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UPDATE

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Inside This Issue

BBG Mourns Death of Founding Partner, Joseph Burden

Joseph Burden, one of the founding Partners of Belkin Burden Goldman, LLP, passed away peacefully on August 24, 2021 at the age of 71. Joseph was an embodiment of the Firm, which was founded in 1989. His dedication helped build one of the most highly regarded real estate law firms in New York City.

During his professional career he was a go-to lawyer for complicated real estate matters, and became one of the City's foremost experts on the loft law, as it was created and expanded. He graduated from SUNY at Stony Brook in 1971 and earned his Juris Doctor from the University of Buffalo in 1974. He was admitted to practice in both New York and Illinois, and was a member of the American Bar Association and the New York County Lawyers Association.

He grew up in Little Neck, Queens, and was a resident of Long Beach, long time prior resident of Port Washington, and was a member of Lawrence Yacht and Country Club.

Outside of the office, Joseph was an avid competitor, playing golf, pickle ball and squash, among many other sports. He was also an active member of Interfaith Nutrition Network, where he volunteered his time on a weekly basis to assist those challenged by hunger, homelessness, and profound poverty.

Joe was an amazing person, well respected adversary, beloved friend and colleague, and an invaluable counsel to so many who relied on his advice and advocacy. He will be missed unconditionally. The Firm sends its most heartfelt condolences and sympathy to his wife June, sisters Elyse and Helene, children Matt and Erica, and their extended family, friends, and coworkers.

In lieu of gifts, the family kindly asks to send donations in his memory to **The Interfaith Nutrition Network**. In addition, please feel free to leave a memory for the family **here**.

Illegal Use, Ancillary Services, and How to Avoid a Rent Freeze

BY SAMUEL MARCHESE

Rent Stabilization Code ("RSC") §2520.6(r)(3) defines "ancillary services" as that space or those required services not contained within the individual housing accommodation, which the owner was providing on the applicable base dates, and any additional space and services provided or required to be provided thereafter by applicable law.

A recurring issue for many owners of rent-regulated buildings is when the New York State Division of Housing and Community Renewal ("DHCR") determines that a tenant's illegal use of a service becomes a required ancillary service that an owner is then required to continue prospectively.

DHCR has determined that although a service is illegally used by a tenant, it is within DHCR's purview to determine that such service is a required ancillary service under the rent regulations. *In the Matter of Stahl York Avenue Co.*, LLC, DHCR Admin. Rev. Dckt. No.: FV-430004-RO (10/10/2019).

The issue of what may constitute a required ancillary service presents a factual issue, which must be determined based upon the totality of the circumstances. *In the Matter of 2025 Continental Avenue*, DHCR Admin. Rev. Dckt. No.: AR-610008-RO (01/31/2013).

In that case, DHCR found that where an owner permits a tenant's long-term continued use of a service, that service becomes a required service.

DHCR has even gone so far as to determine that, even if a violation is issued by a government agency with regard to a building service, in order to compensate the tenant for loss of service enjoyed by the tenant for many years, the tenant's rent was to be permanently reduced by a monthly abatement. *In the Matter of EDJ Realty*, DHCR Admin. Rev. Dckt. No.: HW-610001-RO (04/16/2021). Moreover, when the violation is remediated, the removal of the service does not serve as a waiver of any rights that are afforded to a tenant under the rent laws. *In the Matter of 169 Hester Street*, DHCR Admin. Rev. Dckt. No.: YJ-410044-RO (05/12/2011).

Moreover, DHCR has previously determined that a prohibition on using a service enumerated in a lease or rider is not sufficient to establish that the illegally-used service is not a required service. *In the Matter of 137 East 38th Street LLC*, DHCR Admin. Rev. Dckt. No.: BV-410010-RO (07/17/2015).

Consequently, even if an owner is aware of a tenant's illegal continued use of a service, DHCR could still determine that it is a required ancillary service. If the owner deprives the tenant of that service, the tenant may apply for and be granted a monthly rent freeze. To eliminate the rent freeze, an owner would either have to (i) restore the service and file an Application to Restore Rent, or (ii) file an Application for Modification of Services with DHCR.

