Belkin Burden Wenig & Goldman, LLP

# UPDATE

BBWG

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# IN VICTORY FOR BBWG CLIENT, APPELLATE COURT HOLDS LUXURY DEREGULATION APPLICABLE IN 421-G BUILDINGS

**By William E. Baney**

On January 18, 2018, the Appellate Division, First Department overturned a lower Court's determination that luxury deregulation (high rent/vacancy deregulation) of rent stabilized units was inapplicable to buildings receiving Real Property Tax Law ("RPTL") §421-g tax benefits, and ruled unanimously that the apartments in the 421-g building had been lawfully deregulated (see Kuzmich v. 50 Murray Street Acquisition LLC. Index No. 155266/16 (2018 NY Slip Op 00336)).

RPTL §421-g was enacted in 1995 with the aim to rejuvenate Lower Manhattan, as part of then-Mayor Rudolph Giuliani's Lower Manhattan Revitalization Plan. Section 421-g provided that owners of Lower Manhattan properties could receive certain tax abatements and exemptions in exchange for converting commercial buildings into residential or mixed use buildings. Section 421-g also provided that any units created while the building received tax benefits were fully subject to rent regulation, except for cooperative or condominium units.

In June, 2016, several tenants of a converted Lower Manhattan building sued the building's owner, claiming that their apartments had been improperly deregulated and, therefore, the tenants had been overcharged in rent. The tenants alleged that RPTL §421-g precluded luxury deregulation of units while a building was receiving the tax benefits.

On July 3, 2017, Supreme Court Justice Carol Edmead issued a decision, ruling in favor of the tenants. In her decision, Justice Edmead held that only cooperative and condominium buildings are

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exempt from rent stabilization under RPTL §421-g. Justice Edmead refused to review the legislative history, which indicated that hers was not a correct interpretation of the 421-g law. The legislative history included letters from Mayor Giuliani, then-Speaker of the Senate Joseph Bruno, and the State Senate Debate transcript, recognizing that if the apartments created under the 421-g program legally rented above the deregulation threshold set in the Rent Stabilization Law, those apartments could be deregulated.

The owner appealed and on January 18, 2018, the Appellate Division issued its decision overturning Justice Edmead's ruling.

The Appellate Division held that "421-g buildings are subject to the luxury vacancy decontrol provisions of Rent Stabilization Law of 1969 §26-504.2(a), unlike buildings that receive tax benefits pursuant to Real Property Tax Law §§421-a and 489 [now known as J-51]. Real Property Tax Law §421-g does not create another exemption to Rent Stabilization Law §26-504.2(a)."

The Appellate Division further held that "Plaintiffs also argue that a dwelling in a building receiving 421-g benefits cannot be deregulated based upon the setting of the initial rent at or above the deregulation threshold. They contend that a rent-stabilized dwelling cannot be deregulated unless it is first registered as a rent-stabilized apartment. However, this Court recently rejected this contention in Matter of Park v. New York State Division of Housing & Community Renewal, 150 AD3d 105, 113 (1st Dept. 2017)."

The Appellate Division's decision follows Justice Shlomo Hagler's May, 2017 decision involving a different Lower Manhattan building, in which he had found that the owner had properly deregulated a high rent unit while in receipt of 421-g tax benefits.

The Appellate Division's decision is an important victory for owners of buildings subject to RPTL 421-g, as it enables rents to be increased in accordance with law.

*Litigation Department co-chair Joseph Burden and associate William E. Baney handled the proceedings in Supreme Court. Appeals Department partners Sherwin Belkin and Magda Cruz handled the appeal, together with James M. McGuire, a member of Holwell Shuster & Goldberg, LLP, on behalf of the owner in this action.*

# APPELLATE COURT UPHOLDS RULING IN FAVOR OF CONDO BOARD CLIENT OF BBWG

By Scott F. Loffredo

On February 20, 2018, the Appellate Division, First Department unanimously affirmed the lower Court's order in Richstone v. The Board of Managers of Leighton House Condominium, dismissing a condominium unit owner's claims for trespass, breach of contract and nuisance, which had been based on allegations that the Board had failed to remove construction rigging from the roof terrace appurtenant to the unit, that had been erected for purposes of curing leaks into the building. The Appellate Division also affirmed the lower Court's granting of summary judgment to the Board on its counterclaims seeking legal fees, and an order directing the unit owner to remove a large deck that the Board had discovered the unit owner had erected on the terrace years earlier without the Board's approval, in violation of its bylaws.

