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BBG UPDATE

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EDITORS
Robert A. Jacobs
Kara I. Rakowski
Aaron Shmulewitz

Inside This Issue

Federal Court Awards Fifth Avenue Landlord Multi-Million Dollar Judgment for Rent Arrears

Release in tenant's chapter 11 bankruptcy plan did not relieve guarantor from liability

BY JAY B. SOLOMON & ISRAEL A. KATZ

While the Covid-19 pandemic is (hopefully) now behind us, commercial landlords still find themselves enmeshed in litigation to recover significant rent arrears owed under commercial leases signed before the onset of the pandemic. In a recent hotly contested Federal Court case in which BBG represented a Fifth Avenue commercial landlord ("Landlord"), the U. S. District Court for the Southern District of New York entered judgment totaling more than $2.8 million (representing all rent owed plus attorneys' fees incurred) against the parent company ("Guarantor") of the Spanish-based retail designer Desigual, that had guaranteed tenant Desigual's lease obligations. Notably, in what is currently a hot-button bankruptcy issue (with legislation pending in both houses of Congress), the Court rejected Guarantor's arguments that Landlord had released it from liability pursuant to a non-debtor third party release provision included in Desigual's previously-approved Chapter 11 bankruptcy plan.

In January, 2020, Desigual entered into a three year lease, but by mid-May, 2020 it ceased renovations and refused to pay rent. After Landlord issued default notices, Desigual filed for bankruptcy in July, 2020, immediately commenced an adversary proceeding against Landlord in Bankruptcy Court, and filed an emergency motion to enjoin Landlord from drawing down on its letter of credit that had been deposited with Landlord as security under the lease. Desigual alleged that the lease was void or voidable under the doctrines of impossibility of performance, frustration of purpose, *force majeure* and lack of consideration.

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The Bankruptcy Court rejected tenant's defenses and upheld the validity of the lease, resulting in a final judgment in favor of Landlord which was affirmed on appeal. Other than defending its rights in the adversary proceeding, Landlord's participation in Desigual's bankruptcy case was limited to objecting to Desigual's attempt to "reject" the lease Guaranty along with the lease, and filing a proof of claim based upon Landlord's lease rejection damages claim. Landlord did not participate in the bankruptcy plan filing or approval proceedings, and critically, was not ever provided with the bankruptcy plan solicitation package or ballot to vote to approve or reject the plan.

In February, 2021, Landlord commenced suit in Federal Court against Guarantor under its guaranty for the amount of unpaid rent owed under the lease. The Court rejected Guarantor's release defense because the release in Desigual's Chapter 11 bankruptcy plan only released claims that were derivative or vicarious of Desigual's liability, whereas Guarantor's liability under the lease guaranty was primary and distinct and would continue regardless of whether Desigual had a defense to liability under the lease. The Court further narrowly construed the plan's release provision, holding that nonconsensual third party releases are only enforced in rare cases, and Guarantor failed to explain "why the Plan should be read to extinguish all of its obligations to anyone who happened to do business with its American subsidiary—the organization that actually declared bankruptcy."

The Court further dismissed Guarantor's frustration of purpose and impossibility defenses because "neither temporary lockdown orders nor economic hardship excuse obligations under a commercial lease, and Guarantor's expert report provide[d] no information suggesting any other factual basis for its defenses." The Court further held that a necessary element of both frustration of purpose and impossibility of performance is that the claimed circumstances giving rise to the frustration are objectively unforeseeable and could not have been guarded against in the contract. Because the possibility of store closures and business interruptions were expressly contemplated by the parties in the lease, the Court rejected those defenses.

In what will likely be cases of first impression at the Circuit Court level, both Desigual and Guarantor have appealed the respective District Court rulings to the Second Circuit Court of Appeals. BBG represents Landlord in both appeals.

The attorneys at BBG can assist and counsel owners with the recovery of unpaid rent arrears from commercial tenants and guarantors, including those that have filed for bankruptcy protection. Owners finding themselves in such a situation are encouraged to contact us to discuss their rights and remedies.

*Jay B. Solomon is a partner, and Israel A. Katz is an associate, in the Firm's Litigation Department, concentrating in complex commercial litigation matters. Jay can be reached at 212-867-4466 ext.497 (**jsolomon@bbgllp.com**), and Israel can be reached at 212-867-4466 ext.824 (**ikatz@bbgllp.com**).*

BBG Continues to Expand and Welcomes New Hires

The Firm has recently added the following attorneys and professional support staff in 2022:

Paul Alessandri, Associate, Litigation: Mr. Alessandri represents property owners, developers, investors, condominium boards, as well as other real estate professionals in New York City Civil Courts and State Supreme Courts. His representative matters include complex commercial and residential holdover proceedings, nonpayment proceedings, and plenary actions.

Mark Antar, Associate, Litigation: Mr. Antar concentrates his practice in real estate and commercial litigation, with an emphasis on complex landlord-tenant litigation. Mark has extensive trial and appellate courtroom experience and has successfully tried cases in New York Supreme Court and Civil Court on behalf of commercial and residential real estate developers, asset managers, cooperative and condominium boards, retail businesses and insurance carriers. Mark has also successfully briefed and argued appeals in the Appellate Division and Appellate Term of the State of New York.

