

Aaron Shmulewitz and Colleagues Join BBW&G

BBW&G is pleased to announce that Aaron Shmulewitz, one of New York's most prominent and oft quoted co-op and condo attorneys, has joined BBW&G as a partner.

Mr. Shmulewitz will be joining us from Reed Smith, LLP where his practice includes the representation of more than 250 cooperative and condominium boards, including many of the City's finest and most prestigious apartment buildings. His areas of practice include: acting as general counsel, intra-building disputes, all aspects of corporate representation, enforcement of constituent obligations, enforcement of sponsor obligations, mortgage refinancing, negotiation and preparation of commercial leases and capital improvements contracts, litigation, and conversion and sale of non-allocated space. In connection with such representation, Mr. Shmulewitz has close relationships with virtually every major cooperative and condominium management firm in the City.

Mr. Shmulewitz also represents sponsors in the conversion of buildings to condominium and cooperative ownership, and owners and

tenants in commercial and professional lease negotiations. In addition, Mr. Shmulewitz has represented literally thousands of clients in the purchase, sale and financing of apartments, buildings, single-family homes, and other properties.

Also joining BBW&G from Reed Smith, LLP is **William M. Rifkin**, who will join our firm as Counsel. Mr. Rifkin will practice in the firm's Litigation Department, building upon his more than two decades of litigation experience representing major New York banks, financial institutions, corporations and others in all phases of commercial litigation, landlord-tenant proceedings, foreclosure and bankruptcy.

Denise C. DeNicola will also join BBW&G, as an associate, continuing her Reed Smith, LLP practice, focusing upon transactional real estate; from contract through closing, including sales, purchases, and mortgage refinances (residential and commercial apartments and buildings). Ms. DeNicola will also continue to work closely with Mr. Shmulewitz regarding his cooperative and condominium matters.



Aaron Shmulewitz



William M. Rifkin



Denise C. DeNicola

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Special Points of Interest:

- **Subletting: A step by step guide and what you should know.**
- **Section 8 Housing: Court decisions in conflict over owners' right to opt out of Section 8 Program with respect to Rent Stabilized tenants.**
- **DHCR considers Owner's Application to Deregulate two separate apartments rented by same tenant even though the individual rents were less than \$2,000.00 per month.**

Subletting: An Overview

The standard residential lease prohibits a Tenant from subletting his or her apartment without the Owner's prior written consent. Real Property Law §226-b, the statute that applies to requests for permission to sublet in buildings of four units or more, requires that an Owner not unreasonably refuse a Tenant's sublet request.

Two reasons may cause Owners to not be enamored with sublets. First, an Owner likes to know who is occupying its property. Generally, the Owner will have vetted its Tenants and will have checked out a Tenant's qualifications, references and credit-worthiness, and determined that he/she is acceptable. Allowing a sublet means individuals whom an Owner has not had an opportunity to investigate and approve will be residing in its building. With security such a compelling issue in our post-9/11 environment, Owners cannot be too cautious in monitoring who is occupying their property.

Second, when a request for permission to sublet is rejected, many Tenants consider surrendering possession of their apartments instead of litigating their right to sublet. When Tenants surrender possession, Owners have an opportunity to increase the rent and, in

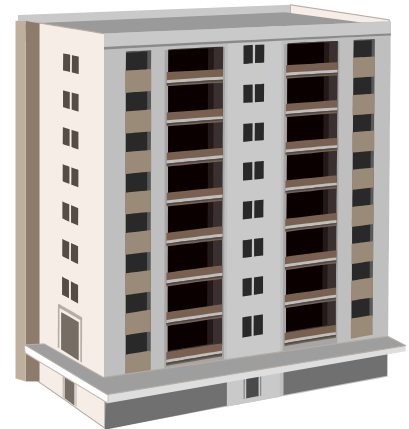
certain circumstances, permanently exempt apartments from rent regulation.

The sublet procedure, governed by Real Property Law § 226-b (and—for Rent Stabilized apartments—Rent Stabilization Code §2525.6) is complex, with numerous time frames that must be strictly adhered to.

