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BBG UPDATE

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Inside this Issue

Is That Lease Really NNN?

BY LAWRENCE T. SHEPPS

When many seek the safe harbor tax deferral of a 1031 exchange, they often look to simplify the nature of their ownership, seeking only fixed monthly payments without the typical obligations and expenses--they often look to purchase a "triple net" or "NNN" lease.

Many seek the allure of a NNN leased property because of its ease of ownership - the property owner has no obligation to maintain or repair the property, to provide for the insurance or to pay any real estate taxes. In a NNN lease, the tenant is responsible, at its sole cost and expense, for the performance of all repairs, maintenance and restoration obligations and for the payment of all real estate taxes and insurance premiums, regardless of their cost or however they may increase over the years, all with a fixed "net" rent due to the property owner.

A NNN lease with a credit tenant can be a great investment for someone looking for "hands-off" ownership with a fixed monthly payment. Under the right circumstances, such an investment can act as an annuity: once the initial costs of the acquisition have been incurred, for the remainder of the investment the property owner merely collects its monthly rent. Subject to the applicable provisions of the Internal Revenue Code, the property owner can even place debt financing on the property, thus freeing up its equity while still having net operating income with such financing in place.

When shopping for NNN investments, investors are usually under the time constraint of needing to identify them (i.e., the "replacement property") within 45 days of the sale of the property from which the proceeds will be used for the 1031 exchange (i.e., the "relinquished property"). Because NNN properties have a short shelf life and are not on the market for very long, there is a limit to the amount of advance planning that may be employed in order to avoid the time crunch. That does not give an investor much time to review and make its decisions. Also, such

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NNN investments are frequently located across the country, making site visits unlikely. Many such NNN leases involve fast food restaurants, banks, tire shops, and supermarkets. They can be anywhere as a standalone tenant occupying its own site, or located on the sides of roads of central business districts, on local roads, and on "pad" sites in shopping centers.

Often, properties are marketed as NNN lease properties, but it is only upon careful review of the operative lease documents that it becomes apparent that the properties are not actually NNN, and have landlord obligations and expenses which may come as a surprise to investors. Sometimes the surprise comes following the closing.

It is a daunting task to sift through all of the various materials that can be provided by some brokers. Brokers can sometimes propose many possible properties simultaneously, and provide comparative matrices and analyses, but it is only upon reviewing the operative lease documents that one can determine whether the sales materials are accurate and the properties true NNN properties.

While one would like to be able to rely on a broker's assurances that they have reviewed the documents and have determined that they are, in fact, true NNN leases, brokers are not typically attorneys and do not read things the way that an attorney would and should read a document. As a result, an optimistic or aggressive broker focused on making a deal might not catch a missing or ambiguous lease provision, or one that creates a potential cost to an owner, which should not be the case in the context of a true NNN lease.

In fact, many leases being marketed as NNN leases provide that the owner is responsible, at its cost and expense, for items like: (i) structural repair work (e.g., repairs to the roof, foundation and structural components of the properties) or (ii) remediation for environmental contamination which may have pre-existed the tenant's occupancy, or may not have been introduced by the tenant itself. Some leases may not have appropriately or sufficiently passed through, to the tenant, the obligations to make payments which may be required under applicable reciprocal operating agreements or other applicable documents, which might affect a parcel if the site is located in a shopping center or otherwise has shared parking or access with other properties. Some leases have unusual provisions permitting early termination, or rental abatements in the event of casualty (which should not be the case when the tenant is responsible for the repair and restoration of the property). The effect of these provisions could shackle the owner with unexpected costs, and could reduce the actual return on its investment.

Some offerors of purported NNN leases do not allow purchasers to review the lease that is the subject of the sale until after a contract is signed and the purchaser is in its due diligence period. Good counsel will fight to review the lease prior to the purchaser having to sign a contract. With a purchaser's limited options to designate replacement properties in 1031 transactions (being limited to either the "3 property rule" or the "200% rule"), it can be a dangerous mistake to agree to be provided with the lease only after you have spent the time and money negotiating a contract--to find out only then that there are potential owner obligations or costs which were not factored into the sales material and which could change the anticipated return on the investment.

A purchaser's anticipated return on investment is usually the driving force in determining which deals are attractive and which are not, and to which deals the purchaser will devote its time and money considering. For this reason, knowing that the lease is what it is purported to be is critical to the owner, and it is essential that competent counsel review the documents as early as possible in the transaction in order to avoid spending unnecessary time and capital chasing deals which might not be actual investment opportunities that meet the purchaser's expectations.

Purchasers who are considering NNN lease investments should involve their counsel early in the transactions. This is, of course, more costly, but the transactional costs involved in performing proper and prudent due diligence can avoid the pitfalls of late discovery of unanticipated costs and obligations. Expenses could even be reduced if counsel is able to determine that the lease may have defects or is unattractive for reasons that would otherwise not have been determined until after a contract is negotiated and signed. An expense that is more than justified, competent counsel can potentially reduce transactional costs, and discover more quickly that a proposed lease is not what it has been presented as, which could either jeopardize the eligibility of the 1031 exchange or the investor's net operating income in the future.

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Questions of Fact Preclude Summary Judgment on Tenants' Claim that Owner's Pre- & Post- *Roberts* Conduct Rose to the Level of Fraud

BY MAGDA L. CRUZ

The issue of how the J-51 tax program affected residential tenancies in buildings receiving those benefits continues to generate litigation about how to calculate lawful rent levels when the tenancies were incorrectly deregulated. These cases generally arise from the Court of Appeals 2009 ruling in *Roberts v. Tishman Speyer Props., L.P.* that left unanswered many substantial questions concerning re-regulation.