The Appellate Division held that the condominium's bylaws and Declaration obligated the unit owner to permit access to the roof terrace to make necessary building repairs, and that the Board was not bound by any alleged oral promise that it would complete work by a date certain. The Court also found that, since, under the bylaws, the Board was entitled to recover attorneys' fees in connection with any abatement, enjoinment, removal or cure of any violation (including the removal of an illegally erected deck) and the unit owner's claims were related to the Board's successful counterclaims, the Board was entitled to recover its full attorney's fees as well as its engineering fees incurred in this matter.

*The victory on appeal was handled by Magda Cruz, Jeffrey Goldman and Scott Loffredo, partners in the Firm's Litigation Department.*

# EXECUTORS BEWARE: PREPARING TO SELL A CO-OP APARTMENT OWNED BY AN ESTATE

**By Nicki Neidich**

Real estate transactions often occur as a result of major life events, such as births, marriages, divorces, and death. Each life event represents a unique set of challenges and presents different timelines, hurdles and documentation which factor into getting a deal closed. The sale of a co-op apartment by the estate of a deceased shareholder often involves a slightly longer timeline and higher transaction costs to the estate than a typical co-op sale by a living individual. This article will sketch out the milestones that an executor or administrator should be aware of.

Prior to taking any action on behalf of an estate (engaging a listing agent, signing a contract, etc.), the fiduciary – either an executor or administrator – must be authorized by the Surrogate's Court through Letters Testamentary (if the deceased died with a will), or Letters of Administration (if the deceased died intestate (without a will)), to act on behalf of the estate. Generally, a fiduciary cannot delegate his/her duties through the use of a power of attorney, so the fiduciary will generally need to personally sign documents required in connection with the transaction. If there is more than one fiduciary, all generally need to sign.

In a co-op apartment sale, the transfer is managed and coordinated by the co-op's transfer agent (typically its management company or attorney). When the seller is an estate, the transfer agent will typically require the following documents be submitted in advance, for review:

- Attorney Certified Copy of Last Will and Testament;
- Certified Copy of Death Certificate;
- Letters Testamentary (or Letters of Administration) dated within six months of closing;
- Affidavit of Debts and Domicile;
- Federal Certificate Discharging Property Subject to Estate Tax, or IRS Letter 1352 stating the Estate is below the minimum amount for filing, with the Application for Certificate Discharging Property Subject to Estate Tax Lien; and
- New York State Release of Lien of Estate Tax.

The estate's transactional attorney should work with the estate's estate attorney from the outset of the transaction in order to begin the document gathering process. This list should be shared with the estate attorney early on in the process to make sure certified copies can be ordered in advance. Letters Testamentary should be sent to the transactional attorney with the deal sheet to evidence who has the authority to sign the contract on behalf of the estate.

NOTE--There are now significant delays in obtaining both the New York State Release of Lien and the Federal Certificate, so fiduciaries and others should plan accordingly. In addition, the IRS frequently changes its procedures for processing such requests; care should be taken to start the process as early as possible so as to leave sufficient time before the anticipated closing date.

The documents will then be reviewed by the transfer agent, who may then request additional documentation, if required.

**Other considerations:**

***Form of Ownership***

If a co-op was owned jointly by spouses, the language on the stock certificate will either provide that the property automatically transfers to the other spouse upon the death of the first spouse (joint tenants or tenants by the entirety) or in the alternative, that the property was owned in some percentages by each spouse (tenants-in-common). In the event that the property was owned as joint tenants, then the death certificate of the first spouse to die should be sufficient for the present transfer. If the property was owned as tenants in common, then both estates will be treated as sellers even if one spouse long predeceased the other, and all documentation will be required for both estates.

## ADVICE TO PURCHASERS

***Co-op Leasehold Title Insurance Policy***

Since the sale of cooperative apartments is controlled by a transfer agent, fraudulent conveyances are rare, if not impossible. However, in the scope of a sale by an estate, if a distant relative attempts to make a claim to the apartment, the new owner would be unprotected. For this reason, it is recommended that purchasers of co-op apartments owned by estates consider obtaining cooperative title insurance on their unit, to help dispose of any issue that could potentially arise down the line in the probate process.

