Belkin • Burden • Goldman, LLP
BBG UPDATE

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Inside This Issue

Partner Lisa M. Gallaudet, Lead Loft Law Counsel at Belkin Burden Goldman LLP, Passes Away After Battle with Leukemia

Lisa M. Gallaudet, who has been an attorney at the law firm Belkin Burden Goldman LLP since 2010, passed away on June 17, 2021 at the age of 42 after a courageous battle with leukemia.

Over her decade long career with the Firm, Lisa cemented a reputation as trusted advisor to some of the top New York City real estate clients and was the lead trial counsel in the Firm's Loft Law Practice. She was recognized as a Super Lawyer, Rising Star, and founding member of Community for Improving Residential Conversions of Lofts.

Lisa M. Gallaudet grew up in Brick Township New Jersey before moving to Brooklyn about 20 years ago. She graduated from Seton Hall University in 2001 and earned her Juris Doctor from Villanova University in 2004. Lisa's legal career preceding her tenure at BBG included positions in the Manhattan District Attorney's Office and as an attorney in the New York City Law Department. She was a member of the American Bar Association and the New York County Lawyers Association.

Outside of the office, Lisa was an avid runner, a talented photographer, a world traveler, and she loved music and surfing. She also actively supported Kids in Need of Defense (KIND), where she represented minor unaccompanied immigrants on a pro bono basis. In 2019, Lisa was recognized as KIND Pro Bono Attorney of the Year. Additionally, she lectured at the New York Multi-Family Summit and has taught Continuing Legal Education courses on New York Loft Law.

Lisa was an exceptional person, a beloved friend and colleague, and an invaluable attorney who will be profoundly missed. Lisa is survived by her parents, Kenneth and Patricia Gallaudet; two brothers, Keith and Dan; her sister-in-law, Amy; nephews, Tristan and Chase; and nieces, Abbey, Gillian and Maura.

In lieu of gifts, the family kindly asks to send donations in her memory to **Kids in Need of Defense** or the **Acute Lymphoblastic Leukemia Foundation**.

The Covid-19 Emergency Rental Assistance Program ("ERAP")

BY MARTIN HEISTEIN

The Covid-19 Emergency Rental Assistance Program of 2021, or "ERAP", is a dedicated fund for the payment of rental arrears owed by eligible tenants who were unable to make rental payments during the Covid-19 pandemic. Last month, it was announced that the State Office of Temporary and Disability Assistance ("OTDA") will begin accepting applications from eligible tenants, and building owners who apply on behalf of their tenants, commencing on June 1, 2021.

Renters and Owners must apply online using the **OTDA portal**.

Rent is not cancelled. Rather, it is being paid for by a nearly $2.4 billion fund for New York State from the Federal government, with monies allocated for this express purpose from the Consolidated Appropriations Act of 2021 and the American Rescue Plan Act of 2021.

The fund will cover up to 12 months of rental arrears plus up to three months of prospective rent. The program can also pay for up to 12 months of overdue electric or gas bills. Payments will be issued directly to the building owner or the utility provider. However, prospective rent payments are only available to "rent burdened households", defined as households that pay 30% or more of their gross monthly income in rent.

There are still many unanswered questions as to how this program will be administered, but, initially, the OTDA website currently indicates as follows:

Tenants who apply for rental assistance must upload the following documents to the portal:

- Personal identification for all household members (passport, driver's license, birth certificate, government issued ID, etc.);
- Social Security number (Individuals do not need to have a lawful immigration status in order to qualify);
- Proof of rental amount (signed lease, cancelled checks; rent receipt, etc);
- Proof of residency/occupancy (signed lease, utility bill, school records, bank statement, insurance bill or driver's license);
- Proof of income to demonstrate income eligibility under the program (documents demonstrating monthly income, such as pay stubs OR documents setting forth annual income for 2020 such as a W-2 tax form or filed income tax return OR self-attestation of income, under certain circumstances).

The tenant will also need to attest that on or after March 13, 2020, a member of the household received unemployment benefits or experienced a reduction in household income caused by the Covid-19 pandemic.

