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Litigation Department

The Importance of a Well-Worded Stipulation

By: Jeffrey L. Goldman



After successfully representing the owner before DHCR in an application for an order granting approval to proceed for eviction on the basis of demolition, and then successfully defending the tenants' Petition for Administrative Review and an Article 78 proceeding for judicial review, a holdover proceeding was commenced for the tenants' eviction pursuant to the DHCR order.

The holdover proceeding was settled by a two-attorney Stipulation of Settlement in which the tenants were paid a substantial six figure sum to surrender possession; a sum well above the DHCR stipend payment of \$77,000.00. Tenants vacated three months later and signed a release discharging the owner "from any

liability or responsibilities to me, and from any claims or damages which I may have in connection with the premises or arising out of my tenancy including, but not limited to, any claims that I have vacated the apartment by any other than voluntary surrender of possession."

Approximately 90 days thereafter, the tenants commenced an action in Supreme Court claiming they were fraudulently induced to enter into the Stipulation as the owner procured the certificate of eviction from DHCR based upon the false representation of his intention to demolish. The tenants claimed that the owner had never demolished the building and tenants would not have

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Primary Residence Update

By: Kristine L. Grinberg

Even Bianca Jagger Can't Always Get What She Wants

The Appellate Division recently ruled in Katz Park Ave. Corp. v. Jagger that Bianca Jagger cannot maintain a rent-stabilized Manhattan apartment as her primary residence, because she is a non-immigrant British citizen who is in this country on a temporary (B-2) tourist visa. The Court found that the applicable immigration statute and regulations require Ms. Jagger to have a principal residence in the United Kingdom during her temporary stay in the United States, and,

thus, she cannot maintain a primary residence in the United States. The B-2 visa requires Ms. Jagger to show that she intends to leave the United States at the end of her temporary stay and she may be admitted for not more than one year, with any extensions being not more than six months each.

The Court reasoned that "[a] B-2 visa holder cannot claim simultaneous compliance with the immigration statute's 'principal' residence requirement and the primary residence requirement

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The Importance of a Well Worded Stipulation ...

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agreed to enter into the Stipulation but for the owner's representation it intended to demolish. (Similar types of claims could also be made after a settlement in an owner occupancy proceeding or any surrender of possession following litigation.)

The Supreme Court rejected the tenants' claim based upon the Stipulation containing not only

general provisions revoking prior "letters of intent" and representations, but also specific provisions by which the tenants withdrew all challenges to the DHCR determination and acknowledged they had no defenses to the eviction proceeding. The Court also accepted the owner's argument that had the tenants wanted the payment to be conditioned upon the actual demolition of the building, that condition could have been inserted in the Stipulation.

While Stipulations of Settlement will resolve an action or proceeding, they will not necessarily preclude the commencement of a new action claiming some impropriety with the agreement. However, a carefully and properly worded Stipulation can result in the successful defense of any further litigation.

Jeffrey L. Goldman is one of the founding partners of BBWG and co-heads the Firm's Litigation Department.

Primary Residence Update

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under the rent regulation law." The Court firmly stated that one who maintains her principal, actual dwelling place in the United Kingdom cannot maintain a primary residence in New York.

The Court further noted that summary judgment in favor of the landlord was warranted on the additional ground that Ms. Jagger failed to show that she is in the United States as anything other than a temporary visitor, and has "failed to rebut the landlord's evidence and demonstrate that there was a substantial physical nexus to the apartment."

To paraphrase the famous Rolling Stones song, this case proves that even Bianca Jagger can't always get what she wants. More importantly, the Appellate Division decision opens up another avenue through which owners can recover rent-regulated apartments on non-primary residence grounds.

"Just the Facts, Ma'am"

Most non-primary residence proceedings are fact-sensitive and turn on the trial judge's evaluation of the documentary evidence and testimony submitted at trial. In BBWG's February 2006 newsletter, we reported that the meaning of "primary residence" appeared to be in a state of flux after the Court of Appeals decision in *Glenbriar Co. v. Lipsman*. In *Glenbriar*, the Court of Appeals held that an elderly "snowbird" tenant maintained her and her husband's New York rent-stabilized apartment as her primary residence, even though her husband maintained his primary residence in Florida and they lived together and were "rarely physically separated." However, the Court of Appeals decision in that case appeared to have been affected by both the limited nature of the Court's review of the case and the fact that the Appellate Division had considered both the age of the tenants and their familial longevity in the New York apartment in ren-

dering its decision.

Now, two recent decisions issued by the Appellate Division, First Department provide much-needed clarification on this issue and reveal that the appellate courts are giving more weight to objective facts than to self-serving, sympathetic and equivocal testimony in non-primary residence holdover proceedings.

