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GOOD GUYS FINISH LAST



By Joseph Burden

Good Guy Guaranties (“GGG’s”) are designed to ensure that defaulting commercial tenants leave the premises promptly, avoiding loss of rental income to landlords. The GGG provides an incentive for the guarantor (usually one of the tenant’s principals) to make sure that the tenant leaves promptly, because the guarantor remains on the hook for rent until tenant vacates the premises.

However, this rent liability could extend beyond tenant’s vacatur. For instance, in *Bri Jen Realty Corp. v. Altman*, NYLJ 1/13/17, p. 26, col. 2, an appellate court construed a GGG to hold the guarantor liable for rent for 11 months after the tenant surrendered the premises.

GGG’s are intended to protect landlords against defaulting insolvent commercial tenants. Absent a GGG, an insolvent tenant has little financial incentive to vacate the premises, and little practical incentive to maintain the premises in good condition before vacating. The GGG alters incentives by obligating an individual, who is presumably solvent, to compensate the landlord for any losses the landlord might incur until the time the tenant vacates. As a result, the guarantor has a strong personal incentive to make sure the tenant vacates promptly, allowing the landlord to recover possession and re-let the premises.

In *Bri Jen*, the Court grappled with how to construe the GGG when the lease stipulated that the rent is due annually rather than monthly. The Court took a literal approach to the problem: the lease stipulated that “annual” rent is due

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in advance, and the GGG obligated the guarantor to pay “such fixed annual rent... as shall accrue up to the surrender date.” The Court reasoned that, because an annual period had begun before the tenant had vacated, the guarantor had become liable for rent for the remainder of that year.

The decision indicates clearly that

lawyers for potential guarantors should take precautions before agreeing to a GGG. Not only could the guarantor remain liable for a year or more after the tenant vacates, but the landlord potentially could collect double rent. (Not only would the guarantor be liable, but the owner could also possibly re-let the premises and collect rent from the new tenant.)

It is clear that in drafting a GGG, an attorney should be careful that the language in the lease protects the interests of his/her client.

Joseph Burden is a founding partner and co-head of BBWG's Litigation Department. For more information on Good Guy Guaranties and related topics, please contact Mr. Burden at jburden@bbwg.com.

NEW YORK SUPER LAWYERS MAGAZINE NAMES 14 BBWG LAWYERS IN THE NEW YORK METRO EDITION FOR 2017

SUPER LAWYERS



Daniel Altman



Sherwin Belkin



Jeffrey Goldman



Martin Heistein



Steven Kirkpatrick



Craig Price



Aaron Shmulewitz

RISING STARS



William Baney



Alexa Englander



Vladimir Favilukis



Lisa Gallaudet



Seth Liebenstein

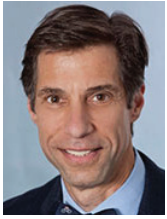


Noelle Picone



Daniel Podhaskie

WHEN PLEASE IS NOT ENOUGH



By Jeffrey L. Goldman

New construction and development, repairs, and code compliance work such as Local Law

11 typically require an owner to temporarily access an adjoining property (e. g. sidewalk bridge, protection of adjoining owner's roof, and the like).

This typically requires several meetings and discussions including construction, architectural and engineering professionals. When "please" (or even "pretty please") are not enough, Real Property Actions and Proceedings Law § 881 is the only solution.

This statute permits a requesting owner to commence a special proceeding in Supreme Court for a temporary license to

enter the adjoining property, even against the adjoining property owner's wishes.

Initially, the petitioning owner must establish whether entry is necessary and reasonable. Then, the Court applies a balancing test and will grant the request when the hardship to be suffered by the petitioning owner outweighs the inconvenience to the adjoining property owner. This is a fact-specific determination based upon affidavits of the construction related professionals.

