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## NEW BAD LAWS OF THE MONTH



## By Aaron Shmulewitz

Two new laws adopted recently by the State, and the City, respectively, will add significantly to the burdens of co-op and condo Board members and managing agents. While apparently well-meaning in intent, the respective legislative bodies apparently gave little, if any, thought to the real-world impact of these new laws.

**1. State Conflicts Of Interest Disclosure Law:**

A new section 727 was added to the Business Corporation Law ("BCL"), and applies to all co-ops and condos incorporated under the BCL. Starting in 2018, every affected Board must annually: (i) deliver to every Board member a copy of BCL section 713, so as to remind them of the obligations and restrictions of "interested directors", and (ii) deliver to all shareholders a report signed by all Board members disclosing all contracts entered into or voted upon by the Board that year in which any of the Board members was "interested", listing each such contract voted upon, information on the contracting party, contract amount, and purpose of the contract; and which Board members attended, and how each Board member voted,

at each Board meeting at which such a contract was voted upon. If no such contracts were voted upon during the year, the Board must still deliver to shareholders a statement declaring that.

Some observations. First, very few condos are incorporated, let alone under the BCL; however, condo Board members should not think that they are off the hook. While the new law included an analog amendment to the Not-For-Profit Corporation Law explicitly aimed at condos, very few condos are formed under that statute, either; presumably, that was an error by the legislature, which will presumably be corrected eventually by reference to the correct statute, the Real Property Law. Second, the statute does not contain any enforcement mechanism. Query how an aggrieved shareholder can seek to enforce his/her rights against his/her Board, other than by suing? Third, the effective date and annual nature of the obligations under the law mean that Boards will not have to comply until the end of 2018. However, and fourth, when mandatory compliance *does* begin, it will likely create significant added work for managing agents, who will likely be tasked by their Boards with reviewing meeting minutes for the year,

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compiling voting records on each contract, and distilling that information into the disclosure forms that the Board members will have to sign. Managing agents will now also need to keep much more detailed meeting minutes during the year, reflecting who voted how. Finally, what if one Board member has an undisclosed interest in a vendor with which a Board is contracting? Would unknowing non-disclosure of that fact thus render *all* Board members liable to the shareholders? And, if so, for what? What would be the measure of monetary damages suffered? Presumably: (i) some Board members may not want to hang around as this new requirement looms on the horizon, and (ii) management companies will soon start to raise their management fees to cover the additional work, and, likely, additional personnel, that will be necessary to comply with this new law.

## **2. City Building Smoking Policy Disclosure Law:**

New Local Law 147 of 2017 requires the “owner” of every City Class A multiple dwelling (including, explicitly, co-op and condo Boards) to adopt a “smoking policy”, which is defined as a written declaration that states clearly and conspicuously where smoking is permitted and prohibited on the premises. The policy must address all indoor locations, including apartments and common areas, and all outdoor areas, including courtyards, roofs, terraces, balconies, patios, and other outdoor areas connected to apartments. Such a smoking policy is applicable to all tenants and residents except for rent regulated tenants.

The policy must be distributed annually to all tenants and residents, posted annually in a prominent place in the building, and incorporated into the leasing package for rented apartments (including those in co-ops and condos), and the House Rules or bylaws (if a co-op or condo). Any changes in such a policy must be disclosed and posted in similar fashion. Failure to comply with the statutory requirements is punishable by violation fines starting, in most cases, at \$250.

This new law also reflects good intentions, but bad effects, as it will add significantly to the work burdens of managing agents and Boards each year. The law is also largely superfluous, as City law already bans smoking in indoor common areas of buildings having 10 or more apartments, and, to the extent that a building has adopted a ban on smoking in apartments (and/or in outdoor areas), such a ban is presumably already reflected in the building’s governing documents. Query why this law is necessary? The minuscule potential positive impact of the law—disclosing whether smoking is permitted or prohibited in any outdoor areas—is far outweighed by the burdens, in time and money, that compliance will engender.

Once again, good intentions will mean that volunteer Board members and overworked managing agents will have to work harder, and face potential greater exposure for non-compliance.

