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CDC Orders Federal Eviction Moratorium Through 2020

BY BENJAMIN J. MARGOLIN

On September 4, 2020, the Centers for Disease Control and Prevention (the "CDC") issued an **order** under Section 361 of the Public Health Service Act to "temporarily halt residential evictions to prevent the further spread of COVID–19" (the "Order"). The Order creates a federal eviction moratorium effective from September 4, 2020 through December 31, 2020, unless rescinded, modified or extended, against "Covered Person(s)," as defined in the Order and discussed below. Under the Order, a landlord, owner of a residential property, or other person[1] with a legal right to pursue an eviction or possessory action shall not evict any "Covered Person" from any residential property in any jurisdiction to which the Order applies during the effective period of the Order. The Order is written broadly enough to apply to co-ops, and to condominium apartments that are leased out.

Notably, the Order does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or a greater level of public-health protection than the requirements listed in the Order. In New York State, for eviction matters commenced prior to March 17, 2020, there is currently a residential eviction moratorium in effect until October 1, 2020 under Administrative Order 160A/20; and for eviction matters commenced after March 16, 2020, the moratorium on residential evictions remains stayed indefinitely under Administrative Order 68/20 and Administrative Order 160A/20. Accordingly,

[1] The Order defines other "person" to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

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it is unclear whether New York State provides the same or greater level of public-health protection than the requirements listed in the Order; ultimately, that question will need to be answered by New York judges. In any event, because of the significant criminal penalties imposed for violation of the Order, as discussed in detail below, it is advisable to err on the side of caution. The Order also does not preclude State, local, territorial, and tribal authorities from imposing additional requirements that provide greater public-health protection and are more restrictive than the requirements in the Order.

The Order defines a "Covered Person" as "any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a sworn **Declaration Form**." Importantly, the Order reinforces that "Covered Person(s)" are still required to pay rent and follow all the other terms of their lease and rules of the place where they live. Furthermore, the Order explicitly provides an important caveat to the moratorium in that persons may still be evicted for reasons other than not paying rent or making a housing payment. Additionally, the Order makes clear that "nothing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract."

To qualify as a "Covered Person," a person must execute the CDC Declaration Form, certifying under the penalty of perjury that (s)he meets certain qualifying criteria, and provide the executed form to their landlord, owner of the residential property where they live, or other person who has a right to have them evicted or removed from where they live. While the form is not required to be notarized, it explicitly states in a text box at the top of the form that "[t]his declaration is sworn testimony, meaning that you can be prosecuted, go to jail, or pay a fine if you lie, mislead, or omit important information."

The Declaration Form requires a person to certify the following:

1. I have used best efforts to obtain all available government assistance[2] for rent or housing;

2. I either expect to earn no more than $99,000 in annual income for calendar year 2020 (or no more than $198,000 if filing a joint tax return), was not required to report any income in 2019 to the Internal Revenue Service, or received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;

3. I am unable to pay my full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, lay-offs, or extraordinary out-of-pocket medical expenses;

4. I am using best efforts to make timely partial payments that are as close to the full payment as my circumstances may permit, taking into account other nondiscretionary expenses;

5. If evicted I would likely become homeless, need to move into a homeless shelter, or need to move into a new residence shared by other people who live in close quarters because I have no other available housing[3] options.

6. I understand that I must still pay rent or make a housing payment, and comply with other obligations that I may have under my tenancy, lease agreement, or similar contract. I further understand that fees, penalties, or interest for not paying rent or making a housing payment on time as required by my tenancy, lease agreement, or similar contract may still be charged or collected.

7. I further understand that at the end of this temporary halt on evictions on December 31, 2020, my housing provider may require payment in full for all payments not made prior to and during the temporary halt and failure to pay may make me subject to eviction pursuant to state and local laws.

Critically, the Order defines "Evict" and "Eviction" as any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property. Because "to pursue possessory action" means to start an eviction proceeding, the Order would appear to also preclude the commencement of a nonpayment proceeding against a Covered Person.

The criminal penalties for violating the Order are extraordinary. Specifically, the Order provides as follows: "Under 18 U.S.C. 3559, 3571; 42 U.S.C. 271; and 42 CFR 70.18, a person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both, or as otherwise provided by law. An organization

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[2] "Available government assistance" means any governmental rental or housing payment benefits available to the individual or any household member.

[3] "Available housing" means any available, unoccupied residential property, or other space for occupancy in any seasonal or temporary housing, that would not violate federal, state, or local occupancy standards and that would not result in an overall increase of housing cost.

