Belkin · Burden · Goldman, LLP
BBG UPDATE

SUMMER 2023 | VOL 67

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Inside this Issue

Attorney Advertising: Prior results do not guarantee a similar outcome.

Time is of the Essence

BY MICHAEL J. SHAMPAN

Closing dates in contracts are an essential component of New York residential real estate transactions for both purchasers and sellers. Unfortunately, scheduling a closing does not always go as smoothly as anticipated. That is because most residential contracts do not list an absolute set closing date or "time of the essence" (TOE) date by which the parties are required to close. Typically, residential contracts list an "on or about" closing date, which is merely an approximate target date. Under such an "on or about" closing date provision, either party has the right to a reasonable adjournment of the closing date, which is widely held to be 30 days from the "on or about" closing date listed in the contract.

If a contract does specifically list a TOE closing date, the parties are required to perform their obligations under the contract and close by the stated TOE date. In order to be effective, a contract must unequivocally state that the closing is "time of the essence". This creates what is sometimes referred to as the "law date" for closing. Simply listing a closing date as "on or before" or "no later than" a certain set date has been held not to have the same meaning as "time of the essence". TOE provisions in contracts can be mutual, or unilateral, obligations on either the buyer or the seller, so long as explicitly stated.

When a contract does not expressly list a TOE closing date, either party may unilaterally make it a TOE closing by giving a clear and unequivocal written notice to the opposing party. This notice must be sent after the "on or about" closing date listed in the contract. The TOE letter must establish the final date upon which the parties to the contract must perform their obligations or else risk being held in default under the contract. Relevant case law has held that so long as a TOE notice provides the opposing party with at least 30 days' prior written notice of the TOE closing date, it will be deemed sufficient notice. A party that provides less than 30 days' written notice of a TOE closing date runs the risk that a Court may determine that the party did not provide the opposing party with sufficient notice as a matter of law.

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The party providing notice of a TOE closing must be ready, willing and able to close and perform its obligations under the contract on the designated TOE closing date. Thus, a TOE letter should contain clear language setting forth a specific TOE closing date, as well as language stating that in the event the opposing party does not perform its contractual obligations by that TOE date, they will be considered to be in default under the terms of the contract.

In order to ensure that a Court can objectively determine that a party was in fact ready, willing and able to close on the TOE closing date, it is recommended that the party setting the TOE closing have a Court reporter or videographer attend the closing on the TOE closing date. The attorney for the party that set the TOE closing should actually conduct a run-through of the closing, even if the opposing party does not attend, in order to demonstrate that his client is in fact ready to close at that time. Though not strictly required, involving a Court reporter or videographer is a prudent approach that would likely provide beneficial evidence in motion papers.

When a seller sets a TOE closing date, the seller's attorney should send correspondence to the purchaser's attorney outlining the closing preparation and requirements, including but not limited to drafts of closing documents, proposed closing figures and adjustments, and payment instructions for the balance of the purchase price. This helps establish the seller's readiness to close.

If a TOE closing does not, in fact, take place on or before the TOE closing date set forth in the TOE letter, the non-defaulting party may seek the default remedies provided under the contract. In the event of a seller default, the purchaser may be entitled to cancel the contract and be reimbursed the initial downpayment. Alternatively, a purchaser could force the sale of the premises by the seller by means of specific performance. Should the purchaser default, the seller might be entitled to cancel the contract and retain the initial downpayment as liquidated damages.

All of these factors make it imperative that before entering into a residential contract, the parties understand that an "on or about" closing date is not set in stone and very rarely provides the finite closing timeframes typically expected. Although it is often difficult to avoid delays in closing, understanding the relevant closing timeframes in the contract, and the potential remedy mechanisms should things go wrong, will likely help ensure a smoother closing process.

Michael J. Shampan *is a partner in the Firm's Transactional Department and can be reached at 212-867-4466 ext. 409, (**mshampan@bbgllp.com**)*

BBG Welcomes Summer Associates

The firm operates a Summer Associate program, through which we recruit law students seeking valuable hands-on experience. In this program, they have the opportunity to work closely with our experienced real estate attorneys and actively engage in the firm's day-to-day operations. We are pleased to announce the selection of the following talented individuals for the summer of 2023:

ZACHARY C. ROZYCKI,

Summer Associate: He is presently enrolled as a 3L student at St. John's University School of Law where he is a Real Estate Fellow at the Mattone Family Institute, while concurrently serving as the Executive Notes and Comments Editor for the esteemed American Bankruptcy Institute Law Review. As he progresses into his third year, he is dedicated to expanding his knowledge of real estate law through his coursework and active employment with the firm.

LATCHMEE RAMNARINE,

Summer Associate: She is a Ronald Brown Scholar currently enrolled at St. John's University School of Law, prepared to utilize over five years of legal experience in her new professional role. Prior to assuming this position, she served as a Junior Paralegal in both our Litigation Department and other law firms. She approaches this opportunity with enthusiasm, seeking to broaden her understanding of real estate law while leveraging the valuable experience she gained as a Junior Paralegal.

Committees and Appointments

We take great pride in recognizing the extensive involvement of BBG attorneys in meaningful organizations and their prestigious appointments. Here are a few notable mentions:

SHERWIN BELKIN, Co-Founding Partner - Sherwin serves on the **New York State Bar Association Landlord-Tenant Committee**, which provides educational updates and programs for practitioners and offers commentary on proposed legislation.

MAGDA CRUZ, Partner – Magda is currently a member of the **New York City Bar Association's Committee on State Courts of Superior Jurisdiction**, which addresses issues related to the NYS Supreme Court, the Appellate Division, the Court of Claims, and the Court of Appeals. Additionally, she participates in the Judiciary Committee's evaluation of candidates for these courts. Recently, she served on a subcommittee of the **Judiciary Committee**, evaluating a candidate for appointment to the NYS Court of Appeals.