*Aaron Shmulewitz ([ashmulewitz@bbwg.com](mailto:ashmulewitz@bbwg.com)) heads the firm’s Co-op/Condo practice.*

## **BBWG IN THE NEWS**

Founding partner **Sherwin Belkin** was quoted: in the September edition of [The Real Deal](#) on the potential effect of new tenant anti-harassment laws; in [Brick Underground](#) on October 2 discussing the uncertainty of the impact of the [Altman](#) decision on owners; and in [citybizlist.com](#) on October 5 on a newly-announced collaboration between AirBnB and We Work. In addition, **Mr. Belkin**, as well as Administrative Law Department head **Martin Heistein** and partner **Kara Rakowski**, were panelists in the New York Multi-Family Summit on September 19.

**Mr. Heistein** also gave an in-house seminar at Avalon Bay on October 19, lecturing on rent regulation and, in particular, recent developments relating to buildings subject to the 421-a tax abatement program. **Mr. Heistein** also lectured on October 25 at a seminar sponsored by Marcus & Millichap on rent regulation and recent court decisions.

Transactional Department head **Daniel Altman** was quoted in an article in the October [The Real Deal](#) that discussed the City’s top real estate law firms.

**Aaron Shmulewitz**, head of the Firm’s co-op and condo practice, was quoted: in [Realtor.com](#) on August 25 on legal issues regarding offensive flags; in [The Real Deal](#) on August 25 on new FinCen regulations; and in [The Cooperator’s](#) October edition on unneighborly behavior.

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# BBWG PREVAILS IN SUCCESSION RIGHTS CASE



**By Christina Simanca-Proctor**

There is no bright-line rule regarding the facts a court will consider when determining the strength of a succession claim asserted after a tenant has resided in a nursing home or rehabilitation facility.

An owner recently represented by BBWG prevailed in a holdover proceeding where the daughter of a rent stabilized tenant claimed succession rights after the tenant's death. The owner was awarded a judgment of possession and a money judgment for use and occupancy.

In the proceeding, the court found that; i) the tenant and the daughter had co-resided in the apartment from 1998 through May, 2007; ii) in June, 2007, the tenant was admitted to a nursing home, where she resided until her death in May, 2013; iii) the daughter never advised the owner that the tenant had been admitted to, or was residing in, a nursing home; iv) the tenant executed all three renewal leases after she was admitted to the nursing home; and v) rent was paid in the tenant's name while she was residing in the nursing home.

The trial court rejected the daughter's claim of succession rights.

The court held that the tenant's execution of renewal leases while she was residing in the nursing home, and the daughter's payment of rent in the tenant's name, precluded a finding that the tenant permanently vacated the apartment prior to her death in May, 2013. As the tenant admittedly resided in the nursing home since at least June, 2007, the daughter and the tenant did not co-occupy the apartment during the two years prior to the tenant's death, a prerequisite for succession.

Further, the court held that the tenant did not maintain a sufficient nexus to the apartment during the period she was residing in the nursing home. The court noted that the tenant never visited the apartment after her admission to the nursing home, no discharge plans from the nursing home were made for the tenant to return home, and no improvements to the apartment were requested in order to facilitate the tenant's return to the apartment in light of the fact that tenant used a wheelchair.

There is no distinct set of facts that will establish an adequate nexus to an apartment, but this decision is instructive on some of the factors that will be considered by a court when considering succession claims.

*The owner was represented in the proceeding by partners Joseph Burden and Christina Simanca-Proctor ([csimanca-proctor@bbwg.com](mailto:csimanca-proctor@bbwg.com)).*

# FINCEN, A LOOK BEHIND THE CURTAIN



**By Craig L. Price and  
Michael J. Shampman**

The high end residential real estate market has continued to thrive in New York City, due in part to wealthy foreign buyers and other purchasers who use legal entities as named purchasers. However, this influx of real estate purchases has prompted the US Treasury Department to seek to crack down on the use of residential real estate transactions as a means of laundering money. As a result, the Financial Crimes Enforcement Network (“FinCEN”) of the Treasury Department adopted regulations effective March 1, 2016 to combat money laundering and to prevent individuals from hiding the proceeds of criminal activity through anonymous real estate purchases. This article seeks to explain how the FinCEN requirements work and to provide instructions as to how to proceed with purchases that fall within its guidelines.

FinCEN seeks to identify the individual(s) who are the true beneficial owner(s) behind shell entities that purchase high-end residential real estate. FinCEN procedures apply to the purchase of condominium units, and one to four family properties in any of the five boroughs of New York City (and to a handful of other areas in the country that have been popular



with foreign purchasers). When the purchaser of such a premises is a corporation, limited liability company, partnership, or other entity, the FinCEN procedures are designed to determine whether such buyer (or its subsidiaries or agents) is involved in illegal activity or money laundering. Trusts are not required to comply with such FinCEN requirements.