Due to the expense incurred for legalizing the service, the most cost-efficient option would be to file an Application for Modification of Services requesting DHCR's permission to eliminate the ancillary service.

Pursuant to RSC §2522.4(d), an owner may file an application to decrease required services for a reduction of the legal regulated rent on the grounds that such decrease is not inconsistent with the Rent Stabilization Law or RSC; however, no such reduction in rent or decrease in services may take place prior to the approval by the DHCR of the owner's application.

In the application, an owner would request permission from DHCR to eliminate the service. Should DHCR grant permission, this action would decrease an owner's exposure to a rent freeze and potential overcharge liability. It is strongly recommended that experienced counsel be consulted prior to filing any such application.

Samuel R. Marchese is an associate in BBG's Administrative Law Department, and can be reached at ***smarchese@bbgllp.com****, or 212-867-4466 ext. 297.*

Foreseeable Changes to Substantial Rehabilitation Laws

BY LOGAN O'CONNOR

Despite the passage of the Housing Stability and Tenant Protection Act in June, 2019, one method for owners to attain a rent stabilization exemption for their buildings remains available–substantial rehabilitation.

Under current law, multiple dwellings may become exempt from rent regulation via the substantial rehabilitation method if: (i) the building is in a substandard or seriously deteriorated condition, (ii) no harassment has occurred at the building resulting in vacant units, (iii) the owner replaces at least 75% of the building systems identified in DHCR Operational Bulletin 95-2, (iv) the building systems renovation fully complies with all applicable building codes and requirements and (v) the owner can provide the building's certificates of occupancy before and after the rehabilitation.

Under current law, owners have the option to request a DHCR advisory opinion as to whether or not the building qualifies as exempt from rent stabilization due to substantial rehabilitation. However, at this time, owners are not *required* to do so. Rather, buildings are simply considered to be exempt upon fulfillment of the enumerated substantial rehabilitation requirements. Building tenants can challenge the exemption, but as long as owners maintain proper documentation of the substantial rehabilitation, there should theoretically be no issue.

However, as of this writing, Senate Bill 7213A is currently under consideration by the New York State Senate. If passed, owners would be *required* to apply to DHCR for an exemption from rent stabilization within one year of the completion of a substantial rehabilitation project.

Furthermore, the bill requires that, with regard to any building that was previously alleged to have been substantially rehabilitated prior to the introduction of the bill, owners of those buildings must seek approval of the exemption from DHCR within six months after enactment of the bill into law.

The bill states that exemption applications will be denied on one or more of four grounds: (a) where the owner or owner's predecessors engaged in harassment of the building's tenants within the five years preceding completion of the substantial rehabilitation project, (b) where the building was not in a seriously deteriorated condition requiring substantial rehabilitation, (c) where the owner's, or the owner's predecessor's, failure to maintain the building materially contributed to the deteriorated condition of the building prior to rehabilitation, or (d) where the substantial rehabilitation work was performed in a piecemeal fashion rather than within a reasonable amount of time while the building was at least 80% vacant.

For the foregoing reasons, it is highly recommended that all owners of substantially rehabilitated buildings and owners that are currently rehabilitating their buildings, gather, organize and maintain all proper documentation of the substantial rehabilitation in compliance with law. This includes, but is not limited to, work contracts, invoices, cancelled checks (or other proof of payment), plans, blueprints, applications for building permits, architects' or general contractors' statements, and before-and-after photos of the conditions.

Notably, the pending bill would also limit the amount of first rent that an owner can charge and collect upon combining two rent-stabilized apartments, to the sum of the rents of the formerly separate units.

It is clear that the pending bill contains various provisions that could benefit owners, but upon which owners can also get snagged. Owners would be well-advised to contact experienced counsel with regard to any such matters.

