

CONDO GRANTED SUMMARY JUDGMENT TO INVALIDATE FORECLOSED MORTGAGE

Deutsche Bank v. Tanibajeva, Appellate Division, 1st Department

COMMENT | Based on procedural irregularities, no valid mortgage chain, and robo-signing.

CONDO BUYER CANNOT SUE BOARD FOR EXERCISING RIGHT OF FIRST REFUSAL AND HAVING DESIGNEE BUY

Bittens v. Board of Managers of The Octavia Condominium, Appellate Division, 1st Department

COMMENT | The Court upheld the Board, even though one Board member was a member of the buying designee. This holding continues a recent trend of such pro-Board decisions.

CO-OP NOT LIABLE FOR TRESPASS OR CONVERSION FOR ENTERING APARTMENT TO MAKE REPAIRS

Schwartz v. Hotel Carlyle Owners Corporation, Appellate Division, 1st Department

COMMENT | The Court held that the co-op had acted responsively with regard to an active leak, and there was no evidence of wrongdoing during such entry.

OVERLY BROAD INDEMNITY PROVISION IN CO-OP ALTERATIONS AGREEMENT VOIDS ENTIRE INDEMNIFICATION OBLIGATION, LEAVES CO-OP NAKED

Nolasco v. Soho Plaza Corp., Appellate Division, 2nd Department

COMMENT | There was no exception for the indemnitee's own negligence, so the indemnitor was let off the hook. This case continues a recent trend; alterations agreements MUST contain a carve-out for the indemnitee's own negligence, among other exceptions.

CONDO RULE AGAINST FEEDING STRAY ANIMALS ENFORCEABLE, AS ARE FINES FOR VIOLATIONS

Lee v. Parkview Estates Condominium, Civil Court, Richmond County, Small Claims Part

COMMENT | The Court rejected the Unit Owner's creative argument that a State law against animal cruelty should invalidate the feeding prohibition and the fine for violating it.

OVERALL CONDO BOARD, AND RESIDENTIAL CONDO BOARD, DUELING MOTIONS FOR INJUNCTIVE RELIEF AGAINST EACH OTHER DENIED

OA Manhattan LLC v. Board of Managers of Cassa NY Condominium, Supreme Court, New York County

COMMENT | The ultimate nightmare scenario of warring Boards in a mixed-use condo, with attendant huge legal fees and adverse impact on sales. Curiously, the Court also denied injunctive relief against a Unit Owner's illegal transient use of, and continued denial of access to, its apartments.

CONDO BOARD CANNOT SUE SPONSOR FOR FRAUD BASED ON GENERAL REPRESENTATIONS IN OFFERING PLAN

Board of Managers of 141 Fifth Avenue Condominium v. 141 Acquisition Associates LLC, Supreme Court, New York County

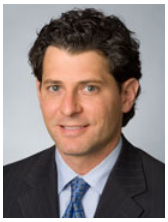
COMMENT | References such as "luxury", "first-class", etc. were deemed mere puffery, and an inadequate basis for a fraud claim. The Court emphasized the lack of proof of fraudulent intent.

CONDO GARAGE UNIT OWNER HELD IN CONTEMPT FOR IGNORING PRIOR COURT ORDER TO CLOSE PORTION OF GARAGE DURING REPAIRS

Perlbinder v. Board of Managers of The 411 East 53rd Street Condominium, Appellate Division, 1st Department

COMMENT | The appellate Court also enjoined the use of that area until all repairs are completed.

YELLOWSTONE INJUNCTION IS NOT AVAILABLE TO COMMERCIAL TENANT WHERE BREACH OF LEASE IS INCURABLE



By Jeffrey Levine

A Yellowstone injunction is a form of injunctive relief available, under certain circumstances, to a commercial tenant that has received a notice to cure from its landlord stating that the tenant is violating the terms of its lease and that the tenant must cure the lease violation within a prescribed time period. The purpose of a Yellowstone injunction is to stay the running of the cure period contained in the notice to cure, so that the tenant will have an opportunity to litigate its claim alleging that it is not in default of its lease and avoid termination of its lease while the claim is being litigated. One of the elements that a tenant must demonstrate to the court before it can be entitled to a Yellowstone injunction is that it has the "desire and ability" to cure the alleged default.

In order to qualify for a Yellowstone injunction, the lease violation must be one that is, by its nature, curable. An example of a breach that the courts have found to be incurable is a commercial tenant's failure to maintain insurance coverage where, after the breach, the tenant is able to procure insurance coverage prospectively, but not retroactively, and, as a result, is not able to protect the landlord against an array of claims that may arise during the period of no insurance coverage. Where a breach is incurable by its nature, the tenant is not entitled to a Yellowstone injunction because a tenant cannot be found to demonstrate an ability to cure that which is incurable.