LLOYD F. REISMAN, Partner – Lloyd serves on the **Cooperative and Condominium Law Committee** of the **New York City Bar Association**, focusing on cooperative and condominium housing law in various areas. He is also a member of **The Condominiums & Cooperatives Committee** of the **New York State Bar Association**. This committee regularly meets to discuss legislative developments and cutting-edge issues in the world of condominiums and cooperatives.

DEBORAH L. GOLDMAN, Partner – Deborah currently co-chairs the **Commercial Leasing Committee of the Real Property Section of the New York State Bar Association**, which aims to identify and address current issues and new developments in connection with commercial leasing.

ZACHARY NATHANSON, Associate - Zachary has been accepted to serve on the **NYC Bar Association Condemnation & Tax Certiorari Committee**, which delves into substantive and procedural law concerning eminent domain and real property tax assessment review proceedings. The committee also explores related legal and public policy topics.

CHRISTINA BROWNE, Partner – Christina has also been designated as the representative of the **LGBT Bar Judiciary Committee** on the 2023 Supreme Court Independent Screening Panel. As part of this panel, she helps interview candidates for the Supreme Court as well as publish ratings.

BENJAMIN MARGOLIN, Associate – Benjamin has been serving on the **NYC Bar Association Housing Court Committee**, which focuses on landlord-tenant law, the structure and function of the New York City Housing Court, and any issues concerning attorneys and pro se litigants, including participating in the **Judiciary Committee**'s evaluation of candidates for Housing Court. Additionally, he currently co-chairs the **Young Lawyers Committee for the Queens County Bar Association**, addressing the challenges faced by young lawyers adjusting to practice and office administration. The committee collaborates with the Program and Continuing Legal Education Committees to organize programs that enhance young lawyers' professional proficiency.

RON MANDEL, Partner – Ron serves on the **Housing & Urban Development Committee** for the **NYC Bar Association**. This committee tackles legal and policy issues related to the urban environment, with a particular emphasis on affordable housing preservation and development.

BBG 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 April – June. As we reflect on these significant milestones, we express our sincere appreciation for their support, hard work, and unwavering commitment.

Robert T. Holland, Partner – 33 Years

Roxanne Lynch-Scott, Paralegal – 32 Years

Kara I. Rakowski, Partner & Co-Chair of Administrative Dept. – 31 Years

Robert Jacobs, Partner – 28 Years

Orie Shapiro, Partner – 24 Years

Brian Haberly, Partner – 21 Years

Lewis Lindenberg, Partner – 20 Years

Jeffrey Levine, Partner – 20 Years

Douglas Davis, Office Services Clerk – 19 Years

Suzana Baci, Controller – 19 Years

Aaron Shmulewitz, Partner – 18 Years

Rosa Lombardo, Legal Assistant – 18 Years

Noelle Picone, Partner – 18 Years

Diana Nisman, Partner – 16 Years

Gabriel Perez, Office Services Clerk – 14 Years

Vivian Tong, Senior Accountant – 14 Years

Michael Shampan, Partner – 10 Years

Lawrence Shepps, Partner – 9 Years

Scott Loffredo, Partner – 9 Years

Stephen Tretola, Partner – 8 Years

Brian Bendy, Associate – 7 Years

Jekin Patel, Senior Accountant – 6 Years

Benjamin Margolin, Associate – 6 Years

Robert S. Marshall, Jr., Partner – 5 Years

Running the Extra Mile for Our Clients

BBG is pleased to announce our recent participation in the JPMorgan Chase & Co. 2023 Corporate Challenge! With the support and encouragement of their co-workers, our team successfully completed a 3.5-mile race around Central Park, joining thousands of other competitors representing companies from across NYC. This event served as a true test of endurance and teamwork, and we are proud to say that each team member exceeded expectations.

The proceeds from this race are generously donated to the Central Park Conservancy, supporting their mission to restore, manage, and enhance Central Park. We are thrilled to have had the opportunity to contribute to this worthy cause, and we eagerly anticipate future opportunities to illustrate how our Firm goes the extra mile, in and out of the courtroom!

BBG has once again been ranked as a top-tier real estate law firm by Chambers and Partners for the 2023 year. We are thrilled to receive this prestigious recognition, which underscores our expertise in real estate law.

To be featured in Chambers and Partners, a globally recognized directory, is a testament to our commitment to excellence. We extend our sincere gratitude to our valued clients and entire BBG team for their ongoing support.

Additionally, we would also like to extend special congratulations to our esteemed practitioners, Sherwin Belkin and David Skaller, who were also individually recognized.

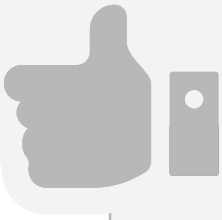
We are delighted to announce that Kara I. Rakowski, Partner and Co-Chair of the Administrative Department, has been recognized as a 2023 Notable Woman of Law by Crain's New York Business for her outstanding professional and civic achievements.

Ms. Rakowski has been a valued member of our firm since 1991, bringing with her extensive experience in representing property owners in rent regulation matters. She provides expert advice on the development of rent-regulated properties, obtaining Certificates of Non-Harassment, navigating Single Room Occupancy/Hotel Stabilization regulations, NYC Loft Law, and human rights issues. Furthermore, Ms. Rakowski adeptly represents property sellers, buyers, and lenders in matters concerning rent regulatory due diligence and affordable housing considerations.

Please join us in extending our heartfelt congratulations to Ms. Rakowski for this well-deserved recognition.

The link to the full list of Notable Women can be found on our website here.