The first step in the process is when the Tenant requests permission to sublet. The request must be in writing, and must be sent to the Owner by certified mail, return receipt requested (although some court decisions have forgiven Tenants that use the wrong method of delivery to the Owner if, in fact, the Owner did timely receive the request).

When an Owner receives a written request for permission to sublet, it is a good practice to keep the postmarked envelope in which the request was mailed. That will enable the Owner (or its attorney) to make sure that the request is processed within the time periods mandated by law.

Tenants sometimes call their landlords, advising that they want to sublet, asking what the proper procedure is. The best practice is to tell the Tenants that all requests have to be done in writing, and that you, as Owner—and ultimate reviewer of the request—cannot give advice on what



the proper procedure is. Owners do not want to be put in the position of having a Tenant claim that a defective request is the result of “bad advice” given by the Owner.

Once the Tenant makes a proper request, the Owner has the right to request that the Tenant provide additional information regarding the proposed sublet. Over the years, BBW&G has created a questionnaire designed to elicit additional information that focuses upon the specific Tenant obligations that the Sublet Law and Rent Stabilization Code impose upon the requesting Tenants.

The additional information questionnaire must be mailed to the Tenant within ten (10) days after the Tenant requests permission to sublet (this is why keeping the post marked envelope is important). If the questionnaire is not sent out in time, the Owner forfeits its right to request the information.

If the additional information questionnaire is not

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sent to the Tenant, the request for permission to sublet must be rejected within thirty (30) days of the Tenant's mailing of the request. If the Owner fails to reject the request within that time period, the request is deemed approved and the Tenant can proceed with the sublet.

If the additional information questionnaire is sent to the Tenant on time, the Owner has no obligation to approve or reject the proposed sublet until the questionnaire is returned. Once the questionnaire is returned by the Tenant, the Owner has thirty (30) days within which to approve or reject the request.

A request for permission to sublet must provide certain requisite information, such as the name, permanent and business address of the proposed subtenant, the Tenant's address during the term of the proposed sublet, the Tenant's reason for subletting, and a copy of the proposed sublet agreement. The failure to provide any of these elements renders the request defective.

The Rent Stabilization Code provides that a Tenant must establish that the apartment is his or her primary residence and will be re-occupied as such at the end of the proposed sublet. The Code provides that a Tenant cannot sublet for

more than two (2) years out of a four (4) year period. Finally, a Tenant can only charge a 10% mark-up to the proposed subtenant, and that is only if the apartment is being sublet fully furnished.

While, certainly there are many legitimate reasons for subletting, such that there is no reasonable basis to withhold consent, BBW&G has encountered many Tenants who that are less than honest or credible regarding their true intentions. Once discovered, such deficiencies and inconsistencies create grounds to reasonably refuse permission to sublet.

For example, many Rent Stabilized Tenants, despite their claims to the contrary, are unable to establish that he/she will return to occupy the apartment as a primary residence at the end of the proposed sublease. The questionnaire (as well as subsequent investigation) may reveal that the Tenant has purchased a home, or taken a permanent new job, such that the Tenant is not really seeking a bona fide sublet with an intention to return to the apartment, but is, instead, merely hoping to hold onto a below market apartment. BBW&G has encountered many Tenants seeking to sublet who intend to overcharge their subtenants. Such Tenants not only hope to keep their subsidized tenancies, but also intend to make an illegal profit at the same time.

Technical reasons also exist for rejecting a Tenant's request. For example, if the Tenant has failed to provide all the necessary information that the Real Property Law and Rent Stabilization Code require, or the Tenant has submitted a request which has all the requisite information, but seeks permission for a sublet which is to commence before the Owner's time to respond to the request has expired; or a Rent Stabilized Tenant seeking permission to sublet for more than two (2) years out of a four (4) year period.

Each request must be carefully reviewed and analyzed. Each step must be handled correctly and within the statutory time frames. An Owner who fails to adhere to all of the procedural requirements will find that its right to have any say as to the requested sublet has been forfeited.

This article was written by Robert Holland, a BBW&G partner practicing in the firm's Litigation Department. If you have any questions regarding sublet requests, please contact Mr. Holland or Sherwin Belkin to assist you.



Robert T. Holland

Section 8: Is There a Choice?