In addition to being liable to the adjoining owner for actual damages occurring as a result of the entry (this can be done by posting a bond and/or obtaining insurance naming the adjoining owner as an additional insured), multiple Court decisions have interpreted RPAPL § 881's

language that a license shall be granted "upon such terms as justice requires" to impose a license fee to compensate the adjoining owner for the inconvenience for either a temporal or physical intrusion. In addition to the license fee, the petitioning owner can also be responsible to reimburse the adjoining owner for its architectural, engineering, and attorneys' fees related to the project.

Therefore, it is critical that counsel that has extensive experience in this area be retained for guidance prior to the initial negotiations with the adjoining owner. BBWG has such extensive experience, representing owners on both sides of the issue for many years.

Jeffrey L. Goldman is a founding member of the Firm, and co-head of its Litigation Department.

BBWG IN THE NEWS



Sherwin Belkin, a partner in the Firm's Appeals and Administrative Law Departments, was quoted in an article discussing delays at government agencies on real estate matters, in *The Real Deal* on [March 2](#), and in a feature entitled "The Life of a Small-Time Landlord" in *The New York Times Sunday Real Estate* section on [April 2](#).



Martin Heistein, head of BBWG's Administrative Law Department, was quoted in *citybizlist.com* on [April 5](#) on the new legislative agreement to revive 421-a real estate tax abatement benefits. **Mr. Heistein** also spoke at a series of seminars sponsored by Marcus & Millichap, one of the City's largest real estate brokers, addressing potential purchasers of multi-family residential housing on the complexities of rent regulation, and also addressed in-house managers at the Brookfield Property Group on rent regulation and dealing with 421-a issues.



David Skaller, a partner in the Firm's Litigation Department, has been appointed a member of the Special Commission on the Future of the New York City Housing Court, which is co-chaired by Justices Peter Tom and Joan Lobis. **Mr. Skaller** was also a guest lecturer on landlord tenant law at Fordham Law School on March 27.



Litigation partner **Matthew Brett** was quoted on [April 13](#) in the online edition of *Real Estate Weekly* and *citybizlist.com* on the Court of Appeals granting of leave to hear the appeal of the decision in *Altman v. 285 W. Fourth LLC*, an important case dealing with owners' high rent deregulation rights. If the current decision is upheld, it could have the effect of restabilizing tens of thousands of apartments and subjecting owners to overcharge penalties. BBWG is representing various industry groups in an amicus brief to be filed at the Court of Appeals.

A Court of Appeals decision upholding the award of legal fees to a BBWG client was discussed in *einnnews.com* on [February 28](#). The victory had been achieved by Magda Cruz and Brian Haberly, partners in the Firm's Litigation Department.

COURT DECIDES THAT RIGHT OF FIRST REFUSAL DOES NOT EXTEND TO MONTH-TO-MONTH TENANCY



By Joseph Burden

It is not unusual for parties to enter into a commercial lease, and, upon the expiration of the lease, the tenant remains in possession as a month-to-month tenant, with the tenant paying rent to the owner. (There may be various reasons for either party not to enter into a renewal or new lease.)

Many Court decisions have held that the terms of the written lease carry over into the month-to-month tenancy. The question faced by a Court recently was whether the right of first refusal in the initial lease carried over into the month-to-month tenancy. In this case, the parties entered into a written one-year lease and, upon the expiration of the lease, the tenant continued to occupy the premises on a month-to-month basis, for a number of years.

Approximately four years after the expiration of the lease, the tenant learned that the landlord was in contract to sell the premises and demanded that tenant be given the right to exercise the right of first refusal that had been set forth in the initial lease. The landlord advised the tenant that the right of first refusal expired when the lease had ended in 2012.

The tenant commenced an action in New York State Supreme Court seeking specific performance of the right of first refusal.

The Court ruled that the right of first refusal did not carry over into the month-

to-month tenancy. The Court noted that the tenant did not renew or extend the lease in accordance with the terms of the lease, but, instead, entered into an oral agreement whereby it became a month-to-month tenant. Thus, following the expiration of the lease, the tenant no longer had maintained an enforceable right of first refusal.

