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UPDATE

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CAN CONDOS CO-OP?

By Craig L. Price and Nicki Neidich

A common question asked of real estate brokers and attorneys by prospective residential apartment purchasers is: Condo or Co-op? Although the large list of differences between the two is outside the scope of this article, one of the most fundamental concerns to purchasers is that, generally, Co-op Boards have a virtually absolute consent right, while Condos have only a right of first refusal—the right to match the existing offer and buy the apartment itself. As a result, Co-op Boards typically require much more information of a prospective purchaser than do Condo Boards. However, in recent years, Condo Boards have increasingly tried to exert more control over sales, including demanding more information for prospective purchasers, and sometimes imposing Co-op-like conditions for waiving the right of first refusal.

COOPERATIVE CONSENT VS. CONDOMINIUM WAIVER

The history of the New York City cooperative apartment regime dates back to the early twentieth century, and the purchase application or board package was born in that era. As many savvy buyers are aware, the dreaded "Co-op board package" is the bane of many purchasers' existence because of the lengthy list of required documents, and intrusive information, sought from a variety of sources. Based on its examination of such a package, a Co-op Board will then issue its consent (or not) to the purchaser to become a shareholder.

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In a Condo, on the other hand, while a purchase application is typically required, the breadth and amount of required documents is typically less than in the average Co-op. For this reason (among others), Condos generally attract a pool of buyers who may otherwise be unsuited to purchase in a Co-op (such as foreigners, investors, pied-a-terres, parents of occupant-children, and higher LTV financing).

RESTRICTIONS AT A CONDOMINIUM

A Condominium has two characteristics which are effectively at tension with one another. A Condo unit is both real property and a communal multi-family dwelling. Owners of real property are protected from unreasonable restraints on alienation, which allows owners to freely transfer their property. On the other hand, the operator of a multi-family dwelling should have some right to determine who can become co-owners and neighbors, thus protecting the property and interests of all of the other owners.

Although Condo unit owners chose to purchase in a building with fewer restrictions, as compared to a Co-op, existing owners not-infrequently "see things differently" than incoming purchasers, and often desire greater control over who may join them. Such greater control often manifests itself in the form of higher scrutiny of the purchase application, the imposition of conditions (like escrows and guaranties), the adoption of rules with respect to subleasing, or transfer fees. A number of Condos are also following the growing trend of becoming smoke-free buildings.

BYLAWS ARE THE KEY

Condos are governed by their bylaws, which dictate the parameters of the operation of the Condominium, including any restrictions on selling or leasing. A diligent purchaser should review the bylaws prior to signing a contract so that (s)he is aware of the current rules. In order to change bylaws, the requisite number of unit owners (as set forth in the bylaws) must vote to approve any change—typically at least 67%, which is often a daunting task.

Case law has indicated that the only enforceable way for a Condo to impose a new significant restriction is to have it codified in its bylaws. Bylaw amendments that impose hefty transfer fees, limit leasing, create transfer restrictions or conditions, or ban smoking in apartments, will be upheld. In contrast, such restrictions that are adopted by a Board alone will likely not be held enforceable.

The requirement to disclose reasonable financial information in a Condo purchase application has been deemed reasonable, because a Board's knowledge of a prospective purchaser's finances is essential in determining if the purchaser will be able to contribute adequately to the Condo's ongoing financial needs. In essence, a Condo Board is exercising its fiduciary duty to protect all unit owners by requiring and examining such information.

It is still unclear what enforceable rights a Board has if it finds such information less than ideal. For example, many Condo Boards now require escrows and/or third party guaranties for purchasers, especially foreign or corporate purchasers. It can be argued that such requirements are beyond the scope of a typical Condo Board's authority under typical bylaw provisions, which are silent on the issue. Some purchasers push back against such conditions, which could create uncertainty with regard to the "closeability" of some unit sale transactions. Often, hasty last-minute negotiations occur to water down such conditions, and a "game of chicken" often ensues.