In *Jekielek v. 260 Partners, L.P.*, the Appellate Division, First Department recently answered a number of such questions and reinforced earlier Court rulings. Most significantly, the Appellate Division made a point of highlighting the extent of the evidentiary burden that tenants have if they claim that contested rent increases were "fraudulent." The Court, once again, eschewed using the punitive "default formula" in order to summarily re-set legal rents.

The *Jekielek* tenants claimed that they were overcharged as a result of the owner deregulating their apartment during a period in which the building was receiving J-51 tax benefits. They further maintained that the overcharge was fraudulent, in part because the owner had allegedly delayed in re-regulating the apartment for several years after the *Roberts* decision issued. The tenants also raised questions concerning whether certain individual apartment improvements were actually made, thereby causing rent increases to be unlawfully inflated.

The Supreme Court summarily found in the tenants' favor, and ordered a hearing to calculate damages under the punitive default formula set forth in the Rent Stabilization Code. However, upon the owner's appeal, the Appellate Division held that material issues of fact existed regarding the tenants' fraud claim, which could not be summarily determined. The factual issues that required a trial included:

> Whether the owner's pre- and post- *Roberts* conduct rose to the level of fraud for purposes of applying the default formula;
>
> Whether the tenants could prove the elements of fraud – reliance, scienter, falsity, representation of a material fact, and injury; and
>
> Whether the individual apartment improvements sufficiently justified the rent increases.

Notably, the Appellate Division confirmed that "an owner is not required to maintain records of individual apartment improvements indefinitely." Nevertheless, the Court made clear that rent increases based on improvements must still be proven when they are properly challenged, and the adequacy of the owner's rebuttal to such challenge is "a question of fact for the factfinder."

In addition, the Appellate Division addressed the proper setting of the base date for calculating the alleged overcharges. The Appellate Division re-affirmed that the base date is four years before the filing of the complaint. Notwithstanding that the law was changed by the Housing Stability and Tenant Protection Act of 2019 to extend the permissible period in which a tenant may collect overcharge damages from four to six years, the complaint, here, was filed before the change in the law.

Moreover, the Appellate Division noted that the four year base date was controlling even where the owner may have technically waived a statute of limitations defense.

The *Jekielek* case provides important guidance on a number of recurring issues in this ever evolving area of rent regulatory law.

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Quick Compliance Check: Required Fire Notices

BY LOGAN O'CONNOR

Owners of apartment buildings with three or more units are required to post and provide various documents regarding fire safety to all tenants. Owners must be aware that different fire notices are required to be distributed at different times throughout a tenant's occupancy.

With respect to posting requirements, owners of multiple dwellings must post (at a minimum): (i) an Emergency Preparedness Notice on the inside of all individual apartment entry doors and in the building's common area or lobby, (ii) a "Close the Door" Notice on the hallway side of every stairwell door in the building and (iii) a "Smoke Detecting Devices" Notice at or near the mailboxes.

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All tenants must receive the following notices upon initial occupancy of an apartment: (i) the NYC Apartment Building Emergency Preparedness Guide ("Guide"), (ii) a Building Information Form ("Information Form") (which must be filled out by the owner), (iii) an Emergency Preparedness/Evacuation Planning Checklist ("Checklist") (which should be filled out by the owner, where applicable) and (iv) the FDNY's Annual Fire Emergency and Preparedness Bulletin ("Annual Bulletin").

Following initial occupancy, tenants must receive the Guide, Information Form and Checklist every three years. Tenants should receive the Annual Bulletin every year. Owners should retain proof that tenants were provided these notices.

Furthermore, owners must be aware of and comply with the particular requirements surrounding the format of all signage (i.e. page size, font size and frame type) and the permitted delivery methods with respect to tenant notices.

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Section 8

BY DAMIEN E. BERNACHE

We have noticed an uptick in applications from Section 8 Voucher holders as a result of changes in the Voucher Payment Standards ("VPS"), which have significantly increased the maximum permissible rent. The VPS differs by unit size, location, and the utilities included in the rent.

Section 8 Voucher holders typically pay 30% of their income towards the total rent ("Tenant Portion"), with the local Public Housing Administrator ("PHA") paying the balance ("PHA Portion"), pursuant to a Housing Assistance Payment Contract ("HAP Contract") between the owner and the PHA.

Locally, the typical PHA's are either NYCHA or HPD. The PHA will perform annual income certifications with the Voucher holder to determine continued program eligibility and the Tenant Portion. The PHA also performs initial and annual inspection of the unit to ensure that it meets the PHA's Housing Quality Standards ("HQS").

Many building owners and brokers have never dealt with applicants who intend to utilize Section 8 Vouchers because the market rent for many areas of New York City historically exceeded the VPS. This presents potential regulatory compliance concerns in three key areas – application evaluation, renewal and maintenance, and Landlord/Tenant Court.

Section 8 Vouchers are considered a lawful source of income that forms the basis for a class protected from discrimination. When an application is received from a Section 8 Voucher holder, a building owner should first determine whether the net effective rent is within the VPS, and therefore, whether the unit qualifies for Section 8 benefits in the first place. If so, the unit should be held off market while the application is processed. There are many considerations that should be given to ensure that applicants are not discriminated against, the prohibition of utilizing income multiples being one example. Certain riders should also be utilized to permit the owner to remarket the unit if the PHA has not performed an HQS inspection or issued the HAP contract in a reasonable amount of time.

Once a Section 8 applicant has been approved, there are additional riders that should be issued that permit owners to avoid common pitfalls that are unique to Section 8 tenants – the tenant's failure to maintain the Section 8 Voucher, or sudden increases in market rent above VPS, being but two examples.

