Belkin • Burden • Goldman, LLP
BBG UPDATE

SPRING 2023 | VOL 66

EDITORS
Robert A. Jacobs
Kara I. Rakowski
Aaron Shmulewitz

Inside This Issue

Governor's New Proposal Addresses Both Affordable Housing and Office Space Vacancies.

BY ZACHARY NATHANSON

On January 31, 2023, Governor Kathy Hochul took some steps to address the void in affordable housing in New York City. In addition to the proposed extension to the Affordable Housing New York program ("421-a(16)"), and a far more restrictive replacement to the "J-51" program, the Governor also introduced a brand new proposed tax incentive for commercial conversions in New York City.

The proposed Real Property Tax Law section 467-m, referred to as *Affordable Housing from Commercial Conversions ("AHCC")*, was created to address the dearth of affordable housing in New York City amidst a glut of vacant office space following the COVID-19 pandemic. It has potential.

Eligibility

AHCC would provide an exemption from some real property taxes, other than for local improvements, for a three (3) year construction period, as defined hereinafter, and thereafter for nineteen (19) years (the "Restriction Period"). AHCC benefits are more substantial in properties located south of 96th Street in Manhattan than they are elsewhere in the City. There are no geographic limitations set forth in the proposal. There are prevailing wage requirements for building service employees for the entire Restriction Period, even if the benefit is terminated.

CONTINUED ON PAGE 2

CONTINUED FROM PAGE 1

AHCC is only available to properties converting from commercial to rental residential uses, and must contain at least six (6) units. Properties cannot convert to a hotel, for transient use, as a cooperative or condominium, or if the property is receiving other real property tax exemptions or abatements.

Under the proposal, projects must commence (when construction "lawfully began in good faith") between December 31, 2022 and December 31, 2032. Completion of construction (defined as the issuance date of a Temporary or Final Certificate of Occupancy covering all residential space) must occur on or before December 31, 2038.

The Benefit

During the construction period – the period between commencement and completion, exclusive of any construction that occurs prior to three (3) years from the completion date – all AHCC properties would receive a 100% exemption from real property taxes, except for those regarding local improvements.

For the 19-year Restriction Period, benefits would depend on the location of the AHCC property. For properties in Manhattan south of 96th Street, the proposed benefit would exempt 50% of real property taxes, not including local improvements, for the first 15 years, and would phase out 10% per year thereafter. Outside of that area in Manhattan, projects would be granted a 35% exemption of real property taxes, not including local improvements, for 15 years, and would phase out 7% per year thereafter.

Affordability Requirements

Under AHCC, the converted property must include at least twenty percent (20%) affordable units, in three or fewer income bands. "Income Bands," for the purposes of the proposal, is defined as the percentage of Area Median Income ("AMI") adjusted for family size that is a multiple of 10%.

Additionally, at least five percent (5%) of the total units must be at or below 40% AMI. The weighted average of all income bands must not exceed 70% AMI, and no income band may exceed 100% AMI.

Much like 421-a (16), AHCC properties must include a unit mix that either provides for proportional affordable and market rate units, or provides affordable units of which at least 50% would be two bedrooms, and not more than 25% would be one bedrooms and studios. Additionally, affordable units cannot be restricted to a specific floor or area. Finally, affordable units cannot be rented to a corporation or other entity, and cannot be left off the market for an unreasonable amount of time. HPD may also promulgate rules that affect marketing, monitoring and marketing bands.

All affordable units must remain subject to rent stabilization through the Restriction Period and until such tenant vacates, even if the AHCC is denied or terminated. The rent registration must designate units as "AHCC Program Affordable Housing Units." Market rate units are not subject to rent stabilization, except to the extent they would otherwise be subject to stabilization requirements.

The proposal does not include much in the way of detail regarding the applications or other filings that would need to be submitted. Under the AHCC, HPD would promulgate application requirements. The proposal does include a filing fee of $3,000 per unit, a portion of which would be paid at submission. This filing fee would not apply to projects with substantial government assistance.

Conclusion

AHCC does not provide the same sizable benefit that 421-a(16) provided to new residential developments. However, it does address a need. The absence of a program which provides affordable housing, like 421-a(16), risks exacerbating already sky-high rents and crushing an avenue for construction of new affordable rental units. Meanwhile, the new reality of remote work has resulted in a steady rate of office vacancies. AHCC seems like a natural solution to both problems.

__Zachary Nathanson__ is an associate in the Firm's Administrative Law Department and can be reached at 212-867-4466 ext. 253, or at (__znathanson@bbgllp.com__).

Dramatic Changes to Notarization Law

BY JOSHUA A. SYCOFF

On January 25, 2023, the New York State Department of State adopted substantial changes to Title 19 of the New York Codes, Rules and Regulations that will significantly alter the notarization process. Most notable among these changes are: (i) heightened notarial record keeping requirements (19 NYCRR 182.9); (ii) the elimination of Remote Ink Notarization ("RIN") and (iii) the addition of a new law effective January 31, 2023, authorizing notaries to perform electronic notarial acts via audio visual means paired with electronic signature software, labeled Remote Online Notarization ("RON") (Executive Law Section 135-c). The new Title 19 laws on notarial acts can be found here.

Record Keeping Requirements for In-Person Notarization:

All New York State notaries performing in-person notary services are now required to abide by strict record keeping requirements; the rules for RON are different and more cumbersome.