Zachary Nathanson, Associate, Administrative: Mr. Nathanson represents developers of 421-a new construction and property owners of rent-regulated housing. He also represents sellers, buyers and lenders in connection with rent regulatory due diligence issues and affordable housing issues. Mr. Nathanson is involved with applications and compliance for real estate tax exemption and abatement programs, including Affordable New York, 421-a, the Industrial Commercial Abatement Program (ICAP), J-51, 420-a and 420-c.

Anthony Morreale, Associate, Administrative: Mr. Morreale advises and represents landlords, owners, and developers on a wide array of regulatory issues and in proceedings before the State Division of Housing and Community Renewal and other agencies. Prior to joining the firm, he served as a court attorney in the Housing Part of the New York City Civil Court.

Summer Interns:

Nicolas Hasbun is a 2L at St. John's Law School
Katelyn Schillaci is a 2L at Pace Law School.

Legal Assistants, Litigation:

The following joined or were appointed as Legal Assistants:

Erona Lacej
Michelle Ruiz
Jeannie Arellano

Other Professional Support Staff:

The following individuals joined as professional support staff:

Jane Jamiolkoski, Jr. Accountant
David Laurea, Jr. Accountant
Stephen Tenezaca, Jr. Accountant
Auckland Teague, Network Analyst
Javon Lawrence, Office Services
Nathaniel Marks, Paralegal
Latchmee Ramnarine, Jr. Paralegal
Jessica Aguilera, Secretary

Retroactive Application of the HSTPA

BY ANDREW E. ZEYER

On June 14, 2019 (the "Effective Date"), the Housing Stability & Tenant Protection Act ("HSTPA") became effective and dramatically impacted New York City real estate. Three years later, many questions still remain about the HSTPA. One of the main unresolved questions involves when and how a Court or administrative agency should apply the HSTPA. There have only been a few cases which have shed some light on the subject, including the recently decided *Karpen v. Andrade* No. 2022-50373 (N.Y. App. Term Apr. 22, 2022).

Karpen v. Andrade

In *Karpen*, the Appellate Term (the "2nd Department") held that the HSTPA could not be applied to a holdover proceeding to evict tenants based on owner's use, where the case was still pending on the Effective Date. The 2nd Department thereby overturned the Civil Court (the "Lower Court") decision to dismiss the owner's case. The primary basis for the 2nd Department's holding was that the Lower Court had improperly applied the HSTPA retroactively to a proceeding commenced prior to the Effective Date and, as a result, the case had been improperly dismissed. Other Courts have held the same in cases pending on appeal. However, unlike those cases, the issues in *Karpen* had never been determined as of the Effective Date and the case was then pending with the Lower Court, not on appeal.

Background: *Karpen v. Castro*

In the underlying case, *Karpen v. Castro* 66 Misc. 3d 362 (N.Y. Civ. Ct. 2019), the owner ("Owner") served a Notice of Non-Renewal to the tenants ("Tenants") of three apartments (the "Apartments") located within the same building in Brooklyn in June, 2018 (the "Underlying Case"). In October, 2018, Owner subsequently commenced three holdover proceedings to evict the Tenants based on owner's use. The proceedings were then consolidated before the Tenants moved to dismiss pursuant to CPLR § 3211(a)(7), for failure to state a cause of action. Owner opposed on the basis that the HSTPA and its applicability to the proceeding were unconstitutional. The importance of Owner's position is largely tied to the ways in which the HSTPA changed the criteria for evicting tenants based on owner's use.

Owner's Use Proceedings and the HSTPA

Prior to the Effective Date, an owner could gain possession of an apartment if the owner or his/her immediate family planned to use the apartment as their primary residence. In *Karpen*, based on such criteria, Owner sought to regain possession of the Apartments in order to convert the Apartments into two duplexes. The families of Owner's two adult children planned to use the duplexes, respectively, as their primary residence. However, the HSTPA went into effect while the Underlying Case was still pending, but before a determination was rendered by the Lower Court or any governmental agency.

Under Part I, Section 5 of the HSTPA, a stricter standard is imposed for owner's use, whereby an owner is now required to demonstrate an "immediate and compelling necessity" to regain possession. In the Underlying Case, the Lower Court applied the new, stricter standards of the HSTPA, despite Owner having initiated the proceeding before the Effective Date, and the Lower Court concluded that Owner had failed to demonstrate an immediate and compelling necessity and dismissed Owner's case.

Retroactive Application of the HSTPA

There is significant ongoing litigation at the Federal level regarding the constitutionality of applying the HSTPA retroactively to proceedings which were pending as of the Effective Date. However, *Karpen* is not the only State Court case which has held that the HSTPA could not be applied retroactively to a proceeding pending on the Effective Date. (See: *IMO Regina Metropolitan Co., LLC v. NYS Div. of Housing & Comm. Renewal*, *Raden v. W7879 LLC*, *Taylor v. 72A Realty Assoc. LP*, and *Reich v. Belnord Partners LLC*, 2020 NY Slip Op 02127 (2020), finding that the retroactive application of Part F of the HSTPA regarding fraud was improper where it would impair an owner's substantive rights in a rent overcharge proceeding which was pending at the appellate level on the Effective Date; see also: *Harris v. Israel*, 2021 N.Y. Slip Op. 796 (February 9, 2021) in connection with Part I of the HSTPA.)

The *Regina Metro* and *Harris* decisions were significant. However, the 2nd Department's holding in *Karpen* could be even more impactful because it took things a step further—the Court held that retroactive application of the HSTPA was improper in a lower court proceeding pending on the Effective Date, where a decision had never been rendered – as opposed to just cases pending on appeal.