Owners should also be mindful of annual HQS inspections and be proactive in performing repairs, as even relative minor issues may cause the suspension or termination of the PHA Portion, which may not be restored retroactively even after the required repairs have been completed.

Finally, tenants with Section 8 Vouchers present additional hurdles in Landlord/Tenant litigation. Tenants with Section 8 Vouchers may only be evicted for "good cause." Moreover, in many circumstances, additional notice to the PHA is a condition precedent to commencement of a summary proceeding.

Owners receiving applications from Section 8 Voucher holders need to be careful in their evaluation and communication with applicants. Care also should be taken if and when summary proceedings are commenced or free market leases are non-renewed. We are available to help building owners and brokers navigate this complex area to avoid the potentially costly and time-consuming prospect of answering a Human Rights Complaint.

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LLC's, Members, & Creditors

BY KATE WILDONGER

Since a limited liability company (LLC) is a separate legal entity from its owners, creditors of the LLC can generally only pursue assets that belong to the business itself, not the personal assets of the LLC's members. This is a common situation where a creditor of an LLC encounters a member who may have the personal assets to pay off the LLC's debts, but the LLC itself does not. Legislation generally allows for business entities to shield individual members from potential personal liability. Creditors of members are also typically unable to access the assets of the LLC to satisfy a debt owed by a member.

It is well-established that a member of an LLC is not personally liable for the debts and liabilities of the LLC, whether arising from tort, contract, or other circumstances, solely because of their membership or participation in the business. (See, Ltd. Liab. Co. Law § 609 (a)). However, a member may be liable in his/her capacity as a member under certain circumstances:

- such liability is agreed to in the articles of organization;
- a provision was later adopted and the member agreed in writing to be bound by it, or if the member specifically voted for its adoption; and/or
- the member acts as a guarantor for a contract to which the LLC is a party.

(See, Ltd. Liab. Co. Law § 609 (b))

The general rule is that a creditor of an LLC member cannot seize the assets of the LLC or obtain any membership rights, but may acquire monetary/profit rights of the debtor-member. A creditor may be able to access a member's profit interest in the LLC if the creditor obtains a judgment against the debtor-member. The judgment creditor can obtain a "charging interest" against the member's profit interest. Upon application, a Court may charge the debtor's membership interest with payment of the unsatisfied amount of the judgment, including interest. The judgment creditor has the same rights of an assignee of the membership interest. (See, Ltd. Liab. Co. Law § 607 (a)); the creditor cannot seize or affect any of the LLC's property. (See, Ltd. Liab. Co. Law § 607 (b)).

It is worth noting that a creditor may affect more than just the member's profit interest if there is a lack of independence between the member and the LLC, the LLC is found to have colluded with the defendant member, or failure to affect the operation of the LLC would diminish the member's financial interest.

For example, in a case involving a divorce proceeding, the wife obtained a temporary restraining order (TRO) preventing her husband, one of two equal owners of various LLCs that owned real property, from transferring or selling his interests in the LLCs. The other member and the LLCs sought to have the TRO lifted against the LLCs[1]. The Court found that the husband provided all the financing for the LLCs' acquisition of the real property, while the other member contributed "sweat equity." The Court determined that the LLCs did not operate independently from the husband regarding the disposition of assets and real property. The Court stated that "since the TRO precludes the defendant from taking any actions as a member of the LLCs which would diminish the value of his membership interest, it serves to enjoin the LLCs as well." *Ricatto v. Ricatto Jacobson*, 4 A.D.3d 514, 772 N.Y.S.2d 705 (2d Dept. 2004). In other words, since the debtor-member provided all the funding for the LLCs' real estate purchases, the debtor-member and the LLCs effectively operated financially as one in the same. The LLCs' real estate acquisitions were held to be inextricably tied to the husband's personal assets.

Persons who own interests in LLCs, and persons who are owed funds by LLCs or their members, should consult with competent counsel to determine their rights and obligations.

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[1] The LLCs argued that, pursuant to Limited Liability Company Law § 601, the defendant's membership interest in the LLCs is considered personal property, and he has no interest in specific real property owned by the LLCs. The Court determined that even though the LLCs were not parties to the action, the LLCs, as nonparties, may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants, or act in collusion or combination with them. The Court found the LLCs and the defendant to be acting in combination. See, *Ricatto*, 4 A.D.3d 514 at 515-516.

DHCR's New "First Rent" Doctrine

BY SAMUEL R. MARCHESE

Prior to November 8, 2023, the "First Rent Doctrine" was an administrative method to compute the initial legal rent of a newly created unit. In essence, when an owner combined two vacant rent stabilized units in municipalities subject to rent regulation, the combination would entitle an owner to charge a "first rent." A "first rent" would be negotiated between ownership and the tenant, and the first rent charged and paid would serve as the rent going forward, subject to subsequent guidelines and other lawful increases. However, after decades of practice, DHCR has elected to modify this doctrine.

DHCR recently filed "Notices of Adoption" required by law to enact amendments to (i) the Rent Stabilization Code; (ii) the Tenant Protection Regulations; and (iii) the State and New York City Rent Control Regulations. Upon being published by the New York State Register, the amendments became effective on November 8, 2023. These changes impact various areas of rent regulation, including (i) substantial rehabilitation; (ii) demolition; (iii) succession; and (iv) the "First Rent" doctrine.

Per DHCR Operational Bulletin 2023 ("OB 2023-3"), which replaced Operational Bulletin 95-2, and per updated DHCR Fact Sheet 38, the following methodology is to be utilized when calculating a first rent:

PRIOR NON-RESIDENTIAL USE

- First Rents: Where an owner creates a housing accommodation in space previously used for nonresidential purposes, the DHCR may find that the resultant housing accommodation was not in existence on the applicable base date. Such a finding may entitle the owner to charge a market or "First Rent," subject to guidelines' limitations for future rent adjustments.