Popular Social Media Post



Sherwin Belkin · 3rd+
Founding Partner at Belkin Burden Goldman, LLP

It didn't pass ....for now. They may reconvene. Will Governor Hochul sign if it does pass? Biggest cliffhanger since "Who shot JR?" (if you're too young to understand this reference, google it)

Sherwin Belkin · 3rd+
Founding Partner at Belkin Burden Goldman, LLP

A last minute effort to harm property owners. Let's hope this isn't passed; if passed, isn't signed; and, if signed, is declared illegal by the Courts once again.

As State Housing Package Implodes, Two Tenant-Friendly Bills Still Simmering

citylimits.org · 6 min read

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Emergency Access To Fix Apartment Conditions

BY KATE WILDONGER

Occasionally, a building owner must access an apartment on very short notice to carry out emergency repairs. If the apartment's occupant does not cooperate in granting access, New York courts have the power to afford to owners emergency access when there is impending risk to the safety and health of the building's occupants or irreparable harm to the building's owner.

When an occupant is unwilling to let the owner (or its agents) into the apartment, the owner must seek an order to show cause in Court seeking a temporary restraining order and/or a mandatory preliminary and permanent injunction directing the occupant to grant access to the apartment on an emergency basis for the limited purpose of remedying the harmful conditions. The burden is on the owner to show that: its claim for access has merit, the owner will suffer irreparable harm without immediate access to the apartment, and the occupant of the apartment will not be unduly inconvenienced by the repair work.

An owner's claim that it is entitled to access is ordinarily supported by both a provision in the lease agreement and by statute. It is standard for a residential lease to provide an owner with a contractual right to access an apartment to inspect and repair conditions. Additionally, Housing Maintenance Code §27- 2008 grants owners a statutory right to access apartments to make repairs:

> No tenant shall refuse to permit the owner, or his or her agent or employee, to enter such tenant's dwelling unit or other space under his or her control to make repairs or improvements required by this code or other law or to inspect such apartment or other space to determine compliance with this code or any other provision of law, if the right of entry is exercised at a reasonable time and in a reasonable manner. The department may by regulation restrict the time and manner of such inspections.

It is well-established in case law that an owner is entitled to access if the owner can establish irreparable injury and show that a balancing of the equities favors granting access. Irreparable harm includes not only continued damage to the building itself but also the potential repercussions of the owner's breached obligations to other occupants of the building if conditions are not repaired timely.

In *400 W. 59th St. Partners LLC v Oyolesi* 2021 N.Y. Slip Op. 32618 (N.Y. Sup. Ct. 2021), the Court allowed the owner to enter the tenant's apartment to fix a leak caused by the tenant's use of an air conditioning unit. The Court ruled that the leak posed a hazard to the tenant's safety and that the repair work was urgent. The tenant attempted to rebut the owner's attempt to gain access by stating that he had stopped using the air-conditioning unit causing the leak. The Court determined that simply discontinuing use of the air conditioner was not a resolution to the problem, and that the owner had both a contractual and statutory right to access the apartment to repair the leak. Moreover, the Court emphasized that if the owner could not gain access to repair the leak, the owner would potentially be in breach of its obligations to other tenants of the building.

Emergency access is also granted by Courts in the context of condominiums. In *Board of Mgrs. of Carriage House Condominium v. Healy*, 2021 N.Y. Slip Op. 3401 (N.Y. App. Div. 2021), the Court granted the Board emergency access to the building's roof deck, holding that the only practical way to reach the roof deck was through the subject apartment. The Court reasoned that emergency access was necessary to ensure the completion of HVAC repairs and maintenance and that the potential harm to individual unit owners who do not have functional air conditioning outweighs the minor inconvenience of allowing occasional access to the subject unit.

Finally, Courts have granted emergency access to cooperatives as well. In *25 Indian Rd. Owners Corp. v. Baez,* 2017 N.Y. Slip Op. 30158 (N.Y. Sup. Ct. 2017), after years of uncooperative behavior by the proprietary lessee in providing access for inspections and repairs, the co-op sought Court intervention for access to the apartment for the purpose of inspecting and making necessary repairs to a leak that had been affecting other tenants in the building. The co-op argued that its inability to enter the apartment caused, and would continue to cause, dangerous conditions and potential safety and health problems in the building; the proprietary lessee did not dispute that water was leaking from his apartment causing damage to the building and an infestation of flies. The Court determined that the issuance of a preliminary injunction was warranted under the circumstances.

Although such cases regarding access for emergency repair purposes are highly fact-specific, Courts have established that a meritorious claim for access based on a contractual agreement or statute, coupled with a showing of irreparable harm and/or potential unsafe conditions to other occupants of the building, will weigh heavily in favor of granting an owner's request.

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Court Limits Lifespan of the Residential Lease Guaranty

BY LAUREN K. TOBIN

Lease guaranties serve an integral purpose in the post-pandemic New York rental market, where many owners have grown wary to accept tenants who are less-than-qualified. In such cases, such owners have typically accepted a guaranty by a third party guarantor to pay rent in the event that the tenant fails to pay. A guaranty is, thus, a useful device that offers assurances for owners focused on risk management, while enabling tenants to secure apartments they might otherwise be financially unqualified to rent.

It is generally undisputed that a guaranty lasts the full term of the lease – but will it survive lease amendments, extensions, renewals, subsequent leases and the like? Recently, in *511 E. 80th St. LLC v. Margalit*, the New York County Supreme Court had an opportunity to examine the lifespan of the residential lease guaranty.

In that case, the parties had entered into a lease with a two-year term commencing in 2016. The guaranty expressly indicated that it would "not be affected by any change in the Lease whatsoever" including, but not limited to "any extension of time or renewals." Notably, the guaranty also provided that the guaranty would bind the guarantor even if the guarantor was not a party to the changes to the lease.