Owners may also file an application for relief under ERAP on behalf of their tenants. If submitted by the building owner, the owner must obtain the tenant's consent by signature on the application. Should any payments be received, the owner is required to apply the funds to that particular tenant's rent arrears.

The owner will need to submit the following:

- A completed W-9 tax form;
- A copy of the tenant's executed lease or other documentation showing the last full monthly rent payment made by the tenant;
- A rent ledger demonstrating the total amount of rent due and owing;
- Banking information for the owner to be used for the direct deposit of funds

When the owner accepts payment for rent under the program, acceptance of the payment constitutes an agreement that:

- The payment satisfies the tenant's full rental obligation for the period covered by the payment;
- No late fees may be charged for that payment;
- The monthly rent is frozen at the current rate and there can be no rent increase for a year;
- No eviction by reason of an expired lease or holdover tenancy can occur for one year after receipt of payment. There is an exception if the building contains four or fewer units and the owner or immediate family intend to immediately occupy the unit as their primary residence, and
- The owner must notify tenant of these protections.

Eligibility

Immigration status is not a barrier to eligibility. Full-time college students who are listed as dependents are not eligible. Once applications are available from OTDA, for the first 30 days, up to 65% of the funds will be available for NYC and at least 35% will be made available to localities outside NYC. Also during those first 30 days, the funds will be allocated first to priority

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tenants as defined in the statute (described further below). After 30 days, money will be allocated on a rolling basis.

The applicable Federal statute states that the highest priority is to be given to households earning up to 50% AMI and have one or more individuals who are unemployed as of the date of application and have been unemployed for at least ninety (90) days. The New York State statute added additional priority groups as follows:

- Mobile home tenants;
- Households with at least one individual from a "vulnerable population", i.e. domestic violence or human trafficking victim or veteran;
- Households with a pending eviction proceeding;
- Households from communities disproportionately impacted by Covid-19 as established by OTDA regulations;
- Household resides in a dwelling consisting of 20 or fewer units.

OTDA is to establish procedures for determining eligibility and what information should be provided by households applying for assistance. The State statute provides that such procedures should ensure flexibility when determining acceptable documentation and will allow for self-attestation.

A property owner has certain obligations while the application is under review:

- The owner cannot bring an eviction proceeding based upon the expiration of the lease or the nonpayment of rent until the application for benefits has been determined; and
- If proceedings have been started, the proceedings cannot be continued until the application for benefits has been determined.

All other obligations under the lease remain. An owner may still commence an eviction proceeding based upon a violation of the lease or tenancy or due to a tenant's nuisance conduct. A tenant has the right to submit proof of receipt of payment of benefits in a legal proceeding, creating a presumption that the rent or utility has been paid for the payment period. Then the burden shifts to the owner to prove that payment was not, in fact, made.

There are still many open issues left unanswered and OTDA is still attempting to work out the problems with the program. For example, if an owner owns multiple buildings, the application will not allow the same email address to be used in completing the application. OTDA is suggesting that owners create a separate unique email address for each building.

In addition, there is much confusion as to when the application is "deemed submitted". And, until the application is deemed to be complete, the funds will not be released.

OTDA has not yet fully promulgated all of the regulations as to how this program will be administered and there are many more questions left unanswered. BBG will be closely following this program and will be sending out updates on future developments.

If you would like to discuss the particulars of the application and whether you or your tenants might qualify, please contact Martin Heistein, co-head of BBG's Administrative Department, at ***mheistein@bbgllp.com*** *or 212-867-4466 ext. 314.*

Navigating the Rent Freeze and Collection of Other Charges During the Covid-19 ERAP Period

BY LOGAN O'CONNOR

On June 1, 2021, the New York State Office of Temporary Disability Assistance opened the online application process for the Covid-19 Emergency Rental Assistance Program of 2021 ("ERAP"). The purpose of ERAP is to provide economic relief to low and moderate-income tenants who have been unable to pay rent due to the Covid-19 pandemic.

