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INSIDE THIS ISSUE

AIRBNB DROPS LAWSUIT
CHALLENGING PENALTIES
FOR ILLEGAL SHORT TERM
RENTALS

BY SHERWIN BELKIN1

APPELLATE COURT UPHOLDS
TRADITIONAL VIEW OF
HIGH RENT VACANCY
DEREGULATION

BY SHERWIN BELKIN2

INCREASING YOUR BOTTOM
LINE—THE MCI TAX
ABATEMENT PROGRAM

BY MARTIN HEISTEIN3

CONSIDERATIONS
WHEN PURCHASING
A COMMERCIAL
CONDOMINIUM UNIT

BY STEPHEN M. TRETOLA...4

THE NEW COMMERCIAL
TENANT HARASSMENT LAW

BY SCOTT LOFFREDO.....5

CO-OP | CONDO CORNER
BY AARON SHMULEWITZ ..6

BBWG SPEAKERS7

BBWG IN THE NEWS8

THE “GOOD NEWS FOR OWNERS” EDITION



AIRBNB DROPS LAWSUIT CHALLENGING PENALTIES FOR ILLEGAL SHORT TERM RENTALS



By Sherwin Belkin

When we last wrote regarding the on-going battle pertaining to short term rentals (involving AirBNB and similar sites), we noted that Governor Cuomo

had signed into law an amendment to the State Multiple Dwelling Law that makes it unlawful to advertise the occupancy or use of dwelling units in a class A multiple dwelling for purposes other than permanent residence, which generally means occupancy by the tenant or tenant’s family for no less than thirty (30) consecutive days.

The new law contains a civil penalty—against the advertiser—of not more than \$1,000.00 for the first violation, \$5,000.00 for the second violation, and \$7,500.00 for the third and any subsequent violations. The law defines the term “advertise” as any form of communication for marketing that is used to encourage,

persuade, or manipulate viewers, readers, or listeners into contracting for goods and/or services as may be viewed through various media including but not limited to newspapers, magazines, flyers, handbills, television commercials, radio, signage, direct mail, websites, and text messages.

AirBNB immediately sued both New York State and New York City, claiming that the law was illegal. AirBNB later dropped its suit against the State, but stated that it would continue its suit against the City—because the City was the enforcement arm for the statute.

However, in a sudden turnabout, AirBNB has now agreed to drop the suit against the City as well, on the condition that fines for violations of the law would be imposed only on the hosts, not on AirBNB. Inasmuch as the sponsor of the legislation said that the intention was never to

continued on page 2

APPELLATE COURT UPHOLDS TRADITIONAL VIEW OF HIGH RENT VACANCY DEREGULATION



By Sherwin Belkin

In the spring of 2015, the Appellate Division, First Department, issued a decision in *Altman v. 258 W. Fourth, LLC* that seemed to upend the traditional view as to how high rent vacancy deregulation was triggered for rent regulated apartments. Until then, the uniform interpretation by the Courts and DHCR had been that deregulation would be triggered if the rent that could be charged to the incoming tenant exceeded the deregulation threshold. *Altman* seemed to hold that the triggering event was not what could be charged to the incoming tenant, but whether the rent of the outgoing regulated tenant had exceeded the threshold.

For example, when the threshold was \$2000 (it was since raised to \$2500 and then to \$2700), if a rent stabilized tenant was paying \$1500 per month and vacated, and via the vacancy allowance, improvements,

and other permitted increases the next rent was legally above \$2000, that apartment would be deregulated and the owner could charge whatever the market would bear. Under the *Altman* interpretation, however, the above apartment would remain rent stabilized at the maximum regulated rent.¹

Industry estimates had been that, if upheld, the *Altman* decision could result in the reregulation of more than 100,000 deregulated units throughout New York City.

We are pleased to advise that in an appeal handled by BBWG (brief written by Sherwin Belkin, Magda Cruz, Matthew Brett and Scott Loffredo; argued by Magda Cruz), the Appellate Term, First Department in *233 E. 5th St. LLC v. Smith* unanimously held that:

...when subsequent to a vacancy, the legal rent, as increased by the vacancy allowance, as well as any increases permitted for post vacancy improvements,

is [at the deregulation threshold], the apartment is deregulated.”

