Belkin Burden Wenig & Goldman, LLP

UPDATE

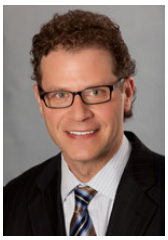
BBWG

EDITORS
Robert A. Jacobs
Kara I. Rakowski
Aaron Shmulewitz

MAY 2018 | VOLUME 44

INSIDE THIS ISSUE

NYC COMMERCIAL RENT TAX BREAK TAKING EFFECT JULY 1, 2018



By Daniel T. Altman

Mayor Bill de Blasio has announced the passage of a new law regarding a change in Manhattan's Commercial Rent Tax (CRT). The CRT is a 3.9% tax imposed on base rent paid by tenants for commercial premises located south of 96th Street. Prior to the change in the law, businesses paying at least $250,000 in annual base rent were required to pay the CRT. Additionally, businesses with less than $5 million in "total income" in the prior tax year and paying less than $500,000 in annual base rent received a full tax credit exempting them from the CRT altogether. For purposes of calculating the CRT, total income is derived from the amount reported on the tenant's federal income tax return in the immediately preceding tax year.

Effective July 1, 2018, the threshold for calculating Manhattan's CRT for businesses with income up

continued on page 2

continued from page 1

to $5 million will increase from $250,000 to $500,000 in annual rent; there will also be an added benefit in the new law, providing for a sliding scale tax for businesses with income between $5 million and $10 million or paying $500,000 to $550,000 in rent.

This is great news for small businesses. Small businesses will benefit by reducing their CRT liability as a result of: (i) the increase in the annual rent threshold for which the tax applies, (ii) providing for a sliding scale tax based upon income, and (iii) eliminating the tax completely for businesses that pay less than $500,000 in annual rent. This change represents the first change to the CRT since 2001.

Dan Altman heads BBWG's Transactional Department. If you have any questions about the CRT or commercial leasing in general, please feel free to contact Daniel Altman at daltman@bbwg.com.

APPELLATE COURT RULES THAT COMMERCIAL TENANT MAY WAIVE ITS RIGHT TO SEEK YELLOWSTONE INJUNCTION

By Jeffrey Levine

A "Yellowstone injunction" is a form of injunctive relief issued by a court that enables a commercial tenant to stay the running of the cure period contained in a notice to cure received by the tenant. That stay remains in effect, potentially for years, until the court that issued the Yellowstone injunction determines whether the tenant actually committed the breaches of the lease referenced in the notice to cure.

In a recent case, the issue of whether a commercial tenant may waive its right to seek a Yellowstone injunction was addressed squarely for the first time by an appellate court, which ruled in favor of a commercial landlord and found that a clause in a lease providing for the waiver of a tenant's right to seek a Yellowstone injunction was enforceable and binding upon the tenant and was not void as against public policy.

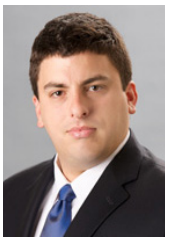
Interestingly, in that case, the lease provision at issue did not expressly provide that the tenant waived its right to seek a Yellowstone injunction. Instead, the provision at issue provided that the tenant may not seek a declaratory judgment with regard to any provision of the lease or with respect to any notice sent pursuant to the provisions of the lease. The court held that the provision barring the tenant from seeking a declaratory judgment operated to also bar the tenant from seeking a Yellowstone injunction, reasoning that a request for a declaratory judgment was the necessary foundation of a request for a Yellowstone injunction.

This recent decision will likely have a far-reaching impact on the negotiation of commercial leases. Landlords should now try to include in their commercial leases a provision whereby the tenant expressly waives its right to pursue a Yellowstone injunction, since the waiver of a tenant's right to seek a Yellowstone injunction could potentially eliminate years of litigation in the event of a breach by the tenant. Tenants will seek to avoid the inclusion of such a waiver provision, since a Yellowstone injunction provides a tenant with a mechanism to forestall the termination of a lease where the tenant has not cured a breach asserted in a notice to cure. Whether any such Yellowstone waiver provision is ultimately included will depend on the parties' relative negotiating positions.