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violating this Order may be subject to a fine of no more than $200,000 per event if the violation does not result in a death or $500,000 per event if the violation results in a death or as otherwise provided by law. The U.S. Department of Justice may initiate court proceedings as appropriate seeking imposition of these criminal penalties."

Thus, should any landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action receive an executed Declaration Form from an alleged or purported Covered Person, it is recommended that you immediately consult with competent counsel to discuss and determine an advisable course of action, especially before pursuing eviction or any other form of possessory action for nonpayment of rent.

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Navigating Discovery Hurdles During A Pandemic

BY ADAM M. BERNSTEIN

Over the course of the COVID-19 pandemic, the Chief Administrative Judge has (thus far) issued 36 administrative orders serving to protect the health and safety of litigants. These administrative orders were in response to various gubernatorial executive orders, and instituted a number of protective measures for in-person and remote-representation of litigants, ranging from a complete suspension of Court appearances, to a gradual implementation of online filing platforms and virtual conferencing systems to allow actions and proceedings to move forward. Despite these measures, there remains a virtual standstill in Housing Court litigation, often to the sole detriment of landlords. While tenant advocates continue to oppose any re-opening of the Courts, they have now deployed new strategies to delay existing eviction proceedings in light of the pandemic. One such area affected by these delay tactics is the discovery phase of litigation.

Summary proceedings are designed to be expeditious, and parties to these proceedings are not automatically entitled to discovery. Instead, they must first obtain permission from the Court to conduct discovery.

Assuming that such a request is granted, the discovery provisions of the Civil Practice Law and Rules require "full disclosure of all matter material and necessary in the prosecution or defense of an action". These provisions are construed liberally by the Courts, who in turn exercise broad discretion in how discovery should proceed. Courts are reluctant to sanction a non-compliant party for its initial failure to disclose as legally required, with the remedies for such non-compliance often being characterized as "drastic". Although Courts become more inclined to invoke discovery sanctions for repeated non-compliance, their decisions turn upon a demonstration that a non-compliant party's conduct rises to the heightened level of "willful and contumacious". Nevertheless, the process of enforcing a party's right to conduct discovery can be both time-consuming and expensive.

A growing trend in discovery disputes centers around a party's refusal to appear for in-person depositions due to the "significant health risks" associated with contracting COVID-19. A non-appearing party now has the potential to derail a case's progression, transforming what should be an expedited proceeding into protracted litigation. A number of recent Supreme and Federal Court cases have addressed these discovery-related issues in light of the COVID-19 pandemic, and have held that even where the Court is unwilling to compel in-person depositions, it will compel virtual depositions upon a showing of "undue hardship".

Given the myriad impediments already affecting the prosecution of landlords' claims, a party's refusal to submit to, and a Court's reluctance to compel, in-person depositions should never serve as a roadblock to an adjudication of claims. If you are confronted with a similar situation, it is crucial to discuss your options with experienced counsel who will be able to assist you in enforcing your rights.

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The Risks of Improperly Documenting Tenant Rent Concessions and Other Incentives

BY LOGAN J. O'CONNOR

Residential rent concessions and other tenant incentives have always been valuable tools to New York City multifamily building owners to retain current tenants and attract new tenants. However, recent circumstances created by the Covid-19 pandemic have left owners looking for additional ways to create value for residential tenants. As a result, owners and property managers are getting more and more creative with their rent incentive programs.

It is important now, more than ever, that owners properly document rent concessions and/or other incentive offerings so that, as the Covid-19 pandemic ebbs, owners do not get stuck with improperly-documented rent concessions or other owner obligations for years to come. Before offering current or future residential tenants rent concessions or other incentives, owners should be aware of the consequences of each.

The most important distinction to note when it comes to a rent concession or other incentive is the legal regulatory status of the subject apartment. Even when an owner understands a residential unit to be fair market, savvy tenants are learning to challenge minor flaws in record keeping which relate to a unit's status. So, owners should first and foremost have a full understanding of the legal status of each residential unit in their buildings.

Owners of regulated buildings must tread very carefully and document accurately any offering of a rent reduction or other tenant incentive. Owners of fair market units may be subject to less limitation, for now, but should document properly any concession and be transparent with promotional offers.

When choosing which concession or other incentive to offer to tenants during this time, owners must be aware of the meaning, proper documentation thereof and consequences of each.

Preferential Rent

"Preferential rent" typically refers to a rent reduction granted to a rent-regulated residential tenant for the life of the tenancy.