COMBINING APARTMENTS

- When two apartments, at least one of which is rent stabilized, are combined to create a new apartment, the resulting new apartment is rent stabilized and the legal rent for such apartment is the combined rents of the two original apartments, plus any applicable rent increases.

> Example 1: Apartment 1 is rent stabilized with a legal monthly regulated rent of $1,000. Apartment 2 is rent stabilized with a legal monthly regulated rent of $2,000. Owner combines both apartments. The new legal rent for the combined apartment is $3,000, plus any applicable guideline-based increases.
>
> Example 2: Apartment 1 is rent stabilized with a legal monthly rent of $1,000. Apartment 2 is fair market with a legal monthly regulated rent of $2,000. The apartments are combined. The result is that the apartment may now be rent stabilized and the monthly legal rent is $3,000, plus applicable guideline-based increases (but this is a gray area and subject to further interpretation).

DIMENSIONS ON AN APARTMENT ARE INCREASED OR DECREASED

- When an apartment's dimensions are increased or decreased, the first rent thereafter is to be increased or decreased by the same percentage as the percentage change in the dimensions.

> Example 1: Apartment 1 is 500 square feet, and the monthly legal rent is $1,000. Apartment 2 is 500 square feet, and the monthly legal rent is $2,000. Apartment 1 is decreased by 50% square feet, which are now combined into Apartment 2. As a result, the monthly legal rent for Apartment 1 is decreased by 50%, and becomes $500. Since Apartment 2's square footage was increased by 50%, the legal rent for Apartment 2 is increased by $1,000, for a new monthly legal rent of $3,000.

Please note that in late December Governor Hochul signed into effect a new law that reinforces DHCR's code amendment -- but the new law is expected to be amended in 2024. BBG will keep readers advised.

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New York's "Prompt Payment Act" Amended: Final Invoicing at Substantial Completion and 5% Retainage Cap in Private Construction Contracts

BY ROBERT S. MARSHALL, JR.

On November 17, 2023, Governor Kathy Hochul signed into law Senate Bill 3539, which amended §§ 756-a and 756-c of the New York General Business Law Article 35-E Construction Contracts, commonly known as the "Prompt Payment Act" (the "Act"), with respect to payment and retainage in construction contracts.

The Act applies to construction contracts for privately owned commercial (and certain residential) projects having an aggregate construction cost of at least $150,000. The amendments apply to such contracts that are entered into on and after November 17, 2023.

As amended, § 756-a now provides that "A contractor shall be entitled to submit a final invoice for payment in full upon reaching substantial completion, as such term is defined in the contract or as it is contemplated by the terms of the contract", rather than at final completion.

As amended, § 756-c now mandates that an owner shall not withhold as retainage more than 5% of the contract sum, and a contractor or subcontractor can also not withhold more than 5% for retainage; in addition, "in no case shall retainage exceed the actual percentage retained by the owner".

The other provisions of § 756-c (which were not modified by the amendment) further require that retainage must be released by the owner to the contractor no later than 30 days following final approval of the work. Any failure of the owner to release retainage to the contractor as required by the Act, or any failure of the contractor or subcontractor to release a proportionate amount of retainage to the relevant parties after receipt of retainage from the owner, will subject the withholding party to the payment of interest at the rate of 1% per month of the amount retained, from the date such retainage was due and owing.

Here is a summary of some of the important practical considerations raised by the amendments to the Act:

- Invoice Timing: Contractors can invoice in full upon substantial completion, not just at final completion.
- Retainage Limits: Owners limited to 5% retainage; contractors and subcontractors also capped at 5%.
- Retainage Release: Owners must release retainage within 30 days of final work approval.
- Interest Payments: Failure to release retainage may lead to 1% monthly interest on the owed amount.
- Applicability: The law applies to construction contracts entered into on or after November 17, 2023.
- Compliance: Owners and contractors should review their construction contract forms to ensure that they are in compliance with the amended Act.

The Act governs important rights and obligations of owners and contractors. Questions about the Act and these amendments, and their effect on pre-existing as well as new construction contracts, should be directed to counsel with expertise in these areas.

*Robert S. Marshall, Jr. is a partner in the Firm's Transactional Department and heads the Firm's construction transactional practice, representing developers, owners, contractors, construction managers, design-builders and design professionals in connection with commercial, residential and mixed-use projects. He can be reached at 212-485-5253 (**rmarshall@bbgllp.com**)*

BBG Continues to Expand and Welcomes New Hires

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

NEW HIRES - PROFESSIONAL SUPPORT STAFF

The following individuals joined as professional support staff:

- **GAGAN PARMAR, Junior Staff Accountant**
- **NATALIA PAKH, Junior Paralegal**

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 October - December. As we reflect on these significant milestones, we express our sincere appreciation for their support, hard work, and unwavering commitment.

Magda Cruz, Partner – 34 Years

Matthew Brett, Partner – 23 Years

Kenneth Rosario, Office Services Clerk – 21 Years

Michelle Ruiz, Legal Assistant – 17 Years

Robert Jenkins, Paralegal – 12 Years

Jaime Lopez, Legal Assistant – 9 Years

Samuel Marchese, Partner – 8 Years

Alissa Prairie, Office Manager/HR – 8 Years

Jay Solomon, Partner – 5 Years

Daniel Phillips, Partner – 5 Years

2024 Partner Promotions

We're thrilled to announce well-deserved Partner promotions for some outstanding members of our team, effective January 1, 2024:

- Anthony Morreale
- Israel A. Katz; and
- Brian Bendy

These individuals exemplify excellence, hard work, professionalism, and unwavering dedication. Their ongoing commitment is crucial to BBG's success, and we're proud to have them on our team. Join us in congratulating them on their much-deserved promotions!