In conclusion, we believe that the trend of Condo Boards becoming more like Co-op Boards in their approach to purchasers is likely to continue, but Condo Boards should recognize that their rights are ultimately subject to the provisions of their bylaws.

For questions involving restrictions in condominiums, please contact Craig L. Price (cprice @bbwg.com) or Nicki Neidich (nneidich@bbwg.com).

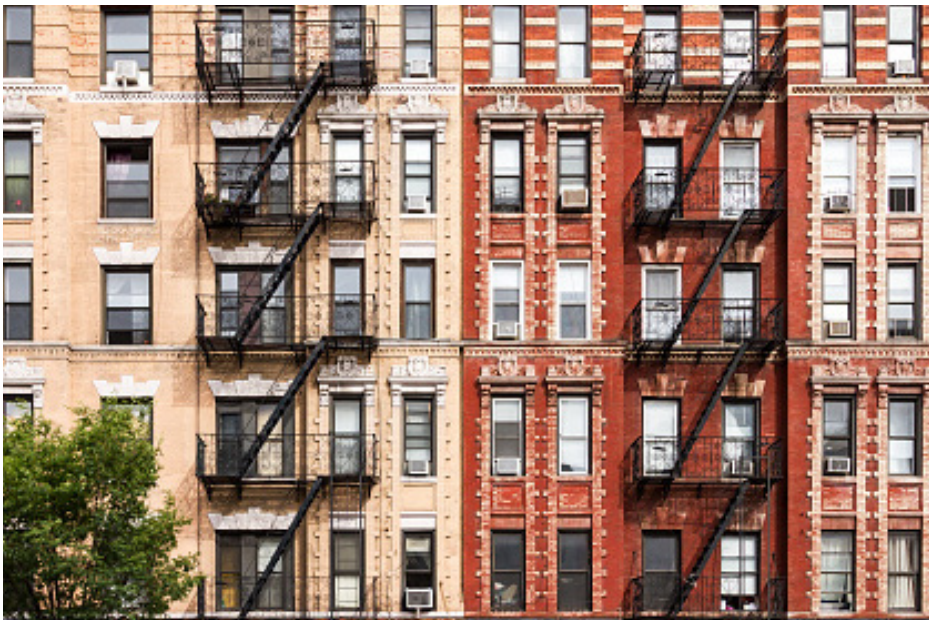
CHANGES TO NEW YORK FORECLOSURE LAWS

By Daniel T. Podhaskie

Recent changes to New York's foreclosure laws have added sections to both the Real Property Actions and Proceedings Law ("RPAPL") and the Civil Practice Law and Rules ("CPLR") that will affect lenders, mortgage servicers and others with respect to residential mortgage loans. The largely borrower-protective changes, which went into effect on December 20, 2016, include amendments to the rules regarding mandatory settlement conferences in residential foreclosure actions, changes to pre-foreclosure notices, new rules that govern vacant and abandoned properties, and new time requirements on the sale of foreclosed properties.

CHANGES TO PRE-FORECLOSURE NOTICES

RPAPL §§1303 and 1304 require a foreclosing mortgagee to send an affected residential homeowner certain notices before commencing a foreclosure action. Under RPAPL §1303, a foreclosing mortgagee must provide notice to the homeowner, and any tenant of the dwelling. The notice must be delivered with the summons and complaint, and must comply with specific font and size requirements, which are detailed in the statute. The RPAPL §1304 notice must be sent to homeowners at least 90 days before commencement of a foreclosure action, filed with the New York State Department of Financial Services ("DFS"), and include a list of local foreclosure assistance agencies obtained from the DFS website.



The changes to RPAPL §§1303 and 1304 add additional required disclosures foreclosing mortgagees must provide. The RPAPL §1303 notice now must include a warning to borrowers about foreclosure scams. The RPAPL §1304 notice must now be in the borrower's native language, provided that the language is one of the six most common non-English languages spoken in New York. A conspicuous change to both notices must advise the borrower that (s)he is not required to leave the home until the property is sold at auction.