As discussed more fully in another article in this newsletter, ERAP funding is to be used to pay tenants' rental arrears accrued on or after March 13, 2020, up to three additional months of prospective rent under certain conditions, and up to twelve additional months of utility charge arrears accrued by tenants on or after March 13, 2020. ERAP funding may not be applied to rental arrears accrued prior to March 13, 2020.

While this long-awaited relief is beneficial to both tenants and owners, owners must be aware of the effects of accepting ERAP funds to cover arrears payments.

One condition to accepting ERAP payments is that owners must waive any late fees that had accrued on rent arrears which the ERAP payment covers. Owners must notify tenants of this protection.

Another condition to an owner's acceptance of ERAP payments is that an owner cannot evict a tenant on behalf of whom ERAP payments are being made due to an expired lease or holdover situation during the twelve-month period following the first ERAP payment (the "ERAP Payment Period"). Owners must also notify tenants of this protection. The only exception to this condition is if the building contains four or fewer units and the owner or owner's immediate family member intends to immediately occupy the unit for use as a primary residence.

Further, a tenant's rent will be frozen at the amount due on the date the first ERAP rental assistance payment is received by an owner, and remain frozen throughout the ERAP Payment Period. During this time, owners may not increase a tenant's monthly rent.

However, in the event that any rent increase would otherwise be due during the ERAP Payment Period pursuant to the Rent Stabilization Law of 1969 or the Emergency Tenant Protection Act of 1974, the legal rent is *not* automatically frozen; only the collectible rent is. Any legal rent increase that would otherwise occur during the ERAP Payment Period should be preserved in the tenant's lease and reflected on monthly rent invoices. While an increased legal rent might not be collectible during the ERAP Payment Period, the increased legal rent should be collectible as soon as the ERAP Payment Period ends, so long as it has been properly preserved in writing. Tenants' monthly invoices should reflect clearly the increased legal rent, and should advise tenants that the full increased legal rent will be due, prospectively, upon expiration of the ERAP Payment Period.

Separate charges are not deemed rent, and are thus not restricted under ERAP. An example would be the §421-a 2.2% surcharge, which should be collectible before, during and after any ERAP Payment Period. Such a separate charge should be clearly identified in a tenant's lease and an appropriate rider thereto.

Moreover, owners should note in all lease documents and tenant correspondence that rent increases resulting from major capital improvements ("MCI's") which are granted during the term of the ERAP Payment Period may be charged and collected. It is still unclear if the legislature intended to include MCI rent increases in the ERAP rent freezes but the ability to collect such MCI increases should be preserved in writing nonetheless, just in case.

It is strongly recommended that owners notify tenants of the ERAP application as early as possible and collaborate closely with tenants in the submission thereof. ERAP applications may be submitted by owners on behalf of tenants, but several pieces of personal tenant information and documentation are necessary, including the tenant's date of birth, gender, primary language, race, ethnicity, social security number and employment status. Finally, even if an owner prepares and submits the ERAP application, a tenant certification must still be signed.

Logan O'Connor is an associate in BBG's Administrative Department, and can be reached at ***loconnor@bbgllp.com*** *or 212-867-4466 ext. 365.*

Court Affirms Dismissal of Class Action Lawsuit Alleging *Per Se* Fraud for Erroneous Deregulation Post-*Roberts*

BY MAGDA L. CRUZ AND SCOTT F. LOFFREDO

In *Gridley v. Turnbury Village, LLC*, 2021 NY Slip Op 03577 (App. Div. 2d Dept. June 9, 2021), the Appellate Division, Second Department issued a significant ruling in the ongoing controversial landscape of what conduct constitutes "fraud" when apartments have been improperly deregulated, or not promptly re-regulated, after the Court of Appeals 2009 decision in *Roberts v. Tishman Speyer Props.*

The Appellate Division concluded that while an owner's post-Roberts deregulation of an apartment and/or failure to promptly re-register an apartment as rent stabilized *could* constitute evidence of fraud when viewed in the context of other specific evidence of fraudulent conduct, the mere fact that the class representative's apartment was rented post-*Roberts* as a market-rate apartment while the building was receiving J-51 tax benefits was not alone sufficient to establish that the owner committed fraud.