All notaries performing in-person notary services must now keep a journal record of certain information from each notarial act; the journal record must be maintained for ten years. The journal record must contain: (i) the date, approximate time, and type of notarial acts performed; (ii) the name and address of any individuals for whom a notarial act was performed; (iii) the number and type of notarial services provided; (iv) the type of credentials used to identify the principal, including, for verification made where a notary relies on the oath or affirmation of two witnesses who identify themselves with a valid government issued ID and who know the document signer personally, the names of the witnesses and, if applicable, the type of credential used; and (v) the verification procedures used for any personal appearance before the notary public. These journal record keeping requirements mark a significant deviation from how most New York notaries have practiced for years. Furthermore, these new requirements are somewhat ambiguous. Finally, existing notaries are not being required to pass any sort of test or re-certification related to these new rules.

One apparent ambiguity is that of section (v), which requires that the notary document the "verification procedures" used for any personal appearance before the notary. However, it is unclear what constitutes a "verification procedure" since the term is not defined. Section 182.5 provides some guidance: "For any individual who physically appears before a notary public, satisfactory evidence of identity requires identity verification through: (1) presentation of the back and front of an identification card issued by a governmental agency, provided the card: (i) is valid and current; (ii) contains the photographic image of the bearer; (iii) has an accurate physical description of the bearer, if applicable; and (iv) includes the signature of the bearer." In addition, while seemingly not required, best practice for notaries moving forward would be to keep a copy of the identification card.

Elimination of Remote Ink Notarization ("RIN"):

Throughout the Covid-19 pandemic, many notaries relied on what was commonly referred to as Remote Ink Notarization ("RIN"). RIN allowed notaries to notarize a signer's wet ink signature via some sort of audio visual means whereby the notary would verify the identity of the signer, the signer would sign in wet ink from his/her remote location, and the signer would then transmit the signature to the notary, who would notarize in New York. On January 31, 2023, the temporary statute allowing for RIN was repealed and replaced with the new Executive Law §135-c, Electronic Notarization. ***Therefore, this type of notarization is no longer permitted.***

Remote Online Notarization ("RON"):

The biggest change to the New York notary laws is the new ability of New York notaries (located in New York) to notarize electronic signatures (i.e., signatures similar to docusign) when the signer is located anywhere in the world (as long as the notarized document has to do with a matter before a United States court or involves property in the United States). Additionally, notaries performing such electronic notarizations can now charge a fee of up to $25 per notarial act performed (even if there are multiple notarization acts within a single session).

Notably, the new electronic notarial act law requires existing notaries to re-register with the state (and pay the applicable $60 registration fee). Notaries are not permitted to perform RON without registering through the Department of State and following the proper registration procedures and submitting (via the notary's New York business express account) a sample version of an electronically notarized document using a digital signature and certificate (presumably supplied and generated by the notary's statutorily-compliant software of choice).

The new electronic notarial act law is likely to dramatically affect the efficiency of transactions and litigation in New York, but not before law firms, title companies, lenders and others figure out a way to properly comply with the regulations. To utilize RON, notaries are required to use software from providers that "meets NYS requirements". However, at the time of this writing, New York has not yet recommend any providers, and offers no guidance other than advising notaries to ask providers whether their software complies with the new requirements. To make matters worse, notarization misconduct carries civil liability for injured parties, exposing notaries, many of whom are attorneys, to significant risk for not properly complying with the laws. Although RON is now technically in effect, it will likely take some time before it becomes widely used by notaries.

Joshua A. Sycoff is an Associate in BBG's Transactional Department, and can be reached at 212-867-4466 ext. 437 (jsycoff@bbgllp.com).

Where Does New York City Commercial Real Estate Stand Three Years After the COVID-19 Pandemic?

BY LEWIS A. LINDENBERG

The real estate industry in New York City is embracing a "new normal" since the COVID-19 pandemic changed the landscape of the real estate market three years ago.

At the onset of the COVID-19 pandemic, former Governor Andrew M. Cuomo issued a series of emergency executive orders, two of which provided for: (1) employees of non-essential businesses to begin to work remotely, and (2) a moratorium against owners bringing lawful Court eviction proceedings. (The orders did not waive or abate rent owed by tenants.) The consequence of the moratorium was that owners could not seek evictions of tenants for failure to pay rent.

The longstanding effects of the executive orders were, at least at that time, uncertain. Many commercial owners sought to assist their commercial tenants by providing either deferred repayment of rent arrears or voluntarily abating a portion of the rent arrears. Additionally, the Federal government provided emergency financial relief funds (the Paycheck Protection Program) for businesses, which effectively afforded cash infusions to tenants to remain in business during the pandemic.

Notwithstanding such financial relief, many tenants took the position that they were not required to pay rent during--and even after--the period covered by the emergency orders. This resulted in tenants asserting a myriad of defenses, including the doctrines of force majeure, frustration of purpose, and impossibility of performance– defenses not regularly asserted in almost 100 years.

With a few exceptions, Courts generally rejected the application of these defenses to waive or abate tenants' rental obligations.

