Belkin • Burden • Goldman, LLP
BBG UPDATE

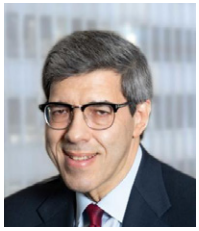
WINTER 2022 | VOL 61

EDITORS
Robert A. Jacobs
Kara I. Rakowski
Aaron Shmulewitz

Inside This Issue

Virtual is a Reality for Co-ops

BY AARON SHMULEWITZ



The ability of co-ops to conduct shareholder meetings virtually (i.e., on platforms such as Zoom) has been made permanent.

That ability, initially enacted in 2019 as part of Business Corporation Law §602 and enhanced in 2020 in response to the social distancing requirements of the Covid pandemic, was to expire at the end of the State disaster emergency, or December 31, 2021, whichever was later. However, the State legislature amended §602 in November, 2021 to eliminate any such sunset date, thus enshrining virtual meetings as permanent fixtures of New York corporate law, which governs co-ops.

The law provides that a corporation can now hold its shareholder meetings—both annual and special meetings—completely virtually, with no requirement for in-person attendance. The law requires a corporation to implement reasonable measures to provide shareholders a reasonable opportunity to participate in the meeting and to vote or grant proxies electronically, and for the corporation to verify that people so voting or granting proxies are, in fact, shareholders, and keep records of votes and other actions taken at such a meeting.

Most co-ops and managing agents have perfected the process for conducting shareholder meetings since the Covid pandemic first impacted the industry in March, 2020; two "annual meeting seasons" have now been handled electronically, and co-ops and managing agents already comply as a matter of course with the above requirements. In addition, I would venture to say that the vast majority of shareholders, Boards, managing agents and attorneys and CPA's who have participated in virtual meetings since March, 2020 have experienced first-hand the relative efficiency, civility and effectiveness of such virtual meetings, and likely see no reason to

CONTINUED ON PAGE 2

CONTINUED FROM PAGE 1

ever go back to "the old days". Thus, the fact that virtual meetings are now here to stay is welcome news to the industry.

While no similar provision has yet been enacted for condominiums, most condos have nevertheless also been conducting their Unit Owner meetings virtually since March, 2020, and will likely continue to do so. A proposed bill (S7278) which would amend Real Property Law §339-v to explicitly permit virtual meetings of condo Unit Owners is making its way through the State Senate; its eventual passage should be likely.

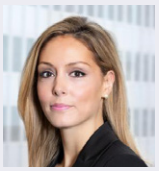
Aaron Shmulewitz heads the Firm's co-op/condo practice, and can be reached at ***ashmulewitz@bbgllp.com****, or 212-867-4466 ext 390.*

Attorney Promotions

The Firm is very happy and proud to announce that three attorneys have been elevated to Partner. The promotions support the Firm's ongoing commitment to reward and recognize attorneys who exemplify excellence, dedication, hard work and professionalism. They are rising stars in their respective fields and will be instrumental in contributing to the high quality legal guidance and representation for our clients and the future growth of our Firm for many years to come. Effective January 1, 2022, the following lawyers will be promoted to Partner:

Michael Bobick joined the firm in 2019 and will act as the new leader of the Firm's Loft Law practice area. Prior to joining the firm, Mr. Bobick was an Assistant General Counsel at the New York City Loft Board. He was admitted to practice in 2013 and holds his Juris Doctor from New York Law School.

Samuel Marchese joined the Firm in 2015 and represents owners of rent regulated buildings in administrative proceedings before the New York State Division of Housing and Community Renewal (DHCR), the New York City Department of Housing Preservation and Development (HPD), the New York City Department of Buildings (DOB), and other City and State agencies in all stages of administrative and judicial review. He received his Juris Doctor from Duquesne University School of Law.



Logan O'Connor joined the Firm in 2018 and represents landlords in proceedings before the DHCR and HPD, among other regulatory agencies. Before joining the Firm, she focused on complex commercial real estate transactions and has experience working in-house with a Manhattan-based real estate development and management company. She received her Juris Doctor from Quinnipiac University, holding a concentration in Civil Litigation and Dispute Resolution with honors.

These promotions recognize their significant accomplishments with BBG and our pride that they are part of the BBG family. Please join us in congratulating them for reaching this new career milestone.