The guidance from this case is that parties

should put their intent in writing and not rely upon an oral understanding that cannot be confirmed. A right of first refusal may be very important to a tenant and as such should be set forth in writing in an agreement signed by both parties. For an owner, the time to exercise the right of first refusal should be clarified so that there is no misunderstanding between the parties.

Joseph Burden is a founding partner and co-head of the Firm's Litigation Department



WELCOME TO THE OATH HEARINGS DIVISION: TEN THINGS OWNERS MUST KNOW ABOUT DOB AND FDNY SUMMONSES

By Orie Shapiro



Respondents in Environmental Control Board (“ECB”) proceedings have long complained about the confounding format of the notice of violation, and the chaotic scene on the day of the hearing. (The City recently began referring to ECB as the OATH Hearings Division and has revised the Notice of Violation form — which it now calls a summons.)

This article strives to clarify ECB practice by presenting the following ten cardinal principles that every owner¹ should know when receiving a summons issued by the NYC Department of Buildings (“DOB”) or the Fire Department (“FDNY”), two of the agencies whose violations are heard by ECB.²

- **Respondent can be held liable even if it did not create or cause the condition.** The fact that an owner did not cause the underlying condition does not insulate him from responsibility or liability. A party who owns or controls the premises is generally responsible for Code compliance at the premises, even if the cited condition was caused by a tenant or other third party. Thus, for example, owners have been held liable if a tenant illegally leases out space on a short term basis, or occupies his apartment in a manner which contravenes the Certificate of Occupancy. The ECB is not concerned whether a tenant may be contractually responsible to the owner to correct the condition. Rather, it

will impose liability on the owner and let the owner seek reimbursement or indemnification in another forum. Please note that, even in the unlikely event that a tenant is willing to be substituted in as respondent in place of the cited owner, the hearing officer can and often does deny an application for substitution.

- **A Respondent can be held liable even if it did not know of the condition.**

Although “ignorance is bliss”, it is ultimately not a defense. Thus, for example, in the instance of unlawful transient occupancy, the mere fact that an owner had no idea that its tenant leased out an apartment on a short term basis would not prevent DOB from citing, and ECB from fining, the owner.

- **A DOB violation can remain open even if Respondent has paid the fine.** In order to remove a DOB violation which was sustained at ECB, Respondent must pay the fine and certify correction by providing the necessary documentation to DOB for the agency’s approval. Until such time as both components are completed, the violation remains open.

- **A DOB violation can remain open even if Respondent has corrected the condition.** DOB may issue a follow-up summons if Respondent has not certified correction. Thus, Respondent must not only correct the violative condition, but also take the affirmative step of certifying correction in order to remove the violation of record and to prevent the

issuance of additional summonses.

- **Even if an initial fine is relatively small, the potential penalty can escalate quickly.** A Respondent may be tempted to pooh-pooh the importance of a summons based on the relatively small sum of money involved. However, the failure to take such a summons seriously could have significant economic implications. For example, a failure to certify correction of certain DOB violations subjects the Respondent not only to the initial fine imposed at ECB, but also a separate internal DOB civil penalty. The DOB may refuse to issue permits with regard to the building until the civil penalty is paid. In addition, DOB may periodically issue additional summonses for failure to comply with the Commissioner’s order, with escalating penalties to be assessed by ECB.

Similarly, fines imposed for FDNY violations escalate dramatically--the City interprets repeat violations as recidivist behavior warranting higher penalties.

- **The issuing agency meets its burden of proof at the ECB hearing by simply submitting the sworn summons.** Once the summons (notice of violation) is presented at the hearing, the issuing agency is not required to provide any additional documentation or testimony to buttress its case. It becomes the Respondent’s obligation to disprove the factual or legal allegations, or present a procedural basis for dismissal.

¹ The Building and Fire Codes define the term “owner” broadly, including, for example, those in control of the subject premises. The term “respondent” refers to the person or entity cited in the summons.