The court addressed the 2015 *Altman* decision by stating that it did not view:

“the contents of a single sentence ... so broadly as to effectuate a sea change in nearly two decades of settled statutory and decision law – that allowed an owner to deregulate an apartment after a vacancy, if the legal rent plus any lawful increases and adjustments to the rent, such as the vacancy allowance, exceeded the [deregulation threshold].”

This decision helps to solidify decades of long standing precedent. However, *Altman* does remain extant—although the owner in *Altman* is seeking to obtain leave to the Court of Appeals for final clarification. Accordingly, issues still remain. But certainly, this unanimous and unequivocal ruling by the Appellate Term in *233 E. 5th St. LLC v. Smith* provides owners with a confirmed legal basis for prior deregulations.

¹ For vacancies occurring on or after June 15, 2015, some interpret the Rent Law of 2015 as placing the trigger event on the pre-vacancy rent.

continued from page 1

AIRBNB DROPS LAWSUIT CHALLENGING PENALTIES FOR ILLEGAL SHORT TERM RENTALS

fine AirBNB, this resolution seems a clear-cut victory for the City and State in now being able to enforce the law and mete out penalties against the actual violators. This is also a major victory for the real estate industry, which had been the subject of fines, even where the property owner had no knowledge of the violation by one of its tenants. Some elected officials have since called for selective enforcement, against

commercial operators only—a dangerous concept.

This is an opportune time for owners to remind their tenants about the heightened risks and potential penalties for illegal short term rentals. BBWG has advised many of its clients regarding sending letters to their residents laying out the new penalties for the violation of

this law, and adding a rider to a lease that makes the penalties and the violation of lease explicit. The hope is that by being pro-active, the violations will stop before they begin.

This article was written by Sherwin Belkin. Mr. Belkin can be reached at Sbelkin@bbwg.com for more information about this article or related issues.

INCREASING YOUR BOTTOM LINE— THE MCI TAX ABATEMENT PROGRAM



By Martin Heistein

Last year, the State Legislature passed a number of changes to the rent regulatory laws that affect property owners. One of the changes involved changing the amortization period for the calculation of Major Capital Improvement (MCI) rent increases. The Legislature changed the amortization period from 84 months to 96 months for buildings with 35 or fewer apartments, or 108 months for buildings with more than 35 apartments.

Of course, the lengthening of the amortization period had the practical effect of lowering the monthly rent increase that owners could pass on to their tenants.

As a way to give something back to the real estate industry, the Legislature also passed a law that provided for a new tax abatement to owners who received an MCI rent increase order after **June 15, 2015**.

The abatement, which is administered by the NYC Department of Finance, provides that owners will receive a one-time tax abatement equal to 50% of the total MCI, multiplied by a formula, depending on the size of the building.

Again, this abatement is only applicable for those buildings that received an MCI order from DHCR after June 15, 2015.

One very important issue to note is that a building will receive the full abatement, no matter how many rent regulated apartments the building contains. For example, if a building is a condominium or cooperative

or if a building contains a number of free market apartment units that are not subject to rent regulation, the building will still receive the full abatement, so long as an MCI order was issued and so long as at least one rent regulated tenant resides in the building.

There is no deadline for filing and receiving this new type of abatement, but the abatement is not renewable—it is a one-time benefit lasting for one tax year.

This new abatement could potentially result in additional revenue to a building's bottom line, but the facts of each filing should be discussed with counsel.

Martin Heistein is Chair of BBWG's Administrative Law Department. Please contact Mr. Heistein at mheistein@bbwg.com if you have any questions regarding the new MCI Tax Abatement program.



CONSIDERATIONS WHEN PURCHASING A COMMERCIAL CONDOMINIUM UNIT



By Stephen M. Tretola

When purchasing a commercial condominium, a buyer should be aware of the potential pitfalls and must evaluate a number of critical issues before entering into a contract. In addition to the due diligence that should always be performed in connection with the purchase of commercial real estate (property condition assessment, engineering and environmental studies, etc.), the governing documents of the condominium must be reviewed by the buyer's professionals to determine the following:

1. Do the by-laws restrict any current or intended use of the unit or any planned operations of the buyer?
2. Having the right to make certain alterations is critical when a new tenant is entering or building is required. What are the owner's rights to alter the unit?
3. Is the buyer entitled to any seats on the overall condominium board?
4. To what extent will the buyer be able to direct the decisions of any separate commercial board? It is vital to have a voice on the board after a major financial investment has been made.
5. Do any special common charge allocations adversely affect the unit which will cause an owner to pay a disproportionate amount of common charges? Conversely, does the commercial unit enjoy any "discounts"

from what its percentage-based common charges would ordinarily be?