Stronger Than Ever

Despite the tumultuous effects of COVID-19, the Firm is stronger than ever with a string of new hires. The Firm has recently added the following attorneys:

Deborah L. Goldman, Partner, Transactional - Ms. Goldman advises on all aspects of commercial real estate law, including sales and acquisitions, financing, ground leasing, brokerage agreements, construction contracts, hotel management agreements, and especially all phases of office and retail leasing. Ms. Goldman has been practicing commercial real estate since she graduated cum laude from New York University Law School in 1992. Ms. Goldman also brings to her legal practice the benefit of an M.B.A. in Real Estate Finance from Columbia Business School and the practical non-legal experience of having worked in the development department of Starwood Hotels and Resorts after completing business school. In 2016, Ms. Goldman was appointed downstate co-chair of the Commercial Leasing Committee of the New York State Bar Association's Real Property Section and was an Adjunct Professor at both Cardozo Law School and Fordham Law School.

Murray Schneier, Partner, Transactional – Mr. Schneier has extensive experience in all aspects of commercial real estate, including sophisticated real estate financing, leasing, as well as acquisitions and sales. Prior to joining the Firm, he practiced at Paul, Weiss, Rifkind, Wharton & Garrison LLP and Proskauer Rose LLP before joining Eiseman Levine in 1996. He graduated magna cum laude from Yeshiva University in 1987 and from New York University School of Law in 1990, where he was on the Editorial Staff of the Annual Survey of American Law.

Leslie Mendoza, Associate, Litigation - Ms. Mendoza focuses her practice on residential and commercial landlord-tenant disputes. She handles holdover proceedings, nonpayment proceedings, and plenary actions. She earned her Juris Doctor with magna cum laude honors from Touro College Jacob D. Fuchsberg Law Center as part of the inaugural class of the Two-Year Accelerated Honors Program, where she was on the Touro Law Review.

Frank Noriega, Associate, Transactional - Mr. Noriega's practice concentrates on development issues, including land use and zoning issues. He has successfully represented developers, homeowners, and religious institutions in various actions brought before the City's land use agencies, including the Board of Standards and Appeals, City Planning Commission, DOB, and other regulatory agencies. He is a member of the New York City Bar Association Land Use Planning and Zoning Committee.

Parker Rothman, Associate, Litigation - Mr. Rothman focuses his practice on commercial real estate litigation, landlord-tenant disputes, and clients seeking to legalize buildings within the purview of the New York City Loft Law. Mr. Rothman graduated cum laude from Brooklyn Law School where he received the CALI Excellence for the Future Award for his success in International Business Transactions, and also received the Brooklyn Law School Pro Bono Award in recognition of his dedication to public service.

Andrew Zeyer, Associate, Administrative - Mr. Zeyer represents landlords, owners and developers in a wide array of proceedings before the DHCR, HPD, and Department of Finance. Mr. Zeyer handles matters including 421-a, MCI, J-51 and ICAP applications and compliance. He also focuses on residential leasing, due diligence analysis of rent regulated buildings, and representation in response to tenant DHCR complaints.

CONTINUED ON PAGE 4

CONTINUED FROM PAGE 3

Heather Foti, Associate *(pending admission)*, Transactional - Ms. Foti joined the firm as a summer associate in August of 2021. She received her B.A. from Northeastern University (magna cum laude) and Juris Doctor from Brooklyn Law School. She was also a judicial intern for the Honorable Gerald Lebovits.

Elizabeth Lulgjuraj-Djokic, Legal Assistant – Ms. Lulgjuraj-Djokic holds more than 14 years of legal assistant experience, which includes handling every aspect of landlord-tenant matters.

A Commercial Lease Dispute: Something Doesn't Sound Right!

BY JEFFREY LEVINE

Sound can issue from a commercial tenant's premises and infiltrate other spaces throughout a building, causing disturbing vibrations, excessive noise and interference with the rights of other commercial or residential tenants. Thus, many commercial leases for premises that are used for purposes that necessarily involve the creation of significant sound often contain provisions requiring the tenant to implement sound mitigation measures to avoid sound emanation and its consequences.

In a recently decided case that was heavily litigated for several years, BBG represented a landlord that had leased space in its commercial building to a tenant for use as a boxing fitness studio. Included in the parties' lease was a provision requiring the tenant to install soundproofing and to ensure that neither sound exceeding a prescribed decibel level nor vibrations would emanate from the premises.

