

Disability Defined for Succession Rights

In *Belnord Realty Associates, L.P. v. Joseph*, the Appellate Term, First Department, provided the first appellate review of the application and interpretation of the term “disability” in the context of succession rights.

Generally speaking, individuals seeking to succeed to another’s rent regulated tenancy must be within a defined class of family members, and must be able to establish co-occupancy with the tenant for two years before the tenant of record dies or permanently vacates the apartment. Under substantially similar provisions of the Rent Stabilization Code and the New York City Rent and Eviction Regulations (Rent Control), an individual claiming succession rights

to rent-regulated apartments can avail herself of a shorter (one year instead of two years) co-occupancy requirement, if she can establish that she is disabled (the “Succession Regulations”).

Under the applicable Succession Regulations, a family member claiming to be disabled for the purpose of succession rights must establish four criteria:

- (1) an anatomical, physiological or psychological impairment (other than drug, alcohol or gambling addiction);
- (2) an impairment that is demonstrable by medically acceptable clinical and laboratory diagnostic techniques;
- (3) that the impairment is

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Special Points of Interest:

- **First appellate court to define the term “disability” under the succession regulations.**
- **A properly drafted lease, coupled with an opportunity to inspect, barred tenant’s attempts to nullify lease.**

“MERGER”: A Clause With Clout

The “As Is” and “Merger” clauses are provisions commonly utilized in commercial leases. The critical importance of the provisions to the preservation of an owner’s rights was recently underscored in a Supreme Court case handled by our firm.

Owners and brokers routinely make representations in an attempt to facilitate the rental of space. Prospective lessees are generally afforded the opportunity to inspect the premises and verify the validity of the representations prior to execution of the lease. Nonetheless, tenants occasion-

ally challenge these representations years after taking occupancy, claiming that the realities of the premises do not conform to the representations that were made, alleging that they were fraudulently induced into leasing the property. These assertions are sometimes employed as a ruse to undo a transaction which a tenant may now deem unfavorable, or as a preemptive attack against a prospective claim for unpaid rent.

In order to prevent such a scenario, many commercial leases include clauses by which the parties agree that

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expected to be permanent; and (4) that the impairment substantially limits one or more major life activities.

In *Belnord*, the family member, an attorney, had lived and worked in Washington State for several years. Her husband and children lived in a co-op apartment in New York City on the Upper East Side. When she returned to New York, she began occupying her elderly parents' large rent controlled apartment on the upper West Side of Manhattan.

Both parents died less than two years after the family member returned to live and work in New York. Given that she failed to meet the requisite two year co-occupancy requirement for succession rights, the family member claimed that she was disabled and that, having occupied her parents' apartment for more than a year before they each died, she was entitled to succeed to their rent regulated status.

The family member claimed that she suffered from congenital hip dysplasia (a condition that can make it difficult for individuals to walk), scoliosis (a curvature of the spine) and osteoarthritis. She claimed that she had been the recipient of handicapped parking permits issued by both the City and State of New York, that she had used a cane when she was younger, and that the hip dysplasia would likely continue to deteriorate over time leaving

her either in a wheelchair or a candidate for hip replacement surgery.

Pre-trial discovery was integral in defeating the family member's claim of succession rights. The discovery included the customary discovery device of a deposition of the family member, where the family member gave sworn testimony about her medical conditions and how those conditions impacted on her daily life. But in this proceeding, the pre-trial discovery also included an independent medical examination, where an orthopedic surgeon of the owner's choosing conducted an examination of the family member to obtain, to the fullest extent possible, an objective, independent evaluation of the family member's true medical conditions.

In her deposition, the family member testified that in 1995 she moved to Washington State in search of professional opportunities. While in Washington, she worked as a solo practitioner, as an associate or contract (per-diem) attorney in various private law firms, and as a law professor. She also testified that after she returned to New York in December 1999, she worked at several prestigious Manhattan law firms, working 50 to 60 hours a week, and commuting to work via subway or bus.