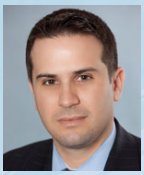
There is no hard and fast rule currently in place as to what breaches of lease are deemed to be curable or incurable and the courts have, to some extent, provided inconsistent rulings. Therefore, when confronted with a breach of lease by a commercial tenant, a landlord should consult with its counsel and be very careful to assess whether the breach is curable or incurable before issuing any termination notice to the tenant. Providing a tenant an opportunity to cure an otherwise incurable default may result in a landlord inadvertently compromising its rights.

Jeffrey Levine (Jlevine@bbwg.com) is a partner in BBWG's Litigation Department specializing in commercial lease disputes and commercial real estate matters

TRANSACTIONS OF NOTE

BBWG represented Dalan Management in its $43.5 million acquisition and financing of 22 West 38th Street, a 12-story, 70,000 square foot office building in the Garment District. The matter was handled by **Daniel T. Altman, Lawrence T. Shepps, Stephen M. Tretola** and **Allan L. Gosdin** of the Firm's Transactional Department.

Mr. Altman, head of the Transactional Department, also represented the purchaser of four apartment buildings in Alphabet City, which closed in December.



Stephen M. Tretola, a partner in the firm's Transactional Department, represented a client on the $32 million acquisition and construction loan financing of a mixed-use apartment building in Chicago, which closed in late 2015.

THE HEAT IS ON

By Joseph Burden

For many years, owners have been obligated to provide heat between October 1 and May 31. The property owner is required to maintain an indoor temperature of at least 68 degrees between 6:00 a.m. and 10:00 p.m. when the outdoor temperature falls below 55 degrees. Between the hours of 10:00 p. m. and 6:00 a.m., owners must maintain an indoor temperature of 55 degrees when the outdoor temperature falls below 40 degrees.

This standard, long in effect, is enforced by the New York City Department of Housing Preservation and Development through complaints made pursuant to 311. Owners who fail to provide heat according to these standards are subject to fines and further remedies if heat is not immediately restored.

A new wrinkle became effective October 1, 2015. Local Law 47 went into effect and now requires property owners to provide tenants with 24 hour notice prior to performing work that could cause interruption in heat, hot water, gas or electricity for at least two hours. If it is an emergency or the interruption is expected to be less than two hours, notice need not be posted.

Owners are required to post a notice in English and Spanish in a common area or prominent location in the building that details the type of work that will be done, as well as the estimated start and end times for the service disruption. HPD is to prescribe the form of the notice. The new section does not specify any penalties for failure to post the notice.

While most property owners give notice to their tenants if there is going to be an interruption in such service, it is now a matter of law and the owners must be wary of these new obligations.

Joseph Burden (jburden@bbwg.com) is co-head of the Firm's Litigation Department.

NOTABLE ACHIEVEMENTS

Sherwin Belkin, a partner in the Firm's Appeals and Administrative Law Departments, was featured prominently in a lead article in The New York Times on December 25, entitled "New York Builders Paying Huge Buyouts to Tenants in Their Way": http://mobile.nytimes.com/2015/12/25/nyregion/new-york-builders-paying-huge-buyouts-to-tenants-in-their-way.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0&referer=. **Mr. Belkin** was also quoted in an article that appeared in dnainfo.com on December 16, entitled "How Airbnb Wants to Win Over Landlords and Share Profits With Them": https://www.dnainfo.com/new-york/20151215/west-harlem/how-airbnb-wants-win-over-landlords-share-profits-with-them. Finally, **Mr. Belkin** was a member of a panel discussing assemblage and development, sponsored by Real Estate Finance & Investment magazine on November 17.

Aaron Shmulewitz, head of BBWG's co-op/condo practice, responded to inquiries in The New York Times Real Estate section on-line edition on November 7 (regarding a condominium's remedies against a Unit Owner producing offensive cooking odors) and November 15 (involving an apartment owner's right to a backyard cabana). **Mr. Shmulewitz** was also quoted in the December edition of The Cooperator in an article entitled "Predators vs. Privacy", in realtor.com on January 4 in an article: "The Worst Co-op Stories Ever!", and in dnainfo.com on January 6 in an article discussing the City's suit against a condominium represented by the firm.

Litigation partner **Matthew S. Brett** authored an article that was featured in The New York Law Journal on December 22 entitled "Post-Vacancy Deregulation in the Aftermath of 'Altman'": http://www.newyorklawjournal.com/home/id=1202745379262/PostVacancy-Deregulation-in-the-Aftermath-of-Altman?mcode=1202615326010&curindex=1. **Mr. Brett** was also quoted in a December 16 article in The New York Post about an eviction proceeding against a tenant harboring pigeons in his apartment.