² Despite the recent name change, the tribunal is still generally referred to as “ECB” and will be referred to as such in this article.



- **Respondent's obligation to correct the condition begins with service of the Summons, not a finding of guilt.** The ECB has held that Respondent is obligated to correct the condition even before Respondent has been found guilty at a hearing. Thus, the DOB summons essentially has two components: a) an order compelling the correction of a condition; and b) a notice setting forth the date of the hearing to determine whether the condition actually exists. Adjourning the ECB hearing generally does not provide Respondent with additional time to achieve compliance. Respondent can face additional violations (and in some instances daily penalties) for failure to comply with the DOB Order—even before the Summons containing the Order is sustained. The obligation to correct is rescinded if the Summons is dismissed at the hearing or upon approval of the Certificate of Correction.
 - **Respondent can be cited under different Code sections for the same act or omission and thereby face multiple fines.** Issuing agencies tend to serve what appear to be duplicative Summonses. As a general rule, as long as the Summonses cite different Code sections, Respondent can be cited more than once and face multiple fines even if the allegations relate to the same act or omission. For example, a Respondent can be charged with permitting a nuisance, as well as failing to comply with an Order to remove said nuisance, since the allegations would be predicated upon different Code sections.
 - **Respondent can be subject to criminal prosecution even though it already paid an ECB fine.** There is a Criminal Court Part dedicated to hearing FDNY and DOB Summons cases. Those cases are generally resolved through a guilty plea to a lesser charge of an administrative violation--not a crime--and the agreement to pay a fine. The issuing agencies occasionally cite an owner in both venues for what is essentially the same charge.
 - **Default lies not in our stars, but in ourselves.** Regardless of the perceived severity or insignificance of a Summons, it is important to appear or be represented at ECB on the hearing date. As the old saying goes, "showing up is half the battle". The ECB fine structure is such that a penalty for defaulting on a violation far exceeds the potential fine for being found guilty.
- Space does not permit a more extensive explanation of the intricacies of ECB practice, but it is hoped that this summary will begin to assist in navigating the murky waters of ECB. Experienced FDNY counsel should be consulted on any such Summons or related matter.
- Orie Shapiro is a partner in BBWG's Administrative Department. For more information about addressing DOB and FDNY violations please contact Mr. Shapiro at oshapiro@bbwg.com.*

COURTS REQUIRE STRICT COMPLIANCE WHEN BRINGING A HOLDOVER PROCEEDING



By **Daniel T. Podhaskie**

In landlord-tenant proceedings, even a minor deviation from strict compliance with service and filing requirements of the Real Property Actions and Proceedings Law (“RPAPL”) can result in the dismissal of an otherwise meritorious action. To appreciate the importance of such strict compliance, an understanding of the service and filing mandates of the RPAPL, as applied by the housing courts, is required.

The RPAPL has specific requirements for how a landlord must serve and file the notice of petition and petition when bringing a holdover proceeding. RPAPL §733(1) requires the notice of petition and petition be served at least five, but not more than 12, days before the petition is noticed to be heard. In interpreting this statute, Courts have continuously required strict compliance with these rules. Two recent cases illustrate that a landlord’s failure to comply with these prerequisites, by even the slightest of margins, will trigger dismissal of the holdover proceeding.

In *1215 Realty v. Khan*, a landlord commenced a chronic non-payment holdover proceeding. The petition alleged that the tenant consistently and chronically paid his rent late. This forced the landlord to commence numerous non-payment proceedings to collect rent. This time, however, rather than bring a non-payment proceeding, the landlord terminated the tenancy and brought a holdover proceeding. After termination of the tenancy, the landlord

served the notice of petition and petition by conspicuous place service. The first service attempt was on October 29, 2015, at 8:52 p. m., the second attempt on October 30, 2015 at 2:09 p. m., and mailings by regular and certified mail on October 31, 2015. The petition was noticed to be heard on November 4, 2015, and the landlord filed proof of service in the housing court clerk’s office on November 2, 2015.

