Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

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ADMINISTRATIVE LAW UPDATE

STATE LEGISLATURE PASSES "THE RENT ACT OF 2011"

By Sherwin Belkin

On June 24, 2011, the New York State Legislature passed The Rent Act of 2011. Among the Act's features are the following:

- The rent laws were extended for four years, to June 15, 2015;
- The vacancy increase is limited to one time in each calendar year, notwithstanding the number of vacancy leases entered into in such year;
  - Notably, the Act does not say if any increase, such as a renewal increase, is permitted after the first vacancy increase in the calendar year;
- The rent threshold for deregulation on vacancy was increased from $2,000 per month to $2,500 per month for any apartment that is or becomes vacant on or after the effective date of the Act;
  - The Act continues the notion that the key is the legal rent that could be charged to the next tenant; even if the amount actually charged or paid is less than the threshold amount.

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ADMINISTRATIVE LAW UPDATE

CHANGES TO LUXURY DEREGULATION

By Joshua G. Losardo

On June 24, 2011, the New York State Legislature approved a four year extension of the rent laws. One significant change in the new Rent Act was an increase in the legal rent threshold required to deregulate apartments pursuant to either vacancy deregulation or high-rent/high-income deregulation.

DHCR has recently updated various Fact Sheets in response to the Rent Act of 2011. DHCR Fact Sheet #36 addresses the changes to high-rent vacancy deregulation and high-rent/high-income deregulation. It provides that, effective June 24, 2011, an apartment must have a monthly legal rent of $2,500.00 or more to be effectively deregulated pursuant to high-rent vacancy.

Fact Sheet #36 further indicates that only apartments with legal or maximum rents of $2,500.00 or more shall be eligible to be petitioned for high-rent/high-income deregulation in 2012.

One requirement in the deregulation of apartments which has not changed, but which many owners are unaware of, is that a Notice of Deregulation is required to be served upon the first deregulated tenant to occupy a former rent regulated apartment pursuant to Rent Stabilization Law §26-504.2(b). The Rent Stabilization

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NEW YORK'S GAY MARRIAGE LAW – WHAT OWNERS SHOULD KNOW

By Diana R. Strasburg

On June 24, 2011, the New York State Senate passed the Marriage Equality Act, which legalizes same-sex marriage in New York. Governor Andrew M. Cuomo signed the bill into law that evening. The law went into effect July 24, 2011 and has implications for owners of regulated residential buildings in New York State.

Rent Stabilization Code § 2522.5(g) provides that a tenant shall have the right to have his or her spouse, whether husband or wife, added to the lease or any renewal thereof as an additional tenant where said spouse resides in the housing accommodation as his or her primary residence.

For many years, the courts have granted same-sex partners succession rights to rent regulated apartments if there was proof of an emotional and financial commitment with the tenant of record, regardless of whether the partner and tenant were registered as domestic partners. However, an owner was not required to add a same-sex partner's name to a lease, even if the tenant and the partner were registered as domestic partners, because registered New York domestic partnerships were not legally akin to New York State marriages. Only legal same-sex marriages performed outside of New York State would be granted the same rights available to individuals lawfully married in New York, including the right to add a spouse to the lease.

With the legalization of same-sex marriage in New York, tenants who marry their same-sex partners shall be entitled to add their spouse as a tenant to the rent stabilized lease. If a tenant requests that a same-sex spouse be added to the lease and furnishes a New York marriage certificate, and proof of joint primary residence, an owner shall now be required to add the same-sex spouse to the lease. If an owner refuses to add a tenant's same-sex spouse to the lease, the tenant may file a lease violation complaint with the New York State Division of Housing and Community Renewal (DHCR), challenging the owner's failure to comply with the law. DHCR is authorized to order the owner to issue leases in such proceedings, and may impose penalties against the owner, including barring an owner from applying for or collecting any rent increases for the affected housing accommodation, and/or fines ranging from $250 up to $5,000.

If you have questions concerning compliance with this new law, BBWG can provide guidance and advice.

Diana R. Strasburg (dstrasburg@bbwg.com) is an associate in the Firm's Administrative Law Department.

CHANGES TO LUXURY DEREGULATION

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Law requires such Notice to include the following disclosures:

- The last regulated rent; and
- The reason that the housing accommodation is deregulated; and
- A calculation of how the legal rent exceeds $2,500.00 per month (pursuant to the Rent Act of 2011, the threshold for deregulation has changed to $2,500.00, effective June 24, 2011); and
- A statement that the last legal or maximum rent may be verified by the tenant by contacting DHCR.