Impact of *Karpen* on Major Capital Improvement Applications

At the administrative level, we have seen the New York State Division of Housing and Community Renewal ("DHCR") retroactively apply the HSTPA to many owners' applications for rent increases/ adjustments based on Major Capital

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Improvements ("MCI's") which were filed and still pending on the Effective Date. Prior to *Karpen*, DHCR began to distinguish MCI applications from other proceedings, finding that the HSTPA applied to MCI applications that were filed but still pending on the Effective Date. DHCR's rationale was that: (i) a pending application did not constitute a "proceeding", unlike an appeal or Petition for Administrative Review ("PAR"), and (ii) retroactive application of the HSTPA to an MCI application did not impair substantive rights of the owner, unlike those in connection with rent overcharge and other proceedings. (See: *Richmond Hill 108 LLC*: DHCR Adm. Rev. Docket No. JO130043RO (10/29/21).) However, *Karpen* could now change that.

Conclusion

The effects of the *Karpen* decision, and whether it will be applied by DHCR in administrative proceedings such as those involving MCI applications, are still uncertain. However, it appears to be a step in the right direction for New York City real estate. City real estate owners should contact attorneys in BBG's Administrative Law Department to discuss the retroactive application of the HSTPA, as well as their other administrative law questions.

*Andrew E. Zeyer is an associate in the Firm's Administrative Law Department and can be reached at 212-867-4466 ext. 410 (**azeyer@bbgllp.com**).*

Security Deposit Regulations for Non-Regulated Tenants That Are Often Overlooked by Agents and Owners

BY ROBERT A. JACOBS

Although counter-intuitive, just because a tenant is not subject to rent regulation does not mean that the tenant's security deposit is not regulated. In 2019, radical changes were made to the security deposit requirements affecting non-regulated tenants as part of the Housing Stability & Tenant Protection Act of 2019; the changes were reflected as amendments to General Obligations Law §7-108. However, although effective since 2019, it would appear that these changes have not been incorporated into the practice and procedures of many owners and property managers to this day.

As a threshold matter, the new provisions limit the amount of security deposit to one month's rent. The only exception is where the deposit is for a "seasonal dwelling", which is defined as a dwelling registered as a "seasonal dwelling" with the local or county governmental agency having jurisdiction over the dwelling, does not involve a lease in excess of 120 days, and the tenant has a primary residence to return to, the address of which is set forth in the lease.

Under the new provisions, the entire amount of the deposit is refundable to the tenant at the expiration of the lease except for (i) reasonable and itemized costs due as a result of the non-payment of rent, (ii) damages caused by the tenant beyond normal wear and tear, (iii) non-payment of utility charges payable directly by the owner, and (iv) moving and storage costs with respect to the tenant's belongings not removed from the dwelling when the tenant vacated.

One of the most overlooked provisions of the new provisions is the requirement that, after the initial lease signing but *before* occupancy, the owner is required to offer the tenant the opportunity to inspect the apartment to determine its pre-occupancy condition. If the tenant accepts such inspection offer, the parties are to meet and execute a written agreement attesting to the condition of the apartment prior to the tenant taking occupancy. This written agreement is admissible as evidence in Court as to the condition of the apartment at the inception of the tenancy.

Equally overlooked is the requirement that, within a reasonable time after notification by either party of intention to terminate the tenancy, unless the tenant gives less than two weeks' notice, the owner must notify the tenant in writing of the tenant's right to request an inspection before vacating the premises. If the tenant requests such inspection, it must take place no earlier than two weeks and no later than one week before the end of the tenancy. The owner must provide the tenant at least 48 hours' notice of the date and time of the inspection. After the inspection, the owner must provide the tenant with an itemized statement specifying repairs or cleaning that are proposed to be the basis for any deduction from the deposit.

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In response, the tenant is to be given the right to cure any such condition before the end of the tenancy. The foregoing right appears to be the first time a tenant is afforded the right by statute to remedy conditions claimed to be the basis for a proposed deduction from a security deposit.

Within 14 days after the tenant has vacated the apartment, the owner must provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and return the balance to the tenant. If an owner fails to provide the tenant the itemized statement (if deductions are being made) and the full amount of the deposit (or the balance if deductions are made) within such 14 days, the new provisions provide that the owner forfeits the right to retain any of the deposit.

Since non-compliance could result in forfeiture of the right to retain any part of the deposit, it is recommended that management companies communicate the foregoing rules and procedures to property managers so that owners are not at risk of losing this valuable right.

*Robert A. Jacobs is a partner in the Firm's Transactional and Administrative Law Departments, and can be reached at 212-867-4466 ext. 359 (**rjacobs@bbgllp.com**).*

Rent Overcharges: What Statute of Limitations Applies?

BY MAGDA L. CRUZ

One major change effectuated by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") concerned the scope of an owner's liability for rent overcharge claims, including treble damages. Prior to the passage of the HSTPA, the scope of liability was generally four years for the overcharge and two years for treble damages. The rental history that could be examined in order to determine if an overcharge had occurred (commonly referred to as the "lookback period") was likewise generally limited to four years prior to the bringing of the claim. The HSTPA expanded the scope of liability to six years for both overcharges and treble damages, and the lookback period, in some cases, became even longer.