Awards & Accolades

David Skaller Recognized Among Top 10 Real Estate Litigators in New York by Business Today!

We're thrilled to announce that Business Today has spotlighted our partner, David Skaller, as one of the top 10 real estate litigators in New York. In the dynamic realm of real estate, litigation is a constant, requiring the expertise of exceptional legal professionals.

As per Business Today's article, "David M. Skaller, of Belkin Burden Goldman, LLP, earns high praise within the industry for his prowess in handling real estate mandates. This litigator is a formidable force in the courtroom."

Skaller stands out among New York's legal elite, focusing on landlord and tenant matters in NYC. His extensive experience and profound understanding of the complexities within New York's real estate law framework set him apart. As the co-head of the firm's Litigation Department, Skaller specializes in non-primary residence, succession, nuisance, holdovers, commercial litigation, buyouts, and demolition.

Notably, he successfully represented the owner in the groundbreaking non-primary residence proceeding of Emil v. Carey, introducing video recordings as evidence. Read more about this award by going **HERE.**

Philanthropy

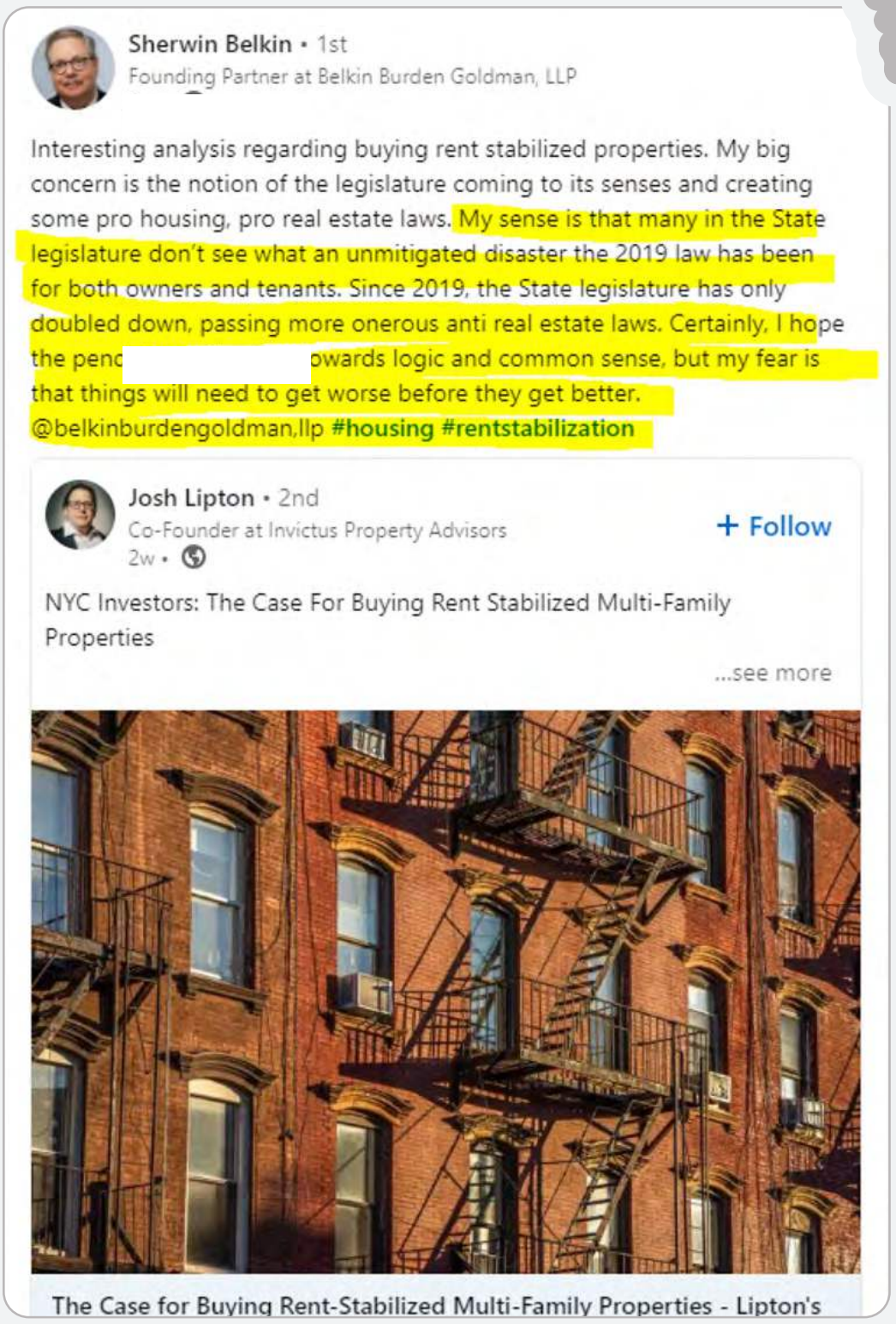
Belkin Burden Goldman LLP extends heartfelt congratulations to Amir Shriki, the shining recipient of this year's Lamplighter Award, and to all the remarkable honorees at the Belev Echad Gala! We are proud to support this amazing cause.

BBG In The News

Founding partner **Sherwin Belkin** was a featured speaker at the Greenpearl New York Multifamily Summit on October 12, participating in the Rent Stabilized Private Round Table, sponsored by Greenpearl: **https://greenpearl.com/multifamily/new-york**.