The tenant moved to dismiss and argued that service was not proper under RPAPL §733(1) since the petition was filed too late—only two days before it was noticed to be heard, which was less than the five days required by statute. The landlord, in opposition to the tenant’s motion, argued that the Court can and should overlook any irregularities in commencement of the proceeding since the tenant was not prejudiced. The (Bronx County) Court granted the tenant’s motion and dismissed the petition. The Court held that, since there was only two days between completion of service and the scheduled Court date, the landlord had failed to comply with RPAPL §733(1) ; the Court held that: “a landlord’s failure to complete service at least five days prior to the date the petition is noticed to be heard, requires dismissal of the petition.” The Court also held that it could not overlook the landlord’s non-compliance, and that there must be strict compliance with the statutory requirements to give the Court jurisdiction.

A similar decision was reached in *N. Y. City Housing Auth. v. Goldman*. In this (Bronx County) holdover proceeding, landlord alleged that the respondent was a licensee and his right to possession

of the apartment terminated when the tenant of record passed away. (A licensee, as opposed to a tenant, is a person in possession of the premises by permission of a former or prior tenant and does not have any landlord-tenant relationship with the landlord.) The petition was noticed to be heard on June 19, 2016 and the affidavit of the process server stated that service was attempted on June 3, 2016 and June 4, 2016. The petition was mailed on June 4, 2016, and filing with the Clerk was completed on June 5, 2016.

Respondent moved to dismiss, arguing that the landlord failed to follow the mandates of RPAPL §733 by serving the petition too early. The landlord acknowledged that the petition might have been served and filed too early, but argued that the Court could disregard any technical defect. Nevertheless, the Court agreed with the Respondent and dismissed the petition. The Court held that summary proceedings require strict compliance with the requirements of RPAPL §733, and, since the petition was served more than 12 days prior to the noticed date, the petition must be dismissed.

When confronted with the possibility of bringing a holdover proceeding, a landlord should consult with experienced counsel and be sure that all required steps are properly taken to serve timely a respondent (whether a tenant or licensee) with the notice of petition and petition, and that the petition is timely filed.

Daniel T. Podhaskie is an associate in the Firm’s Litigation Department, and may be contacted for more information on holdover proceedings and related matters at dpodhaskie@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).

TENANT COOKING 90 MEALS PER WEEK IN SECOND-FLOOR APARTMENT FOR COMMERCIAL SALE OFF-SITE, WITHOUT A GREASE TRAP AND FIRE SUPPRESSION SYSTEM, NOT A LEASE VIOLATION OR NUISANCE

121 Irving MGM LLC v. Perez Civil Court, Kings County, Landlord & Tenant Part

(COMMENT—While not involving a co-op or condo, this case is instructive. The Court premised its ruling on the fact that there were no violations of record, no evidence of nuisance, and the tenant had been engaged in this practice for 24 years without a fire. Perhaps most telling as to the Court's mindset, the Court emphasized that the tenant was a hard-working immigrant single mother.)

SUCCESSFUL BIDDER AT CO-OP FORECLOSURE SALE ENTITLED TO NEW STOCK CERTIFICATES AND PROPRIETARY LEASES IN ITS NAME

ARSR Solutions, LLC v. 304 East 52nd Street Housing Corporation Appellate Division, 2nd Department

(COMMENT—The Court held that the co-op had no standing to challenge the ability of the successful bidder to compel such issuance.)

COMMERCIAL TENANT IN CONDO BUILDING NOT CONSTRUCTIVELY EVICTED BY SCAFFOLDING ERECTED AT FIRST FLOOR

The Board of Managers of The Saratoga Condominium v. Shuminer Appellate Division, 1st Department

(COMMENT—The Court awarded the condo \$750,000 in lost rent that the tenant had tried to avoid paying, emphasizing lease provisions favorable to the condo which barred the claims and defenses advanced by the tenant.)