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

BBG In The News

Founding partner **Sherwin Belkin** was quoted in articles in *The Real Deal* discussing (August 13) the Supreme Court decision striking down the "automatic hardship filing" part of the State evictions moratorium: **Read article here**, (August 18) questioning the accuracy of apartment vacancy survey results in light of the 2020 census figures: **Read article here**, (September 1) criticizing a proposed new State law that would extend the evictions moratorium to January: **Read article here**, and (September 24) critiquing the State Legislature's approach to preserving and extending rent-regulation: **Read article here**. **Mr. Belkin** and Litigation Department partner **Matthew Brett** were also quoted in July 23 articles in *The Real Deal* : **Read article here**, and *Crains New York*: **Read article here**, regarding an important Court decision in which the Firm represented the victorious owner (an affiliate of Firm client John Catsimatidis), which dismissed tenants' claims of rent overcharges and upheld the owner's rent-setting policy in buildings receiving 421-a benefits.

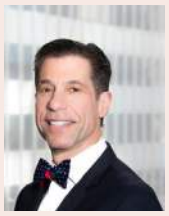
Martin Meltzer, head of the Firm's non-payment practice, was quoted in an October 4 article in *The Real Deal* discussing various methods for owners to pursue amounts owed by tenants, besides non-payment proceedings in Housing Court: **Read article here**.

We are proud to recognize our attorneys who have been named Super Lawyers™:


Daniel T. Altman


Sherwin Belkin


Matthew S. Brett


Jeffrey L. Goldman


Martin J. Heistein


Lewis A. Lindenberg


Craig L. Price


Aaron Shmulewitz

And our attorneys who have been named Rising Stars by Super Lawyers™:


Israel Katz


Scott F. Loffredo


Ron Mandel


Noelle I. Picone


Lloyd Reisman


Michael J. Shampan

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 CO-OP SHAREHOLDERS CAN SUE CO-OP FOR DECIDING TO MAKE LEAK REPAIRS THAT FAVOR RESIDENTIAL SHAREHOLDERS

Kofinas v. Fifty-Five Corp.
United States District Court, SDNY

COMMENT | While claims for punitive damages were dismissed, this Board was caught between a rock and a hard place.

COMMERCIAL CO-OP SHAREHOLDER CANNOT SUE CO-OP OR BOARD MEMBERS FOR ERECTING SIDEWALK SHED IN FRONT OF STORE

Kirschner v. 233 West 99th Street, Inc.
Supreme Court, New York County

COMMENT | In basing its holding on the business judgment rule, the Court noted that the sidewalk shed was required by law, and protects the safety of pedestrians and co-op residents.

CO-OP SHAREHOLDER CAN SUE RENT-STABILIZED TENANT NEIGHBOR TO ENFORCE CO-OP HOUSE RULE AGAINST NOISE

Dubin v. Glasser
Supreme Court, New York County

COMMENT | But the shareholder was denied a preliminary injunction, and was held to be not entitled to attorneys fees.

CO-OP SHAREHOLDERS, NOT CO-OP, RESPONSIBLE FOR REPAIRS TO STOP ROOF LEAKS

Burbridge v. Soho Plaza Corp.
Supreme Court, New York County

COMMENT | This 2010 (!!) case involved a 1997 roof agreement that made the shareholders responsible for the roof. The Court noted that the shareholders failed to object to the co-op's placement of a chiller on the roof, despite having received actual notice thereof.

CONDO UNIT OWNERS CAN SUE COMMERCIAL UNIT OWNER VERIZON FOR NUISANCE ARISING FROM NOISY VERIZON ELEVATORS

OceanHouseNYC, LLC v. 140 West Street (NY), LLC
Supreme Court, New York County

COMMENT | An interesting decision, analyzing which DOB Code should apply in this mixed use building.

CO-OP BOARD'S DECISIONS AS TO HOW TO MAKE EXTERIOR REPAIRS, AND WHETHER TO SUE MANAGING AGENT, ARE PROTECTED BY BUSINESS JUDGMENT RULE

Weinstein v. Board of Directors of 12282 Owners' Corp.
Supreme Court, New York County

COMMENT | The shareholder's complaint was dismissed, including on procedural grounds.