Prior to enactment of the Housing Stability and Tenant Protection Act ("HSTPA") in June, 2019, owners could offer temporary preferential rents to rent-regulated tenants for incremental terms and then increase the rent back to the full legal rent upon renewal. However, when an owner now offers a preferential rent to a rent-regulated tenant, all rent increases upon renewal for that tenant must be based upon the preferential rent rather than the higher, legal regulated rent. It is not until that specific tenant vacates the regulated unit that the owner may rent the unit to a new tenant at the higher legal rent.

When documenting a preferential rent, owners must preserve the higher legal rent in the lease and a signed Preferential Rent Rider and in the annual DHCR rent registrations. If the higher legal rent is not so documented and preserved, owners will be stuck with the lower preferential rent. The preferential rent will then be deemed the new legal regulated rent.

Rent Concession

"Rent concession" typically refers to a temporary rent reduction which can be granted to either a rent-regulated or a fair market tenant.

A rent concession is frequently used to incentivize new tenants, often in the form of one or two months' free rent. According to DHCR guidance, a rent concession need not be continued upon renewal of a lease in the same way that a preferential rent must be.

However, when documenting a rent concession, it is very important to differentiate the temporary concession from a permanent preference. If it looks and smells like a preferential rent, but is simply called a "concession," this will not do the trick in the eyes of the Court or DHCR. A rent concession agreement must outline the exact amount of concession being offered and the time period when such concession will apply. An attempt to disguise a preferential rent as a rent concession will result in the owner being stuck with a permanent preferential rent.

Rent Deferral

"Rent deferral," in light of the current circumstances, typically refers to the temporary limited deferment of rent where a tenant has represented that he/she is unable to pay the full amount of monthly rent due to Covid-19. A rent deferral agreement may be offered to fair market tenants as well as rent-regulated tenants.

Documentation of a rent deferral agreement must be very specific and exact. Not only must the total deferred rent amount be made clear, but precise repayment terms must be outlined. Failure to do so will result in loss to the owner without an ability to regain such loss in Court.

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“Non-Monetary” Incentives

Many owners are now turning to non-monetary offerings to incentivize new tenants. Non-monetary incentives often include offers such as payment of a tenant’s moving costs, free laundry service, one-year gym membership, free parking, etc. Owners have been seeking out local businesses to create value for the tenant, local business owner, and building owner alike.

Owners must be very careful offering non-monetary incentives to tenants in rent-regulated buildings. The Rent Stabilization Code (“RSC”) obligates owners to maintain services provided to rent-regulated tenants. Thus, owners could become stuck having to continue to provide a rent-regulated tenant with free services for the duration of a tenant’s entire tenancy.

An exception to the RSC provides that a service provided to a tenant by an independent contractor pursuant to a contract or agreement with the owner at a separate cost or charge to the tenant (RSC 2520.6(r)(4)(xi)), will not be the owner’s obligation to maintain.

Therefore, unless an owner intends to continue providing the non-monetary incentive to the tenant for free through the duration of tenant’s tenancy, the documentation of the non-monetary incentive must be explicit.

The attorneys at BBG are available to further discuss tenant incentive packages available to you and how to properly record such incentives with new and current tenants alike. BBG does not endorse any one specific incentive method. It is important for owners to analyze tenant incentives on a case-by-case basis.

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Commercial Tenant’s Supreme Court Damages Action Against Landlord Dismissed Where Lease Did Not Require Landlord to Obtain Certificate of Occupancy

BY JEFFREY S. LEVINE

Disputes often arise between commercial landlords and tenants involving the issue of who is responsible for procuring a certificate of occupancy (“COO”) allowing for the intended use of the leased premises. Those disputes frequently also involve claims for damages resulting from the absence of a COO. Moreover, although the identification of responsibility for obtaining a COO is commonly expressed in the lease agreement, communications, actions and representations between the parties to the lease following its execution can, under certain limited circumstances, impact the effect of those expressed lease terms.

In a recent case, BBG represented a landlord that had been sued in Supreme Court by its retail tenant for several hundred thousand dollars in damages resulting from the absence of a COO for premises that had been leased for use as a restaurant. In the lawsuit, the tenant asserted that despite the fact that the lease required the tenant to obtain a COO, the landlord, not the tenant, had assumed the obligation because, following execution of the lease, the landlord orally represented to the tenant that it would assume the obligation. Further, the tenant asserted that the landlord had committed fraud by misrepresenting to the tenant that the premises could, at the time of lease execution, legally be utilized for a restaurant when, in fact, it could not. The causes of action in tenant’s complaint included, among others, breach of contract and fraudulent inducement.