Parties should consult with counsel to protect their interests most effectively in this regard and avoid unintended and costly consequences.

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

DOES A TENANT'S SMOKING OF CERTIFIED MEDICAL MARIJUANA IN AN APARTMENT CONSTITUTE A VIOLATION OF A LEASE'S "NO SMOKING" CLAUSE?



By Scott F. Loffredo

The majority of new apartment leases in New York City contain prohibitions against a tenant smoking in their apartment or elsewhere in the building. All leases contain some sort of prohibition against a tenant creating noxious odors or smoke in and around their apartment. So, what happens when a tenant responds to a landlord's objection to smoking in his/her apartment with a request for a reasonable accommodation on the grounds that his/her smoking of medical marijuana is for the purposes of treating a medical condition?

New York State Public Health Law §3360(1) defines a "certified medical use" of medical marijuana as "the acquisition, possession, use or transportation of medical marijuana by a certified patient, or the acquisition, possession, delivery, transportation or administration of medical marijuana by a designated caregiver, for use as part of the treatment of the patient's serious condition, as authorized in a certification under this title, including enabling the patient to tolerate treatment for the serious condition. **A certified medical use does not include smoking**."

Effective December 27, 2017, the New York State Department of Health issued new regulations expanding the methods by which a certified patient may use medical marijuana other than by smoking. The New York State Medical Marijuana Program currently provides for the use of marijuana by pill, ointment, lotion, oils, patches, semi-solid products, chewable and effervescent tablets and lozenges, and other "non-smokable forms of ground plant material". The Department's website specifically states that "Under the law, smoking is not permitted…".

The smoking of medical marijuana is currently a violation of New York law. The smoking of medical marijuana in one's apartment is currently not protected under law, and would constitute a violation of the "no-smoking" prohibitions found in a tenant's lease.

Should an owner be met with a request for an accommodation for the illegal use of marijuana in your building, or are receiving complaints from neighboring tenants about someone's smoking of marijuana in his/her apartment which interferes with the complainant's use of their apartment, counsel should be consulted to discuss how to address each specific case so that the owner may diligently enforce the terms of the lease.

Scott Loffredo is a partner in the Firm's Litigation Department and can be reached at sloffredo@bbwg.com.

RIGHTS AND OBLIGATIONS OF A BUILDING OWNER REGARDING MODIFICATION OF A BUILDING'S INTERCOM SYSTEM

By Phillip L. Billet

The owner of a residential apartment building containing a "traditional" intercom system (i.e., a system by which an individual in the building lobby communicates with a tenant's apartment via a communications system outside or in the lobby) may wish to replace this system with a "telephone-based" system, which utilizes the tenant's personal (landline or cellular) telephone.

In a building containing rent-regulated tenants, it is crucial that an owner contem5plating such modification become familiar with three of DHCR's rules and

continued on page 4

continued from page 3

policies relating to such modification: (a) an owner's obligation to obtain DHCR's permission before replacing the intercom system; (b) the conditions which DHCR will likely impose in an order granting permission to replace such intercom system; and (c) an owner's right to an MCI rent increase based on its replacement of such intercom system.

Owner's Obligation to Obtain DHCR's Permission Before Replacing the Intercom System

DHCR and the courts have consistently ruled that a building owner who wishes to replace a traditional intercom system with a telephone-based system must first obtain permission from DHCR by filing a modification application. In the application, the owner requests permission to replace the intercom system and demonstrate that such replacement would not be inconsistent with the rent-regulatory laws (i.e., would not result in a decrease in the level of services being provided to rent-regulated tenants).