The threshold amount that triggers FinCEN compliance in Manhattan is \$3,000,000; in the other four boroughs it is \$1,500,000. As of September 22, 2017, FinCEN was amended to also apply to payments by wire transfers, in addition to payments by checks and other means that had been covered from the start.

FinCEN requires title companies to complete and file IRS Form 8300 at the time of closing. As part of the FinCEN procedure, title companies are obligated to collect and report information about applicable purchasers and residential real estate transactions. In order to do

so, the attorney for the buyer must work with the title company ahead of time in order to complete a detailed FinCEN questionnaire and must also furnish the title company with all of the relevant information regarding the buyer and its constituents.

The title company must obtain and record a copy of each beneficial owner’s driver’s license, passport, or other similar identifying documentation. In addition, the title company must be provided with all of the entity documents of the purchasing entity, as well as copies of all of the checks and wire documentation for the transaction. If the buyer’s attorney received a wire for the downpayment from the buyer and wrote the corresponding downpayment check on the buyer’s behalf, the buyer’s attorney must also provide the title company with all of his/her law firm’s contact information and their identification number.

As FinCEN continues to evolve, we will be providing updated articles on relevant procedures and regulations. In the meantime, if FinCEN does apply to your transaction, it is vital to become familiar with the relevant procedures, and to begin to gather all required documentation and information well ahead of the closing. BBWG stands ready to assist in this regard.

*For questions involving FinCEN, please contact Craig L. Price ([cprice@bbwg.com](mailto:cprice@bbwg.com)) or Michael Shampman ([mshampman@bbwg.com](mailto:mshampman@bbwg.com)), a partner and an associate, respectively, in the Firm’s Transactional Department.*

# MORE TO DHCR RENT REDUCTION ORDERS THAN JUST REDUCING RENT



**By Samuel R. Marchese**

Many owners and prospective purchasers of rent stabilized buildings throughout

New York City are familiar with Rent Reduction Orders issued by the New York State Division of Housing and Community Renewal ("DHCR").

On its face, the effect of a Rent Reduction Order is simple. The legal regulated rent is reduced to the level in effect prior to the most recent guidelines increase for the tenant's lease which commenced before the effective date of the Rent Reduction Order. As a result, no subsequent rent increases may be collected after the effective date of the Rent Reduction Order until DHCR issues an Order Restoring Rent. Furthermore, DHCR directs the owner to: (i) restore services cited as not maintained in a Rent Reduction Order; and (ii) file rent restoration applications seeking approval to restore the legal rent.

However, many owners are unaware that when a Rent Reduction Order is issued, the Order stays with the apartment. This means that even though a tenant whose name is on a Rent Reduction Order may vacate, the Order remains in effect for that apartment (and benefits subsequent tenants) until DHCR issues an Order Restoring Rent.

In addition, Rent Reduction Orders are more detrimental than just simply reducing the rent for an apartment. When owners do not timely restore the services and file a Rent Restoration Application, that can have a significant impact on an owner's future interests. Owners could face: (i) higher risk for significant overcharge liability; (ii) possible non-compliance fines and penalties; (iii) DHCR issuing an Order finding that the owner improperly deregulated an apartment; and (iv) DHCR issuing an Order finding harassment.

The best way to illustrate the detrimental impact of a Rent Reduction Order is through a hypothetical.

For example, in 1995, DHCR issued a Rent Reduction Order for a Building-Wide Service Complaint Proceeding, which affects apartments 1, 2, and 3. All three rents are reduced to \$500/month. Owner makes the required repairs, but does not file an application with DHCR to restore rent. In 1999, the building is sold, and the new owner ("Owner B") is unaware of the rent reduction order. From 1999 through 2012, Owner B performs individual improvements in these three apartments, raises the rents above the deregulation threshold, and deregulates these apartments.

In 2013, Owner B rents apartments 1, 2, and 3 to fair market tenants, charging and collecting rents of \$4,500/month

for each apartment. In 2017, Owner B decides to sell the building, and the same fair market tenants are still residing in the apartments. Prospective Buyer's counsel conducts a due diligence review, and discovers that the 1995 Rent Reduction Order is still in effect for apartments 1, 2, and 3. As a result, Prospective Buyer is advised that the apartments were improperly deregulated, and if they purchase the Building, they would have to issue rent stabilized leases to these tenants. Moreover, in the event the tenants of apartments 1, 2, and 3 challenge the rents, the potential overcharge liability is \$229,289 per apartment, totaling \$687,867, *excluding* allowable treble damages.