The tenant, during its operation of its boxing fitness studio, breached the terms of the lease by allowing the emission of noise and vibrations from the premises. As a result of that breach of the lease, the landlord issued a notice to cure to the tenant, demanding, among other things, that the tenant install required soundproofing to eliminate the emission of the sound and vibrations by a specified cure deadline in order to avoid termination of the lease.

After receiving the notice to cure, and prior to the specified cure deadline, the tenant commenced a Supreme Court action against the landlord, asserting that it had not breached the lease, and seeking a finding by the Court to that effect, as well as a monetary award against the landlord for various alleged damage claims. Simultaneously with the filing of the action, the tenant also requested a *Yellowstone* injunction–which is routinely sought by commercial tenants after receiving a notice to cure–in order to stay the running of the cure period set forth in the notice to cure so that the tenant could have an opportunity to litigate its claim that it was not in default under the lease, and to avoid the termination of the lease while the claim was being litigated.

With the *Yellowstone* injunction in place, the parties retained experts to record and evaluate sound and vibration levels and to prepare reports in connection with their findings. After lengthy litigation, the landlord filed a motion seeking summary judgment dismissing the tenant's claims and an award in favor of the landlord that the tenant had breached the lease by allowing the emission of sound in excess of the permitted decibel levels, as well as a judgment for recovery of all legal fees incurred by landlord in the litigation.

The tenant cross-moved for summary judgment in its favor on all of its claims. The tenant also asserted that, due to the condition of certain portions of the building, the landlord needed to perform certain alterations in the building before the tenant could be in a position to comply with the provisions of the lease requiring sound attenuation.

After the hearing on the motions had been delayed due to the Covid-19 pandemic, the Supreme Court ultimately ruled in the landlord's favor. The Court dismissed the

CONTINUED ON PAGE 5

CONTINUED FROM PAGE 4

tenant's claims, finding that the tenant *had* breached the lease for, among other things, allowing excessive noise to emanate from the premises on many occasions. The Court also found that the lease did not require the landlord to perform the alterations that the tenant had claimed were necessary before the tenant could undertake the required sound attenuation. The Court also vacated the *Yellowstone* injunction, which cleared the way for the landlord to terminate the lease. Finally, the Court held that the tenant was obligated to reimburse the landlord for the legal fees it had incurred in connection with the action. In short, an all-around victory for the landlord.

If any landlords are faced with commercial tenants creating excessive noise or other conditions in breach of their leases, or believe that any such breach may be occurring, BBG can provide strategic analysis and recommendations, to help achieve the best and most cost-effective results, whether by way of litigation or a negotiated settlement.

*Jeffrey Levine is a partner in BBG's Litigation Department specializing in commercial lease disputes and commercial real estate matters, and can be reached at 212-867-4466 ext. 317 (**Jlevine@bbgllp.com**).*

The Loft Board – Where Extension Applications Go to Die

BY MICHAEL BOBICK

For many, the term "Loft" is widely used to refer to large open spaces with an industrial feel. However, most readers do not know that the term "Loft" also refers to units that are in the process of being legalized for residential use pursuant to Multiple Dwelling Law §§280-287 (the "Loft Law"). Among other purposes, the Loft Law is a mechanism by which a "Loft" unit is converted from a commercial, manufacturing or industrial use to a legal residential use. The agency tasked with the responsibility of enforcing the Loft Law is the New York City Loft Board.

The Loft Board's responsibilities include determining whether a unit (and/or building) qualifies as an interim multiple dwelling ("IMD") (otherwise known as a Loft unit/building) under the Loft Law. In addition to determining coverage under the Loft Law, the Loft Board is also responsible for the enforcement of the Loft Board's regulations found in Title 29 of the Rules of the City of New York.

The Loft Law generally, and the Loft Board's regulations specifically, require owners of IMD's to legalize their buildings by specific code compliance deadlines. Both the Loft Law and the Loft Board's regulations allow an owner of an IMD to apply to the Loft Board for an extension of those legalization deadlines. Among other items, an application for an extension of such deadlines requires the owner/applicant to prove both "good faith efforts to meet the legalization deadlines" and that "the necessity for the extension arises from conditions or circumstances beyond the owner's control" (also commonly referred by the Loft Board as the "statutory standard").

The Loft Board strictly enforces this statutory standard. Therefore, many extension applications are dismissed for the smallest of reasons. However, the Loft Board is not able to strictly comply with its *other* regulations, specifically the requirement to "promptly decide each application for an extension." As it stands, the Loft Board is *not* deciding extension applications promptly. There have been instances where it has taken well over a year, and sometimes two, for the Loft Board to render a decision.