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# NEW TENANT PROTECTION PLAN NOTICE REQUIREMENTS

**By Kara I. Rakowski**

Tenant Protection Plans ("TPP's") have historically been required by the New York City Department of Buildings ("DOB") when filing plans to alter an occupied building. However, as of December 28, 2017 owners of occupied residential buildings who are performing alterations requiring a DOB permit are now faced with new notice requirements to the tenants. Local Law 154 of 2017 sets forth new rules applicable to TPP's. The following is a brief summary of the new TPP rules.

For construction permits filed after December 28, 2017 in occupied residential buildings, the TPP must:

- Contain specific terms in describing anticipated disruptions in essential services while the work is in progress and of the owner's intended actions to minimize the impact upon the tenants;
- Provide timeframes for service disruptions and an intended plan for minimizing impact; and
- Be published on the DOB's website.

In addition, owners must either post a notice in both English and Spanish in the lobby and on each floor, or distribute to each occupied unit stating:

- That occupants of the building may obtain a paper copy of the TPP from the owner and may access the plan on the DOB's website;
- The name and contact information for the site safety manager, site safety coordinator or superintendent of construction, or if there is no such titled person, the name and contact information of the owner of the building or owner's designee; and
- That the occupants of the building may call 311 to lodge complaints about the work.

Owners must notify DOB in writing at least 72 hours before commencing any work that requires a TPP. Notably, the 72-hour prior notification to DOB will trigger a random inspection of 5% of the sites. DOB has the authority to enforce timeframes or other content of the TPP by issuing Stop Work Orders. A Stop Work Order will not only halt the project indefinitely, but can be extremely time consuming and costly to resolve. Thus, it is imperative that owners be diligent in making sure that the new notice requirements are adhered to, and that contractors comply at all times with the TPP for the project.

*Kara I. Rakowski is a partner and Co-Head of BBWG's Administrative Department. For more information on the new TPP requirements, please contact Ms. Rakowski at krakowski@bbwg.com.*

## EXECUTORS BEWARE: PREPARING TO SELL A CO-OP APARTMENT OWNED BY AN ESTATE

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This form of Leasehold Title Policy comes at a reduced cost relative to a comparable fee owner's title policy. Further, if the collateral documents (the stock certificate and proprietary lease) have been lost, the managing agent may require the estate to obtain the leasehold policy for the benefit of both the buyer and the co-op corporation.

***Inspection***

As a purchaser of a co-op apartment owned by an estate, it is recommended to have an inspection conducted of the apartment prior to signing a contract. Executors do not typically have knowledge of the condition of the apartment, and it is customary that executors do not make any representations as to the condition of the apartment when it is to be delivered at closing, other than being vacant. Therefore, it may be valuable for a professional inspector to assess the condition of the apartment, should any items need to be rectified prior to closing, or a corresponding credit be issued to the purchaser.

Estate fiduciaries should be aware of the issues which challenge estates when involved with the sale of co-op apartments and other real property. BBWG is able to be an active team member in the process of closing out an estate when the sale of property is required.

*Nicki Neidich is an associate in the Firm's Transactional Department, and can be reached at nneidich@bbwg.com.*

# BBWG IN THE NEWS

Co-op/condo practice leader **Aaron Shmulewitz** was quoted in The New York Times Sunday Real Estate section on January 27 on misbehavior by Board members; and in The Real Deal on January 27; and in Habitat magazine on January 28; on the same topic.

**Mr. Shmulewitz** was also quoted with regard to overreaching condo Boards in Brick Underground on February 14; and in Habitat magazine on February 16.

Transactional Department partner **Craig L. Price** was quoted in The Real Deal on December 14 on the year-end state of the market; and in Brick Underground on February 16 on terminating relationships with brokers.

# TRANSACTIONS OF NOTE

Partners **Daniel T. Altman** and **Stephen M. Tretola**, with associate **Krista L. Patterson**, closed a $34 million CMBS loan with Ladder Capital for a client seeking permanent financing after fully leasing up a Midtown office building.

**Messrs. Altman** and **Tretola** also closed a $22 million loan with Bank of America on behalf of a publicly traded REIT for a regional mall property in Santa Fe, New Mexico.

**Mr. Altman** and **Ms. Patterson** also negotiated a commercial lease for a regional Mexican Taqueria brand in the Clinton Hill section of Brooklyn near the Barclays Center.

Partners **Craig L. Price** and A**llison Lissner,** and **Ms. Patterson**, handled the purchase and financing of the St. James Shopping Center in upstate New York, with financing through People's United Bank.