Conditions Which DHCR Will Likely Impose in a Modification Order Granting an Owner Permission to Replace an Intercom System

While DHCR will likely grant an owner's application for permission to replace a traditional intercom system with a telephone-based system, it has established the following with which an owner must comply in order to be permitted to implement such modification:

1. Intercom service must be provided to every apartment in the building;
2. A tenant must have the choice of which available telecommunications provider he or she wishes to use;
3. Each apartment must have a touch-tone landline telephone in order to receive intercom service; and in order to offset the cost to tenants of maintaining landline telephones, the legal rent of all rent-regulated apartments at the building will be reduced by $15.00 per month;
4. However, if a tenant refuses to install a landline telephone in his/her apartment after receiving the $15.00 per month rent reduction, the tenant will not be eligible for a rent reduction if the owner fails to provide intercom service to the tenant's apartment;
5. The installation must comply with all rules and regulations applicable to the jurisdiction in which the building is located and violations may be issued by local agencies based upon "non-compliant installations."

In some cases, DHCR has also imposed an additional requirement that, if a tenant uses a cellphone only and does not have a permanently-installed landline telephone in his/her apartment, the owner must either compensate the tenant for any new costs which (s)he incurs to install a landline telephone, or must pay for the installation of a landline telephone.

Finally, in two other relevant orders, DHCR ruled that: (a) if an owner replaces a traditional intercom system after receiving DHCR approval but fails to comply with all of the conditions set forth in DHCR's modification order, the modification will be deemed to constitute a reduction in services; and (b) if an owner replaces a traditional intercom system after receiving DHCR approval but thereafter restores the original system, any rent reductions imposed by DHCR as a condition of authorizing the initial replacement will remain in effect until the owner files, and DHCR grants, another modification application.

Please note that these cases all deal with the replacement of traditional intercom systems with "telephone-based" systems. It is unclear if DHCR would require an owner to maintain a landline telephone in every apartment of its building if they wish to install a more modern cellphone-based intercom system, or DHCR would only require the owner to maintain a landline telephone (or a "single-purpose" owner-maintained telephone) for those tenants who request such a telephone. We will keep you advised of any new developments in this regard.

Right of an Owner to an MCI Rent Increase Based on its Replacement of the Intercom System at its Building

Notwithstanding the fact that DHCR will impose various conditions with which an owner must comply in order to be permitted to replace a traditional intercom system with a telephone-based system, DHCR has also granted MCI rent increase applications based on an owner's replacement of such intercom system—if the work performed by the owner complies with applicable requirements governing MCI rent increases.

Phillip L. Billet (pbillet@bbwg.com), is a member of BBWG's Administrative Department, and should be contacted for more information regarding modifications and MCI applications.

BBWG IN THE NEWS

Founding partner **Sherwin Belkin** authored an op-ed in The New York Daily News on March 19, critical of the City's rent regulatory system.

Martin Heistein, co-head of the Firm's Administrative Law Department, was quoted in China Daily on March 23 on the topic of 421-a tax abatement benefits available for the conversion of the Waldorf Astoria into condominium apartments.

Aaron Shmulewitz, head of the Firm's co-op and condo practice, was quoted on the enforceability of pet fines, in Brickunderground.com on March 5, and in Habitat on March 12.

Craig Price, a partner in the Firm's Transactional department, was quoted in Brickunderground.com on March 8 on architects' self-certification under DOB Directive 14.

Litigation partner **Matthew Brett** was a panelist at an April 24 CLE seminar co-sponsored by The Rent Stabilization Association and The New York County Lawyers Association on "The Impact of the 2017 Federal Tax Law Changes"; **Mr. Brett**'s topic was choice of ownership entity and rent regulation.

Transactional Department associate **Nicki Neidich** was a panelist on the Recent Alumni Perspectives Panel sponsored by St. John's Law School Mattone Family Institute for Real Estate Law, on March 14. **Ms. Neidich** was also named to Super Lawyers' "Rising Stars" list.

BBWG associates **Will Baney**, **Damien Bernache** and **Samuel Marchese** were named to Real Estate Weekly's "Rising Stars of Real Estate" list, on April 15.

TRANSACTIONS OF NOTE

Partners **Craig Price** and **Lawrence Shepps**, and associate **Krista Patterson**, handled the $91 million sale of the Talleyrand apartment complex in Tarrytown. The transaction was featured in Westfaironline on March 29; and in The Real Deal on April 4.