The law is clear that the doctrines of frustration of purpose and impossibility of performance will not replace the unambiguous language of commercial leases requiring tenants to pay rent even if a force majeure event were to occur, as evidenced by the following holdings in recent Court decisions:

> **"[T] hese doctrines are not implicated by temporary governmental restrictions on in-person operations, as the parties' respective duties were to pay rent in exchange for occupying the leased premises and plaintiff acknowledged that it was open for curbside retail services as of June 4, 2020 and services by appointment as of June 22, 2020." Valentino U.S. A., Inc. v. 693 Fifth Owner LLC, 203 A.D. 3d 480 (1st Dep't 2022);**
>
> **"The doctrine of frustration of purpose does not apply as a matter of law where the tenant was not 'completely deprived of the benefit of its bargain.' " The Gap, Inc. v 170 Broadway Retail Owners, LLC, 195 A. D. 3d 575 (1st Dep't 2021);**
>
> **"Contrary to defendant's argument, (the frustration of purpose) doctrine has no applicability here. This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its product. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the Pandemic." 35 East 75th Street Corp. v. Christian Louboutin, 2020 N.Y. Misc. LEXIS 10423 at *5 (Sup Ct. N.Y. Co. Dec 9, 2020);**

Where do we stand today? The moratorium prohibiting eviction proceedings has been lifted and summary proceeding in the Civil Court are currently ongoing. The process is slower than before the pandemic and, hopefully, things will begin to move more quickly. The Supreme Court continues to remain an option to seek rent as monetary damages against tenants and guarantors.

Notwithstanding, owners legal rights to pursue unpaid rent in Court remain strong—tenant retention is, in itself, a very important business consideration because of uncertain market conditions, including the reality of a remote workforce and a shift in consumer behavior.

In my discussions with owners of commercial office space, and professionals, there are a host of factors contributing to market conditions which will impact on trends for the foreseeable future.

Many businesses have closed their doors permanently and finding replacement tenants remains a challenge. Moreover, tenants who are still leasing demand smaller spaces with more flexible lease terms, at a lower dollar figure per square foot and more construction concessions. Owners are meeting certain challenges on renting office space by attempting to add amenities to their buildings to try to differentiate themselves from the competition. Generally, owners have to be innovative in order to be competitive in the current market.

Suffice it to say that the pandemic has brought tremendous challenges to office and retail leasing. But New York City has endured many severe past challenges, and the fundamentals of what the City has to offer as the financial capital of the world are second to none, and will afford opportunities for the leasing environment to correct itself and come out stronger at the end.

***Lewis A. Lindenberg** is a partner in the Firm's Litigation Department concentrating in commercial lease litigation, and can be reached at 212-867-4466 ext. 335 (**llindenberg@bbgllp.com**).*

CASE DECISION BULLETIN

Court of Appeals Rules in J-51 Deregulation Case: No Default Formula in Casey v. Whitehouse Estates

BY: MAGDA L. CRUZ

In a much anticipated case involving how to calculate legal rents following an improper deregulation while a building was receiving J-51 tax benefits, the Court of Appeals in Casey v. Whitehouse Estates, filed March 16, 2023, unanimously rejected the application of a punitive default formula for resetting the rents, and reaffirmed its prior holding in *Matter of Regina Metro Co., LLC v. NYS Div. of Hous. and Comm. Renewal,* 35 N.Y.3d 332 (2020), on these issues.

In *Casey*, while receiving J-51 tax benefits, apartments were deregulated through 2011 when they became vacant and their rents exceeded the then statutory threshold. The deregulation occurred both before and after the 2009 *Roberts v. Tishman Speyer Props., L.P.* decision, which had held that deregulation could not legally occur during a J-51 period — contrary to 15 years of administrative and judicial rulings that had formerly allowed such deregulation. The tenant-plaintiffs commenced a rent overcharge class action in 2011. Their individual tenancies commenced between 2002 and 2011. The owner's attempt to issue refunds and register rents it believed were lawfully recalculated after the class action was commenced was deemed to constitute a "fraudulent scheme" by the lower Courts.

The Court of Appeals has now reversed and pointedly explained why, as follows:

> **[Owner]'s deregulation of the apartments was based on this same "misinterpretation of the law" involved in Regina and therefore that conduct did not constitute fraud. [Owner]'s subsequent re-registering of the apartments occurred after the four-year lookback period and [tenants] have failed to offer evidence that it somehow affected the reliability of the actual rent [tenants] paid on the base date.**

The Court of Appeals made clear that an actual fraudulent scheme to deregulate needed to be proven before resorting to a punitive default formula to recalculate the rents, and the tenants failed to prove any fraudulent conduct. Once again, the Court of Appeals stated that a fraudulent scheme to deregulate requires a finding of willfulness – and that a misinterpretation of deregulation law is not willful conduct. Without establishing the elements of fraud, as defined in *Regina*, the Court of Appeals reiterated that the proper way to determine the legal rent and any overcharges:

> **For purposes of calculating overcharges, where it is possible to determine the rent "actually charged on the base date" – here October 14, 2007 – that amount should be used and rent increases legally available to [owner] pursuant to the RSL during the four-year period should be added.**

Significantly, the Court of Appeals reinforced "the limited category of cases" where rental history can be examined beyond the applicable rent overcharge statute of limitations.

This holding, in combination with *Regina*, sends a strong message from the State's highest court that liability for rent overcharges is not limitless. The examination of rent histories beyond the applicable statute of limitations and the punitive default formula may be employed only in the rare case where an actual fraudulent scheme to deregulate is found, a heavy burden of proof for tenants.