However, in 2020, the New York Court of Appeals held in *IMO Regina Metropolitan Co., LLC v. NYS Div. of Housing & Comm. Renewal*, and three other cases [*Raden v. W7879 LLC*, *Taylor v. 72A Realty Assoc. LP*, and *Reich v. Belnord Partners LLC*] that "the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment." This holding reinstated the pre-existing four year limitations period for all pre-HSTPA overcharges.

An issue that then arose was how to determine the applicable limitations period when an overcharge complaint was filed after the enactment of the HSTPA (June 14, 2019) but the complainant sought overcharges that allegedly occurred both before and after the enactment.

In *Austin v. 25 Grove St. LLC*, decided on February 3, 2022, the Appellate Division, First Department, provided guidance on that issue, which affects countless overcharge complaints and due diligence evaluations.

Austin was a rent overcharge action that was commenced in July, 2020, after the enactment of the HSTPA. The complaint sought overcharge damages that allegedly began at the inception of the tenancy in 2013 and stretched through the date of the complaint—post HSTPA. Asserting the more expansive HSTPA provisions, the tenant-plaintiff argued that the owner was liable for overcharges for the entire period of the tenancy and maintained that the lookback period to calculate the legal rent (and, therefore, the amount of overcharges) went back even further. The Appellate Division rejected those arguments.

> The Appellate Division in *Austin* ruled, in pertinent part:
>
> To the extent plaintiffs seek to recover overcharges that accrued before the enactment of the Housing Stability & Tenant Protection Act of 2019 (HSTPA), effective June 14, 2019, the amendments to CPLR 213-a and Rent Stabilization Law § 26-516 [changing the pre-existing four year statute of limitations] enacted under the HSTPA are not applicable… *Regina Metro* applies to this case insofar as it determined that Part F of the HSTPA governing rent overcharges cannot be applied retroactively to overcharges that accrued before the enactment of the HSTPA.

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This ruling made clear that even if an overcharge complaint was brought after the enactment of the HSTPA, the pre-existing four-year statute of limitations can control both the scope of liability for damages, as well as the lookback period for calculating the overcharge. It is an appellate ruling that provides good direction and owner-favorable relief when litigating rent overcharge claims or examining potential claims in a due diligence review.

*Magda L. Cruz is a partner in the Firm's Litigation Department, specializing in appeals, and can be reached at 212-867-4466 ext. 326 (**mcruz@bbgllp.com**).*

The Loft Board's Favorite Time of Year

BY MICHAEL BOBICK

It's that time of year again! For those who do not know or are new to the Loft Law, come June of every year, the New York City Loft Board finalizes and mails out to all interim multiple dwelling ("IMD") owners the annual registration invoices and applications for their buildings.

The Loft Board's rules require all IMD owners to register their IMD buildings by July 1 of every year. In order to register their buildings properly, owners are required to sign the annual registration application and pay the required registration fees of $500 per residential unit. The annual registration application and registration fees are due by July 1, with a grace period to July 31. If the documents and fees are not submitted by July 31, a per-unit late fee is automatically generated by the Loft Board on August 1. Late fees will then accrue monthly until paid.

There are severe consequences should an owner fail to comply with the Loft Board's registration requirements. If an IMD owner fails to register, the Loft Board will commence an enforcement proceeding against the owner. The owner will then have one final opportunity to register—and should an owner still fail to register as required, the Loft Board will issue a Loft Board Order which will impose hefty fines of $5,000 for one year; $10,000 for two years and $17,500 for three or more years of delinquency. In addition, a delinquent owner will not be able to file applications at the Loft Board; obtain Loft Board approval letters for legalization work and non-legalization work; schedule narrative statement conferences; or challenge proposed sales of improvements.

By this point, owners should have received a package from the Loft Board with all required documentation. If you have not received the registration package, or if you have questions regarding any of the documentation within the package, or any general questions regarding the Loft Law, please contact BBG.

*Michael M Bobick is a partner in the Firm's Litigation Department, with a focus on Loft Law, and he can be reached at 212-867-4466 ext. 331 (**mbobick@bbgllp.com**).*

Leasing and Rent Registration Requirements for ERAP Recipients

BY MARTIN HEISTEIN

There has been much confusion about how building owners should treat permissible rent increases on lease renewals when accepting rent monies through the Emergency Rent Assistance Program (ERAP), and how to register those rents properly with DHCR.

As most owners are aware by now, upon receipt of ERAP funds, owners must follow ERAP guidelines and agree to not increase the monthly rent above the level being charged at the time of the application, for twelve months following the receipt of ERAP funds. However, lawful rent increases are permitted to be preserved. And, when the ERAP rent freeze period is over, the higher legal rent that was preserved in the lease can then be collected.

DHCR advises owners to send a letter or prepare a lease rider to their tenants, clarifying that the lower rent is being charged pursuant to the rules of ERAP and that the higher legal rent cannot be collected during the period of the ERAP rent freeze (i.e., the 12-month period that starts to run from the date that the owner received the first rent payment from ERAP for that tenant).

Finally, with respect to the rent registration requirements, the legal rent provided in the lease or lease renewal should be registered. However, the frozen rent that is actually being collected due to ERAP should be set forth in the registration space termed "Actual Rent Payment by Tenant"; on the form, next to the field that indicates the reason why the lower rent is being accepted, the owner should write "ERAP"

This information was recently clarified by DHCR on the Office of Rent Administration website under the "Recent News" heading.