When the initial term of the lease ended, the tenant failed to vacate the premises and became a "holdover" tenant. However, the parties subsequently entered into two additional leases—neither of which referenced the initial lease and neither of which were signed by the guarantor. Making particular note of the lack of reference to the original lease, and the nine-month lapse of time between the expiration of the original lease and the subsequent lease, the Supreme Court declined to extend the obligations of the guarantor to the subsequent leases between the same parties. The guarantor's obligations were, thus, curtailed.

What does this mean for owners with tenants whose leases have guarantors? At a minimum, owners must ensure that the guaranty expressly states that the guarantor's obligations will survive any holdover, renewal, amendment, and/or extension of the original lease. In addition, the guaranty should clearly state that the guarantor's obligations extend to any succeeding lease between the same parties for the same premises. Further, any extension or modification of a lease must specifically reference the original lease and the obligations of the guarantor. This concept was fatally absent in *511 E. 80th St. LLC v. Margalit*, as the owner there had failed to mention the original lease in the subsequent agreements, and did not reference the continuing nature of the guaranty.

The Court's decision in *511 E. 80th St. LLC v. Margalit* demonstrates the necessity for owners and their counsel to be particularly careful with lease guaranties, and the drafting of subsequent agreements between the parties, to preserve the owners' expectations of payment security.

Lauren K. Tobin *is an associate in the Firm's Transactional Department, and can be reached at 212-867-4466 ext. 400 (**ltobin@bbgllp.com**).*

Recent Appellate Decisions of Note

BY MAGDA L. CRUZ

Rent Regulation:

• Casey v. Whitehouse Estates, Inc., 2023 NY Slip Op 01351, decided on March 16, 2023, Court of Appeals. Reaffirmed the Court's holdings in Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, concerning the criteria that must be met before a mistaken deregulation of a rent stabilized apartment can be found to be an actionable fraudulent act. Finding no fraudulent act was proven by the tenants, the Court rejected use of the punitive default method in order to set the legal rents after the apartments were re-regulated. Note: BBG represents a former owner in this case.

• Burrows v. 75-25 153rd St., LLC, 2023 NY Slip Op 1940, decided on April 13, 2023, Appellate Division, First Department. Dismissed a tenant rent overcharge class action that was brought to challenge the manner in which initial legal rents were set in a RPTL 421-a development. The Court ruled that the tenants could not establish any fraudulent act due to (a) the absence of any evidence supporting the necessary elements of fraud, which need to be pled with particularity, and (b) the delay in bringing the action beyond the applicable four-year statute of limitations. The Court highlighted the lack of any evidence of tenant reliance upon the alleged errors in the initial registrations and leases because the rents were fully disclosed in those documents. The Court also found no impropriety in the use of a "two-month-free" rent concession, and rejected the claim that rent concessions must be factored into the legal rent as a "net effective rent" akin to a "preferential rent."

CONTINUED ON PAGE 9

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• Tribbs v. 326-338 E. 100th LLC, 2023 NY Slip Op 1950, decided on April 13, 2023, Appellate Division, First Department. Denied tenant's summary judgment motion in a rent overcharge class action that contested the regulatory status of apartments which were deregulated during a period that the owner received J-51 tax benefits. The Court found that the tenants failed to establish any fraudulent act, as a matter of law. The Court was critical of the absence of any tenant affidavit or verified pleading and the tenant's belated effort to remedy their deficiencies through documents submitted in reply. The Court rejected the tenant's arguments that the owner's failure to register apartments with DHCR and/or increases in rent evidence fraud, noting that such acts, standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate an apartment.

• Woodson v. Convent 1 LLC, 2023 NY Slip Op 2857, decided on May 30, 2023, Appellate Division, First Department. In yet another tenant rent overcharge class action, the Court further clarified and reinforced the Regina and Casey standards for fraud and default formula claims as they apply to erroneous deregulation of apartments while the owner was receiving J-51 tax benefits. The Court reiterated the high standard of proof that tenants must present, and that delays in registration or increases in rent, by themselves, are not sufficient proof. The Court reiterated that fraud requires "evidence of a representation of material fact, falsity, scienter, reliance and injury," which the tenants did not produce. Here, again, the Court noted the absence of any tenant affidavit to support the claims. The Court upheld the four-year base date rent as the controlling rent, even if that rent may have been a market rent. Note: BBG successfully represented the owner in this case.

• North Hudson Realty Corp. v. Ecalp Corp., 2023 NY Slip Op 02850, decided on May 30, 2023, Appellate Division, First Department. This case highlights the consequences of the rent laws materially changing during a time when a transaction is pending. Seller and buyer entered into a contract for the purchase of a mixed use building with a number of regulated and deregulated units. Seller provided a due diligence period to the buyer and also gave the buyer an authorization to obtain DHCR records. After the signing of the contract, but before closing, the Housing Stability Tenant Protection Act of 2019 was enacted, which increased an owner's potential exposure to rent overcharge liability. As a result, the buyer demanded proof of apartment improvements that had increased certain rents and had caused deregulations. The seller refused the demand and buyer refused to close. The Court ruled in favor of the seller, enforcing the contract, holding that it is the buyer who bears the risk that a property's value "will be reduced by a change in the law between the execution of the contract and the closing."

Commercial Leases and COVID-19—related Rent Defaults:
Note: BBG successfully represented the owners in all of the below appeals.

• Bremen House, Inc. v. Lobosco, 2023 NY Slip Op 1584, decided on March 23, 2023, Appellate Division, First Department. The Court upheld the grant of summary judgment to the owner in this commercial rent default and holdover ejectment action. The Court rejected tenant's affirmative defenses of force majeure, impossibility of performance and frustration of purpose because "[t]he COVID-19 pandemic-related regulations did not frustrate the purpose of the lease, or render defendant's business operations objectively impossible, as defendant was able to operate his coffee shop and bakery as a takeout business at all times and eventually resumed on-premise services after the restrictions were lifted." Tenant's other defenses were unavailing as the rent obligation was effectively absolute and no basis existed for renewing the lease.