6. Will the buyer receive any preferred "sponsor" type rights which will benefit buyer in its operation of the unit, like unrestricted sale, leasing and signage?

In general, a buyer should ensure—prior to signing a purchase contract—that there are no obstacles to its future operational plan. The condominium's financial statements and board meeting minutes should also be examined to determine whether there are any current or future assessments imposed, and whether the condominium is performing, or plans to perform, any major capital improvements or Local Law 11 work which will incur a material future financial expenditure to the buyer. Reviewing the governing and financial documents of a condominium is critical to ensure that there are no post-closing surprises.

In addition to performing due diligence on the building and its rules, a buyer should consider any contracts or leases that will be assumed in connection with the purchase, since leases being assumed often are the material component driving the purchase. If the unit will be purchased subject to any leases, all such leases (and any amendments and modifications thereto) should be reviewed closely, along with any applicable guaranties and financial statements of the tenant and guarantor. In addition to requiring that certain representations and warranties be made part of the purchase and sale contract with respect to any such leases, a contract for a commercial condominium

unit should also provide as a condition of closing that the seller provide "clean" tenant estoppel certificates from all commercial tenants dated no earlier than thirty (30) days prior to closing, as well as SNDA's, to the extent required under any applicable lease or by buyer's lender.

A study should also be performed to determine whether the building and the unit are subject to any real estate tax abatements, and if so, how such abatements are phasing out in the future, resulting in a corresponding increase in the buyer's taxes.

Our firm has represented numerous clients who have purchased commercial condominium units. In one recent transaction, we represented a purchaser taking title as a tenant-in-common in two commercial condominium units. The transaction involved the assumption of existing leases and the requirement that the condominium adopt a "liberalizing" by-law amendment with respect to permitted alterations.

While each transaction is different, many of the issues discussed above often come into play, and should always be considered carefully. If you are contemplating the acquisition of a commercial condominium unit, BBWG stands ready to assist you.

Stephen M. Tretola is a partner in the Firm's Transactional Department, and has extensive experience representing clients in the sale, purchase, financing and leasing of all types of commercial properties. He can be reached at stretola@bbwg.com.

THE NEW COMMERCIAL TENANT ANTI-HARASSMENT LAW



By Scott Loffredo

On June 28, 2016, Mayor De Blasio signed into law a bill creating a private cause of action for “Commercial Tenants” to bring suit against their landlords if they feel they are the victims of “Commercial Tenant Harassment”. The law went into effect September 28, 2016.

Under the new law, a “Commercial Tenant” is defined as the lawful occupant of “any building or portion of a building (i) that is lawfully used for buying, selling, or otherwise providing goods or services, or for other lawful business, commercial, professional services or manufacturing activities, and (ii) for which a certificate of occupancy authorizing residential use of such building or such portion of a building has not been issued”. The law does not apply to a commercial tenant’s invitee.

The law provides for the potential imposition of damages ranging from \$1,000-\$10,000 per commercial property where harassment is found to have occurred—*not* per act of harassment (effectively capping the damages at \$10,000 per property regardless of how many acts of harassment a court may find have occurred). The law also empowers a court of competent jurisdiction to issue orders restraining further acts of harassment and to award equitable relief, compensatory damages, punitive damages and/or reasonable attorney’s fees and court costs.

The law defines “Commercial Tenant Harassment” as “any act or omission by

or on behalf of a landlord that is intended to cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law.”