These extension applications are more often than not a "lifeline" for an owner to reach the end of the Loft Law conversion process. The process of converting an IMD to residential use is extremely time consuming and, most of all, very expensive. By receiving prompt decisions on extension applications, owners of IMD's would know whether they would have viable sources of income to complete the legalization process. Absent prompt decisions, owners may not be able to complete the legalization process. If the Loft Board is as intent as it has been on enforcing the "statutory standard", then it is imperative that the Loft Board adhere strictly to its own regulations and promptly decide each application for an extension.

*Michael Bobick is a partner in the Firm, and heads the Firm's Loft Law practice. He was previously assistant general counsel to the Loft Board. He can be reached at 212-867-4466 ext. 331, or **mbobick@bbgllp.com**.*

Recent Cases of Note at the Appellate Term, First Department

BY MAGDA L. CRUZ

Appeals from the Civil Court of the County of New York and Bronx County, including the Housing Courts of these two counties, are heard at the Appellate Term, First Department. Its docket includes many cases involving issues arising under the rent laws. Three such cases were recently decided in opinions that clarify principles that frequently recur in landlord-tenant practice.

Succession

In *299 Associates, L.P. v. Mertens*, the Appellate Term affirmed a Housing Court decision, made following a trial, that denied a son of a deceased tenant the right to succeed to the rent stabilized tenancy. The Appellate Term, which has the authority to review a trial record and make its own factual determinations, deferred to the trial judge in this case "who was in the best position to assess the value of the witnesses' testimony." The son had based his succession claim mainly on his and other witness testimony describing his alleged occupancy in the apartment. However, it was not legally sufficient. The Appellate Term noted that "[w]hile the absence of documentary evidence is not fatal to a succession claim, the testimony of the son, which the trial court found to lack credibility, was insufficient to overcome the complete paucity of documentary evidence connecting the son to the apartment for actual living purposes for the [required] two years prior to the tenant's death." In addition, the Appellate Term found that the son's effort to "explain away" the facts and circumstances that did not support his claims "merely raised questions of fact and credibility for the trial judge."

The *Mertens* case showed that the law requires a claimant of succession rights–even if that claimant has direct biological ties to a tenant of record–to still satisfy a quantum of proof that is credible and relevant to the required succession factors. Deficient, inconsistent, and non-credible testimony will not suffice, especially where there is no documentary corroboration.

In *Readick v. Green*, a person who had co-occupied an apartment with a month-to-month tenant claimed that as a "non-traditional family member" of the tenant, he could not be evicted after the termination of the month-to-month tenancy. The co-occupant claimed that a separate action for ejectment was required. The Appellate Term rejected this claim. The Appellate Term held that the Real Property Actions and Proceedings Law ("RPAPL") "contains no language exempting an individual with some family relationship to a [month-to-month tenant] from eviction, whether under RPAPL 711 [grounds where a landlord tenant relationship exists] or RPAPL 713 [no landlord tenant relationship exists]." The Appellate Term also rejected the application of judicial precedent granting succession rights to surviving life partners, such as the seminal 1989 case of *Braschi v. Stahl Assoc. Co*. The Appellate Term noted that *Braschi* "applies to cases commenced by a landlord against a remaining family member of a rent regulated tenant who seeks succession rights, and not to cases between a lessee and another occupant of the apartment."

The *Readick* case showed that succession rights will not extend to situations that do not fall under the specific succession provisions of the Rent Stabilization Code or the Rent and Eviction Regulations (Rent Control).

Fraud

Fraud causes of action are arising with increasing frequency in housing cases. The elements required to establish such causes of action are hotly debated. In *Venkateswaran v. Wilmers*, the Appellate Term shed light on one element that is often overlooked – the time within which to assert a fraud cause of action.

In *Venkateswaran*, the Appellate Term dismissed a fraud action on statute of limitations grounds. CPLR 213(8) requires fraud claims to be made within six (6) years of the date when the cause of action accrued or within two (2) years from the time that the plaintiff discovered the fraud or with reasonable diligence could have discovered the fraud. In 2019, the plaintiff sued the seller of her cooperative apartment for alleged fraudulent representations in the contract of sale concerning past alterations, which were allegedly not made in compliance with all applicable laws. The plaintiff had purchased the apartment in 2011, but allegedly did not learn of the illegal alteration until 2018, when the cooperative board demanded that plaintiff correct the illegality (an open plumbing violation from 1992). The Appellate Term held that the action was untimely because the "essence" of the claim was breach of contract; not fraud.