***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**)*

Maximizing Your Leverage as a Buyer: How Equitable Vendee's Lien and Notice of Pendency Protect Real Estate Purchasers

BY ISRAEL A. KATZ

An equitable vendee's lien is an often-underutilized and little-known common law doctrine that offers significant protection to purchasers of real property in New York. It arises when a buyer purchases property from a seller, but the seller fails to convey clear title to the property or otherwise breaches a material provision of the purchase agreement, which entitles the purchaser to terminate or rescind the agreement and demand the return of its contract deposit. The equitable vendee's lien is a legal remedy that allows the purchaser to assert a claim against the real property being conveyed up to the amount of its contract deposit in order to secure the re-payment of the contract deposit from the seller.

The real value and power of this equitable doctrine is that it affords the purchaser the ability to file a notice of pendency against the property in dispute. A notice of pendency may only be filed if the relief sought in the complaint would affect title or possession to real property. This is why the equitable lien doctrine is such a game changer: The doctrine converts the purchaser's claim from one of money damages only (i.e., the return of its contract deposit) into one seeking to foreclose a lien on real property, which thus permits the purchaser to file a notice of pendency against the real property. The novelty of this doctrine is that it applies even if the purchaser takes a seemingly contradictory position seeking rescission or termination of the contract.

In fact, CPLR 3002(f) makes explicit that a vendee's lien arises even where a purchaser asserts such a contradictory claim of rescission or termination of the contract:

> **Vendee's lien not to depend upon form of action. When relief is sought, in an action or by way of defense or counterclaim, by a vendee under an agreement for the sale or exchange of real property, because of the rescission, failure, invalidity or disaffirmance of such agreement, a vendee's lien upon the property shall not be denied merely because the claim is for rescission, or is based upon the rescission, failure, invalidity or disaffirmance of such agreement**

The filing of the notice pendency offers the purchaser significant advantage in negotiations with the seller, as it effectively prevents the seller from selling, transferring or mortgaging the property to anyone else without first satisfying the purchaser's lien. Faced with those issues, the seller will often be eager to resolve the issue and remove the notice of pendency in order to clear the way for a sale to a third party, or to refinance or obtain new mortgage loans.

Purchasers of cooperative apartments are the exception to this rule. New York courts have consistently held that a notice of pendency may not be filed in connection with a dispute concerning the conveyance of a co-op apartment, because the conveyance of a co-op apartment is not a conveyance of real property. Rather, it is the sale of a proprietary lease for a particular apartment in the building coupled with an ownership interest in the shares of the cooperative that are allocated to the apartment. Because there is no conveyance of real property, no equitable lien arises and no notice of pendency may be placed on the apartment, co-op building or co-op shares while the contract dispute is being litigated.

In sum, an equitable vendee's lien is a valuable and powerful legal tool that allows buyers of real property in New York to protect their investment and secure repayment of their contract deposits. By seeking the imposition of, and foreclosure on, such a lien and filing a notice of pendency, the buyer can effectively prevent the seller from selling or transferring the property to anyone else, or mortgaging the property, and can thus gain significant leverage in the negotiations and litigation surrounding the contract deposit dispute.

***Israel A. Katz** is an associate in the Firm's Litigation Department concentrating in complex commercial real estate litigation matters. Israel can be reached at 212-867-4466 ext.824 (**ikatz@bbgllp.com**).*

APPELLATE UPDATE

CPLR 5704 – A Tool to Obtain Appellate Relief Without Filing an Appeal

BY MAGDA L. CRUZ

There are occasions in civil litigation when a party requires urgent relief from a lower Court that either declines to issue a temporary restraining order ("TRO") pending a hearing on the principal motion, or grants a TRO, *ex parte*, that is, without notice to the opposing party. The affected party may be aggrieved significantly by the lower Court's cursory act, such as when the party is trying to stop on-going or imminent harm in a leasehold, or the sudden granting of a TRO without any opportunity to be heard interferes with the party's rights to enforce a judgment or imposes sudden obligations in a disputed matter. There is a procedural tool that the aggrieved party may deploy in order to have an appellate Court quickly review the lower Court's act, and possibly grant, or direct the lower Court to grant, the TRO, or to vacate the injury-causing TRO.

CPLR 5704 authorizes a justice of the Appellate Division or the Appellate Term to issue an *ex parte* order or provisional remedy that is refused by a lower Court from which an appeal to the respective appellate Court would lie, or to vacate or modify an *ex parte* order granted by such lower Court. This authority is typically utilized sparingly by appellate Courts and, based on their rules, almost always on notice to both sides, but in an appropriate case provides powerful relief, and many times, can be a game-changer.

Consider an instance where a tenant is committing a serious nuisance in an apartment and due to Court backlogs, the property owner is unable to obtain a Court hearing for many months. The property owner moves by order to show cause to obtain an expedited trial date, or alternatively, for an interim order to stop the most egregious of the nuisance behavior, but the Court declines to grant any interim relief, and sets a return date for the motion more than a month in the future.

Turning to the appellate Court in this instance under the authority of CPLR 5704 may enable the property owner to have the appellate Court directly order the lower Court to set an expedited date for the property owner's order to show cause, or to grant a TRO to abate the nuisance behavior, or both. No appeal need be filed by the property owner; it only needs to show that orders by the lower Court can be appealed to the specific appellate Court to which the property owner has turned for CPLR 5704 relief, and that the lower Court acted *ex parte*, not giving the property owner any opportunity to be heard on its emergency application.

Housing Court matters in Manhattan and the Bronx are appealable to the Appellate Term, First Department. Therefore, if the order to show cause was made in a Manhattan or Bronx Housing Court case, the CPLR 5704 motion must be made at the Appellate Term, First Department. If the case originated in the Supreme Court of those counties, then the CPLR 5704 motion would be made at the Appellate Division, First Department.

