

UPDATE

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Special points of interest:

- Owners can take steps to limit their exposure to second-hand smoke claims.
- Co-op shareholder failed to prove mold in apartment caused health problems.
- DHCR promulgated renewal lease rider form to be offered during pendency of High Income Deregulation proceeding.

Using the Internet in Housing Court Litigation

By: Matthew Brett

Go ahead “Google” your tenants. Just put their name in quotes and see what pops up. You never know what you might find.

We recently learned the benefits of such a simple online investigation. Our client suspected that its tenant, a renowned cinematographer was not maintaining her Manhattan apartment as her primary residence. A professional private investigator unearthed evidence that the tenant owned a home in Santa Monica, California. While the investigation report provided some useful information, what we found online about the tenant was about as close as a litigator can get to a smoking gun.

A Google search with the tenant’s name in quotes yielded an interview posted on a cinematographers trade union website. The tenant’s answers confirmed the owner’s suspicions:

Question: When did you move to Los Angeles?

Answer: I went back and forth for a number of years. I shot a movie

in 1992 in New York . . . I still have my place in New York. I haven’t done a movie there in a couple of years.

Digging up this type of information is one thing; actually convincing a judge that it is admissible evidence of non-primary residence is quite another task. We had to overcome evidentiary rules that bar out-of-court statements as inadmissible “hearsay.”

Although the internet is not a new technology, there is a general reluctance by courts (especially in Housing Court) to acknowledge its reliability. Complicating matters is the fact that there have been virtually no cases in which judges can comfortably look to as precedent. That is until now.

We were able to establish that the interview, although only in an electronic form, was an exception to the hearsay rule. First, there was no debate that it consisted of statements by a party (the tenant) against interest. However, the

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Great Balls of Fire: Owners Liable for Secondhand Smoke

By: Andrew Georgakopoulos

1950’s rock and roll legend, Jerry Lee Lewis, composed a song, “Great Balls of Fire,” which served as the title track of the 1989 film depicting the life and times of Buddy Holly and the great American smoking society. A recent decision by a Manhattan judge evokes the memorable lyrics of that epic song. In a case of first impression, *Poyck v. Bryant*,

New York County Civil Court Judge Shlomo S. Hagler, concluded that secondhand smoke can constitute a breach of the implied warranty of habitability.

Real Property Law §235-b provides that in every written or oral lease for a residential apartment there is an implied

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*Using the Internet . . .
(Continued from page 1)*

second element of the evidentiary test posed a much bigger problem: how do we convince a court that the website (or a printout of the website) is authentic? Here is what we did:

We procured a witness from the cinematographers trade union who testified that his organization maintained the website where the interview was posted. We showed that the website bore the trade union's insignia. Finally, we provided the court with instructions on how to arrive

at the web data that we wished to offer as evidence. The court was able to type the website's address on its computer and assess the site for itself.

The interview was ultimately admitted into evidence because the court was convinced that the interview was accurately recorded by the website's owner; the tenant's trade union.

So go ahead, start surfing. It may reveal information you may never have even thought existed. It could transform a questionable claim into a winning case.

Matthew Brett is a senior associate in BBWG's Litigation Department. Mr. Brett has lectured on Internet resources for owners involved in landlord-tenant litigation and currently serves on the Housing Court Committee of the New York City Bar Association.



Winning Non-Primary Residence Proceedings

By: Noelle Picone

In last month's BBWG Update, Litigation partner, Edward Baer, wrote about "The Nuts and Bolts of a Non-Primary Residence Case." Applying the strategies Mr. Baer described in that article, BBWG has successfully prosecuted countless non-primary residence proceedings in the housing courts throughout the City of New York. This article describes three recent cases in which BBWG clients recovered possession of valuable rent regulated apartments from tenants who BBWG litigators proved were living elsewhere and not maintaining those apartments as primary residences.