Administrative Law Department co-head **Martin Heistein** was a featured presenter at an October 26 seminar on "Building Owner Strategies" sponsored by Marcus & Millichap, and discussed regulatory policy changes affecting multifamily housing, and post-HSTPA operations.

Popular Social Media Post



Sherwin Belkin • 1st
Founding Partner at Belkin Burden Goldman, LLP

Interesting analysis regarding buying rent stabilized properties. My big concern is the notion of the legislature coming to its senses and creating some pro housing, pro real estate laws. My sense is that many in the State legislature don't see what an unmitigated disaster the 2019 law has been for both owners and tenants. Since 2019, the State legislature has only doubled down, passing more onerous anti real estate laws. Certainly, I hope the pend owards logic and common sense, but my fear is that things will need to get worse before they get better. @belkinburdengoldman,llp #housing #rentstabilization

Josh Lipton • 2nd
Co-Founder at Invictus Property Advisors
2w •

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The Case for Buying Rent-Stabilized Multi-Family Properties - Lipton's

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Recent Transactions of Note

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

Leases

Partners **Allison Lissner** and **Daniel T. Altman** concluded a 10-month negotiation for a ground lease and option involving an entire block in Queens for a 30-year ground lease to a national tenant for the construction and operation of a battery energy storage system.

Mr. Altman also negotiated:

- A retail lease for the operation of a quick service café in Midtown for a major City landlord;
- A lease with the New York State Board of Elections for a polling place in New York City on behalf of a large national landlord;
- A lease at the World Trade Center on behalf of an international candy purveyor tenant; and
- An 11-year extension/modification agreement on behalf of a major City Landlord with a Dunkin Donuts franchisee for its Upper East Side location.

Ms. Lissner also represented:

- A national restaurateur in two separate ground leases at shopping centers on Long Island; and
- A national restaurateur in the leasing of space in the food court of Grand Central Station.

Partner **Craig L. Price** and associate **Joshua A. Sycoff** represented a residential tenant in the review and negotiation of a residential lease with a rental amount in excess of $100,000 per month.

Messrs. Altman and **Sycoff** and partner **Michael J. Shampan** represented a residential tenant on the review and negotiation of a residential lease with a rental amount of $35,000 per month.

Messrs. Price and **Shampan** represented a landlord in the drafting and negotiation of a residential lease with a rental amount of $29,000 per month.

Buy/Sell and Refinancing Transactions

Partner **Stephen M. Tretola** and associate **Joshua A. Sycoff** represented a seller in connection with the $32 million sale of an Upper East Side rental building.

Partners **Craig L. Price** and **Murray Schneier** and **Mr. Sycoff** represented an affiliate of JAM Real Estate Partners in connection with the $10 million sale of an Upper East Side rental building.

Messrs. Tretola and **Sycoff** represented Muss Development in connection with the long term refinancing of its 15,500 square foot Maimonides Medical Center facility in Brighton Beach, Brooklyn.

Mr. Tretola and associate **Lauren K. Tobin** represented a large Midtown condominium association in connection with obtaining an $11.5 million loan for capital improvements.

Messrs. Price and **Tretola** and **Ms. Tobin** handled the sale of a mixed use building in Jersey City.

Messrs. Altman and **Shampan** represented a client in the refinancing of the underlying mortgages on six Manhattan buildings.

Mr. Schneier negotiated a long-term garage lease on behalf of the owner of an Upper East Side building.

Alternative Transactions

Daniel T. Altman and **Murray Schneier** of BBG's Transactional Department, in concert with **Kara Rakowski** and **Damien Bernache** of the Firm's Administrative Department, assisted a joint venture partnership in providing advice and counsel with respect to its submission of bids in the FDIC's sale of the Signature Bank loan portfolio.

Recent Notable Matters Handled By Our Land Use/Zoning Team

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

- Obtained a favorable determination from the Department of Buildings for a mixed-use residential, commercial and community facility project in Queens, which will involve the construction of nearly 1,600 apartments;
- Led a project team on the proposed Department of City Planning Zoning Map Amendment (rezoning) application to permit construction of approximately 140 apartments in Upper Manhattan;
- Worked with clients on stakeholder outreach, including communication with City Council members, regarding nuanced zoning, political and community relations issues in Manhattan, Brooklyn, Queens, and the Bronx;
- Represented property owner in the successful sale of excess development rights ("air rights") to adjoining property in Brooklyn;
- Successfully represented client with Department of City Planning application permitting expansion of FRESH food store and substantial increase to proposed mixed-use building's floor area and height in Queens;
- Provided comprehensive zoning due diligence and prepared zoning opinions in connection with clients' construction and financing plans, navigating the review process through closing;
- Counseled property owner concerning Zoning Map Amendment (rezoning) application to facilitate construction of a residential development in an underutilized manufacturing site in Brooklyn; and
- Counseled clients in connection with construction license/access agreements throughout the City.

Co-Op/Condo Corner

BY AARON SHMULEWITZ

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 ext. 390, or ***ashmulewitz@bbgllp.com****.*

CONDO AWARDED FORECLOSURE OF LIEN FOR UNPAID COMMON CHARGES

Board of Managers of Cove Club Condominium v. Jade Car Park, LLC Supreme Court, New York County

CO-OP BOARD'S DECISION TO BAR REINSTALLATION OF PRE-EXISTING JACUZZI PROTECTED BY BUSINESS JUDGMENT RULE

Avrahami v. 235 West 108th Street Owners Corporation Supreme Court, New York County

COMMENT | The co-op was also awarded attorneys' fees.

COVID-ERA CONDO BOARD ELECTION RESULTS ADJUDICATED

Farber v. Spring Supreme Court, Rockland County

COMMENT | The mess here arose from the seat-of-the-pants election handling that many Boards employed during the pandemic.