Additional requirements are that a foreclosing mortgagee must send the RPAPL §1304 notice to all known addresses for the borrower, in addition to the address of the property being foreclosed, at least once for each loan in a twelve-month calendar year. The statute was also changed to clarify that the 90-day waiting period shall cease to apply if the borrower files for bankruptcy; however, the notice is still required.

CHANGES TO MANDATORY FORECLOSURE SETTLEMENT CONFERENCES

In response to the 2008 financial crisis, the New York State legislature enacted CPLR §3408. This statute provides for mandatory settlement conferences in residential foreclosure actions, in which the parties are encouraged to negotiate foreclosure avoidance solutions, such as a loan modification or short sale, with the assistance of a court-appointed referee. It requires parties appearing at the conferences to appear with authority to dispose of the case and negotiate in good faith to reach a "mutually agreeable resolution". The statute has now been amended to clarify and impose additional duties on foreclosing lenders, as follows:

1. **Scope of Coverage:** Settlement conferences should include discussions about loan modification, short sale, deed-in-lieu of foreclosure, and any other loss mitigation options.

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2. **Appearances:** Both plaintiff and defendant must appear; however, the amendments allow for telephonic appearances at the Court's discretion.

3. **Documents:** The foreclosing mortgagee must now submit reinstatement and payoff amounts, payment history, copies of the note and mortgage, loss mitigation application forms and any other documents the presiding judge may request.

4. **Good faith negotiation:** The good faith standard will be measured by a totality of the circumstances and gauged against compliance with the Court rules, mortgage servicing rules, and conduct and avoidance of undue delay; however, failure to make or accept an offer cannot be deemed a failure to negotiate in good faith.

A notable change to the law provides that a defendant-homeowner who appears at the conference, but who has failed to answer the foreclosure complaint, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer within 30 days of the initial conference, without having waived substantive defenses.

NEW RULES REGARDING VACANT AND ABANDONED PROPERTIES

RPAPL §§1308, 1309 and 1310 are all new sections that were enacted to address the expanding problem commonly referred to as "zombie homes." These are homes that have been abandoned by a defaulting borrower, and have led to concerns of decreased property values, and attraction of squatters, in some neighborhoods.

RPAPL §1308 is entitled "Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property." The law applies to first mortgage lien holders; however, state or federally chartered banks and credit unions are exempt from the provision. Lenders to which the statute is applicable must now comply with the following obligations:

1. **Duty to Inspect 90 days After Delinquency:** The lender (or its servicer) must complete an external inspection of the property within 90 days of a borrower's delinquency to determine if the property is occupied. This inspection must be repeated every 25-35 days, at different times of the day.

2. **Duty to Post Notice:** Within seven days after the property is deemed abandoned or vacant, the servicer must post a notice on an easily accessible part of the property, which would be reasonably visible to the borrower, property owner or occupant. The notice must contain the servicer's contact information, and the property must be monitored to ensure that the notice remains posted.

3. **Duty to Maintain:** Once it is determined that the property is abandoned or vacant, the lender/servicer must maintain the property. This includes, but is not limited to, securing broken windows and doors; securing property that may be deemed an attractive nuisance; removing and remediating significant health and safety issues, including outstanding code violations; and responding to government inquiries regarding property condition.

4. **Protection of Mortgagor's Personal Property:** The lender/servicer may not remove personal property unless it creates a significant health hazard.

5. **Violation and Enforcement:** If it is determined that a lender/servicer has violated these requirements, a civil penalty may be imposed of up to $500 per day.

RPAPL §1309 is entitled "Expedited Application For Judgment of Foreclosure and Sale for Vacant and Abandoned Property." This section provides that the foreclosing mortgagee may move for immediate judgment of foreclosure and sale, upon proof that the property is vacant and abandoned. This relief is precluded if the borrower demonstrates an intention to contest the foreclosure action; however, there is no requirement that the borrower actually answer the complaint, only that the borrower demonstrate an intention to contest the foreclosure action.