• N. Star Textile, Corp. v. Micro Office Solutions 4, 2023 NY Slip Op 1844, decided on April 6, 2023, Appellate Division, First Department. Tenant sought to excuse its non-payment of rent during the COVID-19 pandemic by relying on a lease provision that allowed abatement of rent if a condition existed that violated the certificate of occupancy of the building. The Court held that "[b]y its plain terms, the Certificate of Occupancy lease provision does not confer upon the tenant defendant the broad option to abate its rent payment whenever its business is affected by a governmental action, such as the government restrictions issued in connection with the COVID-19 pandemic." The Court also pointed to another lease provision that required the tenant to "continue paying rent even if plaintiff is prevented from performing any of its obligations under the lease due to government preemption, rule, order, or regulation resulting from an emergency."

• 902 Associates v. Union Square 902 Suites, LLC, 2023 NY Slip Op 1734, decided on March 30, 2023, Appellate Division, First Department. In this case, the Court declined to vacate the monetary default judgment that was entered against the commercial tenant, which failed to timely appear in the action. The Court found that the tenant had no meritorious defense. The claims of "impossibility of performance" and "frustration of purpose" were unavailing because tenant's business was not shut down due to the pandemic-related executive orders; tenant "claimed only that its revenues decreased significantly." The Court further noted that "it is undisputed that [tenant] did not resume paying rent even after the governmental restrictions were lifted. Because [tenant] was able to continue operations, albeit in a limited capacity, its performance of the lease was not rendered impossible by the pandemic-related regulations."

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• 88 Greenwich Owner LLC v. 21 Rector St. LLC, 2023 NY Slip Op 02960, decided June 6, 2023, Appellate Division, First Department. The Court affirmed the grant of summary judgment in favor of the owner and against a restaurant tenant and its guarantor. The lease did not provide them with any right to withhold rent during the COVID-19 pandemic. The Court rejected, once again, "frustration of purpose, impossibility of performance, and failure of consideration as defenses to the nonpayment of rent under a commercial lease as a result of the pandemic, particularly where, as here, there was a relatively 'brief period of closure' and the lease specifically carved out the obligation to pay rent as an exception to limitations on performance." In addition, the lease clauses which address "restrictive governmental laws or regulations," "Acts of God," "fire or other casualty," or other reasons beyond a party's reasonable control — do not provide a defense to claims for unpaid rent. The Court also rejected the contention that the pandemic-related Executive Orders constituted a taking by eminent domain and, "section 5.7 of the lease states that even in the event of a taking by eminent domain, defendants were not relieved of the obligation to pay rent." With respect to the arguments involving the Guaranty Law, the Court ruled that the immunity for certain lease guaranties affected by pandemic-related executive orders did not apply in this case. The owner successfully enforced the guaranty without violating any commercial tenant harassment provisions.

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

New Lease Flood Notice Requirement

BY: LOGAN O'CONNOR

Starting June 21, 2023, every residential lease in New York will be required to include information pertaining to a building's flood history, current flood risk and flood insurance. This change comes about as a result of Senate Bill S5472A, adding Real Property Law Section 231-b, which was signed by Governor Hochul in December, 2022.

The law requires all residential leases to include the following information:

1. Whether any part of the building is located in a Federal Emergency Management Agency ("FEMA") designated floodplain;
2. Whether any part of the building is located in a Special Flood Hazard Area according to FEMA's Flood Insurance Rate Maps;
3. Whether any part of the building is located in a Moderate Risk Flood Hazard Area according to FEMA's Flood Insurance Rate Maps;
4. Any prior damage to the building due to a natural flood event that the owner has knowledge of or reasonably should know has occurred and the nature of any such damage; and
5. A notice to tenants stating explicitly "Flood insurance is available to renters through the FEMA National Flood Insurance Program to cover your personal property and contents in the event of a flood. A standard renter's insurance policy does not typically cover flood damage. You are encouraged to examine your policy to determine whether you are covered."

Owners should contact their insurance brokers to determine if buildings are located in any of the areas referenced above. Should you have any questions about this required notice, please contact BBG.

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**).*

Recent Transactions of Note

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

Leases

Co-head of the Transactional Department, partner **Daniel T. Altman**, handled the negotiation of an inline store lease at the World Trade Center on behalf of an international candy company.

Mr. Altman and partner **Michael J. Shampan** represented an international art dealer in the negotiation of its office lease in the Meatpacking District, as well as a national fertility company as tenant in its expansion in the northeast in a Philadelphia office lease.

Mr. Shampan represented the owners of two West Village buildings in the leasing of a health and fitness club, and a home furnishing showroom.

Mr. Shampan and partner **Allison R. Lissner** represented the owner of a Midtown building in the leasing of a convenience store.

Ms. Lissner also represented a national REIT in the leasing of approximately 10,000 sf of retail space to a national discount variety store in Merrillville, Indiana. **Ms. Lissner** also represented a popular NYC-based burger chain in the leasing of approximately 2,400 sf of restaurant space at The Produce Terminal in Pittsburgh. **Ms. Lissner** also represented an Upper East Side co-op in the leasing of approximately 3,000 sf of ground floor and cellar space for an upscale café operated by a top NYC chef.

Partner **Robert S. Marshall** represented a tenant in the negotiation of a lease for, and subsequent build-out of, a fine art gallery in Chelsea.

Messrs. **Marshall** and **Altman** represented a tenant in the negotiation of a high end jewelry store lease in SoHo.

Purchase/Sale and Refinancing Transactions

Partners **Daniel T. Altman** and **Lawrence T. Shepps** handled a $38 million recapitalization and restructuring of a TIC ownership of a ground lease with a loan assumption and modification which included CrowdStreet funding.