Specifically, the law identifies the following as acts of “Commercial Tenant Harassment”: (i) using force against or making express or implied threats that force will be used against a commercial tenant or its invitee; (ii) repeated interruptions or discontinuances of one or more essential services; (iii) interruption or discontinuance of essential services for an extended period of time; (iv) interruption or discontinuance of an essential service which substantially interferes with a commercial tenant’s business; (v) repeated commencement of frivolous court proceedings against a commercial tenant; (vi) removal from covered property of any personal property belonging to a commercial tenant or its invitee; (vii) removal of the entrance door for a covered property, rendering the lock on such entrance door inoperable, or changing such lock without supplying a duplicate key to the commercial tenant; (viii) preventing a commercial tenant or its invitee from entering covered property; (ix) substantially interfering with a commercial tenant’s business by commencing unnecessary construction or repairs in or near covered property; and (x) engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant’s business.

However, a landlord’s *lawful* termination of a tenancy, or lawful refusal to renew or extend a lease or other rental agreement,

does not constitute Commercial Tenant Harassment.

The law specifically states that a finding of harassment shall not act to relieve a tenant of the obligation to pay any rent for which the commercial tenant is otherwise liable and expressly states that any award issued by a court shall be reduced by any amount of delinquent rent or other sum for which a court finds such commercial tenant is liable to the landlord.

Finally, the law states that it is an affirmative defense to any claim of Commercial Tenant Harassment if the landlord can prove: (i) such condition or service interruption was not intended to cause any commercial tenant to vacate a commercial space or waive or surrender any rights to the property, **and** (ii) the landlord acted in good faith and in a reasonable manner to correct promptly such condition or service interruption, including providing notice to all affected tenants in a covered property.

As this Commercial Tenant Harassment law creates a new leasing environment in the City, both owners and tenants would be wise to consult with counsel prior to commencing such an action or taking actions to settle, defend or resolve a potential claim. If you are faced with such a situation, BBWG can help you.

Scott Loffredo is an associate in the Litigation Department at BBWG. For more information on Commercial Tenant Harassment claims and related topics, please contact Mr. Loffredo at sloffredo@bbwg.com.

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).

COMMERCIAL UNIT OWNER IN CONDO ORDERED TO UNDO MISAPPROPRIATION OF COMMON ELEMENT PARKING AREAS

Board of Managers of The Sailmaker at City Island Condominium v. Laddomada Supreme Court, Bronx County

COMMENT—The Court rejected a purported amendment to the Declaration that was recorded 16 years after the alleged (but undocumented) Unit Owner amendment vote, and questioned whether the Commercial Unit Owner had tried to defraud the Court by having it recorded a year after the litigation had begun.

CO-OP CAN CONTINUE TO USE GARAGE ROOF AS TRASH PICKUP/STORAGE AREA, AND FOR PARKING BY DELIVERY TRUCKS AND VENDORS, BUT CANNOT USE IT FOR PARKING BY CO-OP EMPLOYEES

Silver Towers Owners Corp. v. Cromwell Silver Towers Group Limited Partnership Appellate Division, 2nd Department

COMMENT—The garage tenant had objected to the co-op's use of its parking facility for all purposes.

SHAREHOLDER SUIT AGAINST CO-OP RELATING TO HIS DESIRED CHANGE IN USE OF NON-HABITABLE PORTION OF FIRST-FLOOR APARTMENT BARRED BY STATUTE OF LIMITATIONS

Seigel v. The Dakota, Inc. Appellate Division, 1st Department

COMMENT—The shareholder waited at least six years to sue, after knowledge of the co-op's position. The Court also rejected his breach of warranty of habitability claim for the entire apartment, because he never lived in it.

HOLDER OF FIRST MORTGAGE ON CONDO UNIT NOT ENTITLED TO SURPLUS MONEY ON CONDO LIEN FORECLOSURE

Board of Managers of Coronado Condominium v. Silva Supreme Court, New York County

COMMENT—This counter-intuitive decision was based on several technicalities, including that the purchaser's title company had missed the mortgage in its title search, and it remained of record despite the foreclosure.

MANAGING AGENT NOT LIABLE TO CONDO FOR NEGLIGENT SUPERVISION OF POORLY PERFORMED WORK BY CONDO'S INDEPENDENT CONTRACTOR

Board of Managers of Maple Run Condominium v. John McGowan and Sons, Inc. Supreme Court, Nassau County

COMMENT—The Court based its decision on the terms of the management agreement, and the agent's lack of a supervisory role over the contractor.