Finally, there is RPAPL §1310. This is also a new provision which requires the DFS to maintain a registry of vacant and abandoned properties. A lender/servicer must submit the vacant property information to the DFS within 21 days after learning the property is vacant, and must include contact information, date of foreclosure if applicable, and the last known address and contact information for the mortgagor.

These statutory changes now require lenders and servicers to update their pre- and post-foreclosure procedures, and create numerous new ways in which a lender/servicer can fail to comply, which could materially delay or adversely impact an already lengthy foreclosure process. Mortgagees seeking to commence a foreclosure action, or who require assistance in complying with these new rules, should contact BBWG for guidance.

Daniel T. Podhaskie is an associate in BBWG's Litigation Department.

DEALING WITH TENANTS WHOSE SECTION 8 BENEFITS HAVE BEEN TERMINATED

By Damien Bernache

Two recent cases highlight the continued pitfalls facing owners whose tenants are Section 8 Voucher recipients. Owners who have Section 8 tenants, or prospective tenants, must navigate the complex interplay among the Rent Stabilization Code, the New York State and City Human Rights Laws, the "Williams Consent Decree", the U. S. Department of Housing and Urban Development, the Housing Assistance Payment agreement, as well as the internal rules and regulations of the relevant housing authority which administers the voucher program on behalf of HUD.

Owners of buildings larger than a two-family home in New York City are required to accept a proffered Section 8 Voucher from both new and existing tenants, and cannot discriminate based on lawful source of income. A Section 8 Voucher recipient is only obligated to pay a portion of the total rent, as determined by the relevant housing authority.

What many owners do not realize, however, is that if the Section 8 Voucher is terminated, the tenant is not obligated to pay the Section 8 portion of the rent previously paid by the relevant housing authority, unless the owner and tenant enter into a completely new agreement. A renewal lease proffered and signed under the RSC does not constitute a new agreement. So, the question often arises: what is an owner to do where the Section 8 Voucher has been terminated?

As non-payment proceedings will not permit an owner to successfully recover the entire contract rent, the only remedy left is to commence a holdover proceeding based on an alleged breach of lease stemming from the tenant's failure to maintain continued eligibility of Section 8 benefits.

In *1089 Anderson Realty Inc. v. Torres*, the owner commenced a holdover proceeding predicated upon the tenant's termination from the Section 8 program for the tenant's failure to remove an illegal partition. As the tenant was no longer an active Section 8 Voucher recipient, the owner chose not to comply with the "Williams Second Partial Consent Decree" and did not allege the tenant's Section 8 status in the petition. In dismissing the petition without prejudice, the court held that both defects were fatal.

In *Greenstone 26 LLC v. Woods*, the New York City Housing Authority ("NYCHA") suspended payment to the owner in December, 2015 without notice. By notice dated January 1, 2015 (but probably issued in January 2016), the owner was advised by NYCHA that the tenant's voucher would be terminated by February 15, 2015 (probably intended to be 2016), unless the tenant cured her failure to timely re-certify. After failing to receive NYCHA's portion of the rent for December 2015 and January 2016, the owner apparently assumed that the tenant's Section 8 Voucher had already been terminated, and commenced a holdover proceeding predicated upon the tenant's termination for her failure to timely re-certify. The owner properly pleaded the Section 8 status of the tenant and, more importantly, had complied with the Williams Second Partial Consent Decree, which put NYCHA on notice that the owner sought the tenant's eviction for her failure to timely re-certify. NYCHA did not object or advise that the tenant's voucher had not been terminated. After several defaults, the tenant was ultimately evicted.

The tenant moved to be restored, and the Court held a hearing, at which it was revealed that, despite the termination notice sent by NYCHA and the suspension of the subsidy from December, 2015 through February, 2016, the tenant's subsidy was never actually terminated for her failure to re-certify. NYCHA testified that the suspension of the tenant's subsidy from December, 2015 through February, 2016 was in error, and that retroactive payments were ultimately made to the owner. However, the subsidy was again suspended in March, 2016 following a failed inspection, and was not reinstated until October, 2016. Because the tenant's voucher was not terminated for her failure to re-certify, the Court vacated the default judgment and restored the tenant to occupancy.