CONDO UNIT OWNERS NOT ENTITLED TO PRELIMINARY INJUNCTION TO STOP NOISY NIGHTCLUB IN BUILDING

Snir v. Fluency LLC Supreme Court, New York County

COMMENT | The denial was based on the fact that the injunction was the ultimate relief sought, and there was also no proof to counter the assertion that the sounds were within permitted decibel levels.

ALTERATION AGREEMENT LIQUIDATED DAMAGES FOR LATE COMPLETION OF ALTERATIONS ARE ENFORCEABLE

Barbiere v. 175 West 12th Street Condominium Supreme Court, New York County

COMMENT | Sophisticated parties, the shareholder could have chosen not to do alterations, and the $200/day amount was deemed reasonable. A very important decision for Boards.

CONDO ENTITLED TO PRELIMINARY INJUNCTION TO COMPEL UNIT OWNER TO GRANT ACCESS TO ENABLE CLEANUP OF HOARDING CONDITIONS

Board of Managers of The Beekman East Condominium v. Schulman Supreme Court, New York County

COMMENT | The Court cited to provisions in the Declaration and bylaws. A fire in the apartment, rodent infestation, and objectionable odors helped.

CO-OP AND EMPLOYEES CAN'T SUE SHAREHOLDER FOR DEFAMATION FOR MERELY REPRODUCING EXCERPTS FROM PRIOR LITIGATION AGAINST THEM

North Shore Towers Apts. Inc. v. Kozminsky Appellate Division, 2d Dept.

COMMENT | In the context of urging shareholders to vote for new slate of Directors.

CONDO ENJOINED TO ELIMINATE RODENTS FROM BUILDING

Brumberg v. The Board of Managers of The Cast Iron House Condominium Supreme Court, New York County

COMMENT | And failure to do so would be contempt of Court.

CO-OP SHAREHOLDER MUST PAY $192,000 TO ADJOINING BUILDING OWNER FOR WRONGFUL USE OF ITS ROOF FOR MANY YEARS

1304 Madison LLC v. Alberts Supreme Court, New York County

CO-OP SHAREHOLDER CAN BRING DERIVATIVE ACTION AGAINST DIRECTORS

Torres v. Lindsay Park Board of Directors Appellate Division, 2d Dept.

COMMENT | The Court held that demanding that the Board take action would have been futile.

CO-OP'S HOLDOVER EVICTION PROCEEDING DISMISSED BECAUSE UNDERLYING NOTICES DEFECTIVE

35-45 81st St. Owners Corp. v. Carraso Civil Court, Landlord & Tenant Part, Queens County

CONDO AND MANAGING AGENT NOT LIABLE FOR INJURIES TO APARTMENT VISITOR, SINCE THEY HAD NO KNOWLEDGE OF CONDITIONS THAT CAUSED THE INJURY

DeFouchier v. 105 Lexington Condominium Supreme Court, Kings County

SHAREHOLDER CAN SUE CO-OP FOR LEAKY TOILET WATER ACCUMULATING UNDER FLOOR

Webster v. Forest Green Apt. Corp. Appellate Division, 2d Dept.

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UNSUCCESSFUL ELECTION NOMINEE CAN'T SUE BOARD
Spyros v. The Board of Directors of 230 East 18th Street Corporation
Supreme Court, New York County

COMMENT | The Court held that the Board had properly reduced its size prior to the election, as per the bylaws.

CONDO BUYER CAN SUE SPONSOR AND AFFILIATES FOR FAILING TO REMEDY CONSTRUCTION DEFECTS
Schwartz v. El Ad US Holding, Inc. Supreme Court, New York County

COMMENT | But most claims were dismissed on technical grounds.

SHAREHOLDER MUST INDEMNIFY CO-OP AND MANAGING AGENT AGAINST INJURY CLAIMS BY CONTRACTOR'S EMPLOYEE
Melikov v. 66 Overlook Terrace Corp. Supreme Court, New York County

COMMENT | Because the shareholder did alterations without signing an alterations agreement (but wouldn't the outcome have been the same if he had signed it?).

CO-OP'S MOTION FOR SUMMARY JUDGMENT TO EJECT DELINQUENT SHAREHOLDER DENIED ON PROCEDURAL GROUNDS
East Drive Housing Development Corporation v. Lawrence Supreme Court, New York County

CHALLENGE TO CO-OP BOARD ELECTION FAILS
Kilian v. 220/67 Owners Corp. Supreme Court, New York County

COMMENT | The Court held that the challenger did not introduce any evidence warranting overturning the election.

CO-OP PREVAILS IN NON-PAYMENT PROCEEDING AGAINST ESTATE; ESTATE CANNOT BENEFIT FROM ITS OWN 5-YEAR DELAY IN GETTING ADMINISTRATOR APPOINTED
Turin Housing Development Fund Corporation v. Kennedy
Civil Court, New York County Landlord & Tenant Part

COMMENT | But why didn't the co-op move to do so on its own, sooner?

CONDO BUYER'S SUIT AGAINST SPONSOR FOR CONSTRUCTION DEFECTS DISMISSED
Rossa v. RHR 160 LLC Supreme Court, New York County

COMMENT | The buyer's acceptance of the deed was held to constitute a merger of potential claims, per language of the deed and the offering plan.

BUILDING OWNER CAN'T COMPEL REMOVAL OF NEIGHBOR'S SIDEWALK SHED
276-W71 LLC v. Board of Managers of 240 West End Ave Condominium
Supreme Court, New York County

COMMENT | The Court found that there was no likelihood of success on the merits—-the shed was erected per City law, and required for public safety.