Owners are also required to file an Annual Apartment Registration with DHCR reporting that the apartment has become permanently exempt. Owners must serve such form on the deregulated tenant by certified mail within thirty (30) days of the tenant commencing occupancy, or the filing of the registration, whichever occurs later.

Should you have any questions about the Rent Act of 2011, BBW&G's attorneys may be contacted at any time to answer your questions.

Joshua Losardo (jlosardo@bbwg.com) is partner of the Firm.

WHAT TO DO WHEN THE 60 DAYS TO EXECUTE A RENEWAL LEASE EXPIRES

By Jeffrey L. Goldman

The Rent Stabilization Code requires that an owner o er the tenant a renewal lease 150-90 days prior to the expiration date of the current lease term and the tenant then has 60 days to execute and return the renewal lease form. Rent Stabilization Code Section 2523.5(a). The tenant can elect either a one or two year renewal lease or advise the owner that it is not renewing the lease.

Where the tenant elects in writing not to renew and then fails to vacate by the expiration date of the term, an owner can immediately commence a holdover proceeding to recover possession without having to serve any predicate notice. What if the tenant remains silent and does not execute and return the renewal lease form? Owners often contact BBWG after the expiration of the term and ask BBWG to commence a proceeding to recover possession. However, Rent Stabilization Code Section 2524.2(c)(1) requires the service of a 15-day notice of termination for failure to execute a renewal lease. Decisional authority has held that notwithstanding the service of the notice of termination, the tenant still has a right to cure by executing a renewal lease. The service of this predicate notice will delay the commencement of a holdover proceeding for 3 weeks. Given the delays inherent in Civil Court, the tactics employed by tenants and their representatives to delay a merit-based determination and the inability to initially collect any use and occupancy until after the proceeding is commenced (assuming the tenant even o ers to pay), three weeks is an eternity.

Owners should diary 60 days from the date when the renewal o er is made. If the renewal lease is not returned, you should contact BBWG to discuss the timing for preparation and service of the 15-day notice of termination which can be served prior to the expiration date of the renewal term. The termination date in the notice would be the last day of the renewal term. Under this scenario, the owner can immediately commence a holdover proceeding to recover possession the day following the expiration of the term without being delayed three weeks.

An alternative option that could be considered is the "deemed renewal lease" procedure provided under the Rent Stabilization Code. This procedure has di erent requirements and may be useful when the owner seeks to continue the tenancy, rather than terminate.

Please contact BBWG to discuss when best to serve the notice of termination and other issues related to a tenants failure to execute a renewal lease in a timely fashion including whether the initial o er complied with the requirements of the Rent Stabilization Code.

Jeffrey L. Goldman (jgoldman@bbwg.com) is a founding partner of the Firm.

STATE LEGISLATURE PASSES "THE RENT ACT OF 2011"

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- The high-rent/high-income thresholds for deregulation were increased to $2,500 and $200,000 (in each of the prior two years);
  - The $2000 / $175,000 thresholds remain in e ect for all proceedings commenced prior to July 1, 2011.
- The individual apartment improvements rent increase ("IAI") for rent stabilized apartments was amended for larger buildings; that is, buildings with 36 or more apartments:
  - For buildings with 35 or fewer apartments, the IAI remains 1/40th of the cost incurred by the owner;
  - For buildings with 36 or more apartments, the IAI becomes 1/60th of the cost incurred by the owner where the rent adjustment takes e ect on or after September 24, 2011
- The 421-a tax exemption program has been extended, with certain limitations, provided that any eligible project must apply to HPD for a Preliminary Certi cate of Eligibility by June 23, 2012.

If you have any questions or concerns pertaining to the new law, please contact BBWG for assistance.

Sherwin Belkin (sbelkin@bbwg.com) is a founding partner of the Firm.

THE IMPORTANCE OF DUE DILIGENCE REVIEW IN CO-OP AND CONDO PURCHASES

By Craig L. Price and Alana Wrublin

A purchaser seeking to buy a co-op or condo apartment must find out as much as possible about the building in which she is purchasing. Unlike the purchase of a house, the buyer of a co-op or condo is buying into an existing financial situation that must be explored. In addition, a buyer must know the nature of the building's rules and restrictions to which she will become subject.