This hypothetical scenario occurs frequently, to many owners. Owners purchase or sell buildings with rent stabilized apartments that have active Rent Reduction Orders in place. Once a Rent Reduction Order is issued to any apartment, owners should immediately commence the rent restoration process so as to protect their future interests. Moreover, it is crucial that prospective purchasers of such buildings engage competent counsel to perform appropriate due diligence to avoid significant risks.

*Samuel R. Marchese ([smarchese@bbwg.com](mailto:smarchese@bbwg.com)) is an associate in the Firm's Administrative Law Department. For more information regarding rent reduction orders and the rent restoration process, please contact Mr. Marchese.*

# LEASE ENTERED INTO AFTER NOTICE OF PENDENCY HELD VOIDABLE



By **Scott F. Loffredo**

On September 29, 2017, the Appellate Term, Second Department in *BH 2628 LLV v. Zully's Bubbles Laundromat, Inc.* reversed a lower Court decision entered after trial dismissing landlord's post-foreclosure holdover proceeding brought pursuant to RPAPL §713(5) on the grounds that the occupant had a valid lease and was not bound by the judgment of foreclosure since it had not been named in the underlying foreclosure action.

The Appellate Term held, "as the lease with the former owner upon which occupant's defense to this proceeding is based was signed several months after a notice of pendency had been filed in connection with the foreclosure action, occupant was, contrary to the Civil Court's holding, bound by the judgment of foreclosure and the lease was voidable by petitioner following its purchase at foreclosure."

RPAPL §713(5) allows for a special proceeding to be maintained after service of a 10-day notice to quit where "the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to the respondent".

The Appellate Term held that since the lease was *voided* and not *terminated*, no landlord-tenant relationship ever existed between the parties and, therefore, the appropriate proceeding for petitioner to have commenced against the occupant was a post-foreclosure proceeding pursuant to RPAPL §713(5) and not a holdover proceeding under RPAPL §711(1).

As petitioner demonstrated that: (i) it had voided the lease; (ii) it had exhibited the referee's deed to occupant's principal; (iii) it had served a 10-day notice to quit; and (iv) occupant had remained in possession of the subject property after the expiration of the 10-day period, the Court held that petitioner was entitled to a final judgment of possession, and reversed the lower Court.

The purchaser of a building at a foreclosure sale can be confronted with unforeseen hurdles when attempting to evict occupants of the building. If you are considering the purchase of a building at a foreclosure sale, it is vital to discuss with legal counsel prior to the purchase how best to obtain vacant, legal possession.

*Scott F. Loffredo ([sloffredo@bbwg.com](mailto:sloffredo@bbwg.com)) is an associate in the Firm's Litigation Department.*

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## BBWG IN THE NEWS

**Robert Jacobs**, a member of BBWG's Transactional and Administrative Law Departments, was quoted in an article in the September edition of [The Real Deal](#) that discussed expeditors.

An \$80 million purchase & financing transaction relating to two Downtown Brooklyn properties that was handled by partners **Craig L. Price**, **Kara Rakowski** and **Lawrence Shepps** was cited in [Real Estate Weekly](#) on August 24.

Appeals Department partner **Magda L. Cruz** was a panelist on The Jack Newton Lerner Landlord Tenant Practice Institute at the New York County Lawyers' Association on September 15, presenting an update on notable appellate decisions in 2016 and 2017.

**Matthew S. Brett**, a partner in the Firm's Litigation Department, authored an op-ed published in [Crain's New York](#) on August 29 that challenged concepts underlying the City's claimed housing emergency. **Mr. Brett** is also scheduled to lecture at [The Wayfinder Summit](#) on November 8 on the topic of the [Altman](#) decision and rent regulation.

Transactional Department associate **Nicki Neidich** has been appointed a member of the New York City Bar Association's Co-op Condo Committee.