CONDO UNIT OWNER ORDERED TO CLEAN UP HAZARDOUS HOARDING CONDITIONS THAT HAD CAUSED FIRE AND RESULTANT FLOODING
Board of Managers of The Greene House Condominium v. Cohen
Supreme Court, Kings County

COMMENT | BBG represented the victorious Condominium.

CONDO UNIT OWNER RESPONSIBLE TO REPAIR WATER DAMAGE FROM RUPTURED PIPE THAT SHE HAD INSTALLED
Silverman v. Milford Management Corp. Appellate Term, 1st Dept.

CONDO ENTITLED TO ACCESS LICENSE TO ADJOINING PROPERTIES UNDER RPAPL §881
The Board of Managers of The Columbus House Condominium v. NYC 7900 Holdings LLC Supreme Court, New York County

LANDLORD DID NOT DISCRIMINATE AGAINST DISABLED TENANT BY FAILING TO STOP BARKING DOG IN ADJACENT APARTMENT
Blitz v. BLDG Management Co., Inc. United States District Court, Southern District of New York

COMMENT | Involving a rental building, but instructive for Boards. The landlord had offered several reasonable accommodations, which the tenant refused.

CO-OP BOARD NOT LIABLE TO SHAREHOLDER FOR FAILING TO INVESTIGATE HER COMPLAINTS OF NEIGHBOR'S HOUSE RULE VIOLATIONS
Eskin v. 60 E. 9th St. Owners Corp. Supreme Court, New York County

COMMENT | A textbook example of a typical intra-neighbor dispute, and the perils facing a Board in investigating it, or not.

CONDO UNIT OWNER CAN BE SUED BY DOWNSTAIRS NEIGHBOR FOR NUISANCE ARISING FROM NEGLIGENCE IN INSTALLATION OF WATER APPLIANCES
Kanayama v. Kesy, LLC Appellate Division, 1st Dept.

CO-OP SHAREHOLDER CAN SUE BOARD FOR UNREASONABLY DENYING CONSENT TO INSTALL AIR CONDITIONER UNIT
Heykal Properties, LLC v. 450 West 31st Street Owners Corp.
Appellate Division, 1st Dept.

COMMENT | The shareholder had the exclusive use of the affected area, per the proprietary lease, and consent to alterations could not be denied unreasonably.

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CONDO BUYER FORFEITS $1.9 MILLION DEPOSIT FOR REFUSING TO CLOSE BECAUSE BUILDING HAD VIRTUAL DOORMAN AT NIGHT
Dille v. Zoelle LLC Appellate Division, 1st Dept.

COMMENT | The facts were fully disclosed in the offering plan; the purchase agreement contained the usual waiver language.

CONDO BUYER CAN'T SUE BOARD PRESIDENT FOR WAIVING THE RIGHT OF FIRST REFUSAL BY INACTION
Tumayeva v. Geyber Appellate Division, 2d Dept.

COMMENT | The Condominium's bylaws permitted waiver by simply failing to exercise the right of first refusal by its deadline. The Board did so.

CO-OP BOARD DECIDES SHAREHOLDERS' DISPUTE OVER COMMON HALLWAY DÉCOR, AS PER HOUSE RULES
Neuwelt v. 33072 Owners Corp. Appellate Division, 1st Dept.

COMMENT | This litigation over this seemingly small issue is now in its third year.

CONDO ORDERED TO HOLD NEW ELECTION; INELIGIBLE CANDIDATES BARRED FROM RUNNING
Jablecki v. Board of Managers of Harborview Condominium
Appellate Division, 1st Dept.

CONDO UNIT OWNERS CAN SUE BOARD FOR VARIOUS CLAIMS RELATED TO NON-REPAIR OF UNITS
Calderoni v. 260 Park Avenue South Condominium
Appellate Division, 1st Dept.

COMMENT | The Court also appointed a Receiver, to prevent further deterioration in the apartment.

PROPERTY OWNER MUST PROTECT NEARBY—-NOT JUST ABUTTING—-PROPERTIES FROM EXCAVATION-RELATED DAMAGES
7-11 East 13th Street Tenants Corp. v. The New School
Appellate Division, 1st Dept.

COMMENT | This litigation is now ten years old.

QUESTIONS OF FACT BAR SUMMARY JUDGMENT TO UNIT OWNER AGAINST CONDO OVER MOLD AND RELATED CLAIMS
LiNQ1, LLC v. 170 East End Condominium
Appellate Division, 1st Dept.

CONDO CAN SUE UNIT OWNER FOR COMMON CHARGE ARREARS
The Board of Managers of The Residential Section of Galleria Condominium v. Hong Appellate Division, 1st Dept.

COMMENT | The defendant's various "pro se" arguments were disposed of by the Court.

REJECTED PURCHASER CAN SUE HDFC CO-OP FOR RACIAL AND DISABILITY DISCRIMINATION
Gibson v. 526 West 158th Street HDFC Appellate Division, 1st Dept.

CONDO BOARD STRICTLY LIABLE UNDER LABOR LAW FOR INJURY TO CONTRACTOR'S EMPLOYEE, EVEN THOUGH NO CONTROL OVER WORK
Hossain v. Condominium Board of Grand Professional Building
Appellate Division, 2d Dept.

COMMENT | Labor Law claims continue to vex buildings, with Court decisions seemingly going in all directions, with no predictability.

CONDO BOARD CAN IMPOSE PAYMENT REQUIREMENT FOR UNIT OWNER TO INCORPORATE HALLWAY INTO APARTMENTS
Wong v. The Board of Managers of The 45 West 67th Street Condominium Appellate Division, 1st Dept.

COMMENT | The common provision in the bylaws stating that such a Unit Owner had the right to incorporate hallway space into his apartments did not bar the Board from charging for the privilege.

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