The lower Court decision, which had denied class certification and had dismissed the action, was unanimously affirmed.

The case involved a 95-unit apartment building in Jackson Heights, Queens, that began receiving J-51 tax benefits in 2008. As vacancies occurred, the owner deregulated apartments based on high rent vacancy deregulation under the Rent Stabilization Law. The owner continued this practice until 2016 when the New York State Division of Housing and Community Renewal issued its "J-51 Initiative," predicated on *Roberts*, notifying owners of the need to register apartments as rent stabilized if the building was receiving, or had received, J-51 tax benefits and if tenants in occupancy during the J-51 period were still in occupancy. The owner promptly complied with the J-51 Initiative and issued rent stabilized leases to all affected tenants, but did not make adjustments to the rents because they typically fell below legal rent levels given the market conditions in the Jackson Heights area.

In 2019, notwithstanding having had his tenancy corrected as rent stabilized, and never having been overcharged, tenant Gridley (who had first moved into his apartment as a free-market tenant in 2015), sued the owner, alleging that the failure to register his apartment as rent-stabilized with the DHCR in the years prior to 2016 was part of a fraudulent scheme to deregulate the apartments in the building. The plaintiff sought class action certification and alleged that he and other members of his class had suffered damages in the form of rent overcharges because the rents should have been reset under the Rent Stabilization Code's default formula.

The tenant's theory was one of *per se* fraud–he claimed that the owner should have re-regulated all of the apartments shortly after the *Roberts* decision, which, he claimed, put owners on notice that receipt of J-51 tax benefits barred deregulation.

The tenant claimed that deregulations after *Roberts*, coupled with the failure to promptly re-register the apartments with DHCR, were in and of themselves sufficient to demonstrate "fraud" as a matter of law, without the need to proffer any evidence of the legal elements of a fraud claim–a representation of material fact, falsity, scienter, reliance and injury.

This *per se* theory was rejected by the Appellate Division in *Gridley*.

The Appellate Division also emphasized that there was no evidence that the tenant was overcharged since, admittedly, the rents he paid were below legal rent levels. The Court made clear that there must be some evidence of actual injury before a cause of action for fraud can be sustained.

Gridley v. Turnbury Village, LLC serves as an important indicator of how the Second Department may decide rent overcharge claims which stem from the aftermath of the *Roberts* decision. True to the Court of Appeals' expressed intent in the seminal 2020 holding in Matter of *Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, where issues of deregulation and overcharge fraud were determined, the *Gridley* Court recognized that a proponent of a fraud claim has a high burden of proof in class action litigation.

Magda L. Cruz is a partner specializing in appellate litigation and can be reached at ***mcruz@bbgllp.com*** *or 212-867-4466 ext. 326. Scott F. Loffredo is a partner in the Litigation Department and can be reached at* ***sloffredo@bbgllp.com*** *or 212-867-4466 ext. 381.*

They are available to assist if you would like guidance or advice on the impact of this decision and others on ongoing litigations in the Supreme Court and appellate courts.

BBG In The News

Founding partner **Sherwin Belkin** was quoted in a May 17 article in *The Real Deal* that examined the current status, and the prognosis, of various legal challenges by owners to the HSTPA: **Read article here**, and in a June 23 article in the same publication commenting on DHCR's denial of an owner's right to demolish a building occupied by a single rent-stabilized tenant: **Read article here**.

Martin Meltzer, head of the Firm's non-payment practice, was quoted in a June 24 article in *The Real Deal* on the CDC's extension of the eviction moratorium through July: **Read article here**.

Litigation Department partner **David M. Skaller** was a guest lecturer on March 30 in a class of a Fordham Law School course entitled *Residential Landlord Tenant Law*, on the topic of holdover proceedings. **Mr. Skaller** was also quoted in an April 12 article in *brickunderground.com* on the right of a townhouse owner to rent out rooms: **Read article here**.