In *ALH Properties Two, LLC v. Ernest W. Castaldo*, the tenant owned and occupied a house in Pennsylvania. The tenant contended that only a co-owner occupied the Pennsylvania house up until her death in 2000, and thereafter, the house was not regularly used. Although the tenant had pro-

fessional contacts and friends in New York, the court concluded that the documentation and testimony showed that, contrary to his claim, the tenant primarily resided in Pennsylvania.

In making its decision, the court noted the numerous documents which listed the Pennsylvania house as the tenant's address during the period preceding the litigation, including, his driver's license, real estate tax documents, bankruptcy petitions filed in Pennsylvania, automobile insurance records, and utility accounts. Additionally, the tenant had a post office box in Pennsylvania. Another telling fact was that the tenant was not registered to vote in New York until 2005, after the case had commenced. The court found that the registration was simply an effort on the tenant's part to create a misleading paper trail connecting him to the New York apartment.

The owner also successfully discredited the tenant's claim that no one lived in the Pennsylvania house after 2000, by showing the on-going telephone, electrical and cable service at the house. The court did not believe that the tenant would maintain these various services for the Pennsylvania house if he did not primarily reside there.

In *Trumps CPS LLC v. Howard Gottbetter*, the owner proved that the tenant, a practicing attorney, was using his Manhattan apartment as his office, not as his primary residence. The owner showed that the tenant actually lived with his fiancée, first in Queens, and later in New Jersey.

In concluding that the Manhattan apartment was not the tenant's primary residence, the court relied on applications and leases for the Queens and NJ apartments signed by the tenant as "resident," along with various

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*Great Balls of Fire . . .**(Continued from page 1)*

obligation of the landlord to the tenant that the apartment is fit for human habitation and that there are not any conditions that are dangerous, hazardous or detrimental to the tenant's life, health, or safety. If such conditions exist, the tenant may claim that the warranty of habitability has been breached. A breach of the warranty of habitability can result in a rent abatement and can cause the owner to incur other damages.

In June 2006, the U.S. Surgeon General issued a report that found that secondhand smoke imposes a "serious health risk" on individuals. Judge Hagler cited this as a basis to add secondhand smoke to the long list of conditions that traditionally constitute breaches of the warranty of habitability (such as, lack of heat, peeling lead paint, vermin infestation, and water leaks).

Poyck v. Bryant involved a condominium unit. The unit owner sued his tenants for nonpayment of rent. The tenants had moved into the unit in 1998 and began to default in their rental obligations in August 2001, when new neighbors moved into the adjoining apartment. The tenants claimed that the new neighbors constantly smoked in their apartment and in the common floor hallway. Second hand smoke seeped into the tenants' apartment and adversely affected their health. The tenants tried taking remedial steps, such as sealing their apartment door with weather-stripping and operating air filters around the clock to try to diminish the smoke entering their apartment, but the condition was too severe. After repeatedly asking



Owners can take steps to limit their exposure to secondhand smoke claims.

building personnel and the landlord to remedy the condition, including advising the landlord in writing that the tenant's wife was recovering from cancer surgery and was extremely allergic to tobacco smoke, the tenants vacated the premises when the landlord was not responsive to their plight.

Judge Hagler ruled that secondhand smoke can be as invasive as other conditions that courts have found to breach the warranty of habitability, including noxious odors, chemical fumes, excessive noise, water leaks and extreme dust penetration. Judge Hagler rejected the landlord's argument that he had no control over the adjoining apartment because the residents were separate condominium owners. Judge Hagler held that acts of third parties are within the scope of a landlord's responsibility for purposes of RPL 235-b. The court reasoned that the owner could have asked the board of managers of the condominium to start an action against the smokers pursuant to the prevailing house rules, by-laws or the Condominium Act to stop the objectionable

conduct.