Another example where a CPLR 5704 motion may quickly return the parties to the status quo until a hearing on the disputed matter is conducted by the lower Court, is when a party obtains an *ex parte* TRO staying a proceeding from going forward, such as stopping discovery, precluding a summary judgment motion from being heard, or a trial from continuing. Such sudden interruptions cause delays and other strategic obstructions that can significantly prejudice the other party. Here again, CPLR 5704 can provide an opportunity to quickly put the matter before a justice of the appellate Court that hears appeals from the lower Court that issued the *ex parte* TRO. The appellate Court justice will review the *ex parte* TRO, and generally, after hearing from both sides, can vacate or modify the *ex parte* TRO, and allow the lower Court proceedings to resume.

Of course, the outcome of any CPLR 5704 motion is dependent upon the facts and legal issues underlying the motion. However, when faced with a situation involving urgent circumstances, or a material unhinging of the course of litigation, or infringement of substantial rights, the CPLR 5704 procedure should not be overlooked

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**).*

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 affiliates of Dalan Management in the $34.25 million sale of a Houston, Texas multifamily property.

Messrs. **Tretola** and **Sycoff** represented the seller of a Westchester commercial property in a $12 million deal.

Partners **Craig L. Price** and **Michael J. Shampan**, and Mr. **Sycoff**, handled: the $11.350 million purchase of a Brooklyn townhouse; the $15.250 million purchase of Water Mill property; and the $7.575 million sale of an Upper West Side townhouse

Mr. **Tretola** and partner **Murray D. Schneier** handled the $26 million refinance of 181 East 119th Street in New York and a tenant in common interest's acquisition of 116 Edgecombe Avenue in New York.

Leases

Partners **Daniel T. Altman** and **Allison Lissner** represented: a landlord in the negotiation of an option agreement to enter into a long term ground lease for a 65,000 square foot full square block on Bruckner Boulevard in the Bronx for the development and operation of a standalone battery energy storage system.

Mr. **Schneier** negotiated a hotel lease in Flushing.

Recent Notable Matters Handled by our Land Use/Zoning Team

Our team, led by partner **Ron Mandel** and associate **Frank Noriega**:

• Obtained approval for a zoning variance from the Board of Standards and Appeals to authorize a manufacturing use that is not permitted by right in the zoning district.

• Successfully assisted property owner and architect with "vesting" case to allow development to obtain certificate of occupancy issued pursuant to former zoning district regulations that changed in 2010.

• Obtained Zoning Resolution Determination from Department of Buildings to authorize construction of multi-family housing, which will result in substantially more units within the building than would otherwise be permitted.

• Counseled developer with street mapping issue involving Department of City Planning, Borough President's Office, and Department of Buildings to authorize construction of sewer line associated with the development of the building.

• Successfully lobbied Department of Buildings and obtained dismissal of decision previously issued by the Office of Administrative Trials and Hearings (OATH), and monetary penalties removed, related to a Privately Owned Public Space (POPS). A related POPS amendment for the property is being handled by the firm.

• Counseled client regarding Department of Transportation revocable consent process to authorize construction of development on City property.

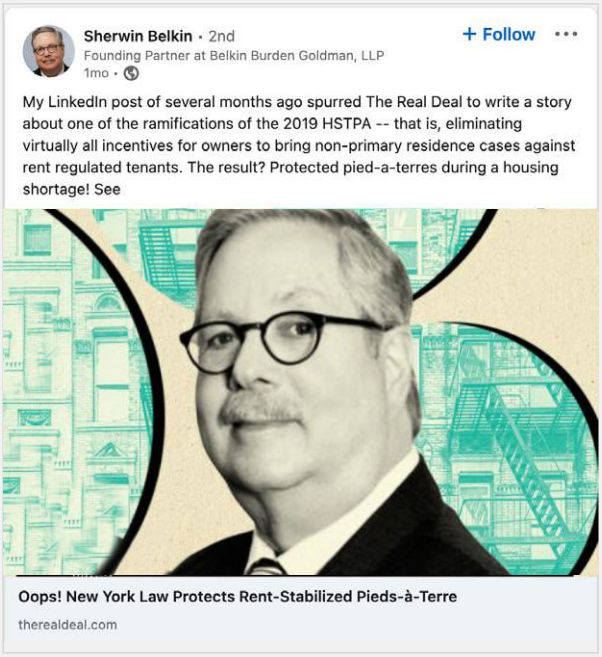
BBG In The News

Founding partner **Sherwin Belkin** was featured in a January, 2023 Quarterly Market Update webinar on numerous issues affecting New York City multifamily housing presented by Marcus & Millichap, which can be accessed **here**. **Mr. Belkin** was quoted in a January 20 article in The Real Deal that reported on a Court decision reinstating a tenant's overcharge complaint in a building receiving 421-a abatement benefits (Read **here**), and in a February 23 article in the same publication about an unintended consequence of the HSTPA—illegal tenant pied-a-terres (Read **here**). **Mr. Belkin** was also quoted in a March 6 article in brickunderground.com discussing the new City law regulating AirBnB-type transient use of apartments, and how building owners can register to prohibit them (Read **here**), in a March 16 article in The City, critiquing proposed "good cause eviction" legislation (Read **here**), and in the "Ask Real Estate" feature in The New York Times Sunday Real Estate section on March 19, regarding an owner's remedies involving a non-paying tenant (Read **here**).