A buyer's due diligence review for co-op and condo purchases involves having her attorney review the building's financial statements, offering plan and amendments (if of relatively recent vintage), meeting minutes, proprietary lease, bylaws, house rules, alteration agreement and purchase application, as well as speaking with the building's managing agent.

The most important component of the review is the building's financial statements, since that gives the most recent formal glimpse into the building's financial status, into which the buyer is investing. Buying into a building with financial woes will plague a purchaser for years to come, especially if that could have been avoided through due diligence. Reviewing meeting minutes will update the look into the building's financial status, and speaking with the managing agent will make the review as "real time" as possible.

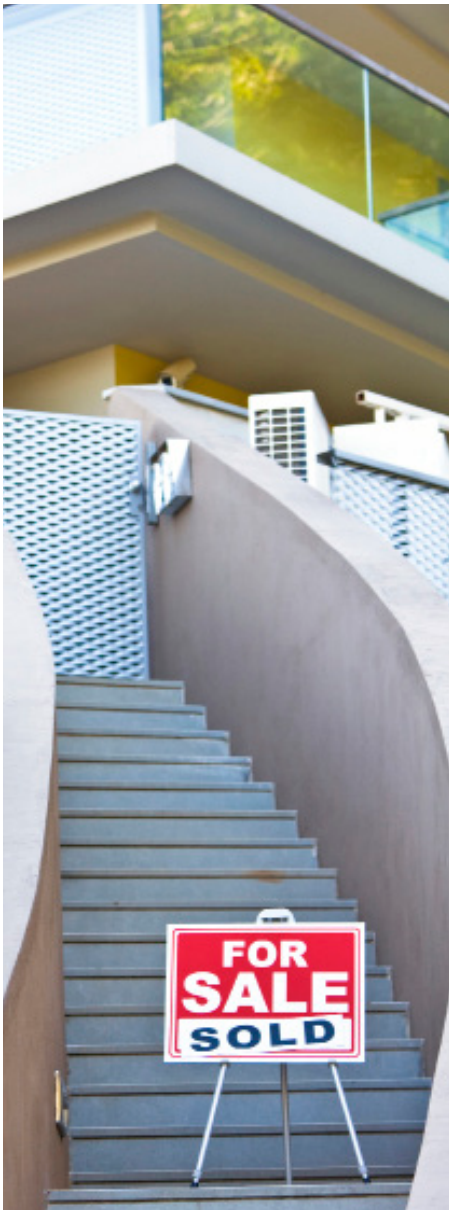
Reviewing governing documents allows prospective purchasers to evaluate the restrictions that will govern them and their neighbors. Awareness of such restrictions and regulations is vital as it informs buyers of the building's policies on pets, subletting, carpeting, noise, financing limits, and any additional closing costs that may not have been apparent upon the purchaser's offer submittal. Additionally, if a buyer is contemplating alterations, the building's alteration agreement must be reviewed in order to assess the procedure, possible time limits, and potential costs of making such changes.

One aspect of due diligence for condo units also involves determining whether there is a mortgage on the unit and whether that mortgage is capable of being assigned. If so, this creates the potential opportunity to save the purchaser thousands of dollars on State and City mortgage recording tax while still obtaining a mortgage from her desired lender.

The due diligence review must be accomplished quickly—upon verbal offer and acceptance, but before the purchase contract is signed. A thorough due diligence review can be complicated but it will protect a buyer by affording her the opportunity to assess the potential risks of the transaction prior to contract. Armed with such information, the buyer can avoid entering into a potentially-disastrous deal, or sign the contract with open eyes; a well-informed buyer may even be able to negotiate a more favorable purchase price or sale terms.

For these reasons, a person considering buying a co-op or condo apartment must ensure that her counsel perform the requisite due diligence as soon as possible.

Craig L. Price (cprice@bbwg.com) is a partner in the Firm's Transactional Department. Alana Wrublin (awrublin@bbwg.com) is an associate in the Firm's Transactional and Administrative Law Departments.



CASES AND TRANSACTIONS OF NOTE

DANIEL T. ALTMAN, chair of BBWG's Transactional Department, and MELANIE A. CAPOBIANCO, an associate in the department, successfully negotiated and closed on a modification and extension of two matured mortgages totaling approximately $15 million with a regional bank on a Manhattan property.