An owner can take steps to limit its exposure to such claims. An owner can be proactive in commencing proceedings against tenants who are responsible for causing excessive secondhand smoke to the detriment of their neighbors. Another suggestion is to include a no smoking provision in the initial lease which can serve as an absolute basis for eviction if a tenant or an occupant breaches this covenant. (The "no smoking" provision would not likely be enforceable in the renewal lease of rent regulated tenants because the law provides that the renewal lease must be on the same terms as the original lease.) Boards of cooperatives and condominiums can implement policies that restrict or eliminate smoking in their buildings.

The days are long gone where smoking in one's own home did not have consequences in the context of landlord-tenant relations. Now, owners must respond to complaints from non-smokers, or risk abatements to their rent, and possible liability for other related injuries. In the immortal words of Jerry Lee Lewis and Buddy Holly, "Goodness Gracious, Great Balls of Fire!"

Andrew Georgakopoulos is an Associate in the Litigation Department, specializing in Housing Court matters.



Co-op/Condo Corner

Latest Legal Developments

By: Aaron Shmulewitz

SHAREHOLDER FAILS TO PROVE THAT MOLD IN APARTMENT CAUSED HEALTH PROBLEMS; CLAIMS DISMISSED

Fraser v. 301-52 Townhouse Corp. (New York County Supreme Court, Index Number 113586/02, decided September 27, 2006), involved the growing issue of personal injury claims based on mold in an apartment. In the case, the Court held ten days of hearings on the issue of causation of the alleged injury, and ultimately held that the complaining shareholders' experts had failed to offer sufficient evidence to support the contention that the relevant scientific community recognizes that a causal relationship exists between the presence of mold and the alleged health complaints.

COMMENT—This potentially very far-reaching decision not only held that the shareholders had failed to show causation between the presence of mold in the apartment and illness to them, but that the general scientific community has failed to recognize a causal link between mold and illness. If upheld on appeal, and if followed by other courts, this decision could substantially weaken the burgeoning mold lawsuit industry that has begun to plague cooperatives and condominiums.

CONDOMINIUM'S INSISTENCE ON IMPOSING CONDITIONS NOT PERMITTED UNDER BYLAWS ENTITLES PURCHASER TO CANCEL DEAL AND RETURN OF DEPOSIT

In *Lisenenkov v. Kasziner* (*New York Law Journal*, 11/2/06, p. 23 col. 3), a condomin-

ium's bylaws provided that the condominium did not have a right of first refusal on the sale of apartments. Despite not having any right to do so, the condominium board refused to certify to a purchaser's title company that the condominium had no such right unless the purchaser deposited two years' worth of common charges in escrow with the condominium (apparently based on the board's concerns regarding the purchaser's financial stability). Without such certification, the title company refused to insure title, and the transaction failed to close. In the ensuing lawsuit over the downpayment, the Court held that the title company's refusal to insure title due to the board's refusal to issue the requested certification rendered title not insurable—a requirement of the parties' purchase agreement—and the purchaser was, therefore, entitled to cancel the transaction and to recover the downpayment. The Court noted that, despite what may have been well-founded concerns about the purchaser's finances, the condominium's governing documents did not give the condominium any right to withhold or impose conditions on a purchase.

COMMENT—This case once again points out the need for condominium boards to adhere closely to bylaw provisions regarding purchases and other matters. Courts generally construe such provisions narrowly; if a right does not exist explicitly in the condominium's governing documents, a court is unlikely to permit a condominium to find and exercise such right.

UNLICENSED CONTRACTOR CANNOT RECOVER AMOUNT DUE UNDER CONTRACT, OR FORECLOSE A MECHANICS LIEN

In *Young's L&M Construction Inc. v. Kelley* (*New York Law Journal* 8/15/06, p. 22 col. 1), a contractor that had performed renovation work in a co-op apartment sued the shareholder of the apartment for monies unpaid under the contract, filed a mechanics lien against the building, and sought to foreclose on that lien. The shareholder's motion to dismiss the lawsuit was granted. The Court held that, under the New York City Administrative Code, a contractor must be a licensed "home improvement contractor" in order to be entitled to enforce its remedies. Since this contractor was not so licensed, it had no standing to sue the shareholder or to foreclose on a mechanics lien.