*Martin Heistein is co-head of BBG's Administrative Law Department, and can be reached at 212-867-4466 ext. 314 (**mheistein@bbgllp.com**).*

A Buyer's Nightmare – Acquiring a Building Without Performing a Due Diligence Review

BY LOGAN O'CONNOR

Purchasers of New York City real estate occasionally feel that they have negotiated such fantastic deals that they are willing to waive their right to a due diligence period. The misbelief is that the price of the building is so good that it does not matter what kind of records the seller can provide with respect to the building. This is how we end up with a buyer's nightmare.

For illustration purposes, let's imagine a theoretical 6-story 24-unit pre-war walk-up building in which all residential units were allegedly deregulated more than twenty years ago. The purchaser believes that he is acquiring twenty-four free market class "A" apartments at a steal of a price. So, the purchaser waives his due diligence review period. What could go wrong?

Well, if just one tenant in the building decides to challenge the regulatory status of his/her apartment, this could open up a Pandora's Box of issues. If the purchaser is left to defend the regulatory status of a unit, the apartment could be found to be regulated if the purchaser cannot produce documentation substantiating the deregulation, even if the deregulation occurred more than twenty years ago.

Furthermore, if the deregulation is found to have been fraudulent in nature, the purchaser could be assessed treble damages, despite the fact that the purchaser did not even own the building at the time of deregulation.

Thus, if the tenant was paying $3,000 per month in rent when the legal regulated rent should have been $2,000, the purchaser could be left to pay $72,000 in overcharge damages (this does not take into consideration the permissible rent guidelines increases) plus $72,000 in treble damages, for a total of $144,000 in damages. And if *all* tenants in the building were to file similar claims, our theoretical purchaser would be left to pay a minimum of $3,456,000 in damages. So, unless that amount was factored into the purchase price, the purchaser has, in fact, emphatically *not* gotten the bargain (s)he expected.

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This analysis also ignores the possibility of outstanding rent reduction orders. A rent reduction order is detrimental to a purchaser's asset as it results in rent being frozen at the amount charged at the time the order was issued. Further, an outstanding rent reduction order prevents lawful deregulation. Even if the rent is restored, a purchaser can no longer deregulate the apartment now due to the 2019 enactment of the Housing Stability & Tenant Protection Act.

The attorneys at BBG regularly perform due diligence reviews so that our clients are made fully aware of the potential liabilities associated with the acquisition, financing or sale of a building. Any potential purchaser should avail him/herself of our expertise.

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

Appellate Update

BY MAGDA L. CRUZ

(Recent decisions by the New York Court of Appeals involving commercial and residential real estate matters that are of interest and with potential broad impact.)

Matter of DCH Auto v. Town of Mamaroneck (June 16, 2022). A net lessee of a parcel of commercial real property in Mamaroneck sought to challenge a real estate tax assessment as being too high. On Article 78 judicial review, the Court dismissed the net lessee's challenge because it interpreted the relevant statute, Real Property Tax Law §524 (3), as permitting only the "owner" to file a grievance with the local tax authority. The Appellate Division affirmed, but the Court of Appeals reversed and held that the net lessee was entitled to file the tax assessment grievance as the entity that is contractually obligated to pay real estate taxes on the net leased property. In reaching this decision, the Court found that the text of RPTL §524 (3) did not clearly define who could challenge real estate tax assessments and it was therefore necessary to employ various principles of statutory construction in order to discern the legislative intent of the provision. In reviewing the legislative history of the statute, examining how the specific provision in dispute conforms to the overall statutory framework, and how the State Department of Taxation and Finance has interpreted the provision in its public service publications, the Court of Appeals held that the right to file real estate tax grievances belongs to net lessees in addition to owners.

Batavia Townhouses, Ltd. v. Council of Churches Housing Development Fund Company, Inc. (May 24, 2022). This case also involved a statutory construction dispute, this time in the mortgage foreclosure context. The mortgagor-plaintiff commenced an action to declare that its wrap-around mortgage was no longer enforceable because, despite having failed to make any payments for more than six years, the defendant-mortgagee had never brought a foreclosure action. The Supreme Court ruled that the mortgagee's claim was, indeed, now time-barred and the six-year statute of limitations had not been tolled by any means set forth under the General Obligations Law. The two means at issue were (1) an "acknowledgement of the debt" (GOL §17-101), or (2) "a promise to pay… by the express terms of a writing signed by the party to be charged" (GOL §17-105). The Court of Appeals held that GOL §17-101 did not apply. Only an express promise to pay could toll the operative limitations period; the actions by the mortgagor in listing the outstanding mortgage as a liability in various annual financial statements and tax returns within the limitations period were a mere formality that amounted to, at best, nothing more than an implied promise to pay. Those acts were legally ineffective to toll the statute of limitations under the governing GOL §17-105. In reaching this conclusion, the Court of Appeals noted that the legislative history of GOL §17-105 showed that express and unequivocal acts of intent to pay are necessary so as to prevent "[s]erious impairment of titles to land and hindrance of real property financing." As a result, the mortgage debt was held extinguished as unenforceable due to the mortgagee's failure to commence a timely foreclosure action.