Aaron Shmulewitz, head of the Firm's co-op/condo practice, was quoted in a June 15 article in *brickunderground.com* on apartment swapping: **Read article here**.

Kara I. Rakowski, co-head of the Firm's Administrative Law Department, was quoted in a May 26 article in *EQ*. magazine, decrying pending legislation that would eliminate the 421-a tax abatement program: **Read article here**.

Partners **Sherwin Belkin**, **Jeffrey Goldman**, **Craig Price**, **Kara Rakowski**, **Noelle Picone** and **Diana Strasburg** were acknowledged for their assistance, in a new book entitled *Selling Your Townhouse*, authored by Firm clients Dexter Guerrieri and Jav van den Berg Ordway.

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**.

COMMERCIAL CONDO UNIT OWNER CAN SUE CONDO FOR MOLD AND WATER DAMAGE

Sagacious Minds, Inc. v. Board of Managers of The Brighton Tower II Condominium

Supreme Court, Kings County

COMMENT | The Court rejected the Condominium's various technical and jurisdictional arguments.

SHAREHOLDER CAN SUE CO-OP BOARD FOR BREACH OF ROOFTOP AIR CONDITIONER LICENSE AGREEMENT IN NOT ALLOWING REPLACEMENT UNIT

Stolzman v. 210 Riverside Tenants, Inc.

Supreme Court, New York County

COMMENT | The Court granted the co-op's motion to dismiss the shareholder's other causes of action.

FAILED CONDO PURCHASER CAN SUE BOARD FOR TORTIOUS INTERFERENCE WITH CONTRACT

Tumayeva v. Oceana Condominium No. Two

Supreme Court, Kings County

COMMENT | The evidence showed that the Board president lived below this apartment and apparently did not want children living there.

CONDO NOT OBLIGATED TO ARBITRATE DISPUTE UNDER CONDO'S BYLAWS

Board of Managers of The 825 West End Condominium v. Grunstein

Appellate Division, 1st Dept.

CONDO CAN FORECLOSE ON LIEN FOR UNPAID ASSESSMENTS BY SPONSOR ON UNSOLD UNITS

Bowery 263 Condominium Inc. v. D.N.P. 336 Convent Avenue LLC

Supreme Court, New York County

COMMENT | The Court rejected the sponsor's rote affirmative defenses.

CO-OP LIABLE TO HOLDER OF UNSOLD SHARES FOR REFUSING TO PERMIT TRANSFER OF OWNERSHIP TO PURCHASER

144-80 Realty Associates v. 144-80 Sanford Apartment Corp.

Appellate Division, 2d Dept.

COMMENT | Apparently, the co-op never advanced any real reason for refusing to permit the transfer.

HOLDER OF UNSOLD SHARES IS EXEMPT FROM CO-OP'S SUBLETTING RESTRICTIONS AND FEES

Dunnegan v. 220 East 54th Street Owners, Inc.

United States District Court, SDNY

COMMENT | The Court agreed with a recent New York State Court decision that had limited the holding in Pastena, thus restoring privileged status to Holders of Unsold Shares.

CO-OP SHAREHOLDER NOT ENTITLED TO PRELIMINARY INJUNCTION ORDERING CO-OP TO ABATE ASBESTOS IN APARTMENT

Real World Holdings LLC v. 393 West Broadway Corporation

Supreme Court, New York County

COMMENT | The Court held that such an injunction would be the ultimate relief sought, and that the shareholder had not proven a likelihood of success since it did not prove that the co-op was the cause of the asbestos presence.

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QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT FOR CO-OP IN SEEKING DISMISSAL OF PERSONAL INJURY SUIT BY CONTRACTOR'S EMPLOYEE

Shala v. Park Regis Apartment Corporation

Appellate Division, 1st Dept.

COMMENT | Boards should ensure that shareholder alteration agreements are signed, and their contractors' insurance is in order. Full disclosure—BBG is general counsel to this co-op, although not involved in this litigation.