Unlike free market apartments, Owners of rent-stabilized apartments are subject to additional restrictions, conditions, and obligations. Most of these additional Owner obligations are in place for the protection of the Tenant. One of these conditions obligates the Owner in most situations to renew the lease of a Rent-Stabilized Tenant upon its expiration on the “same terms and conditions” as the Tenant’s initial lease.

Until 1999, under Federal law, the “same terms and conditions” did not just cover the verbiage used in the lease; it also included the contract that enabled a qualifying tenant to receive

Federal rental subsidies through the Section 8 program. This was called the “endless lease provision.”

When an apartment is subsidized by the Section 8 Program (created by the Federal Housing and Community Development Act of 1974), both the Owner and the Tenant are bound by two contracts. The first is the residential lease which establishes the Landlord/

Tenant relationship between the two parties. The second is the Housing Assistance Payments Contract (the “HAP contract”), which is entered into by the Owner, Tenant, and the government agency that administers the Federal Section 8 subsidy [in New York City, the relevant agencies are the New York City Housing Authority

of rent that is not covered by the Section 8 subsidy. The HAP contract runs concurrently with the residential lease entered into between the Owner and the Tenant.

On October 1, 1999, there were major changes made to the Federal legislation that controls the Section 8 program. One of these changes was the removal of the “endless lease” provision. In effect, it could be argued that the HAP contract is no longer deemed a “same term and condition” of the residential lease between the Owner and Tenant. The 1999 amendment to Section 8 allows an Owner flexi-

bility in deciding whether or not to continue accepting the federal subsidy on behalf of a Tenant.

Despite the removal of the “endless lease” provision under Federal law, the local statutes concerning Rent Stabilization have not been altered to accept this change. As a result, some Section 8 administrative agencies (such as NYCHA) take the position

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When an apartment is subsidized by the Section 8 Program (created by the Federal Housing and Community Development Act of 1974), both the Owner and the Tenant are bound by two contracts.

(“NYCHA”), the NYC Department of Housing Preservation and Development (“HPD”) or the NYS Department of Housing and Community Renewal (“DHCR”).]

The HAP contract memorializes an Owner’s acceptance of a portion of a Tenant’s monthly rent via the Section 8 Federal subsidy. Thus, the Tenant is only expected to pay the portion



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that this new Federal law is not binding upon them. The ongoing friction between these two legal positions has resulted in numerous judicial decisions from New York City courts and surrounding counties that seem to contradict one another.

Westchester, Queens and Brooklyn Decisions

There have been a series of cases in Westchester County that have held that as a result of the changes in Federal law, an Owner has the right to opt out of a HAP contract with a Rent-Stabilized Tenant. Echoing these decisions, Queens County decisions have also held that Owners are no longer under the constraints of the “endless lease” provision and can opt out of the Section 8 program regarding their Rent Stabilized Tenants. As

recently as December 2004, a Kings County case was decided in a similar fashion.

A Different View From the Bronx

While Westchester County, Queens County, and Kings County all seem to have accepted the 1999 Federal changes, Bronx County has sided with the regulatory agencies and opposed this change in the law. On the surface, the reason for this reluctance appears to be the belief that New York’s Rent Stabilization Law cannot be contravened by a Federal law. However, in addition to legal interpretation, a major factor in these Bronx County decisions may be a view of some concerned with the possible loss of housing for a sector of the City’s population that can only afford apartments with the help of the Section 8 Federal subsidy.

In a November 2004 decision, one judge wrote, “For pure public policy reasons this court cannot countenance the right of a landlord to unilaterally opt out of a Section 8 rent stabilized tenancy.”

The Dispute Awaits Appellate Review

Despite numerous decisions surrounding this controversial topic, at present, none hold any controlling weight. All of these decisions have been rendered by lower courts of equal jurisdiction. Due to the lack of a controlling appellate decision, these cases merely serve to foreshadow future disputes and decisions. As a result, pending meaningful appellate review and clarification, this dispute will continue to be decided on a case by case basis.

This article was written by Jaret Weber, an associate practicing in BBW&G’s Litigation Department.