HOWARD WENIG and CRAIG L. PRICE of BBWG's Transactional Department represented an investor on the sale of an East Side commercial building. Separately, MESSRS. WENIG and PRICE represented an investor in the purchase and flip of vacant land in the Bronx, for over twice the original purchase price.

MR. PRICE also represented Dianova USA, Inc., a multi-national not-for-profit organization dedicated to providing social programs and developing innovative initiatives in the fields of addiction prevention and treatment, education and youth development, in connection with the sale of the foundation's New York City headquarters. ROBERT HOLLAND of BBWG's Litigation Department assisted in obtaining the necessary Attorney General and judicial approvals necessary to complete the sale.

MESSRS. ALTMAN and PRICE, as well as JAMIE CHAPMAN and ALANA WRUBLIN of BBWG's Transactional Department, represented a foreign investor in the purchase of a condominium unit at AOL Time Warner Center for approximately $21 million.

MR. PRICE also represented the estate of a renowned sculptor in connection with the sale of an Upper West Side townhouse.

MR. WENIG and SETH A. LIEBENSTEIN, an associate in BBWG's Transactional Department, represented a prominent investor in the leasing of a Bronx parking lot to the New York City Health and Hospitals Corporation for a 15-year term.

MR. LIEBENSTEIN also represented an investor in the leasing of an entire commercial building on the Lower East Side to The Educational Alliance.

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 or (ashmulewitz@bbwg.com).

CONDO UNIT OWNER CANNOT BLOCK NEIGHBOR FROM CONSTRUCTING POOL, DECK AND SHED ON TERRACE AREA AFTER HE PAID LICENSE FEE TO DO SO

Board of Managers of 500 West End Condominium v. Ainetchi Appellate Division, 1st Department

COMMENT | *In emphasizing that the terrace was a common area, the Court ignored a provision in the "builder's" purchase agreement, and its obvious intent, that required advance consent of the neighboring Unit Owner to any such construction.*

CO-OP'S DECISION TO EVICT SHAREHOLDER IN "PULLMAN" PROCEEDING PROTECTED UNDER BUSINESS JUDGMENT RULE

Perry v. 61 Jane Street Tenants Corp. Supreme Court, New York County

COMMENT | *The Court held that the Board was acting in the best interests of the co-op by protecting all shareholders from the disruptive behavior of one.*

CONDO UNIT OWNER CANNOT SUE NEIGHBOR FOR SECOND-HAND SMOKE WHEN SMOKING IN APARTMENTS IS NOT BANNED BY BYLAWS

Ewen v. Maccherone Appellate Term, 1st Department

COMMENT | *In dismissing the complaint, the Court noted that City apartment residents must accept some objectionable conditions. The Court also implied that the decision might have been different if the Condominium barred smoking in apartments, or if the plaintiff had sued the Condominium as well.*

SUCCESSFUL BIDDER AT CONDO MORTGAGE FORECLOSURE SALE CANNOT CANCEL PURCHASE DUE TO 3-YEAR DELAY IN BANK'S ABILITY TO CLOSE

Zweig v. Tolchin Supreme Court, New York County

COMMENT | *The Court emphasized that the terms of sale warned of potential litigation-based delays.*

CO-OP THAT PRODUCED ALTERED SET OF MEETING MINUTES IN DISCOVERY IS PRECLUDED FROM OFFERING EVIDENCE IN OPPOSITION TO COMPLAINT, AND IS SANCTIONED

Aloyts v. 601 Tenants Corp. Appellate Division, 2nd Department

BOARD MEETING PROPERLY HELD, ACTIONS OF BOARD PROTECTED BY BUSINESS JUDGMENT RULE, BUT REFEREE TO DETERMINE IF COMMERCIAL UNIT OWNER OWED ANY ARREARS

Board of Managers of The 25 Charles Street Condominium v. Seligson Appellate Division, 1st Department

CONDO UNIT OWNER NOT ENTITLED TO STAY OF OBLIGATION TO PAY COMMON CHARGES DUE TO LEAKS AND MOLD

Schottenstein v. Windsor Tov, LLC Appellate Division, 1st Department

COMMENT | *The Court held that the conditions were not a "casualty loss" as defined in the bylaws, since only this unit was damaged. More importantly, the Court stated that the interests of the Condominium's other Unit Owners outweighed those of this single Unit Owner.*