Matter of *Callen v. New York City Loft Board* (February 15, 2022). After a loft owner and its tenants settled a Loft Law coverage application, whereby the loft owner recognized the tenants as rent stabilized and agreed to procure an updated certificate of occupancy for the lofts from the Department of Buildings, the New York City Loft Board rejected the settlement and refused to accept the tenants' withdrawal of their coverage application. The Loft Board maintained that because the occupancy

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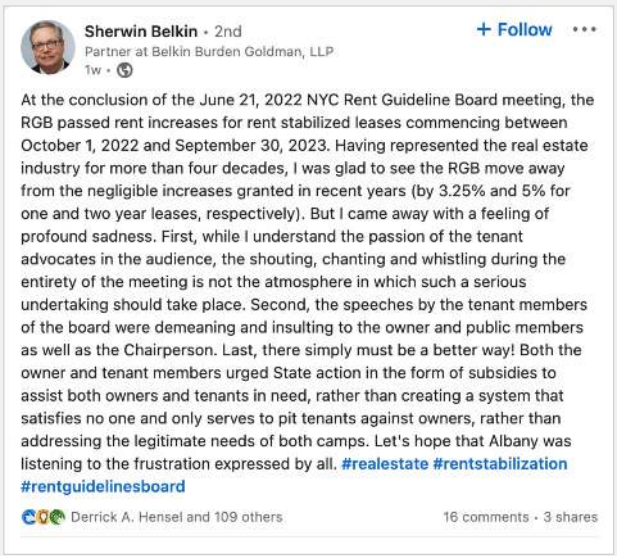
was currently in violation of the existing certificate of occupancy, it could not condone "illegal living arrangements" and the coverage application must be adjudicated on the merits. On Article 78 review—jointly sought by the owner and tenants—the Supreme Court held that the Loft Board's actions were not rationally based, and the Appellate Division agreed, finding that the parties, both of whom were represented by experienced counsel, should not be forced to litigate. The lower courts noted that there was no evidence of any violation having been issued by any City agency for illegal occupancy or unsafe conditions at the loft building. However, on the City's further appeal, the Court of Appeals reversed. In a brief memorandum decision, the Court did not credit the Loft Board's determination that the settlement agreement "perpetuat[ed] an illegal living arrangement." The Court stated that "[the] rationality of that determination is not before us." Nonetheless, the Court concluded that "[u]nder these limited circumstances, it was not irrational for the Board to remand for further proceedings, thereby declining to give effect to a provision of the settlement agreement in which tenants purported to withdraw their application for Loft Law coverage." In this curious decision, no mention was made as to what would happen if on remand the tenants simply elected to default and not prosecute their coverage application.

*Magda L. Cruz is a partner in the Firm's Litigation Department, specializing in appeals, and can be reached at 212-867-4466 ext. 326 (**mcruz@bbgllp.com**).*

BBG's Popular Social Media Posts



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BBG In The News

Founding partner **Sherwin Belkin** presented a Master Class on various aspects of New York City real estate, sponsored by *The Urban Real Estate Center*. **Access here.** Also, **Mr. Belkin** answered a query in *The New York Times Sunday Real Estate* section Q&A feature on June 18 on issues involved in providing an apartment to a home health care aide: **Read article here.**

Martin Heistein, co-head of BBG's Administrative Law Department, was a panelist at a June 2 seminar on rent regulation issues presented by Marcus & Millichap. **Mr. Heistein**'s topic was "Potential Multifamily Regulatory Changes & Operating Post-HSTPA".

Craig L. Price, co-head of the Firm's Transactional Department, was quoted in a June 2 article posted on *brickunderground.com* on tenants buying their residences: **Read article here.**

A 12,000 square foot medical services facility lease negotiated by Transactional Department partner **Stephen M. Tretola** on behalf of Firm client Muss Development LLC was the subject of an April 6 article in *The Commercial Observer*: **Read article here.**

Litigation associate **Alex B. Pia** was appointed to the New York City Bar Association's Construction Law Committee for a three-year term.

The Firm was mentioned in a May 4 article in *Crain*'s on leading commercial broker Jeff Peck of Savills: **Read article here.**

Recent Transactions of Note

Members of BBG's Transactional Department recently handled the following:

Partners **Daniel T. Altman** and **Stephen M. Tretola**, and associate **Joshua A. Sycoff**, represented the purchaser on the $27 million purchase of a multifamily complex in Texas.

Partners **Craig L. Price**, **Stephen M. Tretola** and **Murray Schneier** and associate **Joshua A. Sycoff** represented the purchaser in connection with the purchase and financing of an industrial property in Sarasota, Florida.

Mr. Altman and partner **Lawrence T. Shepps** represented the seller in connection with the $124 million sale of a Manhattan apartment building.

Messrs. Tretola, **Schneier** and **Sycoff** represented the borrower on the refinance of its property in Kingston, Pennsylvania.

Mr. Price and associate **Heather Foti** represented the seller in connection with the sale of two Upper Manhattan properties subject to regulatory agreements.

Messrs. Price, **Tretola** and **Sycoff** represented a Lower East Side building owner on the refinancing of its mortgage with New York Community Bank.

Mr. Price and partner **Deborah Goldman** represented the purchaser in the purchase of a Midtown West building.

Partner **Lloyd R. Reisman** represented the seller of a portfolio of commercial condominium garage units in New York City.

Mr. Shepps represented the seller on an $18 million apartment building sale in Brooklyn.

Mr. Price and partner **Michael J. Shampan**, and **Mr. Sycoff**, represented the purchaser of an Upper West Side townhouse, and the seller of an $11 million SoHo co-op.