The Supreme Court ultimately ruled in the landlord’s favor and dismissed all of the tenant’s claims. The Court found that the alleged oral representations by the landlord, both before and after execution of the lease, did not relieve the tenant of its obligation to obtain the COO because the lease expressly stated that oral representations by the parties could not modify the terms of the lease and pre-execution representations were barred by a “merger clause,” whereby all understandings and agreements had been “merged” into the lease. Thus, the provision of the lease that required the tenant to obtain a COO controlled. Further, the Court agreed with the landlord that it had not committed any fraud.

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The landlord had also argued, and the Court noted in its decision, that the lease contained an express provision stating that if the tenant had not obtained a COO by a specified date, the tenant could opt out of the lease and surrender possession of the premises to the landlord--which the tenant did not do. Thus, the lease provided for a very specific remedy that the parties had contemplated as the tenant's sole recourse in the event a COO had not been obtained.

After the tenant's case had been dismissed, the Court conducted an attorneys' fee hearing at which the landlord was awarded a monetary judgment against the tenant for the attorneys' fees incurred in successfully defending the lawsuit.

This case demonstrates the importance of carefully crafted lease provisions to cover issues that may arise with regard to obligations following lease execution. BBG's transactional and litigation departments work together to counsel owners in preparing commercial leases, managing the post-lease execution process, and handling any litigation that may ensue.

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DHCR Holds Public Hearing on Proposed MCI Reasonable Cost Schedule and MCI Waiver Applications

BY MARTIN HEISTEIN

On June 16, 2020, the New York State Division of Housing and Community Renewal ("DHCR") published Operational Bulletin 2020-1 which, among other things, declared that pursuant to the 2019 Housing Stability and Tenant Protection Act ("HSTPA") the DHCR must establish a schedule of reasonable costs for Major Capital Improvements ("MCI's") that set a ceiling for what can be recovered through a temporary MCI rent increase.

This was a major revision from the way MCI's were processed pre-HSTPA, in that owners were previously able to recover the full cost of the capital improvement, based upon their actual costs.

Under the HSTPA and pursuant to Operational Bulletin 2020-1, DHCR is now proposing that MCI rent increases be calculated based upon a standardized "reasonable cost" that DHCR has set forth in a proposed Reasonable Cost Schedule ("RCS") included in Operational Bulletin 2020-1. The Operational Bulletin states quite clearly that "only costs that are actual, reasonable, verifiable and eligible may be approved for a temporary MCI rent increase. The amount of costs that may be approved will be the lesser of either (i) the actual, verified amount spent and claimed by the owner, or (ii) the reasonable costs as detailed in the Schedule."

It is unclear how DHCR devised the RCS but it appears that one possible source for these numbers would be the schedule of costs promulgated by the New York City Department of Housing Preservation and Development ("HPD") regarding J-51 tax abatement applications. However, according to the Regulatory Impact Statement issued on the same day as the Operational Bulletin, it appears that DHCR also used its own staff with "experience in MCI processing" as a source in developing the RCS.

It remains to be seen what the final numbers will be when DHCR finalizes the RCS, which will occur after testimony is heard at the September 9 public hearing. However, the Operational Bulletin does provide for a waiver application procedure to DHCR from the RCS. The application for a waiver must demonstrate that (i) the claimed costs in the MCI application are priced higher than those costs listed in the RCS; and (ii) the costs are accurate and reasonable under the circumstances; or (iii) the use of the RCS costs will cause an undue hardship to the owner and that the actual costs for the improvements are appropriate to the interests of the owner, the tenants and the public.

An owner must request in writing a waiver of the cost figures set forth in the proposed RCS and must include several documents and certifications/affidavits demonstrating that the costs set forth in the MCI application are accurate and reasonable. Most importantly, the waiver application must be filed within 60 days of the promulgation of the RCS and related amendments to the rent regulations.

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So far, BBG has filed approximately 50 applications to DHCR seeking a waiver of the costs set forth in the proposed RCS.

If you would like to discuss the particulars of your MCI application and whether you might qualify for a waiver, please contact Martin Heistein.