COMMENT—This case is the latest in a series of cases that strictly enforce the City's licensing laws that govern contractors. Apartment owners who are involved in disputes with contractors should ascertain their license status, since the absence of a license could enable the apartment owner to prevail quickly on procedural grounds.

ATTORNEY RECEIVES MAXIMUM SANCTIONS FOR MATERIAL MISSTATEMENTS AT HIS OWN TRIAL

1050 Tenants Corp. v. Lapidus (*New York Law Journal*, 10/17/06, p. 27, col. 1), continued the string of adverse judicial holdings against a well-known real estate attorney arising from his years of various litigations against his cooperative. The Court held that the attorney had "lied repeatedly and without shame" at various points in the litigation, and ordered him to pay sanctions of \$10,000.

COMMENT—It is important to consider the imposition of sanctions as a possible means of

detering litigious shareholders.

SINGLE INSTANCE OF CRIMINAL CONDUCT BY A TENANT'S EMPLOYEE IS INSUFFICIENT TO SUPPORT EVICTION OF THE TENANT FOR CRIMINAL ACTIVITY

In *Solow Building Company v. Banc of America Securities* (*New York Law Journal*, 9/19/06 p. 36, col. 1), the Appellate Term reversed a lower court decision and held that an owner could not evict its commercial tenant—a securities company—because one of the tenant's traders had engaged in "late trading" and other violations of securities laws. The Court held that since the only evidence of criminal activity was by one employee, the owner had not satisfied the requirement of showing that the tenant's use of the premises for criminal activity was "customary and habitual."

COMMENT—While not a case involving cooperatives or condominiums, this case is instructive in showing the standards that must be met in order for a tenant to be evicted for criminal activity, an issue that cooperatives and condominiums are occasionally faced with.

Aaron Shmulewitz heads our co-op/condo practice. Aaron represents more than 300 co-op and condo boards throughout New York City, as well as sponsors of conversions, and purchasers and sellers of co-op and condo apartments, buildings, houses, and other properties.



Winning Non-Primary Residence Proceedings (Continued from page 2)

court documents and communications in which the tenant represented that he resided in the other apartments. Three doormen from the Manhattan building further corroborated the use of the apartment as an office, not a home. They testified that they saw the tenant leave the Manhattan apartment in the late afternoon on weekdays, say goodbye, and not return until the following morning. The doormen further said they rarely saw the tenant on weekends, never saw dry cleaning, groceries or fast food deliveries for the tenant and never saw the tenant doing laundry in the building.

Proof that the tenant had made false claims in other judicial forums, and that there were many illogical explanations in his testimony in this case, also caused the court to reject his story. One example was the reason the tenant gave for signing rental documents in his name in Queens and New Jersey. The tenant claimed he was simply trying to help his fiancée because she did not have

good credit. However, such a contention begged the question why he did not simply list himself as a guarantor.

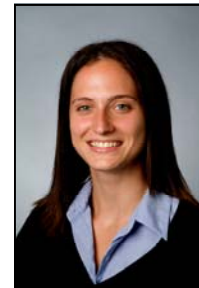
In *450 West 58th St. Company v. Gil Chang a/k/a Chang Gil Jung*, the tenant left his Manhattan apartment to reside with his wife and children in their Orange County, NY, house. He, nonetheless, claimed that he primarily resided in the Manhattan apartment without the rest of his family, as he worked and went to college in New York City. He claimed that he would go to the Orange County house only on weekends. The owner proved that the tenant's claims were not credible.

EZ Pass records showed that, during the majority of the past year, the tenant spent between zero and three nights in the Manhattan apartment. Telephone and utility bills displayed a drastic drop in the usage of those services after the move to Orange County. Tax returns recited the Orange County address. Bank and credit card statements showed banking and credit transactions in Orange County. A mortgage note and a

STAR exemption for the Orange County house contained sworn certifications by the tenant that the property was his primary residence.