Transactional Department co-head, partner **Craig L. Price**, and partner **Stephen M. Tretola** and associate **Lauren K. Tobin**, represented Tatar Holdings in the $30 million purchase and $23 million loan assumption of a portfolio of Lower East Side commercial properties.

Mr. Tretola, Ms. Tobin and partner **Murray Schneier** represented Muss Development in the defeasance of a $27 million loan and $26 million refinance of an Upper East Side multifamily property.

Messrs. Price and **Shepps**, and associate **Joshua A. Sycoff**, represented AYA Acquisitions on the $20 million purchase and financing of three adjacent Hell's Kitchen multifamily/mixed use buildings spanning a total of 27,379 sf across 36 units.

Messrs. Price and **Shepps** handled the purchase and financing of a Lower Manhattan commercial property.

Mr. Schneier handled the $8 million sale of an industrial property in Delaware.

Messrs. Price, Shampan and **Sycoff** handled: the $25 million purchase of an Upper East Side co-op apartment; the $20 million sale of a West Village townhouse; the $11 million sale of a Chelsea condominium unit; the $9 million purchase of an Upper West Side condominium unit; and the sale of two Upper West Side townhouses totaling $12 million.

CONTINUED ON PAGE 12

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Partner **Lloyd F. Reisman** and **Ms. Tobin** handled the $10 million sale of a Tribeca condominium unit.

Mr. Schneier, with the assistance of Litigation Department partner **Jeffrey Goldman** and associate **Israel Katz**, closed on the acquisition of four properties and the disposition of one property of a Greenwich Village portfolio as part of the settlement of a hotly contested business divorce arbitration and dissolution of a partnership. As part of the deal, the joint venture partners swapped like-kind properties in a 1031 exchange to defer hundreds of thousands of dollars in capital gain taxes which would have been incurred by our client from the transaction.

Recent Notable Matters Handled by Our Land Use/Zoning Team

Partner **Ron Mandel** and associate **Frank Noriega**:

- Successfully navigated a Department of City Planning application and the negotiation of a restrictive declaration with the Department of Parks and Recreation related to a waterfront development that includes two 17-story buildings and a public esplanade in Long Island City.
- Successfully closed out and obtained Certificates of Correction from the Department of Buildings for three-year-old OATH violations.
- Obtained the support of the New York State Department of Environmental Conservation to authorize the development of waterfront residential buildings (which would otherwise not have been permitted), in Rockaway Beach, Queens.
- Negotiated an agreement with the New York City Department of Buildings to avert enforcement of a vacate order in a multi-tenant commercial building.
- Represented multiple parties in the negotiation of construction license agreements authorizing the installation of construction protections and access on neighboring properties.

Other Recent Notable Matters Handled by Our Transactional Team

Partner **Robert Marshall** represented a construction manager in the negotiation of a “construction manager as constructor” agreement for the ground-up construction of a new apartment building in New Jersey.

BBG In The News

Founding partner **Sherwin Belkin** was quoted in a March 31 article in **The Real Deal** discussing a Federal Court decision that struck down as unconstitutional a City law that had limited enforcement of commercial guaranties, and in an April 6 article in **WealthManagement.com** discussing the same issue. **Mr. Belkin** was also quoted in an April 11 article in **The Real Deal** discussing an appellate Court decision that greatly expanded developers' rights to evict rent-regulated tenants in building demolition cases. **Mr. Belkin** was also quoted in a June 12 article in **law360.com**, decrying as unconstitutional a bill adopted by the State Senate in the waning days of its term that would alter the fraud standard used in rent overcharge cases. **Mr. Belkin** also penned a letter to the editor that appeared in the June 27 edition of **Crains New York**, criticizing two bills passed by the State Assembly that would harm owners of rent-regulated buildings.

The purchase of three Midtown West mixed-use buildings by a Firm client, represented by Transactional Department co-head **Craig L. Price**, partner **Lawrence Shepps** and associate **Josh Sycoff**, was featured in an April 14 article in **The Commercial Observer**.

Zoning and land use partner **Ron Mandel** has been appointed to a three-year term on the New York City Bar Association's Housing & Urban Development Committee.

Commercial leasing Litigation partner **Christina Browne** presented a CLE webinar on May 15 on Commercial Real Estate Roundtable—Issues in Part 52 Practice, sponsored by the New York Women's Bar Association. The link is **here**.

Notable Achievements

Founding partner **Sherwin Belkin** and Litigation Department partner and co-chair **David M. Skaller** have been included as Ranked Lawyers by Chambers and Partners for 2023.

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 ext. 390, or **ashmulewitz@bbgllp.com**.*

CO-OP ENTITLED TO SUBLETTING FEES, LATE CHARGES, LEGAL FEES AND ASSESSMENT FROM SHAREHOLDER

61 W. 62 Owners Corp. v. Pastena Supreme Court, New York County

INVESTOR CANNOT ENJOIN CO-OP'S FORECLOSURE SALE OF DELINQUENT'S APARTMENTS

Eastside Units East 73rd Street LLC v. 317 East 73rd Owners Corp. Supreme Court, New York County

COMMENT | The Court held that there was no irreparable injury, since there were compensable monetary damages for the commercial enterprise.

CONDO CANNOT COMPEL FORECLOSING MORTGAGEE TO PAY COMMON CHARGE ARREARS UNDER RPAPL 1308

Wilmington Savings Fund Society v. Rosado Supreme Court, Rockland County

COMMENT | Novel theory failed—trying to shoehorn payment obligation into property inspection obligation; nice try.

ACCESS AGREEMENT LICENSE FEES TO ADJOINING PROPERTY OWNER AND ITS TENANTS CALCULATED

The Board of Managers of The Barbizon/63 Condominium v. Bozzo Supreme Court, New York County

SHAREHOLDER CAN SUE CO-OP FOR REFUSING TO GRANT HIM SECOND PARKING SPACE

Turekian v. 9201 Shore Tenants Corp. Supreme Court, Kings County

COMMENT | The Court agreed with the shareholder that the stated primary residency requirement could cover a shareholder who owns two apartments.