In *Tabak v. Steele*, after trial, the Civil Court dismissed the landlord's petition. The Court held that the tenant (who was married) primarily resided in the subject rent-controlled Manhattan apartment, despite the overwhelming documentary evidence submitted by the landlord which established that the tenant was actually primarily residing at her residence on Long Island. The Appellate Term subsequently affirmed the Civil Court. However, in March, 2007 the Appellate Division unanimously reversed those decisions "on the facts" and granted the landlord's petition. The Court based its deci-

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sion on Justice Suarez's dissenting opinion in the Appellate Term's decision. BBWG was co-counsel to the landlord on the Appellate Division appeal.

The Appellate Division based its ruling on various objective facts, including: the tenant listed her Long Island residence address on "various important documents"; the tenant made most of her credit card purchases in Suffolk County; the tenant filed a bankruptcy petition in the Eastern District of New York (the jurisdiction for her Long Island residence) as opposed to the Southern District (where the subject apartment is located); the bankruptcy petition made no mention of the subject apartment; and the tenant changed the address on her driver's license to the subject apartment *only after* the termination notice was served.

The *Tabak* Court stated that: "Against this overwhelming documentary and testimonial evidence, and contrary to the findings of the trial court, [tenant's] own evidence was woefully inadequate to demonstrate that she actually lived in the subject apartment during the years prior to service of the notice of termination."

Also in BBWG's February

2006 newsletter, we noted that the Appellate Term had affirmed a decision by the Civil Court in *Carmine Ltd. v. Gordon*, holding that an estranged married couple maintained separate primary residences in two different Manhattan apartments, even though: both the

and Civil Court's decisions in *Carmine Ltd.* "on the facts," holding that "the documentary evidence offered by Ms. Gordon was of little or no probative value" and that "the credibility of both Gordons is seriously undercut by [her witnesses'] mutually contradictory representations...."

Both *Tabak* and *Carmine Ltd.* clear up some of the confusion over primary residence that resulted from the Court of Appeals decision in *Glenbriar*. These recent decisions by the Appellate Division bolster the proposition that while people may lie about where they primarily reside, documents certainly do not, and the appellate courts now appear to be more willing to accept cold, hard facts over conflicting or incredible (yet sympathetic) testimony. As Sgt. Joe

Friday in *Dragnet* might say, the key to prevailing in a non-primary residence proceeding is: "Just the facts, ma'am."

Kristine L. Grinberg, is an associate practicing in BBW&G's Appeals and Litigation Departments.



"Against this overwhelming documentary and testimonial evidence, and contrary to the findings of the trial court, [tenant's] own evidence was woefully inadequate to demonstrate that she actually lived in the subject apartment during the years prior to service of the notice of termination."

husband and the wife signed leases and renewal leases for both apartments; the husband's and wife's joint income tax returns, bank account, credit card statements and bills listed the husband's apartment's address; and records from Con Ed showed that there was barely any electrical usage at the wife's apartment for an extended period of time. The wife also admitted that she spent "considerable time" at her estranged husband's apartment and often slept on the couch there.

A Defendant in *Tabak*, the Appellate Division unanimously reversed both the Appellate Term's

Transactional Department

Delivery v. Execution—When is a Lease a Lease?

By: Allan Gosdin and Daniel T. Altman

It is easy to assume that like most contracts, once a landlord and tenant sign a lease, it is a binding agreement between the parties.

However, it is not that simple. Commercial lease riders prepared by BBWG contain a clause which conditions the validity and effectiveness of the lease upon its execution by landlord and tenant **and** the delivery of the fully executed document from landlord back to tenant.

For example, our leases contain the following clause:

“It is understood and agreed that Landlord shall be under no obligation hereunder until this Lease has been executed by Landlord and delivered to Tenant and any checks delivered to Landlord in connection herewith shall have cleared collection. Landlord’s deposit of any

checks delivered by Tenant in connection with Tenant’s execution of this Lease shall not constitute Landlord’s execution and delivery of this Lease.”

While it might be tempting to assume that such a clause is simply “boiler-plate” language, and doesn’t have any effect in the real world, it has been long held by New York courts that *delivery* is an essential requirement in rendering a lease effective and that simply executing the lease is not sufficient.

In the DFT cited case of *219 Broadway Corp. v. Alexander’s, Inc.* (Court of Appeals 1979), the tenant entered into extensive negotiations with the landlord for a lease of property in New York City which the tenant intended to utilize as a parking lot. An acceptable lease was drafted between the parties which the tenant signed and returned to land-

lord’s attorney. However, a fully executed lease was never returned to tenant and the landlord subsequently leased the property to a third party. The tenant filed an action against landlord for breach of the lease and on appeal, the Court of Appeals ruled against tenant because the lease was never delivered back to tenant.

The Court noted that, as in other land conveyances, a lease requires the parties to fulfill certain prerequisites to be effective and that it is well-established in New York that delivery of the lease is one such prerequisite. Without delivery, a lease is not effective.