Mr. Belkin and **Aaron Shmulewitz**, head of the Firm's co-op/condo practice, jointly presented a webinar hosted by AKAM Associates on March 8 regarding new New York City Local Law 18 regulating AirBnB-type transient use of apartments; the webinar can be accessed **here**.

Litigation Department partner **Matthew S. Brett** was quoted in a December 27 article in The Real Deal, and in a January 3 article in law360.com (Read **here**), with regard to a lawsuit brought by BBG on behalf of Kingston property owners to challenge the proposed imposition of rent stabilization in that city, and a concomitant rent reduction.

BBG's Popular Social Media Posts



LinkedIn

Follow Us

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***).

PROBLEMATIC SHAREHOLDER CANNOT STOP CO-OP FROM EVICTING HIM UNDER PULLMAN DOCTRINE

Haimovici v. Castle Village Owners Corp. Supreme Court, New York County

COMMENT | The Court held that the Board had followed its prescribed procedures, and the shareholder had ample opportunity to cure his bad behavior.

PURCHASER CAN SUE HDFC CO-OP FOR HOUSING DISCRIMINATION, BASED ON INFERENTIAL EVIDENCE

Gibson v. Castillo Supreme Court, New York County

CONDO BOARD HAS RIGHT TO INSPECT UNIT

Board of Managers of 145 Americas Condominium v. 145-Seven LLC Supreme Court, New York County

SHAREHOLDER'S INDEMNITY OBLIGATIONS TO CO-OP AND MANAGING AGENT UNDER ALTERATIONS AGREEMENT VOIDED BECAUSE INDEMNITY CLAUSE OVERLY BROAD

Sanchez v. Madison 79 Associates, Inc. Supreme Court, Kings County

CO-OP SHAREHOLDER NOT RESPONSIBLE TO REPAIR LEAK DAMAGES FROM ATRIUM DOORS INSTALLED BY PRIOR SHAREHOLDER

131 Perry Street Apartment Corporation v. Clauser Supreme Court, New York County

COMMENT | The current shareholder never signed an assumption of his predecessor's alterations agreement. Boards should require assumption of alterations agreements as a condition for closing.

CO-OP LIEN FOR UNPAID MAINTENANCE SUPERIOR TO BANK LIEN, UNDER UCC AND RECOGNITION AGREEMENT

JP Morgan Chase Bank, N.A. v. 476 Broadway Realty Corp. Supreme Court, New York County

CONDO UNIT OWNERS TIME-BARRED FROM SUING SPONSOR PRINCIPALS FOR NOT SELLING UNITS AT MARKET

Shomshonov v. Board of Managers of The Heights Condominium Supreme Court, Kings County

SUIT AGAINST CONDO DISMISSED FOR FAILURE TO SERVE PRESIDENT OR TREASURER, AS REQUIRED BY GENERAL ASSOCIATIONS LAW

Sherman v. The Watchcase Factory Condominium Supreme Court, New York County

CONDO CAN SUE SPONSOR AND PRINCIPALS FOR FRAUD IN CONSTRUCTION DEFECTS CASE

Board of Managers of 87-89 Leonard Street Condominium v. Leonard Street Owner, LLC Supreme Court, New York County

CONDO UNIT OWNER CAN SUE BOARD OVER PERGOLA BAN

Starke v. Board of Managers of 20 Pine Street Condominium Supreme Court, New York County

COMMENT | The business judgment rule did not bar the suit, because questions of fact existed as to the Board's reasons for the ban.

CO-OP SHAREHOLDER NOT ENTITLED TO JURY TRIAL, DUE TO WAIVER PROVISION IN PROPRIETARY LEASE

Mazzocchi v. Windsor Owners Corp. United States District Court, SDNY

CONDO CAN SUE SPONSOR PRINCIPALS FOR BREACH OF FIDUCIARY DUTY, BUT NOT FOR DIRECT LIABILITY FOR CONSTRUCTION DEFECTS

Board of Managers of Petit Verdot Condominium v. 732-734 WEA, LLC Supreme Court, New York County

CONTINUED ON PAGE 11

CONTINUED FROM PAGE 10

CONDO CAN INSTALL HEATERS NEAR UNIT OWNER'S PARKING SPACE IN GARAGE

Aydin v. Board of Managers of The Decora Condominium Supreme Court, Kings County

CONDO UNIT OWNERS CANNOT ENJOIN NOISY USE OF PUBLIC FACILITY CONDO UNIT

Samaha v. Brooklyn Bridge Park Corporation Supreme Court, Kings County

COMMENT | Disputed noise levels, unclear balancing of equities.

COMMERCIAL CONDO UNIT OWNER CANNOT SUE BOARD OVER COOKING PROHIBITION IN CONDO DEC

Arisa Realty Co. XI LLC v. Board of Managers of The Leonard Condominium Supreme Court, New York County

COMMENT | The Commercial Unit Owner had knowledge of the ban when it purchased the unit.

CONDO UNIT OWNER NOT ENTITLED TO INJUNCTION COMPELLING CONDO TO REPAIR ROOF

Green Coaster Nabisco, LLC v. The Residential Board of Managers of Two Twenty Five Rector Place Condominium Supreme Court, New York County

COMMENT | The injunction was denied because the alleged harm was compensable by money, and the injunction would have been the ultimate relief sought in the suit.

DAUGHTER OF MITCHEL-LAMA CO-OP SHAREHOLDER CAN ENJOIN CO-OP'S SALE OF HER APARTMENT UNDER CONVERSION PLAN

Bass v. WV Preservation Partners, LLC Appellate Division, 1st Dept.