EXECUTOR'S SUIT AGAINST CO-OP FOR WRONGFUL REFUSAL AND DISCRIMINATION DISMISSED

Alvarez v. Charles Street Owners Corp. Supreme Court, New York County

COMMENT | In a sweeping victory, the co-op was awarded use and occupancy, ejectment of unauthorized family members, and attorney fees.

PULLMAN EVICTION UPHELD, BASED ON CO-OP'S STRICT ADHERENCE TO ITS OWN PROCEDURAL REQUIREMENTS

Peters v. Caton Towers Owners Corp. Supreme Court, Kings County

COMMENT | But the co-op was denied attorney fees under a strict reading of the proprietary lease, since the shareholder was somehow deemed not in default.

INJURED EMPLOYEE OF SHAREHOLDER'S CONTRACTOR CAN SUE CO-OP UNDER LABOR LAW

Spirollari v. Breukelen Owners Corp. Supreme Court, Kings County

COMMENT | This case illustrates well the potentially huge anomalous risk to co-ops even though they do not control the work or the workers, who are doing work for others.

VOTING AGREEMENT AMONG CO-OP SHAREHOLDERS VIOLATES BCL 501(C), AND IS THUS UNENFORCEABLE

Oliver 889 LLC v. 889 Realty Inc. Appellate Division, 1st Dept.

COMMERCIAL CO-OP SHAREHOLDER MUST PAY MAINTENANCE DESPITE ITS COMPLAINTS OF BAD ODOR IN UNIT

49 East Owners Corp. v. 825 Broadway Realty, LLC Supreme Court, New York County

COMMENT | Based on the Court's analysis of the proprietary lease language.

PROPERTY OWNER GRANTED ACCESS LICENSE TO ADJOINING PROPERTY FOR REPAIRS, PURSUANT TO RPAPL 881

139-94 Apartments Corp. v. 1460 Lexington LLC Supreme Court, New York County

FORMER CONDO UNIT OWNER CANNOT CHALLENGE ELECTION HELD THREE YEARS PRIOR, OR INSPECT BALLOTS FROM THEN

Frankel v. Board of Managers of The 392 Central Park West Condominium Supreme Court, New York County

CONTINUED ON PAGE 15

CONTINUED FROM PAGE 14

CO-OP SHAREHOLDER CAN ENJOIN COMMERCIAL TENANT FROM MAKING EXCESSIVE NOISE IN OPERATION OF STORE

Gross v. 133 East 80th Street Corporation Supreme Court, New York County

COMMENT | BBG is general counsel to this co-op, but was not involved in this litigation.

CONDO BOARD MEMBER ENTITLED TO DEFENSE AND INDEMNITY BY CONDO'S INSURANCE CARRIER, DESPITE LATE NOTICE OF CLAIM TO CARRIER

Salvo v. Greater N.Y. Mutual Insurance Company Appellate Division, 1st Dept.

COMMENT | The Court held that the four-year delay in notice to the carrier did not prejudice the carrier.

MITCHELL-LAMA CO-OP PROPERLY REMOVED DIRECTOR BASED ON INDICATIONS OF BRIBETAKING

Thomas v. Esplanade Gardens, Inc. Supreme Court, New York County

COMMENT | The Court held that the co-op followed its own internal procedures for removal, and that the Director received due process.

APARTMENT OWNER'S SUIT AGAINST DEVELOPER'S ARCHITECT FOR CONSTRUCTION DEFECTS IS TIME-BARRED UNDER STATUTE OF LIMITATIONS

Anderson v. AKAM Associates, Inc. Supreme Court, New York County

COMMENT | The lawsuit was brought 14 years (!) after construction was completed, and 11 years (!!) after the statute of limitations expired.

SHAREHOLDER CAN SUE CO-OP FOR SOOT PERMEATING APARTMENT

Whealon v. Gramercy Park Residence Corp. Appellate Division, 1st Dept.

CO-OP BUYER CANNOT SUE SELLER FOR FAILURE TO DISCLOSE ASBESTOS, IN LIGHT OF CONTRACT'S NO REPRESENTATIONS CLAUSE

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

COMMENT | Caveat emptor—-plus, the lawsuit was commenced six years after the closing.

CO-OP SHAREHOLDER CANNOT SUE NEIGHBORING SHAREHOLDER FOR BREACH OF PROPRIETARY LEASE FOR ILLEGAL PHYSICAL CONDITIONS

Karkus v. 331 West 71st St. Apartment Corporation Supreme Court, New York County

COMMENT | There is no privity of contract between neighbors.

SOME OF CO-OP SHAREHOLDER'S CLAIMS VS. CO-OP DISMISSED IN LONG-STANDING LITIGATION OVER PENTHOUSE CONSTRUCTION

Tahari v. 860 Fifth Avenue Corporation Appellate Division, 1st Dept.

COMMENT | BBG is general counsel to this co-op, but was not involved in this litigation.

CONDO CAN PRELIMINARILY ENJOIN UNIT OWNER TO LIMIT TO TWO DOGS ON TERRACE, AND TO RETAIN BARKING-REDUCTION SPECIALIST

The Board of Managers of The Broad Exchange Building Condominium v. Lambert Supreme Court, New York County

COMMENT | Why wasn't the injunction denied, as being the ultimate relief sought?

CO-OP TURNDOWN OF BUYER BASED ON NON-DISCRIMINATORY REASONS (FINANCES AND TAX RETURNS) PROTECTED UNDER BUSINESS JUDGMENT RULE

McCabe V. 511 West 232nd Owners Corp. Appellate Division, 1st Dept.