She testified that in January 2002, she began her then-current position as in-house counsel for a corporation in Hauppauge, New York, commuting two hours each way to her Hauppauge office. The com-



mute entailed taking the subway to Pennsylvania Station, transferring to the Long Island Railroad, which she rode to the Central Islip stop; and then taking a taxi or car service from the train station to her office.

She also testified that she went to restaurants, movies, and operas, she shopped for herself, did her own housecleaning, laundry and banking, and did not have a home health aide or attendant. She testified that she had an exercise regime, which included walking on a treadmill, and admitted that, in addition to the treadmill, she had weights, a stationary bicycle, a Stairmaster, and a rowing machine in the subject apartment.

In response to the question how her medical conditions impacted on her daily life, she testified that she cannot sit or stand for long periods of time, that she has trouble getting up, sitting down and going up or down stairs, and that she suffers from chronic pain from her various conditions. She testified that she sees an osteopathic physician and acupuncturist about once a month, takes warm baths to relax and relieve pain and

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tension in her knees, hips and back, and that the only medication that she takes is a homeopathic anti-inflammatory.

At the independent medical examination, the owner's orthopedic surgeon found the family member to be unwilling to participate in many diagnostic tests designed to provide objective medical proof of any disability. However, from his review of X-rays of her spine, hips and knees, the owner's expert was able to conclude that there was no credible proof that any of the family member's conditions were disabling, and that there was no credible, objective proof of any medical conditions that would be causing the family member to suffer from the chronic pain she claimed she endured.

After trial, the family member's claim of succession rights was rejected by the Housing Court and owner was granted a possessory judgment. The Housing Court found that while the family member had proven that she had a medical impairment, and that the impairment may be permanent, the family member had failed to demonstrate that the impairment substantially limited even one of her major life activities.

On appeal, the Appellate Term affirmed the Housing Court, finding the fact that the family member had handicapped parking permits was not dispositive on the issue of whether she

was disabled for the purposes of succession rights. The Appellate Term also rejected the family member's argument that given the remedial nature of the rent control laws, a less rigorous standard should be applied in construing the "substantial limitation" criteria. The Appellate Term observed that the more restrictive threshold for defining disability under the regulations dealing with succession rights indicated that the State Legislature intended disability to be defined more narrowly in the Succession Regulations than under other laws and regulations, such as anti-discrimination statutes and ordinances. The Appellate Term also observed that the "substantial limitation" criteria of the disability definition pertaining to succession rights is "functionally identical" to the disability definition contained in the Americans with Disabilities Act ("ADA"), and relied on case law interpreting the ADA in affirming the trial court.

The Appellate Term acknowledged that while the family member may experience some pain and difficulty walking, her own treating physician testified that the family member functions "reasonably well" and the family member herself testified about her ability to walk, work, and undertake a lengthy daily commute.

With the Appellate Term's decision in *Belnord*, owners and tenants now have appellate authority to look to when litigating a family member's claim of disability in connection with a

claim of succession rights. Given the family member's burden of proving a "substantial limitation" of a major life activity, it is likely that succession rights litigation involving a disability claim will likely turn on the extent to which a family member can demonstrate that the medical impairment is such that it substantially interferes with major life activities such as walking, talking, eating, sleeping, breathing and working. In addition to the family member's testimony, such cases are likely to also entail battles by dueling medical experts.

This article was written by Robert T. Holland, a partner in BBW&G's Litigation Department (Mr. Holland also practices in the firm's Transactional Department). Mr. Holland and fellow Litigation Department partner Edward Baer represented Belnord Realty Associates, L.P. in the trial discussed in this article. Magda Cruz and Sherwin Belkin represented the Owner on the appeal.



Robert T. Holland

MERGER: A Clause With Clout . . .
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the premises are taken in an “As Is” condition, coupled with a “Merger Clause” stating that representations that are not expressly memorialized in the lease are not binding.

BBW&G recently secured a favorable decision from the New York State Supreme Court which, among other things, offers significant guidance as to the effectiveness of the “As Is” and “Merger” clauses—particularly where the tenant was able to conduct an inspection and verify the purported representation prior to its occupancy.