CONDO ENTITLED TO SUMMARY JUDGMENT AGAINST UNIT OWNER, AND PREDECESSOR, AND GUARANTOR, FOR UNPAID COMMON CHARGES

Board of Managers of The Club at Turtle Bay v. McGown
Supreme Court, New York County

COMMENT | The prior Unit Owner was an affiliate of its successor, and was not released from its financial obligations because the entities never notified the Condominium of the transfer. The guarantor was an officer of both entities.

MECHANICS LIEN FILED AFTER RECORDING OF CONDO DECLARATION IS INVALID

Herc Rentals, Inc. v. Elevation Holdings, LLC et al.
Supreme Court, Kings County

COMMENT | This was a blanket lien filed against all units in the Condominium, and was plainly barred by Real Property Law §339-l.

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CONDO SPONSOR ENTITLED TO KEEP DEFAULTING PURCHASER'S $1.5 MILLION DEPOSIT

361 Broadway Associates Holdings, LLC v. Morales
Appellate Division, 1st Dept.

COMMENT | The purchaser had failed to rescind during a permitted period after various delays; the Court held that the purchaser could thus not take advantage of a later delay.

FORMER CO-OP DIRECTOR NOT ENTITLED TO INDEMNIFICATION FROM CO-OP FOR LEGAL FEES SHE WAS ORDERED TO PAY TO CO-OP FOR SUING HER FOR HER DISCLOSURE OF CO-OP'S PRIVILEGED INFORMATION

Platt v. Windsor Owners Corp.
Appellate Division, 1st Dept.

COMMENT | The textbook definition of chutzpah.

HOLDER OF UNSOLD SHARES NOT ENTITLED TO MAINTENANCE ABATEMENTS

Transus LLC v. Beach View Apt. Corp.
Appellate Term, 1st Dept.

COMMENT | The Court held that the non-resident HUS could not claim breach of warranty of habitability, and that the HUS did not sustain its burden of proving breach of the proprietary lease.

CO-OP SHAREHOLDER CANNOT EVICT SUBTENANT FOR FAILING TO WEAR MASK IN COMMON AREAS

Rush Properties v. Riveros
Supreme Court, Nassau County

COMMENT | In this unusual ruling, the Court found no evidence of a threat to public health (!), and that the co-op's rules did not recognize the ongoing changes to governmental regulations and the availability of vaccines.

CONDO CANNOT COLLECT COMMON CHARGE ARREARS FROM APARTMENT'S OCCUPANT

Board of Managers of Two Columbus Avenue v. Leschins
Supreme Court, New York County

COMMENT | The occupant was somehow related to the Unit Owner, but the Court ruled that only the Unit Owner could be made to pay.

CO-OP SHAREHOLDER MUST PAY USE AND OCCUPANCY DURING LITIGATION OVER REPAIRS COMPLETION DISPUTE

Tavor v. Lane Towers Owners, Inc.
Appellate Division, 2d Dept.

CO-OP CAN EVICT SHAREHOLDER FOR BRINGING MULTIPLE FRIVOLOUS LAWSUITS

800 Grand Concourse Owners, Inc. v. Thompson
Appellate Term, 1st Dept.

COMMENT | The Court found that the shareholder's behavior constituted objectionable conduct under Pullman, in deliberately costing the co-op thousands of dollars in unnecessary legal fees. Potentially a huge game-changer for Boards that are plagued with "professional tenants".

CO-OP GRANTED FULL ACCESS TO SHAREHOLDER'S APARTMENT TO TREAT RODENT INFESTATION ARISING FROM "COLLYERS" SITUATION

444 East 75th Street Corp. v. Morris
Supreme Court, New York County

COMMENT | The Court held that, while the shareholder had made progress in addressing the Collyers situation, the co-op still needed access to address the rodents. BBG represented this victorious co-op.

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