CONDO UNIT OWNER RESPONSIBLE FOR PLUMBING REPAIRS BECAUSE PIPE WAS WITHIN HIS UNIT

Brito v. Board of Managers Maple Arms Condominium Appellate Division, 2nd Dept.

UNIT OWNER CAN SUE CONDO FOR FAILING TO TAKE ACTION TO STOP NOISE FROM UPSTAIRS NEIGHBORS

Bacharach v. Board of Managers of The Brooks-Van Horn Condominium Supreme Court, New York County

COMMENT | Curiously, the Court held that the Unit Owner couldn't sue the upstairs neighbor for private nuisance, as the noise (children running and jumping) was normal apartment living sounds.

TRO ISSUED TO PREVENT "COMPETING" CO-OP BOARD FROM ACTING ON BEHALF OF CO-OP

Tower Owners Inc. v. Loev Supreme Court, Kings County

COMMENT | Disputed election, warring factions; for some reason, these cases arise disproportionately in Brooklyn.

SON OF DECEASED SHAREHOLDER IN MITCHEL-LAMA CO-OP NOT ENTITLED TO SUCCESSION RIGHTS

Kralik v. New York City Department of Housing Preservation & Development Supreme Court, New York County

COMMENT | The son couldn't prove that he had lived there with the shareholder.

HDFC SHAREHOLDERS CANNOT SUE MANAGING AGENT FOR BREACH OF FIDUCIARY DUTY

Plato v. Charles Supreme Court, New York County

COMMENT | The Court held that the managing agent owed a fiduciary duty to the co-op, not to shareholders.

SHAREHOLDER ENTITLED TO ATTORNEY FEES IN MOLD SUIT AGAINST CO-OP

Hartman v. WVH Housing Development Fund Corporation Appellate Term, 1st Dept.

CONDO CAN SUE SPONSOR PRINCIPAL FOR BREACH OF FIDUCIARY DUTY DUTY

Board of Managers of The 432 Park Condominium v. 56th and Park (NY) Owner, LLC Supreme Court, New York County

COMMENT | The principal was on the Board, and made binding decisions in a dispute between the Board and the sponsor.

CONDO UNIT OWNER NOT ENTITLED TO INJUNCTION TO COMPEL SPONSOR TO REPAIR ROOF LEAK

Schwartz v. El Ad US Holding, Inc. Supreme Court, New York County

COMMENT | Because the injury was compensable by money, and repairs were already underway.

UNIT OWNER CANNOT ENJOIN NOISY USE OF HOTEL COMPONENT OF BUILDING

Montgomery v. 215 Chrystie LLC Appellate Division, 1st Dept.

COMMENT | The potentially noisy use of that space had been disclosed in the offering plan when the plaintiff bought.

CONTINUED ON PAGE 12

CONTINUED FROM PAGE 11

CONDO BOARD HELD IN CONTEMPT FOR MISLEADING COURT

Park 56 LLC v. Board of Managers of The Parc Vendome Condominium Supreme Court, New York County

COMMENT | The Court's decision is a blistering hammering of the Board's actions over 16 years.

VALID GIFT OF HDFC CO-OP APARTMENT NOT MADE BY NOW-DECEASED BROTHER

Rivera v. 98-100 Ave. C HDFC Appellate Division, 1st Dept.

CO-OP GRANTED SUMMARY JUDGMENT FOR UNPAID MAINTENANCE; DISPUTED ISSUE OF PRECISE AMOUNT DUE TO BE DETERMINED AT HEARING

Plaza 400 Owners Corp. v. Kurpis Supreme Court, New York County

NYC DEP ENTITLED TO SUMMARY JUDGMENT FOR UNPAID WATER/SEWER CHARGES FROM CONDO & UNIT OWNERS, BUT TIME AND INTEREST LIMITED

Department of Environmental Protection v. Board of Managers of The 772 East 8th Street Condominium Supreme Court, New York County

COMMENT | Boards should always verify that management companies are paying water and sewer charges.

SHAREHOLDER CANNOT CANCEL CO-OP'S SALE LIEN NOTICES FOR NON-PAYMENT

Ger v. Saxony Towers Realty Corp. Appellate Division, 2nd Dept.

CO-OP BOARD'S DETERMINATION THAT SHAREHOLDERS WERE COMPLYING WITH NOISE HOUSE RULE PROTECTED BY BUSINESS JUDGMENT RULE

Rumor v. Lyan Supreme Court, Queens County

SHAREHOLDER CAN SUE CO-OP FOR INTERFERING WITH HIS ALTERATIONS, UNDER ALTERATIONS AGREEMENT

Irving Place Tenant Corp. v. Erem Supreme Court, New York County

SHAREHOLDER CANNOT ENJOIN IMPLEMENTATION OF CO-OP BYLAW AMENDMENT

Glodek v. Fine Arts Development Laboratories, Inc. Supreme Court, New York County

SHAREHOLDER CANNOT SUE CO-OP OR ITS FORMER COUNSEL FOR FAILING TO RECOGNIZE FORMER OWNERSHIP AS JOINT TENANCY

Young v. 101 Old Mamaroneck Road Owners Corp. Appellate Division, 2nd Dept.