**Mr. Price**, **Ms. Patterson** and associate **Michael Shampan** handled the mortgaging of multiple condominium units in a Soho building to further secure a term loan facility in the original amount of up to 25 million Euro from a Luxembourg lender. The principal purpose of the loan was the acquisition of property in France. In order to complete this complex transaction, the BBWG team coordinated with London counsel on European aspects of the transaction, as well as with Delaware counsel.

**Mr. Price**, partner **Lawrence Shepps**, and **Ms. Patterson** handled a building and project loan for the development of property located in the Columbia Heights section of Brooklyn, as the follow-up to the $49 million financing of the properties as part of their acquisition for $76 million.

# 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).

## CONDO BOARD CAN SUE SPONSOR, AND ITS PRINCIPAL, CONTRACTOR AND ARCHITECT, FOR DEFECTS IN NEW CONSTRUCTION BUILDING

*Board of Managers of Marke Garden Condominium v. 240/242 Franklin Avenue LLC et al. Supreme Court, Kings County*

COMMENT | In this [10-year-old!] lawsuit, the Court denied the various defendants' motions for summary judgment on different grounds, but held most significantly that apartment purchasers were deemed third-party beneficiaries with the right to sue such defendants. This holding goes against the trend of barring such suits by purchasers.

## QUESTIONS OF FACT PRECLUDE DISMISSAL OF HDFC CO-OP'S EVICTION PROCEEDING OVER UNAUTHORIZED PITBULL

*Hunts Point HDFC v. Castillo Civil Court, Bronx County, L&T Part*

COMMENT | The Court held that questions of fact existed as to whether or not the Board had knowledge of the dog for more than the maximum 90-day period afforded by the New York City Pet Law.

## QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT TO CONDO BOARD SUING UNIT OWNER FOR UNAUTHORIZED ALTERATIONS

*Forestal Condominium v. Davydov Appellate Division, 2nd Department*

COMMENT | The Court held that the Board had failed to prove its case regarding what requests for consent were made by the Unit Owner, what responses were given by the Board, and when each occurred. Boards must keep accurate records as to their actions.

## EVICTION PROCEEDING FOR TENANT'S VIOLATION OF PET RESTRICTIONS MAY PROCEED

*Silverleaf LP v. Matthew Civil Court, Bronx County, L&T Part*

COMMENT | While involving a rent-stabilized tenant, this case is still instructive for Boards. As


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with another case above, the Court held that the tenant failed to prove the landlord's knowledge of the dog's presence for more than 90 days, thus defeating her motion to dismiss based on the New York City Pet Law. The lesson is that Boards must act immediately upon learning of a dog's presence, if there is to be any chance of enforcing a pet restriction.

## COMMERIAL CONDO UNIT CANNOT BE LEASED TO FROZEN YOGURT SHOP

*82 Retail LLC v. The Eighty Two Condominium Appellate Division, 1st Department*

COMMENT | The Court found conflicts between different sets of condo documents, and resultant questions of fact as to whether all food establishments, or only those involving cooking, were intended to be prohibited. Unfortunately, such document conflicts are not uncommon.

## CO-OP NOT LIABLE FOR DEATH OF SHAREHOLDER WHO FELL FROM APARTMENT WINDOW BY SMOKING WHILE DRUNK

*Milano v. 340 East 74th Street Owners Corp. Appellate Division, 1st Department*

COMMENT | The Court rejected the estate's creative claim that the co-op's admitted failure to install window guards as required by City law because of occupancy by the decedent's children somehow created liability to the decedent.

## CONDO UPHELD ON CONVEYANCE OF DECOMMISSIONED ELEVATOR SHAFT SPACE; NEIGHBORING UNIT OWNER'S CLAIM REJECTED

*Chu v. Klatskin Appellate Division, 1st Department*

COMMENT | The neighboring Unit Owner's claims to such space were defeated by the Court's careful analysis of the applicable provisions in the condo's Declaration and Bylaws.

## CO-OP CAN SEEK SHAREHOLDER'S EVICTION FOR INSTALLATION OF NEW WASHING MACHINE IN VIOLATION OF HOUSE RULES

*280-290 Collins Owners Corp. v. McCaskill City Court, Mount Vernon, L&T Part*

COMMENT | But the co-op's motion for summary judgment was denied based on questions of fact as to whether the co-op's grandfathering of pre-existing washing machines when the House Rule was adopted contemplated that those shareholders could also replace those washers with new ones without Board consent. A better drafted provision could have avoided this litigation.

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