Although a husband and wife can maintain separate primary residences, the court explained, this is not such a case. Rather, the evidence showed that the husband resides with his family in Orange County and merely uses the Manhattan apartment for convenience when he goes to school at night several times a week. Such usage is not protected by the New York City rent laws.

Noelle Picone is a Legal Assistant in the Litigation Department. Ms. Picone has recently passed the New York State Bar Exam and is awaiting admission to become an Associate of the firm.



Are Your High Income High Rent Deregulation Petitions Still Pending? Take Steps to Terminate Your Tenants' Renewal Leases Early

By: Joshua Losardo

Many owners who filed High Income High Rent Deregulation Petitions in 2005 and 2006 have not yet received final orders from DHCR. Although this is frustrating, DHCR has promulgated a Renewal Lease Form Rider which provides terms to terminate a tenant's renewal lease sixty (60) days after an Order of Deregulation is issued, even if the tenant has more than one (1) year

remaining on his or her renewal lease.

DHCR's "Renewal Lease Form Rider for Renewal Leases to be Offered During Pendency of High Income Deregulation Proceedings" states that if DHCR grants a petition for deregulation, the tenant's renewal lease "shall be cancelled and shall terminate after sixty (60) days from the date of issuance of an order granting

such petition."

In High Income High Rent Deregulation Petitions, DHCR will issue an order granting an owner's petition if it is determined that a tenant's household income exceeded \$175,000.00 in both years preceding the year in which the petition is filed, and the legal regulated rent of the apartment is over \$2,000.00 a

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Take Steps to Terminate Your Tenants
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month.

In the event a tenant appeals an Order of Deregulation by filing a Petition for Administrative Review ("PAR"), DHCR's Rider also serves to terminate a tenant's renewal lease sixty (60) days after the issuance of an order denying the tenant's PAR.

BBW&G highly recom-

mends that owners use DHCR's Renewal Lease Form Rider on all apartments being petitioned for High Income High Rent Deregulation to ensure the earliest possible collection of an apartment's market rent.

For a copy of DHCR's Rider, please contact Joshua Losardo, an associate in BBW&G's Administrative Law and

Bankruptcy Departments. Mr. Losardo specializes in the luxury deregulation process.



BBW&G NEWS

MAY I QUOTE YOU?

ROBERT JACOBS, a BBW&G Transactional Department partner has been appointed Chairman of the Sub-Committee on "SOHO Zoning Issues" of the Land Use Committee of the New York City Bar Association.

CRAIG INGBER, a BBW&G Transactional Department partner was a featured speaker at a program sponsored by the Community Housing Improvement Program ("CHIP") and Washington Mutual Bank on the "Buying and Selling Real Estate in New York: An Insider's Guide" at the Waldorf Astoria Hotel on November 8, 2006. Mr. Ingber spoke on transactional issues affecting buying and selling real estate, including the forms of ownership owners may want to consider when deciding to purchase real property in New York State.

AARON SHMULEWITZ, head of BBW&G's Coop/Condo Department, was quoted in the *New York Times* Real Estate section "Q&A" column regarding the rights of a cooperative to gain access to a shareholder's apartment in an emergency situation. Mr. Shmulewitz stated that proprietary leases usually give the cooperative the right to gain access to a shareholder's apartment, at any time, when there is a need for emergency repairs. In answering the specific question asked, Mr. Shmulewitz noted that since there was an active leak, the co-op may have had the right to remove locks or dislodge the door in order to mitigate water damage to a downstairs apartment.

KARA RAKOWSKI, a partner in BBW&G's Administrative Law Department, continues to offer her expertise to the Education Program of the Real Estate Board of New York ("REBNY"). Ms. Rakowski taught the topic "Rent Regulation" in REBNY's Fall 2006 Broker Qualifying course.

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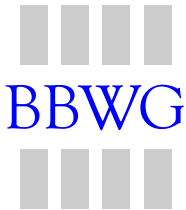
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