GUARANTOR OF TRUST'S OBLIGATIONS TO CO-OP CANNOT AVOID GUARANTY OBLIGATIONS BASED ON DISPUTE INVOLVING TRUST

Churchill Owners Corp. v. Kent Supreme Court, New York County

CONDO BOARDS CAN SUE UMBRELLA HOA FOR BREACH OF FIDUCIARY DUTY

Board of Managers of Van Wyck Glen Condominium v. Van Wyck at Merritt Park Homeowners Association, Inc. Appellate Division, 2nd Dept.

CHURCH GRANTED LICENSE TO INSTALL PROTECTIONS ON NEIGHBORING CO-OP BUILDING PER RPAPL §881

Redeemer Presbyterian Church East Side v. 160 East 91 Owners Corp. Supreme Court, New York County

HOA HOUSE RULE LIMITING DOGS' WEIGHT TO 25 POUNDS HELD NULL & VOID

Turan v. Meadowbrook Pointe Homeowners Association, Inc. Appellate Division, 2nd Dept.

MANAGING AGENT NOT LIABLE TO CONDO FOR SPONSOR CONSTRUCTION DEFECTS

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

COMMENT | This litigation is now 11 years old.

UNIT OWNER CAN SUE CONDO FOR FAILING TO FOLLOW ITS OWN BUILDING SAFETY PROTOCOL, WHICH LED TO DOORMAN ASSAULTING HER

Sackas v. 240 East 46th Street Condominium Appellate Division, 1st Dept.

CONTINUED ON PAGE 13

CONTINUED FROM PAGE 12

CONDO AWARDED SUMMARY JUDGMENT ON FORECLOSURE OF LIEN FOR UNPAID COMMON CHARGES

Board of Managers of The Carnegie Plaza Condominium v. Delcioppo Supreme Court, New York County

COMMENT | BBG represented the victorious condo.

CONDO BUYER CANNOT SUE SELLER FOR FRAUD BASED ON BUILDING HAVING ONLY A VIRTUAL DOORMAN

Dille v. Zoelle LLC Supreme Court, New York County

COMMENT | The virtual doorman was fully disclosed in the offering plan, which the buyer could have seen in conducting due diligence.

SHAREHOLDER CANNOT SUE CO-OP FOR FAILING TO SELL ROOF SPACE TO HER

Levinson v. 77 Perry Realty Corp. Appellate Division, 1st Dept.

COMMENT | The Court held that the parties had never reached full agreement on all terms.

CO-OP'S "PULLMAN" EJECTMENT OF SHAREHOLDER UPHELD UNDER BUSINESS JUDGMENT RULE

Rivercross Tenants Corp. v. Kovach Appellate Division, 1st Dept.

CONDO LIEN FORECLOSURE SET ASIDE

Board of Managers of The 442 St. Marks Avenue Condominium v. Milord Appellate Division, 2nd Dept.

COMMENT | Because the condo had failed to disclose a mortgage of record against the unit.

SHAREHOLDER LIABLE FOR CO-OP'S ATTORNEY FEES UNDER ALTERATIONS AGREEMENT

Mandracchia v. Renovate-Create Sourcing and Procurement Corp. Supreme Court, New York County

COMMENT | The shareholder had sought to blame the co-op for an alteration gone awry. BBG represented the victorious co-op.

BBG Continues to Expand and Welcomes New Hires

The Firm has recently added the following attorneys and professional support staff in 2023:

Andrew Stafutti, Associate, Litigation: Mr. Stafutti served as in-house Litigation Counsel at a leading NYC property management company where he handled a high volume of residential and commercial nonpayment and holdover litigations, as well as HP actions for apartments and commercial tenants. Additionally, he managed outside counsel and drafted commercial lease amendments, assignments and assumptions of leases, and notices of default. He received his Juris Doctor from CUNY School of Law and is a member of both the New York State Bar Association and the New York County Lawyers' Association.

Other Professional Support Staff:
The following individuals joined as professional support staff:

Esther Jacobs, Secretary
Michael Brown, Office Services Clerk

Anniversaries
BBG would like to acknowledge and congratulate the following members of the BBG team who have been with the Firm for over 5 years and whose work anniversary dates fall in the months of January — March. As we reflect on these significant milestones, we express our sincere appreciation for their support, hard work, and unwavering commitment.

Sherwin Belkin, Co-Founding Partner – 34 years

Jeffrey Goldman, Co-Founding Partner, Co-Managing Partner & Co-Chair of Litigation Dept – 34 years

Daniel Altman, Co-Managing Partner & Co-Chair of Transactional Dept – 33 years

Dwight Braumuller, Paralegal – 32 years

Martin Meltzer, Partner – 31 years

Stewart Smith, Partner – 21 years

Nilda Guzman, Legal Assistant – 21 years

Craig Price, Partner & Co-Chair of Transactional Dept – 18 years

Rodney Tavarez, Paralegal – 15 years

Christina Browne, Partner – 11 years

Damien Bernache, Partner – 7 years

We are proud to announce that March 6, 2023 marks the Firm's 34th anniversary! We would like to sincerely thank all our clients for entrusting us with their continued business, support, and loyalty.

Upcoming Firm Events:
We look forward to our upcoming client appreciation nights on March 30 and April 4, where we will be hosting various clients at our new office where they can expect the following:
i.) a tour of our new office space,

ii.) meet, greet and connect with other real estate industry professionals, and

iii.) complimentary drinks and snacks.

* For any clients who were unable to attend this event for either date, please continue to read our newsletters for more Firm updates and future events. For more information, feel free to reach out to us at **info@bbgllp.com.**

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