Partner **Aaron Shmulewitz** represented a co-op corporation in connection with a $24 million refinancing of its underlying mortgage with Apple Bank.

Partners **Martin Heistein**, **Damien Bernache** and **Lloyd Reisman** served as special counsel to an institutional real estate fund in connection with the $142 million sale of a 4-unit mixed-use condominium in Boerum Hill, Brooklyn, consisting of approximately 270 rental apartments (both market rate and affordable), retail space and a parking garage. **Mr. Bernache** was responsible for facilitating HPD approval for the transfer of the inclusionary housing units and **Mr. Reisman** was responsible for obtaining a "no-action letter" from the Attorney General's office in connection with the sale.

Recent Notable Matters Handled by our Land Use/Zoning Team

Partner **Ron Mandel** and associate **Frank Noriega** recently represented clients in the following matters:

Representation of developer in connection with assemblage issues, transfer of air rights, and development-related easements for project in East Village.

Provide zoning and code due diligence to purchaser of 284-unit apartment building in downtown Brooklyn.

Obtain Department of Buildings' Zoning Resolution Determination to authorize multi-family project and avoid need for City Planning zoning change.

Counsel co-ops on Upper West Side and Midtown East in connection with Department of City Planning applications to modify their Privately Owned Public Spaces (POPS).

Negotiation of licenses/access agreements for numerous construction projects throughout the City.

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).

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT TO EITHER SHAREHOLDER OR CO-OP IN PULLMAN EVICTION PROCEEDING OVER NOISE

Bock v. 3515 Owners Corp. Supreme Court, Bronx County

COMMENT | This case has been pending for 10 years!

CONDO CANNOT COMPEL UNIT OWNER TO PAY INTERIM COMMON CHARGES

Cielo Garage Owners Company LLC v. Board of Managers of The Cielo Condominium Supreme Court, New York County

COMMENT | The Court held that the availability of monetary damages defeated the condo's claim of irreparable harm, which was necessary for the requested equitable injunction to compel interim payment.

CO-OP DOG OWNER NOT LIABLE TO NEIGHBORING SHAREHOLDER FOR BITE BY DOG WITH NO PRIOR VICIOUS PROPENSITIES

Arias v. Inwood Gardens, Inc Supreme Court, New York County

CONDO PURCHASER CAN INTRODUCE EVIDENCE OF PATENT & LATENT DEFECTS IN SUIT AGAINST SPONSOR

Tribeca Space Managers, Inc. v. Tribeca Mews Ltd
Appellate Division, 1st Dept.

CONDO SELLERS CAN SUBPOENA BUYERS' BANK REGARDING INFO AND RECORDS PERTAINING TO BANK'S CREDIT REJECTION OF BUYERS' MORTGAGE APPLICATION, THE BASIS FOR BUYERS SEEKING TO CANCEL CONTRACT

Gibb v. Dozortsev Supreme Court, New York County

PRINCIPALS OF SHAREHOLDER ENTITY CAN'T SUE CO-OP FOR BREACH OF PROPRIETARY LEASE, BUT SHAREHOLDER CAN SUE FOR DENIAL OF ALTERATIONS CONSENT AND WRONGFUL TERMINATION OF PROPRIETARY LEASE

Orange Orchestra Properties, LLC v. Gentry Unlimited, Inc.
Supreme Court, New York County

CONDO UNIT OWNER CANNOT WITHHOLD COMMON CHARGES DUE TO LEAKS IN APARTMENT

Board of Managers of Linden Gardens Condominium v. Ventour
Supreme Court, New York County

COMMENT | Curiously, the Court also declined to issue an injunction to compel the condo to make repairs.

PRO SE CO-OP SHAREHOLDER'S SUIT AGAINST CO-OP DISMISSED FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

Gerasimov v. Amalgamated Housing Corp.
United States District Court, Southern District of New York

CO-OP CAN SUE SHAREHOLDER FOR LEGAL FEES INCURRED IN PRIOR SUCCESSFUL NON-PAYMENT PROCEEDING

Amato v. Dayton Beach Park No. 1 Corp.
Appellate Division, 2nd Dept.

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT TO EITHER PARTY FOR RENT UNPAID ON LEASING OF RESIDENTIAL APARTMENT FOR PARTLY-COMMERCIAL PURPOSES

Good Company Pictures, LLC v. 132 Cloud Nine, LLC
Supreme Court, New York County

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CONDO UNIT OWNER CAN SUE INDIVIDUAL BOARD MEMBERS FOR BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT

Board of Managers of The Alfred Condominium v. Miller
Appellate Division, 1st Dept.

CO-OP APARTMENT TO BE SOLD AND PROCEEDS SPLIT BETWEEN ITS FEUDING OWNERS BECAUSE APARTMENT ITSELF COULD NOT BE PHYSICALLY PARTITIONED

Topp v. Pincus
United States District Court, Southern District of New York

COMMENT | Partitioning the apartment was impossible due to lot line window and C of O issues.

TRANSFEREE OF CONDO UNIT FROM SPONSOR CANNOT SUE INTERIM INVESTOR TO WHOM SPONSOR HAD ALSO AGREED TO SELL THE UNIT

Unit 3B 11 Beach LLC v. Kim
United States District Court, Southern District of New York

COMMENT | The latest chapter in this tortured litigation trail in at least two Courts, in which all parties seemingly acted badly.