DISGRUNTLED CO-OP SHAREHOLDER'S CLAIMS OVER BOARD APPOINTMENTS AND DECISIONS DISMISSED

Morbieu v. Keayes Supreme Court, New York County

COMMENT | But this pro se "professional tenant" could sue for disparate treatment.

BUYER ENTITLED TO REFUND OF DEPOSIT ON BUSTED SALE DURING COVID

Rossman v. Schwanz Supreme Court, New York County

COMMENT | The Court held that the buyer didn't "clearly repudiate" the contract.

CO-OP BUILDING REALLY A DE FACTO RENTAL, CONTINUING TO BE OPERATED BY SPONSOR TO SKIRT RENT-STABILIZATION

Baldwin v. McCarry Civil Court, New York County, L&T Part

DELINQUENT UNIT OWNER CANNOT STOP CONDO FROM BARRING HIS ACCESS TO BUILDING AMENITIES

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

COMMENT | The definition of chutzpah—-the Unit Owner owed $700,000 to the Condominium.

CONTINUED ON PAGE 16

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UNIT OWNER CANNOT SUE CONDO FOR GRANTING ROOF AREA EASEMENT TO ANOTHER UNIT OWNER
Kazoku, LLC v. The Board of Managers of The Museum Building Condominium Supreme Court, New York County

COMMENT | Business judgment rule discretion.

CONDO ENTITLED TO AWARD OF UNPAID COMMON CHARGES PLUS ATTORNEY FEES
Board of Managers of Academy House Condominium v. People Foreign Exchange Appellate Division, 1st Dept.

TWO-UNIT CO-OP EXEMPT FROM STRICT LIABILITY TO INJURED EMPLOYEE UNDER LABOR LAW
Salazar v. 52 W. 9th Street Owners Corp. Supreme Court, Bronx County

COMMENT | The Court held that the building qualified as a one- or two-family residence under the Labor Law, and the shareholder exerted no control over the work.

CONDO CANNOT SUE SPONSOR'S PRINCIPALS FOR MARTIN ACT VIOLATIONS
Board of Managers of Petit Verdot Condominium v. 732-734 WEA, LLC Appellate Division, 1st Dept.

CONDO BUYER CAN SUE CERTAIN AFFILIATES OF SPONSOR, BUT NOT OTHERS
Astor Ben Sasha LLC v. HFZ 235 West 75th Street Owner LLC Appellate Division, 1st Dept.

HEARING NECESSARY BEFORE LAUNDRY VENDOR CAN BE REQUIRED TO VACATE HDFC CO-OP BUILDING FOR TWO-YEAR RENOVATION PROJECT BY CO-OP
116 Street Laundromat and Dry Cleaning Inc. v. 240-42 West 116 Street Housing Development Fund Corporation Appellate Division, 1st Dept.

CO-OP EVICTS SHAREHOLDER AND FAMILY FOR OBJECTIONABLE CONDUCT UNDER PULLMAN DOCTRINE
1710 Owners Corp. v. Sussman Civil Court, Kings County, L&T Part

COMMENT | Business judgment rule, analysis of factors.

CONDO UNIT OWNER CAN SUE BOARD FOR FAILING TO ADDRESS HER CONTINUOUS COMPLAINTS OF UNSANITARY WATER IN APARTMENT
Rosenthal v. The Board of Managers of The Charleston Condominium Appellate Division, 1st Dept.

COMMENT | Address complaints, Boards.

NYC WATER BOARD CAN ONLY SEEK RETRO WATER CHARGES FOR TWO YEARS, NOT FOUR
Big Six Towers, Inc. v. New York City Water Board Appellate Division, 2nd Dept.

COMMENT | The case hinged on whether the water charges were considered "underbilled" (two-year lookback) or "unbilled" (four year lookback).

CONDO CAN SUE UNIT OWNER TO COMPEL REMOVAL OF STRUCTURE SHE BUILT IN BUILDING'S BACKYARD
Schoen v. The Board of Managers of 255 Hudson Condominium Appellate Division, 1st Dept.

COMMENT | Since it was a common element of the condo.

CO-OP BLOCKED FROM SELLING AIR RIGHTS
Cogan v. Lei Supreme Court, New York County

COMMENT | The Court ruled the appraisal inadequate, and that the Board members breached their fiduciary duty to the shareholders.

MOST CLAIMS BY PROFESSIONAL UNIT OWNER AGAINST CONDO BOARD AND RETAIL UNIT OWNER DISMISSED
Grasid Realty, LLC v. 162 West 56 Classic II Equities LLC Supreme Court, New York County

COMMENT | Board decisions were protected under the business judgment rule. BBG is general counsel to this condo, but was not involved in this litigation.

CONDO OWES POOL MAINTENANCE COMPANY LIQUIDATED DAMAGES FOR EARLY TERMINATION OF MAINTENANCE CONTRACT
Pool Doctor Management Service, Inc. v. Board of Managers of The Meadowlands Estates Condominium Appellate Division, 2nd Dept.

CO-OP BUYER'S DEFAULT IN CONTRACT OBLIGATIONS ENTITLES SELLER TO KEEP DEPOSIT
Agosta v. Abraham Appellate Division, 1st Dept.

CONDO ENTITLED TO APPOINTMENT OF RECEIVER IN SUIT AGAINST UNIT OWNER FOR UNPAID COMMON CHARGES
Board of Managers of Printing House Condominium v. Mountbatten Equities, L.P. Appellate Division, 1st Dept.

CONDO BOUND BY UNIT OWNER'S SUBMISSION OF SIGNED ALTERATIONS AGREEMENT WITHOUT OBJECTION BY BOARD WITHIN PRESCRIBED TIME
Parc 56, LLC v. Board of Managers of The Parc Vendome Condominium Appellate Division, 1st Dept.

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