The Appellate Term explained that an allegation of fraud "does not change the nature of the action … from an action upon contract to an action upon fraud within the meaning and purpose of the statute of limitations." Further, "[c]ourts will not apply the fraud statute of limitations if the fraud allegation is only incidental to the claim asserted; otherwise fraud would be used as a means to litigate stale claims."

CONTINUED ON PAGE 7

CONTINUED FROM PAGE 6

Although the *Venkateswaran* case involved a contract of sale, residential leases are also contracts and are subject to principles of contract interpretation. When faced with a fraud cause of action in a case challenging the legality of a lease or its terms (such as rent), the timeliness of the fraud claim should be considered.

*Magda L. Cruz is a litigation partner of the firm specializing in appeals, and can be reached at 212-867-4466 ext. 326 (**mcruz@bbgllp.com**).*

Recent COVID-Era Successes at OATH Hearings Division

BY ORIE SHAPIRO

As we approach the second anniversary of Covid-related Court disruptions, the OATH Hearings Division (formerly, and still generically, known as "ECB" [1]) has continued virtually unimpeded. Those used to crowding into tightly packed waiting rooms might wonder how ECB has functioned in an era of social distancing. The answer is a phone call away. ECB has eschewed the more sophisticated technological systems used by other judicial and administrative tribunals for remote proceedings, opting instead for telephonic hearings. During the Covid era, I have tried over 200 summons cases telephonically, without seeing my adversary, witness or trier of fact.

The following are three notable results, achieved in ECB hearings during 2021.

1) The Department of Buildings ("DOB") sought fines of approximately $60,000 for transient occupancy (AirBnB) in a small residential building and presented a phalanx of evidence to support the charge. On behalf of the building owner, we moved to dismiss the summons based upon an "impossibility" defense, arguing that the owner had commenced a holdover proceeding before being served with the violations. These defenses routinely fail at ECB because owners usually commence such proceedings after being served with the administrative violation; the dispositive date for liability is not the date of the hearing, but rather the day that the summons was issued. In our case, however, the holdover proceeding preceded DOB's commencement of the administrative proceeding. The holdover petition was premised on expiration of the lease rather than on transient occupancy. Nonetheless, the Hearing Officer dismissed the ECB proceeding, accepting our argument that the pendency of the holdover proceeding at the time of the issuance of the DOB summons supported a finding of impossibility.

2) DOB issued summonses to the owner of a large Bronx building, alleging the illegal conversion of an apartment to four SRO's, seeking a total of $180,000 in fines including daily penalties. At the hearing, we sought dismissal based on a seldom-used fact-intensive statutory exemption. Under Administrative Code § 28-202 (9.2), the exception applies if the owner can show:

   a. The violation was the first of its kind issued for the building or was issued within 30 days after such first violation;

   b. The building was registered with the Department of Housing Preservation & Development at the time of the violation; and

   c. The owner reasonably did not know of, or could not reasonably have known of, such illegal conversion, and took lawful immediate and diligent steps to cure said violation.

   We submitted evidence and introduced testimony that each of the criteria was satisfied. The Hearing Officer found that our evidence and argument proved that the exemption applied. However, she limited the exemption to the daily penalties and imposed $45,000 in base penalties. We successfully appealed the decision, and the Appeals Unit modified the Hearing Officer's decision to eliminate *all* of the penalties.

[1] The New York City Office of Administrative Trials and Hearings ("OATH") is the City's Administrative Law tribunal and consists of a Hearings Division, which tries summonses issued by various City agencies, and a Trials Division, which hears an array of more complex cases. For the sake of clarity, this article will refer to the OATH Hearings Division by its former name, ECB.

CONTINUED ON PAGE 8

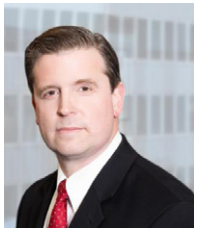
CONTINUED FROM PAGE 7

3) I tried and secured dismissal of AirBnB summonses in an unusual rehearing. At the prior hearing, our witness' (the former tenant) testimony that she was present at the apartment on the dates of purported transient occupancy was found to be not credible. The Hearing Officer found that the summonses should have been sustained but dismissed them on technical service grounds. DOB reissued the summonses. During the rehearing, I demonstrated that the prior credibility finding was not binding. The second Hearing Officer, who was aware of (and typically in agency hearings would defer to) the prior decision, nonetheless accepted the witness' testimony and dismissed the summonses on the merits.