TENANT ENJOINED TO WEAR MASK, STOP SMOKING, AND STOP ALLOWING DOG TO ROAM FREELY AND SOIL BUILDING AREAS

19 India Fee Owner LLC v. Miller

Supreme Court, Kings County

COMMENT | Although involving a rental building, this case is instructive. The Court found irreparable injury to the landlord in the absence of such injunctive relief. Multiple affidavits by staff and neighbors were crucial.

CONDO BOARD CAN SUE MANAGING AGENT FOR BREACH OF FIDUCIARY DUTY

Board of Managers of Brightwater Towers Condominium v. FirstService Residential New York Inc.

Appellate Division, 2nd Dept.

ACCESS LICENSE TO ADJOINING BUILDING SHOULD NOT HAVE BEEN GRANTED WITHOUT COMPENSATION TO AFFECTED BUILDING OWNER

400 E57 Fee Owner LLC v. 405 East 56th Street LLC

Appellate Division, 1st Dept.

COMMENT | Not-uncommonly, access here required shutting down residents' use of their terraces.

CONDO ENTITLED TO ATTORNEYS FEES FROM UNIT OWNER USING APARTMENT AS ILLEGAL TIMESHARE

Board of Managers of The Peregrine Tower Condominium v. NYC 2014 LLC

Appellate Division, 1st Dept.

COMMENT | The Court relied on the ECB's finding of a long-standing illegal use. BBG represented the victorious condo.

LONG-TERM CO-OP MASTER COMMERCIAL LEASE UPHELD FOR TENANT, DESPITE CO-OP'S EFFORTS TO INVALIDATE IT

Courtview Owners Corp. v. Courtview Holding, B.V.

Appellate Division, 2d Dept.

COMMENT | The validity of the lease continues a huge financial benefit to the master tenant. BBG represented the victorious tenant.

SPONSOR PRINCIPAL CONVERTED SPONSOR FUNDS THAT SHOULD HAVE PAID CONDO COMMON CHARGES AND ASSESSMENTS ON UNSOLD UNITS

Cedro LLC v. Axia Realty, LLC

Appellate Division, 1st Dept.

COMMENT | The other condo Unit Owners sued the sponsor and its principal. She claimed that she took the money to prevent her fellow principal from misappropriating it.

CONDO CANNOT FORECLOSE ON LIEN FOR UNPAID FINE AMOUNTS

Board of Managers of The Silk Building Condominium v. Crafa

Supreme Court, New York County

COMMENT | The Court held that the condo had failed to establish the reliability of its fine calculation method.

SPONSOR PRINCIPALS BREACHED FIDUCIARY AND OTHER DUTIES TO CONDO UNIT OWNERS BY FAILING TO HOLD ELECTIONS, RETAINING MAJORITY BOARD CONTROL, HIRING SPONSOR AFFILIATE AS MANAGING AGENT, AND NOT HAVING AUDITED FINANCIAL STATEMENTS

Tsui v. Chou

Supreme Court, New York County

COMMENT | In an example of rough and ready justice, the Court ordered a new election, limited sponsor seats, terminated the management agreement, and awarded attorneys fees to the Unit Owners.

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CO-OP SHAREHOLDER'S BANKRUPTCY FILING DISMISSED

Lippman v. Big Six Towers, Inc.

United States District Court, EDNY

COMMENT | The Court held that the shareholder had failed to satisfy the requirements of the Bankruptcy Code in this long-standing series of litigations.

LANDLORD NOT LIABLE TO TENANT FOR CLAIMS OF HARASSMENT BY FELLOW TENANT

Edstrom v. St. Nicks Alliance Corp.

Appellate Division, 1st Dept.

COMMENT | Although involving a rental building, this case is instructive. The Court held that the landlord exercised no control over the alleged harasser or over the context in which the harassment allegedly occurred.

CONDO GRANTED SUMMARY JUDGMENT ON CLAIM FOR COMMON CHARGE ARREARS BY UNIT OWNER, AND LEGAL FEES

Board of Managers of The Normandie Condominium v. Lenox NY LLC

Supreme Court, New York County

COMMENT | Summary judgment was granted on the issue of liability, with an inquest ordered to determine the amount due.

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