BANKRUPTCY STAY NOT LIFTED; CONDO CANNOT ENFORCE FILED LIEN FOR UNPAID COMMON CHARGES

In re Sukhu
United States Bankruptcy Court, Southern District of New York

COMMENT | The Court noted that the mere filing of a lien post-petition violated the bankruptcy stay.

FORMER PRESIDENT OF HDFC CO-OP LIABLE TO CO-OP FOR $162,000 IN QUESTIONABLE PAYMENTS TO HER AND OTHER THIRD PARTIES AFFILIATED WITH HER

3405 Broadway HDFC v. Martinez
Supreme Court, New York County

COMMENT | She was also ordered ejected from her apartment.

CONDO PROPERLY GRANTED UNIT OWNER EASEMENT FOR EXCLUSIVE USE OF PORTIONS OF ROOF AND CORRIDOR

Iwashiro v. The Board of Managers of The Museum Building
Supreme Court, New York County

COMMENT | The Court held that the Board had the authority to do so, and had amended the Declaration properly.

CONDO UNIT OWNER CANNOT SUE SPONSOR FOR LOST RENTAL INCOME AS A RESULT OF POST-CLOSING LEAKS

Baik v. Riverside Center Site 5 Owner LLC et al.
Supreme Court, New York County

COMMENT | A scholarly analysis of why the Unit Owner's claims should be dismissed. The Unit Owner was also ordered to pay the sponsor's legal fees, as per the purchase agreement.

CONDO UNIT OWNER ENJOINED FROM CONTINUING TO MAKE VERBAL THREATS TO ON-SITE MANAGING AGENT

Board of Managers of The Promenade Condominium v. Eshaghpour
Supreme Court, New York County

COMMENT | The agent had apparently tried to enforce the requirement for Board consent to alterations, and the Unit Owner apparently took umbrage.

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT IN SUIT TO FORECLOSE CONDO LIEN

Baxter Street Condominium v. 125 Vertical Parking Group, LLC et al.
Supreme Court, New York County

COMMENT | This dispute was over $9,000 in assessments for common element repairs; the legal fees are already presumably some multiple of that figure.

CONDO NOT LIABLE TO UNIT OWNER FOR DENYING TENANT ACCESS TO UNIT

Weiss v. Bretton Woods Condominium II
Appellate Division, 2nd Dept.

COMMENT | This 10-year old case involves a dispute over a $2,451 non-payment in 2010, and whether the Unit Owner was obligated to pay legal fees therefor.

CO-OP LIABLE FOR DISABILITY DISCRIMINATION FOR NOT MAKING REASONABLE ACCOMODATION EXCEPTION TO PET BAN FOR EMOTIONAL SUPPORT ANIMALS

Mutual Apartments, Inc. v. New York City Commission on Human Rights Appellate Division, 2nd Dept.

COMMENT | But the damages award and penalties were halved, to $65,000.

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SPONSOR PROPERLY ENJOINED FROM EXERCISING VOTING CONTROL OVER CONDO BOARD AFTER END OF INITIAL CONTROL PERIOD

Tsui v. Chou Appellate Division, 1st Dept.

CONDO PRESIDENT'S PUBLIC CRITICISM OF TREASURER NOT DEFAMATORY

Harpaz v. Dunn Appellate Division, 2nd Dept.

COMMENT | The Court held that the president's statements were protected by qualified privilege, and there was no evidence of malice.

MANAGING AGENT NOT LIABLE TO CONDO UNIT OWNER FOR HER FAILURE TO RECEIVE NYC REAL ESTATE TAX ABATEMENT

Kang v. Douglas Elliman Property Management
Small Claims Court, New York County

COMMENT | The abatement was ultimately denied due to questions of the Unit Owner's residency and eligibility.

CO-OP AND MANAGING AGENT LIABLE TO SHAREHOLDER FOR FAILURE TO ADDRESS NUMEROUS WATER LEAKS AND RESULTANT MOLD

Baker v. 40 East 80 Apartment Corporation
Appellate Division, 1st Dept.

COMMENT | In this 2003(!!) case, the shareholder was awarded $870,000 plus 9% interest from 2006 onward, plus legal fees.

CONDO CAN SUE SPONSOR FOR CONSTRUCTION DEFECTS

The Board of Managers of 150 East 72nd Street Condominium v. Vitruvius Estates LLC Appellate Division, 1st Dept.

COMMENT | The sponsor's effort to dismiss the case failed on procedural grounds.

CO-OP BUYERS ENTITLED TO CANCEL CONTRACT AND DEPOSIT REFUND

Licht v. Rosenberg Supreme Court, New York County

COMMENT | The Board required a guarantor as a condition for approval, so the Court held that the buyers were not unconditionally-approved as required by the purchase agreement.

CO-OP SHAREHOLDER CANNOT WITHHOLD MAINTENANCE, EVEN FOR BREACH OF WARRANTY OF HABITABILITY

Andreas v. 186 Tenants Corp. Appellate Division, 1st Dept.

COMMENT | The shareholder maintained her primary residence elsewhere, so could not assert the warranty of habitability.

CO-OP SHAREHOLDER CANNOT CHALLENGE PROPRIETARY LEASE AMENDMENT, BECAUSE SUIT BROUGHT TOO LATE

Dau v. 16 Sutton Place Apartment Corporation
Appellate Division, 1st Dept.

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