Jaret Weber

Luxury Deregulation: When Two Becomes One

In a previous article (*Update*, January 2005), we stated that if a Tenant rents more than one apartment in a building, and the rent of each apartment is less than \$2,000 per month, an Owner may combine the apartments' rents to reach the \$2,000 threshold (so that DHCR must then verify whether or not the household income for each of the prior two calendar years was in excess of \$175,000) if the Owner can demonstrate that the combined apartments are used as a single integrated living space.

In a recent proceeding, an Owner filed a deregulation petition with DHCR, in which it requested permission to deregulate two apartments. The Owner alleged that both apartments were occupied by one family. The rent of each apartment was less than \$2,000 per month; however, the Owner argued that the apartments were being used by the family as

an integrated unit and the combined rents of the apartments were greater than \$2,000 per month.

DHCR's Rent Administrator denied the Owner's petition based upon a finding that, in a prior deregulation proceeding, DHCR had determined that a physical connection between the apartments had been sealed.

DHCR's Rent Administrator directed to consider how the apartments were actually being used; combine the rents of two apartments used as one; and examine the combined household income.

Therefore, the apartments were found not to be "combined," and since the \$2,000 rent threshold was not attained, DHCR refused to examine the household income. However, on PAR, DHCR's Commissioner ruled that the Rent Administrator acted improperly by failing to consider how the apartments were actually being used during the relevant

time period – that is, the most recent two calendar years. Since the prior denial related to a time frame that pre-dated the now relevant two year time frame, the Commissioner reversed the Rent Administrator's order, and remanded the proceeding to the Rent Administrator for an examination of the potential integrated use of the two apartments during the more recent two year time frame. If the use was found to now be integrated, then the Rent Administrator was directed to examine the combined household income.

This article was written by Phillip Billet, an associate practicing in BBW&G's Administrative Law Department.



Phillip Billet

BBW&G NEWS

“MAY I QUOTE YOU?”

BBW&G was named to *Development New York's* list of Top Real Estate Attorneys for 2005. *Development New York* also profiled BBWG client **The Winter Organization**, and its four generations in New York's real estate industry.

* * *

Sherwin Belkin was quoted in *Newsday's* article “Make Yourself at Home” pertaining to the burgeoning market in sublets, both City and suburban. Mr. Belkin noted the distinction in legal requirements between renting a portion of a home that the lessor owns, and subletting an apartment that is merely rented.

Mr. Belkin was also called upon to respond to an inquiry in *the New York Times'* Sunday Real Estate Section “Q & A” column. Mr. Belkin, in addressing the rent stabilized letter-writer's question about his desire to have a kitchen and bathroom “upgrade,” distinguished an owner's obligation to repair and maintain, as opposed to upgrading functional equipment – which the owner is not obligated to do. Mr. Belkin also noted that the tenant could not undertake alterations absent the owner's permission, and that, if the tenant was seeking improvements, the owner might agree to undertake the work, but the tenant's rent would be increased by 1/40th of the cost of the improvement.

The “Q & A” column posed another question to Mr. Belkin concerning an owner's obligation to provide multiple non-duplicable front door keys to a rent stabilized tenant. Mr. Belkin referred to a DHCR Advisory Opinion stating that the owner's obligation was only to provide a front door key to “each lawful occupant who is of reasonable age” – not the endless supply that the tenant was demanding.

Mr. Belkin was interviewed by the *Philadelphia Inquirer* for an “only in New York” article. Mr. Belkin described some of the lengths that non-primary resident tenants will go to in their effort to hold onto below market rent regulated apartments.

Mr. Belkin also appeared as a guest lecturer at the **Real Estate Board's** broker's qualifying course, speaking on rent regulation and fair housing laws.

Finally, Mr. Belkin appeared on the *Fox-5 News*. He was interviewed regarding the manner in which New York's housing laws, which are intended as tenant protective, are often distorted in actual practice, so they are used by unscrupulous tenants to victimize innocent owners.

* * *

Magda Cruz will be speaking at the **Rent Stabilization Association's** seminar “Managing Rent Regulated Property in New York City.” Ms. Cruz will discuss “Considerations when Purchasing Property for Owner Occupancy.”

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PLEASE NOTE: This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of all or any of the issues described in this newsletter is dependent upon your particular facts and circumstances. Accordingly, it is suggested that prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should make sure to consult with your attorney.

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