Defending summonses at ECB has always presented unique challenges, not the least of which is that respondents shoulder the burden of disproving the accuracy and/or sufficiency of the summons. Although respondents are not required to be represented by counsel at such hearings, it would be prudent to retain or consult with an attorney experienced in ECB matters, particularly in instances where the potential fines are significant, the issues presented are complex or the method of correction is unclear.

Orie Shapiro is a partner in the Firm's Administrative Law Department, and can be reached at 212-867-4466 ext. 347, or at ***oshapiro@bbgllp.com****.*

Defeating a Claim for Legal Fees by a Successor Tenant In a Rent Stabilized Apartment



BY BRIAN CLARK HABERLY

One of the most frustrating cases for a landlord to bring in Housing Court is a licensee holdover proceeding involving a rent stabilized apartment where the occupant of the apartment has a succession claim and a claim for legal fees.

These holdovers happen when a rent stabilized tenant either dies or vacates the apartment and there is an occupant remaining in the apartment with whom the landlord has no landlord-tenant relationship–e.g., the occupant is not a signatory to any lease with the landlord. In addition, before bringing a case, such a landlord would typically conduct an investigation in order to assess whether the occupant has a valid succession claim.

If the landlord prevails in the proceeding against the occupant, the landlord recovers possession of the apartment as well as fair market use and occupancy. However, since the occupant of the apartment was not a signatory to the original lease, the landlord is generally not able to obtain a judgment for legal fees against the occupant. However, if the *occupant* prevails on a succession defense and obtains a renewal lease, the occupant will often make a claim for legal fees against the landlord as a prevailing successor tenant, under Real Property Law §234. That statute provides that if there is a legal fees clause in a lease, a prevailing tenant can recoup his/her legal fees from the landlord.

This type of one-sided entitlement to legal fees is what makes these cases so frustrating for landlords. Having said that, on the bright side, a legal fees claim by a successor tenant is more complicated than it seems at first glance.

First, the successor tenant must have a copy of the former tenant's original lease showing that it has an applicable legal fees clause. Without a copy of the original lease that contains such a clause, the successor tenant has no legal basis for a claim for legal fees.

Second, under relevant case law in the First Department (*245 Realty Associates v. Sussis*), in order for a successor tenant to be able to recover legal fees, the original lease must have both a legal fees clause and specific language that the lease will be binding upon successors in interest. Unless the original lease has this language, the successor tenant cannot recover legal fees from the landlord.

This was recently reaffirmed in a case handled by this firm, *530 Second Ave. Co., LLC v. Zenker*, where the Appellate Term, First Department, found that under the holding in *Sussis*, a successor tenant was not entitled to recover legal fees against the landlord. In *Zenker*, the occupant prevailed on her succession claim and then moved for legal fees against the landlord. The Housing Court found that the occupant, now successor tenant, was entitled to legal fees and the landlord appealed.

CONTINUED ON PAGE 9

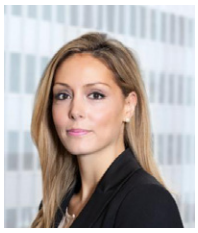
CONTINUED FROM PAGE 8

The Appellate Term reversed and found that, based on *Sussis*, the successor tenant was *not* entitled to legal fees since the original lease lacked language extending the original lease's terms to a successor in interest. The Appellate Term specifically stated that without this required language in the original lease, the successor tenant could not rely on the former tenant's lease as a basis to recoup legal fees from the landlord.

Landlords faced with succession cases should consult competent, experienced counsel to guide them through these hurdles.

*Brian Clark Haberly [**bhaberly@bbgllp.com**] is a partner in the firm's Litigation department and can be reached at 212-867-4466 ext. 325. Mr. Haberly handled the Zenker litigation in Housing Court. Appellate partner Magda Cruz [**mcruz@bbgllp.com**] handled the successful appeal at the Appellate Term and the motion at the Appellate Division, which denied the successor tenant permission to appeal further. She can be reached at 212-867-4466 ext. 326.*

NYC Extends and Expands HPD's Pilot Program



BY LOGAN J. O'CONNOR

The New York City Council has voted to extend and to expand the Department of Housing Preservation and Development's ("HPD") three-year-old Pilot Program.