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The "Fraud" Exception in *Regina*—Recent Applications by the First Department Seem to Conflict

BY MAGDA L. CRUZ

Housing deregulation and the setting of legal rents are areas of extensive litigation in New York City. The 2019 passage of the Housing Stability and Tenant Protection Act ("HSTPA") in which Part F amended Rent Stabilization Law § 26-516 and CPLR 213-a, governing claims of rent overcharge and the statute of limitations for bringing such claims, added further uncertainty into these areas of law. One provision with wide-ranging implications was that which allowed the entire rental history of an apartment to be examined, effectively eliminating any limit to exposure to rent overcharge liability, and potentially resulting in the re-regulation of apartments whose status could now be open to challenge.

In *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, the Court of Appeals issued a lengthy decision that held, on substantive due process grounds, that Part F of the HSTPA could not be applied retroactively, so that the law that was in effect before the passage of the HSTPA on June 14, 2019 was to control overcharge claims that pre-dated the HSTPA. Separately, the *Regina* Court also sought to clarify the issue of what rental history could be considered when determining a deregulation dispute and the legal base rent if the premises are ultimately found to be rent stabilized under pre-HSTPA law, which generally imposed a four-year statute of limitations. [2020 NY Slip Op 02127 (Ct. App. 4/2/20).] The *Regina* Court stated:

> Prior to the HSTPA, nothing in the rent stabilization scheme suggested that where an unrecoverable overcharge occurred before the base date, thus resulting in a higher base date rent, the four-year lookback rule operated differently. To the contrary, the limitations provisions—in order to promote repose—precluded consideration of overcharges prior to the recovery period (former RSL § 26-516[a][2]; former CPLR 213-a). [2020 NY Slip Op 02127 at *19.]

Significantly, the *Regina* Court recognized that "use of a potentially inflated base date rent, flowing from an overcharge predating the limitations and lookback period, was proper in the absence of fraud." The *Regina* Court also stated that "[l]ikewise, no exception is justified by the fact that the inflated base date rent … resulted from improper deregulation, as opposed to an improperly high increase to a stabilized rent." The *Regina* Court emphasized that "[t]he RSL makes no such distinction, and there is no indication that, under the pre-HSTPA law, an overcharge resulting from improper (but non-fraudulent) luxury deregulation warranted anything but the application of the standard lookback provisions." [2020 NY Slip Op 02127, at *19-*20.]

The *Regina* Court further opined that the "fraud" exception to the four-year limitations and lookback period was a narrow one:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations. [2020 NY Slip Op 02127, at *13.]

Since the decision in *Regina* was issued, the Appellate Division, First Department, has applied the ruling on a number of occasions. Significantly, in two decisions, issued on the same day (May 28, 2020), the Appellate Division reached opposite conclusions.

In *Corcoran v. Narrows Bayview Co., LLC*, 183 A.D.3d 511 (1st Dep't 2020), the Court held that despite an unlawful deregulation during a period when J-51 tax benefits were being received, and the absence of required registrations with DHCR or any notices given

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to the incoming tenants, the legal rent for the apartment was to be the rent charged on the four-year base date, even though that rent was a market rent.

The Court in *Corcoran* declined to apply any "fraud" exception to the four-year rule, as dictated by the *Regina* holding. Consequently, no overcharges or treble damages were awarded to the tenants.

The *Corcoran* Court stated:

> Given the lack of evidence that defendant engaged in fraud in deregulating the apartment, plaintiffs' claims for rent overcharge and to calculate the legal regulated rent are subject to a four-year look back period (see Matter of *Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, NY3d , 2020 NY Slip Op 02127 [2020]; CPLR 213-a).
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> The parties agree that the applicable base date is April 2006, four years prior to the April 2010 date of the complaint, and **we reject plaintiffs' suggestion that the lack of DHCR filings contemporaneous with the base date requires one to look beyond the four-year period to an *earlier* legal regulated rent reported in a DHCR filing**. This Court has held that "rental history," as that term is used in CPLR 213-a, is not restrained to DHCR records and may include the records of the landlord and the tenant (*Regina Metro. Co., LLC*, 164 A.D.3d 420, 427, 84 N.Y.S.3d 91 [1st Dept 2018], affd NY3d , 2020 NY Slip Op 02127). **Accordingly, the correct base rent is $2,000, which is the rent actually paid by the prior tenants in April 2006.**

The *Corcoran* Court then proceeded to apply all guideline increases to renewal terms that accrued after April 2006 – thus, refusing to impose any "rent freeze" for the absence of rent registrations and finding no basis for treble damages, and stated:

> The Court properly dismissed plaintiffs' claim for treble damages premised on the allegation that defendant willfully deregulated the apartment or violated rent laws by not filing annual regulated rent disclosures with DHCR. A finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*, where defendant followed DHCR's guidance when deregulating the unit (see *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398, 998 N.Y.S.2d 729, 23 N.E.3d 997 [2014]; *Regina Metro. Co., LLC*, 164 AD3d at 423), and plaintiffs failed to raise an issue of fact in this regard. Furthermore, **failure to timely file annual disclosures with the DHCR cannot support treble damages** (*see* Administrative Code of City of NY § 26-516[a]).