# 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](mailto:ashmulewitz@bbwg.com)).

## CO-OP SHAREHOLDER CAN HAVE DAUGHTER OCCUPY APARTMENT IN HER ABSENCE

*221 Middle Neck Owners Corp. v. Paris District Court, Nassau County, Landlord & Tenant Part*

COMMENT—The Court followed the liberal rule in the Second Department. Numerous holdings involving this issue in the First Department (which includes Manhattan) have gone the other way, requiring simultaneous occupancy by a shareholder for such a relative to live in the apartment.

## CONDO BOARD NOT SANCTIONED FOR FILING LIENS FOR ATTORNEYS FEES INCURRED DUE TO UNIT OWNER'S NON-MONETARY DEFAULTS

*The Board of Managers of 1255 Fifth Condominium v. Foschi Supreme Court, New York County*

COMMENT—The Court held that, while the recoverability of such fees was uncertain under the bylaws, their imposition was not frivolous.

## ESTATE'S SUIT AGAINST HDFC CO-OP TO RECOVER ALLEGEDLY-MISAPPROPRIATED STOCK CERTIFICATE BARRED BY 3-YEAR STATUTE OF LIMITATIONS

*Loscalzo v. 507-509 President Street Tenants Association HDFC Appellate Division, 2nd Department*

COMMENT—Query whether seeking a different form of relief would have gotten around the statute of limitations.

## MECHANICS LIEN FOR WORK IN CO-OP APARTMENT VACATED BECAUSE LIENOR MISIDENTIFIED SHAREHOLDER AS OWNER OF THE ENTIRE BUILDING

*Zen Restoration, Inc. v. Hirsch Supreme Court, New York County*

COMMENT—This is a not-uncommon error. Lien notices can get quashed easily for a whole host of technical and procedural errors.

## CO-OP BOARD CANNOT SELECTIVELY WAIVE REQUIREMENT FOR CONSENT BY ONE NEIGHBOR TO ERECTION OF TERRACE ABOVE HIS APARTMENT

*Dicker v. Glen Oaks Village Owners, Inc. Appellate Division, 2nd Department*

COMMENT—The Board's decision to not require the consent of an investor shareholder--but to still require consent from resident shareholders--was disparate treatment and thus not protected by the business judgment rule. In addition, the Court held that the Board erred in imposing an assessment in the same amount for each apartment, instead of calculating it in an amount per share as required by the proprietary lease.

## **CO-OP SHAREHOLDER TIME-BARRED IN SUING TO CHALLENGE NEW ROOF HOUSE RULES; UNAVAILABILITY OF TERRACE IS NOT A BREACH OF WARRANTY OF HABITABILITY**

*Musey v. 425 East 86 Apartments Corp. Appellate Division, 1st Department*

COMMENT—The Court held that the shareholder should have brought an Article 78 proceeding within four months after the new rules were adopted. Very significantly, the Court also held that a terrace is an amenity, and not an essential function owed by a co-op. That could have huge ramifications in many ways.

## **CONDO GARAGE UNIT OWNER RESPONSIBLE FOR STRUCTURAL REPAIRS**

*Perlinder v. Board of Managers of The 411 East 53rd Street Condominium Appellate Division, 1st Department*

COMMENT—The Court noted that the damage arose from salt over the years, during which the Unit Owner had failed to maintain and repair the garage as needed.

## **CONDO BOARD CAN SUE SPONSOR FOR NOT SELLING VACATED UNITS**

*The Board of Managers of The Warren House Condominium v. 34th Street Associates LLC Appellate Division, 1st Department*

COMMENT—In denying the parties' motions for summary judgment, the Court noted that questions of fact existed regarding the adverse impact of the sponsor's large-scale retention of units on Unit Owners' ability to sell and refinance apartments, and the increased wear and tear on the building by rental tenants. The holding echoes the older Jennifer Realty decision, and could have a huge impact on the aftermath of condo conversions.

## **PRO SE TENANT LITIGANT SANCTIONED, REQUIRED TO SEEK COURT APPROVAL BEFORE BRINGING ANY NEW LITIGATION**

*Cangro v. Park South Towers Associates Appellate Division, 1st Department*

COMMENT—Many buildings have a persistently litigious resident against whom such remedies would be welcome and laudatory.

## **COMMERCIAL CONDO UNIT OWNER AND TENANT NOT LIABLE FOR SIDEWALK INJURY; CONDO SOLELY LIABLE**

*Keech v. 30 East 85th Street Company LLC Appellate Division, 1st Department*

COMMENT—The Commercial Unit Owner and the tenant had no duty to maintain the sidewalk under the condo's governing documents.



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