Notably, the Court faulted the owner for its failure to recognize that NYCHA's attempted termination of tenant's voucher was procedurally defective pursuant to NYCHA's own internal management manual. The Court created a new hurdle for owners to clear:

> [owner] easily could – and should – have ascertained prior to commencing this proceeding that in fact [tenant's] Section 8 benefits had not been

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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).

CO-OP HELD TO HAVE ACQUIRED TITLE BY ADVERSE POSSESSION TO LOT USED FOR PARKING FOR 40 YEARS

Waterview Towers, Inc. v. 2610 Cropsey Development Corp. Supreme Court, Kings County

COMMENT—In a lawsuit that had spanned nearly ten years, the Court's decision was a scholarly and treatiselike examination of the facts, and a fascinating view into the history of Brooklyn.

CO-OP'S ELIMINATION OF SECOND PARKING SPACE FROM DISABLED SHAREHOLDER DOES NOT CONSTITUTE HOUSING DISCRIMINATION BASED ON DISABILITY

Temple v. Hudson View Owners Corp. United States District Court, SDNY

COMMENT—The Court held that a second parking space was a convenience, not an entitlement, under disability laws, and that a disabled shareholder had no greater rights in that regard than nondisabled shareholders.

TENANTS NOT ENTITLED TO ENJOIN LANDLORD FROM RENTING OTHER SRO UNITS FOR TRANSIENT STAYS IN VIOLATION OF LAW

Amelius v. Grand Imperial, LLC Supreme Court, New York County

COMMENT—While not involving co-ops or condos, this case is nevertheless instructive. The Court held that, while transient occupancies in neighboring apartments did not breach the warranty of habitability to other tenants in the building, the City is entitled to enjoin such use, on those same grounds.

DEFAMATION SUIT BY CO-OP AND MANAGEMENT COMPANY AGAINST SHAREHOLDERS DISMISSED

Holliswood Owners Corp. v. Rivera Appellate Division, 2nd Department

COMMENT—The Court held that the complained of statements were protected opinions of perceived poor management, not factual assertions.

CO-OP COULD BE HELD LIABLE FOR INJURIES TO CONTRACTOR'S EMPLOYEE FOR FALL FROM DEFECTIVE LADDER

Cardenas v. 111-127 Cabrini Apartments Corp. Appellate Division, 2nd Department

COMMENT—The decision was premised on a finding of strict liability under the Labor Law, even though the Court held that the employee could have been comparatively negligent.

PROPERTY OWNER NOT OBLIGATED TO CONTINUE TO MAINTAIN FORMER PARTY WALL THAT IS NOW PART OF ADJACENT BUILDING'S FACADE

211 West 61st Street Condominium, Inc. v. NYCHA

Appellate Division, 1st Department

COMMENT—The party wall stopped being used for support, and therefore was no longer a party wall.

CONDO ENTITLED TO APPOINTMENT OF RECEIVER AGAINST LONGSTANDING DELINQUENT UNIT OWNER, AND RECEIVER CAN EVICT UNIT OWNER FOR NONPAYMENT OF RENT

The Heywood Condominium v. Wozencraft Appellate Division, 1st Department

COMMENT—The Unit Owner had stopped paying common charges to the Condominium in 2007, complaining of a lack of services and amenities in the building. This decision is important in laying out a process—albeit long and involved—for a condo to follow in enforcing payment remedies against a delinquent.

TERMINATED CO-OP SUPERINTENDENT CANNOT FILE FEDERAL EMPLOYMENT DISCRIMINATION ACTION, SINCE CO-OP HAD FEWER THAN STATUTORY MINIMUM TRIGGER NUMBER OF EMPLOYEES

Crean v. 125 West 76th Street Realty Corp. United States District Court, SDNY

COMMENT—This combative employee had also had a union grievance denied, and OSHA claims dismissed; his wife's employment discrimination claims were also dismissed since she was not an employee. Boards should be careful in deciding who to hire, but true character is often displayed last.