In contrast, the Appellate Division *did find* a basis to apply the "fraud" exception in *435 Central Park West Tenant Association v. Park Front Apts. LLC*, 183 A.D.3d 509 (1st Dep't 2020). In *Park Front*, apartments had been improperly treated as exempt from rent stabilization when the building exited a federal housing program. The tenants claimed "that the HUD rent in effect on the last day of federal oversight, April 11, 2011, was an illegal rent and thus could not be used as the initial legal regulated rent (base rent) to determine whether [owner] engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment." Unlike *Corcoran* (which also had claims of "illegal" rents during a period when the owner was out of compliance with the Rent Stabilization Law), in *Park Front*, the Appellate Division held that the tenants could challenge the legality of their four year base date rent by examining earlier rental history.

Significantly, in allowing the broader review, the Appellate Division seemed to go beyond the narrow definition of "fraud" in *Regina*. The Appellate Division made a point of rejecting the owner's argument that "fraud" could only occur in the context of a fraudulent scheme to deregulate:

> **We reject defendant landlord's argument that the fraudulent exception to the four-year lookback period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR** (*Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal* (2020 NY Slip Op 02127, *5; see also *Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 938 N.E.2d 924, 912 N.Y.S.2d 491 [2010]; *Thornton v. Baron*, 5 NY3d 175, 833 N.E.2d 261, 800 N.Y.S.2d 118 [2005]), and plaintiffs' recovery would be limited to those overcharges occurring during the four-year period immediately preceding plaintiffs' rent challenge.

By all measures, it appeared that the Court of Appeals in *Regina* sought to bring clarity to pre-HSTPA law on the loaded issues of housing deregulation and rent overcharge claims. The "fraud" exception was carefully defined in *Regina*. However, it would appear that the "fraud" exception may continue to defy narrow application, and is likely to be the subject of continuing litigation.

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Proposed New City Law Banning Criminal Background Checks for Housing Applicants A Disaster for Co-Ops, Apartment Subletters, Managing Agents and Brokers (...in addition to Landlords)

BY AARON SHMULEWITZ

A proposed law that has been introduced at the City Council would make it a discriminatory practice for any real estate broker or "landlord" to: (i) make a "criminal history inquiry" regarding a housing applicant, or (ii) take "adverse action" against a housing applicant for having been arrested or convicted of one or more criminal offenses.

The proposed law, known as Intro. 2047 (see the text **here**), would add criminal history as a prohibited ground of housing discrimination under the City's Human Rights Law. The proposed law would effectively bar housing providers and their agents from declining a housing application based on an applicant's actual criminal history—or even running a criminal background check on a housing applicant.

Of further concern, the definition of "landlord" in the proposed law—an "owner, lessor, sublessor, lessee, sublessee, assignee, mortgagee, vendee or managing agent … or other person having the right to sell, rent or lease, or approve the sale, rental or lease of a housing accommodation … or any other person, firm or corporation directly or indirectly in control of a dwelling"--is written broadly enough to include not only owners of rental apartment buildings, but also co-op Boards, co-op and condominium apartment owners wishing to lease out their apartments, and the buildings' management companies that process all such sale, leasing and subletting applications for such co-ops and condominiums. Real estate brokers, who normally participate in the background-check process, would also be prohibited from doing so.

The proposed law is part of a package of several "social justice" initiatives, and hearings were held on September 15 by the Council's Committee on General Welfare, and the Committee on Civil and Human Rights.

The proposed law would deprive co-op Boards and co-op and condo apartment owners (let alone owners of rental apartment buildings) from being able to exercise the common sense right to decide whether or not to lease an apartment, or to approve an apartment sale, lease or sublease, to a person with a criminal history.

The proposed law would have a disastrous impact on an already-weakened apartment market in a City going through unprecedented challenges, and should be opposed vigorously by co-op and condo Boards, apartment owners, and rental building owners. Please contact your City Councilperson to register your opposition to the bill.

Aaron Shmulewitz heads the Firm's co-op/condo practice, and can be reached at ***ashmulewitz@bbgllp.com****, or 212-867-4466, ext. 390*

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, extension 390, or (ashmulewitz@bbgllp.com).