The Pilot Program, which originally became effective on September 28, 2018 pursuant to Local Law 1 of 2018, requires owners of buildings placed on the Pilot Program List to apply for a Certification of No Harassment ("CONH") in order to receive a permit from the Department of Buildings ("DOB") for certain covered categories of work. As a result, countless owners became subject to restrictive regulatory requirements overnight.

Upon submission of a CONH application to HPD, HPD conducts an investigation to determine whether tenant harassment has occurred at the building during the preceding five years. If HPD issues an initial determination of Reasonable Cause for a harassment finding, then an owner can either (i) refute the determination by way of a hearing before the Office of Administrative Trials and Hearings ("OATH") or (ii) elect to take the statutory cure which requires the owner to set aside 25% of the building's floor area for low-income housing in perpetuity. If a final determination of harassment is issued by OATH, then an owner *must* either take the cure or wait five years before applying for a CONH again.

When the Pilot Program was first enacted, buildings could be included on the Pilot Program List (the "List") if: (i) they were issued a full vacate order by DOB during the five-year period prior to July 24, 2018, (ii) they were active participants in HPD's alternative enforcement program for more than four months since February 1, 2016, (iii) a final determination of harassment had been made based on acts of harassment committed at the building after September 27, 2013, or (iv) the building was located in one of eleven specified community districts throughout Manhattan, Brooklyn, the Bronx, and Queens, *and* it received a particular Building Quality Index ("BQI") score (which was meant to identify buildings with high levels of physical distress or ownership changes), as outlined in the statute.

When the first List was published on October 12, 2018, the List simply identified each building's address but did not describe the reason for its inclusion on the List.

Three years later, little has improved. The List now simply states the reason for a building's inclusion as "yes" or "no" under each of the possible inclusion categories. No further information or rationale is provided by HPD to explain the reason for a building's inclusion.

Despite this glaring deficiency, the City Council has now extended the Pilot Program for five more years *and* expanded application of the Pilot Program to the entire City (not just the original eleven community districts).

Furthermore, the expanded Pilot Program now allows tenants to seek payment of

CONTINUED ON PAGE 10

CONTINUED FROM PAGE 9

at least $5,000 per dwelling unit, plus reasonable attorneys' fees and costs, where a CONH application is denied due to a finding of harassment.

Moreover, HPD may now include on the List buildings where a stop-work notice or order is issued or where approval of construction documents is rescinded due to work without a permit. In this case, the stop-work notice or rescission of construction documents shall be deemed to be a *per se* finding of harassment and a CONH will be denied or rescinded.

One seemingly positive amendment to the new Pilot Program law is that vacate orders issued due to a fire will now no longer condemn a building to inclusion on the List under the vacate order category.

The attorneys at BBG will continue to monitor and keep clients apprised of any and all updates to the Pilot Program, and its impact on clients' buildings.

*Logan O'Connor is a partner in BBG's Administrative Law Department and can be reached at 212-867-4466 ext. 365 (**loconnor@bbgllp.com**).*

BBG In The News

Litigation Department partner **Matthew Brett** was quoted in an October 15 article in *The Real Deal* reporting on the Firm's victorious representation of an affiliate of Firm client Muss Development in obtaining the dismissal of a suit by a tenants group that had alleged rent overcharges, and upheld the owner's rent-setting policy in a building receiving 421-a benefits: **Read article here**.

Transactional Department partner **Deborah Goldman** moderated a Peer-to-Peer seminar on ground leases at the ICSC Law Conference on November 5. **Ms. Goldman** also presented a CLE on commercial leasing for the New York State Bar Association on November 17, and drafted the materials on "Reviewing A Lease Agreement" that were distributed there.

In notable transactions, **Ms. Goldman** also represented the purchaser of a 165-acre camping resort upstate.

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).

HOA BAN ON FENCE VALID, BUT FINES ARE BARRED

Ives v. Fieldpoint Community Association, Inc.
Appellate Division, 2nd Dept.

COMMENT | The Court ruled that the HOA's bylaws and the business judgment rule permitted regulation of fences, but the HOA's bylaws limited the Board's authority to impose fines to a one-time fine of $50, not the ongoing $20/day fine that the Board actually imposed, which totaled $35,000 in total.