SINGLE INCIDENT OF A FIRE DELIBERATELY SET BY TENANT INSUFFICIENT TO SUPPORT EVICTION FOR NUISANCE

Kwai & Wong Inc. v. Hodges Civil Court, New York County, Landlord & Tenant Part

COMMENT— While involving a rental, this case is instructive. The tenant had deliberately set clothing on fire in his bathtub, while the oven's gas jets were turned on. The Court held that one fire is not a pattern, which is a prerequisite for a finding of nuisance. The Court suggested that an eviction proceeding based on waste or simple lease default may have fared better.

HVAC UNIT IN CONDO APARTMENT IS THE RESPONSIBILITY OF UNIT OWNER, NOT CONDO

Hazen v. Corinthian Condominium Civil Court, New York County, Landlord & Tenant Part

COMMENT—The Court based its decision on the Declaration provisions, which delineated the components of the apartments and the common elements. The Condominium was able to avoid responsibility to cure a violation for the nonworking heat in the apartment, which was likely filed as a result of the Unit Owner's own complaint. BBWG represented the Condominium in this victory.

CONDO UNIT OWNER ENTITLED TO INCORPORATE HALLWAY INTO COMBINED APARTMENTS WITHOUT HAVING TO PAY CONDO A LICENSE FEE

Ritt v. Board of Managers of The Citizen Condominium Supreme Court, New York County

COMMENT—The common bylaw provision that provides for such physical incorporation without payment under such circumstances was held to bar the Board from demanding the hefty payment that it did. BBWG represented the victorious Unit Owner.

BBWG IN THE NEWS

Sherwin Belkin, a partner in the Firm's Appeals and Administrative Law Departments, was quoted in an article that analyzed the ongoing judicial and legislative battle involving AirBnB-type transient use of apartments, in The Real Deal on February 14. **Mr. Belkin** also discussed "Multi-Family Housing, Rent Regulation and Due Diligence" for The Knakal Group at Cushman & Wakefield on January 26, and "The Impact of Rent Regulation on the Acquisition, Ownership and Management of Multi-Family Housing in New York City", in a joint presentation with Pinnacle City Living the TH Real Estate Division of TIAA Global Asset Management on February 14.

Aaron Shmulewitz, head of BBWG's co-op/condo practice, was quoted in an article in the January edition of The Cooperator on the impact of celebrities in buildings. **Mr. Shmulewitz** also responded to an inquiry in The New York Times Sunday Real Estate section's "Ask Real Estate" feature on February 4, on the issue of liability for children playing in common areas, and in a related item in Habitat magazine on February 7.

Land use and zoning partner **Robert Jacobs** was quoted in NYREJ.com on January 24 on the increasing popularity of license agreements for developers.

Litigation partners **Matthew Brett** and **Magda Cruz** authored a letter to the editor that appeared in the January 9 New York Law Journal, discussing the import of the recent BBWG appellate victory in 233 East 5th Street LLC v. Smith and correcting a recent column that had discussed it.

New Litigation Department partners **Lisa Gallaudet** and **Christina Simanca-Proctor** were profiled in Globest.com on January 6 and in NYREJ.com on January 24.

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DEALING WITH TENANTS WHOSE SECTION 8 BENEFITS HAVE BEEN TERMINATED

terminated, that she had completed her annual recertification process and that NYCHA issued its notice dated January 1, 2015 in error.

This, despite the facts that the owner had notified NYCHA of its intent to seek the eviction of the tenant for her failure to recertify timely, and that NYCHA had failed to advise the owner that the tenant's Section 8 Voucher was not in the process of being terminated.

Given the very complicated interplay among various federal, state and local laws and regulations concerning Section 8 tenants, owners are strongly encouraged to seek expert advice and counsel prior to commencing a summary proceeding.

Damien Bernache is an associate in the Firm's Administrative Law department. For more information on Section 8 issues, please contact him at dbernache@bbwg.com.

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