MITCHELL-LAMA CO-OP'S FAILURE TO GIVE SHAREHOLDER REQUIRED NOTICE OF SURCHARGE BARS CO-OP FROM BRINGING NON-PAYMENT PROCEEDING BASED THEREON

Rochdale Village Inc. v. Richard
Civil Court, Queens County, Landlord & Tenant Part

CONDO SPONSOR CALCULATED MANDATORY RESERVE FUND CORRECTLY AT LOWER FIGURE, ENTITLED TO CREDIT CLAIMED, AND NOT LIABLE FOR ALLEGEDLY-DEFECTIVE WORK

Board of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner LLC
Supreme Court, New York County

COMMENT | This was a hands-down victory for the sponsor in a 2011 lawsuit over a 2007 conversion. How much in legal fees has this condo incurred over the 9-year history of the lawsuit? How many of the Board members who voted to bring suit in 2011 are still around?

HDFC CO-OP'S EVICTION PROCEEDING AGAINST UNAUTHORIZED SUBTENANTS IS BARRED DURING THE PENDENCY OF THEIR HOUSING DISCRIMINATION PROCEEDING AGAINST CO-OP

Cooper Square Mutual Housing Association II HDFC v. Mumford
Appellate Term, 1st Department

COMMENT | This ruling serves to encourage the filing of discrimination proceedings as an offensive weapon to stop the clock on eviction litigation.

CONDO UNIT OWNERS' CHALLENGE TO BYLAW AMENDMENTS ADOPTED BY BOARD IN 2015 IS TIME-BARRED

Gharai v. Board of Managers of The Atelier Condominium
Supreme Court, New York County

COMMENT | Such a suit must be brought within four months after the act occurred. A timely challenge likely would have succeeded. Watch the clock!

FOUR FIRES IN APARTMENT IN ONE 24-HOUR PERIOD IS ONE INCIDENT, NOT A PATTERN, AND INSUFFICIENT TO CONSTITUTE A NUISANCE WARRANTING EVICTION

Riverbay Corp. v. Scott
Civil Court, Bronx County, Landlord & Tenant Part

COMMENT | This decision defies logic. Query which reflects a more potentially hazardous situation—one fire a day for four days, or four fires in one day.

CO-OP SHAREHOLDER CAN SUE CO-OP FOR TAKING OF A 9-SQUARE FOOT AREA ADJACENT TO APARTMENT

Fellner v. 40 East 88 Owners, Inc.
Supreme Court, New York County

COMMENT | The co-op apparently planned to use that space for a building-wide electrical upgrade, not an uncommon occurrence. At least two years of hard-fought litigation over 9 square feet…

CO-OP SHAREHOLDER ENTITLED TO UNPAID RENT, ATTORNEY FEES, AND MOVING & STORAGE COSTS REIMBURSEMENT FROM HOLDOVER SUBTENANT

Traska v. Helm
Supreme Court, New York County

COMMENT | This was apparently the subtenant from hell. The shareholder was seeking to enforce two prior stipulations to vacate.

HDFC CO-OP CANNOT EVICT SHAREHOLDER FOR SERIAL SUBLETTING

Clinton 510 Owners HDFC Inc. v. DiPietro
Civil Court, New York County, Landlord & Tenant Part

COMMENT | The co-op's procedural defect—not inviting the shareholder to attend the meeting at which the termination of his proprietary lease would be voted upon—-deprived the co-op of the protections afforded under the Pullman decision and the business

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judgment rule. The Court also alluded to some bad faith conduct on the part of the Board. Optics matter.

CONDO UNIT OWNER CANNOT BAR ACCESS BY CONDO TO LIMITED COMMON ELEMENT ROOF DECK TO SERVICE ALL UNITS' HVAC EQUIPMENT

Board of Managers of Carriage House Condominium v. Healy
Supreme Court, New York County

COMMENT | The Court analyzed the requisite factors to grant an injunction. The Court also found bad faith by the recalcitrant Unit Owner.

CO-OP SHAREHOLDER CAN INTERVENE IN MECHANICS LIEN FORECLOSURE ACTION BY HIS CONTRACTOR AGAINST CO-OP

The I. Grace Company v. The 740 Corporation
Supreme Court, New York County

COMMENT | In the interests of full disclosure, BBG is general counsel to this co-op, but not involved in this case.