CONDO CANNOT BRING HOLDOVER PROCEEDING AS AGENT OF UNIT OWNER AGAINST UNIT OWNER'S LICENSEE

The Board of Managers of The J Condominium v. Tornabene Appellate Term, 2nd Department

(COMMENT—The condo had relied on a common condo bylaw provision authorizing precisely such a proceeding. The Court held that such provision was trumped by the RPAPL, which does not authorize summary proceedings by agents of owners.)

FORMER CO-OP BOARD MEMBER HELD IN CONTEMPT FOR VIOLATING INJUNCTION BY DISCLOSING ATTORNEY-CLIENT COMMUNICATIONS TO CO-OP'S LITIGATION ADVERSARY

Board of Directors of Windsor Owners Corp. v. Platt Appellate Division, 1st Department

(COMMENT—Unauthorized disclosure of private Board communications and information is a growing problem, made easier by advances in e-communications. This former Board member acted foolishly, apparently out of vindictiveness, possibly voiding any D&O coverage she may once have had.)

HOA HAS AUTHORITY TO PERFORM LANDSCAPING SERVICES TO FRONTS OF MEMBERS' HOMES, AND TO CHARGE COSTS TO MEMBERS

Minkin v. Board of Directors of The Cortlandt Ridge Homeowners Association, Inc. Appellate Division, 2nd Department

(COMMENT—But questions of fact precluded judgment on the HOA's entitlement to impose fines and fees on members who had performed unauthorized landscaping on their own.)

CONDO'S DEFECTIVE CONSTRUCTION CLAIMS AGAINST SPONSOR, ITS PRINCIPALS AND ARCHITECT DISMISSED

Board of Managers of 325 Fifth Avenue Condominium v. Continental Residential Holdings LLC Appellate Division, 1st Department

(COMMENT—In continuing the clear trend of dismissing such defective construction claims, the Court relied on a prior release by the Board, and refused to pierce the corporate veil.)

CO-OP LIKELY DISCRIMINATED AGAINST SHAREHOLDER WITH ADHD BY NOT EXTENDING ITS REGULAR 90-DAY ALTERATIONS COMPLETION PERIOD

Steinberg-Fisher v. North Shore Towers Apartments, Inc. Appellate Division, 2nd Department

(COMMENT—The Court found that the State Division of Human Rights finding of no probable cause was arbitrary and capricious, since the shareholder's ADHD prevented her from completing tasks within required time constraints.)

CO-OP SHAREHOLDER ENTITLED TO LICENSE FEE FOR ACCESS BY ADJOINING BUILDING OWNER FOR REPAIR PURPOSES

Van Dorn Holdings, LLC v. 152 W. 58th Owners Corp. Appellate Division, 1st Department

(COMMENT—This continues the recent trend of awarding compensation in license access cases. Here, the adjoining building owner was also ordered to pay the attorney and engineering fees of the co-op and the affected shareholder, but struck down a per diem penalty for late completion, for now.)

CO-OP CAN FORCE SHAREHOLDER TO STOP, AND REMOVE, UNAUTHORIZED TERRACE ENCLOSURE UNDER CONSTRUCTION

Moltisanti v. East River Housing Corporation Appellate Division, 1st Department

(COMMENT—The shareholder was not entitled to an injunction to freeze the unauthorized status quo. The Court rejected the shareholder's novel argument of disparate treatment—that the co-op had not taken similar action against other shareholders' unauthorized terrace enclosures.)

COMMERCIAL TENANT IN CO-OP OBLIGATED TO PAY FULL RENT; ITS LEASE INTERPRETATION REJECTED

644 Brdy Realty Inc. v. Bleecker Tower Tenants Corp. Appellate Division, 1st Department

(COMMENT—The Court noted that the tenant had apparently been the sponsor of the co-op conversion, and could not take advantage of a purported ambiguity in the lease that it had drafted.)



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