CONDO'S INSURANCE CARRIER MUST DEFEND BOARD MEMBER IN DEFAMATION ACTION DESPITE FOUR-YEAR DELAY IN HER NOTIFYING THE CARRIER OF THE SUIT

Salvo v. Greater New York Mutual Insurance Company
Supreme Court, New York County

COMMENT | The Court found no prejudice to the carrier from the delay, which occurred because the Board member apparently didn't know of the existence of the insurance coverage. Despite the somewhat serendipitous ruling here, Board members and managing agents would be well-advised to notify insurance carriers of suits immediately.

CONDO AND MANAGING AGENT ARE NOT LIABLE FOR PERSONAL INJURIES SUFFERED IN ELEVATOR ACCIDENT, SINCE THEY HAD NO KNOWLEDGE OF THE DEFECT

Syrnik v. Board of Managers of The Leighton House Condominium
Appellate Division, 2d Dept.

COMMENT | Full disclosure: BBG is general counsel to this Condominium, but had no role in this litigation.

INVESTOR IN CONDO SPONSOR ENTITY CAN SUE SPONSOR, ITS AFFILIATES, PRINCIPALS AND LAW FIRM FOR FRAUD AND OTHER CLAIMS, FOR TRANSFERRING APARTMENT TO AFFILIATE OF SPONSOR INSTEAD OF TO INVESTOR PER PURCHASE AGREEMENT

Kim v. HFZ 11 Beach Street LLC, et al.
Supreme Court, New York County

COMMENT | The case reflects a very convoluted and puzzling transaction, which reeks of sponsor bad faith and inexplicable conduct by sponsor's team. Most (but not all) claims against the sponsor's law firm were dismissed.

CONDO BOARD'S LIS PENDENS AGAINST SPONSOR APARTMENT CANCELLED IN SUIT OVER IMPROPER ALTERATIONS

The Board of Managers of 334 East 54th Street Condominium v. 336 East 54 Street Associates Appellate Division, 1st Dept.

COMMENT | A lis pendens can only be used in a lawsuit over competing ownership rights, not in a suit over a simple contractual wrong or tort.

FAILED APPLICANTS FOR MITCHELL-LAMA CO-OP APARTMENT CANNOT SUE CO-OP OR BOARD MEMBERS FOR HOUSING DISCRIMINATION

Wood v. Mutual Redevelopment Houses, Inc.
United States District Court, Southern District of New York

COMMENT | The applicants failed to submit required proof of income as per co-op's rules.

CO-OP SHAREHOLDER ENTITLED TO EMAIL ADDRESSES OF ALL OTHER SHAREHOLDERS PER BCL §624

Westchester Portfolio LLC v. The Board of Directors of Parkway Village Equities Corp., et al. Supreme Court, Queens County

COMMENT | This is apparently the first time that a New York court has granted this relief, although the industry has been bracing for such a ruling for years. The lives of Board members and managing agents will become markedly harder if this doctrine stands.

CONTINUED ON PAGE 12

CONTINUED FROM PAGE 11

HDFC CO-OP BOARD ELECTION SET ASIDE DUE TO LACK OF QUORUM

Singleton v. Morton Appellate Division, 1st Dept.

COMMENT | The Court held that the estates of deceased shareholders should have been counted as shareholders for quorum purposes, thus meaning that less than 50% of the shareholders were represented at the meeting, falling short of a quorum.

CONDO CAN SUE SPONSOR FOR NUISANCE IN NOT ADDRESSING NOISY HVAC UNITS AND FOR FRAUD IN OFFERING PLAN MISREPRESENTATIONS

Board of Managers of The Latitude Riverdale Condominium v. 3585 Owner, LLC Appellate Division, 1st Dept.

COMMENT | Overlapping entities and common ownership doomed the sponsor here.

CO-OP BUYER CANNOT SUE SELLER FOR ALLEGED MISREPRESENTATIONS IN SALE CONTRACT EIGHT YEARS EARLIER

Venkateswaran v. Wilmers Appellate Term, 1st Dept.

COMMENT | Such claims are governed by a six-year statute of limitations.

Belkin • Burden • Goldman, LLP
One Grand Central Place
60 East 42nd Street 16th floor
New York, New York 10165

Belkin · Burden · Goldman, LLP
ATTORNEYS AT LAW

www.bbgllp.com

One Grand Central Place, 60 East 42nd Street, 16th floor, New York, NY 10165 | Tel: 212.867.4466 | Fax: 212.297.1859