Mr. Price and fellow Transactional Department partner **Stephen Tretola** represented the purchaser in the acquisition and financing of a five-story Upper East Side apartment building containing 20 units, after BBWG had also handled the administrative due diligence in connection with the purchase.

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 UNIT OWNER CANNOT SUE BOARD FOR INSTALLING RIGGING ON TERRACE NEEDED TO REPAIR BUILDING LEAKS; CONDO ALSO AWARDED ATTORNEY FEES AND ENGINEER FEES

Richstone v. Board of Managers of Leighton House Condominium Appellate Division, 1st Department

COMMENT | The Court held that the Board had a right of access for repairs under the Declaration and Bylaws, and did not need the Unit Owner's permission to fulfill its repair duties. BBWG represented the Condominium in this important decision.

ONE STOVE-TOP FIRE IS NOT A NUISANCE SUFFICIENT TO WARRANT EVICTION

Sydney Leasing LP v. Maquilon Civil Court, Queens County, L&T Part

COMMENT | Although involving a rent-stabilized tenant, this case is still instructive for Boards, as it illustrates the high bar set by judges when dealing with cases involving subjective "quality of life" issues.

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT AS TO WHETHER CO-OP SHAREHOLDER PERFORMED UNAUTHORIZED ALTERATIONS

7 West 92nd Street HDFC v. Amaro Appellate Term, 1st Department

COMMENT | The Court held that there were triable issues of fact as to the nature and extent of work done in the shareholder's bathroom, and whether the Board had authorized them.

CONDO NOT GUILTY OF CONTEMPT OF COURT, BECAUSE IT HAD SUCCESSFULLY CURED CONDITIONS UNDERLYING TWO-YEAR-OLD VIOLATIONS OF RECORD

Faber v. Loft 14 Condominium Civil Court, New York County, L&T (HP) Part

COMMENT | In addition, the Court ruled that one violation was invalid due to an apparent error in the floor number stated. BBWG represented the victorious Condo.

6

CONDO UNIT OWNER CAN SUE BOARD FOR ABATEMENT OF COMMON CHARGES, BASED ON CONDO'S FAILURE TO CURE WATER LEAKS AND PROVIDE GAS; BUT UNIT OWNER NOT ENTITLED TO INTEREST ON ABATED COMMON CHARGES

Davydov v. Board of Managers of The Forestal Condominium Appellate Division, 2nd Department

COMMENT | This latest decision in this ongoing contentious dispute indicates that condos will prospectively be treated more like co-ops with regard to the consequences of failing to provide essential services to constituents.

CO-OP SHAREHOLDER MUST OCCUPY APARTMENT SIMULTANEOUSLY FOR CO-OCCUPANT TO CO-OCCUPY

Chiagkouris v. 201 West 16 Owners Corp. Appellate Division, 1st Department

COMMENT | In this important decision that deals with a common and divisive issue in co-ops, the Court affirmed prior holdings in the First Department that uphold co-op Boards' rights — even with regard to co-occupants intended to be covered under the State "Roommate Law".

CONDO PROFESSIONAL UNIT OWNER NOT EXEMPT FROM OBLIGATION TO PAY ASSESSMENT TO FUND COMMON ELEMENT IMPROVEMENTS MERELY BECAUSE UNIT OWNER NEVER OCCUPIED ITS ALLOTTED SEAT ON CONDO BOARD

Board of Managers of The East 86th Street Condominium v. Park Avenue Physicians Realty, LLC Appellate Division, 1st Department

COMMENT | The Unit Owner was held to have known of its rights under the Condo bylaws to a seat on the Board, but never made an effort to occupy the seat.

Belkin Burden Wenig & Goldman, LLP

ATTORNEYS AT LAW

www.bbwg.com

New York Office | 270 Madison Avenue | New York, NY 10016 | Tel 212 .867 .4466 | Fax 212 .867 .0709
Connecticut Office | 495 Post Road East, 2nd Floor | Westport, CT 06880 | Tel 203 .227 .1534 | Fax 203 .227 .6044