BUILDING OWNER NOT AN "OUTDOOR ADVERTISING COMPANY" UNDER CITY LAW, AND THUS NOT SUBJECT TO FINES FOR HAVING ADVERTISING SIGNS INSTALLED ON ITS PROPERTY

Rosen v. City of New York Supreme Court, New York County

COMMENT | *The case turned on a procedural technicality--the ECB's failure to timely appeal the decision by the administrative law judge. While this case did not involve a co-op or condo, it is instructive since it reflects the new, potentially hefty, fines that co-ops and condos could face for not complying with the City's new stringent outdoor advertising requirements.*

CO-OP NOT ENTITLED TO REIMBURSEMENT FOR SECURITY GUARD COSTS INCURRED DURING EVICTION PROCESS FOR OBJECTIONABLE UNAUTHORIZED TENANT, UNDER STRICT READING OF PROPRIETARY LEASE PROVISIONS

Himmelberger v. 40-50 Brighton First Road Apartments Corp. Supreme Court, Kings County

CONDO SPONSOR WHO FAILED TO MAKE REQUIRED RESERVE FUND PAYMENTS, AND USED CONDO FUNDS FOR PERSONAL EXPENSES, BARRED FROM NEW YORK STATE OFFERINGS, AND MUST PAY RESTITUTION AND PENALTIES

People v. Levy Supreme Court, New York County

COMMENT | *The Court emphasized the degree to which the AG had proven its case, and how the sponsor had failed to rebut.*

CO-OP ORDERED TO EFFECT TRANSFER OF SHARES, SINCE SHAREHOLDER PROVED OWNERSHIP

R&L Realty Associates v. 205 West 103 Owners Corp. Supreme Court, New York County

CO-OP MUST MAKE ROOF REPAIRS NECESSARY TO RESTORE SHAREHOLDER'S USE RIGHTS AS PROVIDED IN OFFERING PLAN AND PROPRIETARY LEASE

Shapiro v. 350 E. 78th Street Tenants Corp. Appellate Division, 1st Department

COMMENT | *The Court held that the extent to which the shareholder can reinstall decking, furniture and planters was a question of fact, to be decided subsequently. The dissent argued that the shareholder shouldn't be entitled to any relief, since the roof's deterioration was largely due to her manner of use.*

BBWG NOTABLE ACHIEVEMENTS

HOWARD WENIG, BBWG'S managing partner, was reappointed to the Business Development Board of Hudson Valley Bank for the year commencing July 1, 2011.

SHERWIN BELKIN, a partner in BBWG's Administrative Law and Appeals Departments, responded to an inquiry in the July 3 *Sunday Real Estate Section* of the New York Times regarding an owner's rights to add new restrictions in riders to renewal leases for rent-stabilized apartments. MR. BELKIN also addressed the Community Housing Improvement Program Board of Directors on June 28, and the Real Estate Board of New York Residential Committee on June 30, regarding statutory changes in owners' and tenants' rights created by the Rent Act of 2011.

JEFFREY L. GOLDMAN, co-chair of BBWG's Litigation Department, responded to an inquiry in the June 5 *Sunday Real Estate Section* of the New York Times regarding the rights of an owner and a tenant on the tenant's desire to cancel a lease before commencing occupancy.

JOSEPH BURDEN, co-chair of BBWG's Litigation Department, responded to an inquiry in the May 29 *Sunday Real Estate Section* of the New York Times regarding the rights of an owner to pursue debt collection against a tenant without resorting to a Housing Court proceeding.

AARON SHMULEWITZ, head of BBWG's co-op/condo practice, responded to inquiries in the *Sunday Real Estate Section* of the New York Times regarding the ability of a condominium to conduct Board meetings by email (June 19), and the right of relatives to serve simultaneously on a co-op Board (May 22). MR. SHMULEWITZ was also quoted in a May 19 article in the Wall Street Journal regarding owners of unbuilt condominium units owing real estate taxes to New York City, and in the June edition of The Real Deal in articles on co-ops and condominiums selling dead space, and on management companies increasing administrative fees.

KARA RAKOWSKI, a partner in BBWG's Administrative Law Department, authored an article in the June edition of The Mann Report on a new City requirement that large buildings benchmark energy usage.

JEFFREY S. LEVINE, a partner in BBWG's Litigation Department, authored an article in the June edition of The Mann Report on an owner's right to evict a commercial tenant for performing unauthorized alterations.

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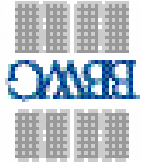

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