CO-OP UNLAWFULLY RETALIATED AGAINST SHAREHOLDER FOR FILING DOG DISCRIMINATION DISABILITY CASE

Matter of Delkap Management, Inc. v. New York State Division of Human Rights Appellate Division, 2nd Department

COMMENT– But the Appellate Division halved the fines and penalties against the co-op.

CO-OP SHAREHOLDERS' CLAIM OF BAD FAITH CONDUCT BY BOARD DISMISSED, UNDER BUSINESS JUDGMENT RULE

Gonzalez v. Been Appellate Division, 1st Department

COMMENT–The alleged bad faith claim was based on the Board's refusal to call a special meeting of shareholders in response to a petition. The Court upheld the Board's decision, noting that an independent third party determined that many of the signatures on the petition were fraudulent or duplicates.

BBWG SPEAKERS



Administrative Law Department chair **Martin Heistein** was a featured speaker at an RSA Seminar on November 15 entitled "Managing Rent Regulated Property: Protecting Your Bottom Line in a Zero Guideline World". **Mr. Heistein** spoke about the MCI application process and other major changes to the rent regulatory laws.



Land use and zoning partner **Robert Jacobs** was co-chair of a CLE program sponsored by the New York City Bar Association on December 5 on "The Do's and Don'ts of Zoning Lot Mergers and Development Rights Transfers in NYC".



Litigation partner **Steven Kirkpatrick** lectured at a CLE program sponsored by the New York City Bar Association on November 7, discussing "Inside, Outside, and Court Side Perspectives on Retail Leasing."



LISA GALLAUDET AND **CHRISTINA SIMANCA-PROCTOR**, OF BBWG'S LITIGATION DEPARTMENT, WERE ELEVATED TO PARTNER, EFFECTIVE JANUARY 1, 2017



BBWG IN THE NEWS



Sherwin Belkin, a partner in the Firm's Appeals and Administrative Law Departments, was quoted in articles that discussed: the new legislation to combat AirBNB-type transient use of apartments, in [bisnow.com \(October 24\)](#), and AirBNB's dropping of its opposition thereto, in [USA Today \(November 14\)](#), and the selective enforcement of the new legislation, in [citybizlist.com \(December 20\)](#); and the efforts of AirBNB users to evade detection, in [buzzfeed.com \(December 22\)](#); the impact of the State Senate election results on the real estate industry, in [The Commercial Observer \(November 9\)](#); a proposed new City law to impose maximum time limits on the presence of sidewalk sheds, in [bisnow.com \(December 7\)](#) and in [Real Estate Weekly \(December 14\)](#); and with regard to BBWG's representation of the owner in the appellate court's favorable ruling on "Altman" high rent deregulation issues, in [citybizlist.com \(December 12\)](#); and [The Wall Street Journal \(December 22\)](#). (see also article, above, in this newsletter).



Litigation Department co-head **Jeffrey Goldman** was quoted in articles discussing the impact of Firm client Donald Trump's election on the then-pending Trump University litigation being handled by the Firm ([November 10](#)), and the potential risks involved in housing homeless persons in hotels ([November 5](#)).



Aaron Shmulewitz, head of BBWG's co-op/condo practice, responded to an inquiry in the [December edition](#) of [The Cooperator](#) on a unit owner's right to review neighbors' payment records, and in an article in [realtor.com](#) on suing neighbors for playing objectionable holiday music ([December 13](#)).



Martin Heistein, head of the Firm's Administrative Law Department, was quoted in [citybizlist.com](#) with regard to the revival of the 421-a real estate tax abatement program ([November 11](#)), and the impact of the program on real estate taxes in general, in [The Commercial Observer \(November 16\)](#).



Land use and zoning partner **Robert Jacobs** was quoted in [citybizlist.com](#) on the impact of a City Planning Commission vote to change the value of air rights for Broadway theaters ([November 17](#)).



An article authored by **Kara Rakowski**, a partner in the Firm's Administrative Law Department, entitled "Pitfalls To Avoid When Certifying Statements In A DOB Permit Application" was featured in the November edition of the [CHIP New York Housing Journal](#).



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