A commercial tenant commenced an action, in State Supreme Court, claiming that it executed the lease in reliance on a broker’s letter indicating that the premises consisted of a specified amount of rentable square feet and that the rent was predicated upon such square footage. The lease did not incorporate the broker’s letter, and was silent as to the amount of square footage in the premises. Tenant alleged that, in actuality, the square footage was approximately 22% less than the amount represented, and commenced an action for rescission of the lease, and damages; under the claim of fraudulent inducement.

As counsel for the owner, BBW&G moved for summary judgment for an order dismissing the complaint and for a judg-

ment on the owner’s counterclaim for the unpaid rent. The Court granted the entire relief that BBW&G sought.

The Court cited the “As Is” clause which provided that “tenant has examined and inspected the Demised Premises and Tenant agrees to accept said Demised Premises in their “As Is” condition existing on the commencement date of the date thereof.” The lease further contained a merger clause which provided that “no earlier statement or prior written material shall have any force or effect. Tenant agrees that it is not relying on any representations or agreements, other than those contained in the lease.” The Court found these clauses to be sufficiently specific so as to extinguish potential claims for fraud. Moreover, the Court found that under the facts presented, Tenant could not have properly stated a claim for fraudulent inducement in that it could have discovered the actual square footage by making additional relevant inquiries and exercising ordinary intelligence.

The Court’s decision was particularly satisfying in that the owner was able to rebut the claims of fraudulent inducement and obtain a judgment on its counterclaim for rent and additional rent, without the need for the expenditure of time and money entailed by discovery or a formal trial.

A properly drafted lease, coupled with the tenant being

given the opportunity to verify the accuracy of owner’s representation, barred the tenant’s attempt to retroactively nullify the lease.

The article was written, and the case was handled, by Lewis A. Lindenberg and Ori Shapiro. Mr. Lindenberg is a partner in BBW&G’s Litigation Department and Mr. Shapiro is an associate practicing in the firm’s Administrative Law and Litigation Departments.



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BBW&G NEWS

MAY I QUOTE YOU?



Martin J. Heistein was a featured lecturer at CHIP's recent seminar on owner's rights and remedies. Mr. Heistein discussed the criteria, the application process and the rent increase ramifications of Major Capital Improvements to rent regulated housing.



Edward Baer's article "Waivers Regarding Lease Terminations" was published in *Landlord Tenant—New York*. Mr. Baer described how an owner's actions or omissions can cause a tenant's default, violation of lease, termination notice or petition to be waived (and thereby nullified). Mr. Baer, who is co-chair of the Landlord-Tenant Committee of the Real Property Section of the New York State Bar Association was also a panelist at the Association's presentation on Real Estate as part of its series "The People's Law School: What Everyone Needs to Know..."



Sherwin Belkin's letter to the Sunday *New York Times*' Real Estate Section editor took issue with a letter that had recently been published by the *Times*. Mr. Belkin stated: "In her April 16, 2006 letter to the editor, Assemblywoman Deborah Glick comments on the definition of demolition under the Rent Stabilization and Rent Control Laws, as discussed in Josh Barbanel's article "A New Chapter in the Face-Off Between Tenants and Landlords [4/2/06]." Assemblywoman Glick opined that the legislature intended demolition to be limited to the complete razing of a building, such that she described anything less as a "phony demolition." Unfortunately, the Assemblywoman's opinion is legally incorrect and fails to understand the manner in which the term demolition has consistently been applied to regulated housing by the administrative agencies and the courts. Simply stated, over the past fifty years, the NYC Office of Rent Control, the NYC Conciliation and Appeals Board, the NYS Division of Housing and Community Renewal and the appellate courts have consistently ruled that "demolition" under the rent regulations does not require a complete razing of the building to the ground. Contrary to the Assemblywoman's implication, this is neither a new, novel, nor a "phony" legal concept, but, rather, is predicated upon five decades of legal precedent."



Aaron Shmulewitz addressed a *New York Times* posed question from the daughter of co-op apartment owners who had asked the board to reissue the stock certificate in her name. Mr. Shmulewitz noted that the rights pertaining to such transfers were generally found in the proprietary lease, and that the board "would have the right to ask for whatever financial documentation is reasonably necessary to demonstrate that the proposed additional shareholders are financially responsible."

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