SHAREHOLDER'S TRESPASS CLAIM AGAINST CO-OP DISMISSED; CO-OP GAVE SUFFICIENT NOTICE OF ENTRY TO MAKE NECESSARY REPAIRS

Salvator v. 55 Residents Corp.
Supreme Court, New York County

COMMENT | All claims against the managing agent were also dismissed. (BBG is general counsel to this co-op too, but not involved in this case.)

CONDO MUST DISCLOSE DETAILS OF SETTLEMENTS TO REMAINING DEFENDANTS

The Board of Managers of 325 Fifth Avenue Condominium v. Continental Residential Holdings LLC
Supreme Court, New York County

COMMENT | The Court stated that amounts received in such settlements are material and necessary information, and thus subject to disclosure to other defendants.

CONDO BOARD ENTITLED TO JUDGMENT OF FORECLOSURE AGAINST DEFAULTING UNIT OWNER, AND APPOINTMENT OF REFEREE

Board of Managers of The 4260 Broadway Condominium v. Veloz
Supreme Court, New York County

CONSENT JUDGMENT IN FEDERAL GOVERNMENT FORFEITURE ACTION EXTINGUISHES CONDO RIGHT OF FIRST REFUSAL; GOVERNMENT FREE TO SELL APARTMENT AT PRICE WELL BELOW-MARKET

United States v. Real Property Located in New York
United States District Court, Central District of California

COMMENT | The Board apparently had been a party to the consent judgment to authorize a sale, but then apparently had second thoughts based on the price at which the apartment was offered, and tried to buy the apartment itself pursuant to the right of first refusal.

BBG In The News

Founding partner **Sherwin Belkin** was quoted in *The Real Deal* on July 2 in an article discussing a conflict between a recent Court decision and an Executive Order on evictions, and the impact the conflict might have on owners' ability to conduct evictions: **Read article** here, and on August 12, decrying the manner in which Housing Court cases are being permitted to commence and proceed: **Read article** here. **Mr. Belkin** was also quoted in a July 4 article in *The New York Times* on the possibility of an increased number of nationwide evictions: **Read article** here, and in a July 27 article in *The City* on the possibility that increased vacancy levels could negate the "housing emergency" underpinning for rent regulation: **Read article** here. **Mr. Belkin** will also be a panelist on the New York Multifamily Summit Online Conference on October 9, which is organized by Greenpearl and co-sponsored by the Firm: **Watch** here.

Litigation Department head **Jeffrey L. Goldman** was quoted in an August 3 article in *The Commercial Observer* decrying the delays in reopening Housing Court to full operational capacity, and the adverse impact of those delays on owners: **Read article** here. **Mr. Goldman** was also quoted in an August 5 article in *The Real Deal* discussing an important Court victory obtained by him and Litigation Department partner **Scott Loffredo** on behalf of an affiliate of Firm client The Moinian Group, defeating a commercial tenant's reliance on Executive Orders banning gatherings as excusing the tenant's performance under its lease: **Read article** here.

A lawsuit filed by Litigation Department partner **David M. Skaller** on behalf of Firm client Vornado Realty Trust against Elie Tahari for breach of a lease for midtown commercial space was the subject of a September 3 article in *The Real Deal*: **Read article** here.

Administrative Law department co-head **Martin Heistein** and Litigation Department partner **Martin Meltzer** gave a July 20 in-house Training Seminar on the latest issues regarding rent regulation and Housing Court procedures, to approximately 40 managing agents at the Bozzuto Organization. **Mr. Heistein** was also quoted in a September 14 article in *The Real Deal*, critiquing reasonable cost limits for MCI increases proposed by DHCR: **Read article** here.

Administrative Law department co-head **Kara Rakowski** was a presenter in a webinar on "Fair Housing Compliance" sponsored by Community Housing Improvement Program (CHIP) on September 30.

Transactional Department partner **Craig L. Price** was quoted in a July 27 article in *Brick Underground* on the increasing frequency of "rent-to-buy" deals: **Read article** here. **Mr. Price** was also a panelist in a July 30 seminar presented by Brooklyn Law School entitled "Real Estate Roundtable: Starting or Reinvigorating a Real Estate Legal Career in 2020 and Beyond".

Litigation Department partner **Matthew Brett** was quoted in an August 20 article in *law360.com* on owners' litigation alternatives to Housing Court in seeking to enforce tenant rent payment obligations: **Read article** here, and in an August 27 article in the same publication discussing the anticipated resumption of eviction cases in New York City: **Read article** here.

Transactional Department partner **Stephen M. Tretola** was a presenter in a July 1 roundtable discussion entitled "Legal Issues Facing Landlords During COVID" sponsored by Firm client Muss Development.

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