The Court also pointed out that requiring delivery is not an archaic common law principle but serves a very real purpose in the business world. Parties often draft and execute leases prior to the time they intend the lease to be-

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Year Round Al Fresco Dining Gets Easier in New York City

By: Craig Ingber

The New York City Departments of Buildings, Consumer Affairs and Fire have worked together to permit restaurant owners to keep their sidewalk cafes heated and operating year-round, legally. The advent of portable natural gas heaters has facilitated the heating

of sidewalk cafes and reduced heating costs to a level that is no longer prohibitive.

Only unenclosed (open air) sidewalk cafes may apply for the necessary permits to use natural gas heaters (propane heaters are not permitted). Restaurant owners must have an existing Department

of Consumer Affairs license, or obtain one first and then, also comply with the filing requirements of the DOB and Fire Departments.

Once DOB approvals are obtained for the gas heaters and approved hardware, the restaurant

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When is a Lease a Lease . . .
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come binding. Requiring delivery ensures that the leasehold interest in the property is not conveyed solely by virtue of the executed lease but rather only at such time as the parties actually intend the lease conveyance to become effective.

The requirement of lease delivery is not one which exclusively benefits a landlord. In a recent Appellate Division case, landlord and tenant entered into negotiations for the lease of a portion of a commercial building which tenant was going to use for a coffee shop. Tenant executed the lease and forwarded same to landlord along with a check for the security deposit and first month's rent. Two days later, tenant sent landlord a fax advising that tenant was no longer inter-

ested in the property and stopped payment on the check. Landlord sued tenant for breach of the lease. The Appellate Division ruled in favor of tenant since a fully executed lease was never returned or "delivered" to tenant.

The moral is that once a party signs a lease, it must keep abreast of the status of the other party's signature and return delivery. Any delay by the other party in countersigning the lease could be the precursor to that party's indecisiveness or intent not to move forward with the lease after all.

Delivering the lease by hand or overnight courier and insisting upon the fully executed lease being returned in a specific time frame is good practice and can provide some protection (*i.e.*, stating clearly in the cover letter that if the fully executed lease is not returned by a specified date, the lease is deemed void). In instances

where there is a time sensitive issue or it is a large leasing deal, the parties may want to consider a sit-down meeting to execute the lease in the same fashion as a sale closing. This will ensure that there is no future question as to when the lease was delivered to both parties and thus avoid any dispute over whether the lease was in fact delivered.

If you wish to further discuss this or any other leasing issue, please contact Allan Gosdin, an associate, or Daniel T. Altman, a partner, of the Firm's Transactional Department.



Year Round Al Fresco Dining . . .
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owner must obtain an "Open Flame" permit from the Fire Department. The Fire Department also requires that the gas heaters be supervised at all times by a staff member who holds a FDNY Certificate of Fitness.

All of this means that landlords will have to be even more vigilant when seeking to enter into leases with restaurateurs who usually derive substantial benefits from the operation of a sidewalk café. The use of gas heaters raises issues concerning their initial installation, the monitoring of their use once in place, and the compe-

tency of the individuals charged with the supervision of the equipment. There is no doubt that the use of gas heaters should also be taken into account when considering the types and levels of insurance and fire suppression at any given location.

Serious consideration is warranted when presented with a request to install gas heaters in an existing location. Attention should be given to the nature of the existing structure, adjoining uses and existing commercial and residential tenants. We suggest you consult with your attorney before agreeing to what may otherwise appear to be a simple request from an existing or new tenant.

The request requires answers to many questions before any approval is given.

Craig Ingber is a partner in the Firm's Transactional Department and can provide direction on permit issues and other commercial and residential transactional matters.



Passing Electricity Costs onto Your Tenants

By: Martin J. Heistein

Increases in electricity costs have a direct impact upon property owners of regulated housing who must continue to provide electricity to their tenants, while at the same time increases in rents are suppressed by the Rent Guidelines Board.

How can property owners maintain the bottom line when electricity costs rise, but rents do not rise accordingly?

Most owners are unaware that there is an application that can be filed at the New York State Division of Housing and Community Renewal which allows for the conversion of master metered buildings (where the owner pays the electricity bills for the entire building) to individual metered buildings (where the tenant becomes responsible for the cost of his or her own electrical consumption). DHCR recognizes that tenants in master metered buildings receive unlimited use of electricity as a service included in the rent, with no incentive to conserve the consumption of electricity. Therefore, DHCR encourages applications to convert master metered buildings to individual meters, as a way of encouraging tenants to conserve electricity.

There are two types of individual meters – direct metering and submetering. This article will concentrate on direct metering. A future article will discuss submetering (where the tenant purchases electricity directly from the owner, who in turn, purchases it from a public utility at a bulk rate).

Under direct metering, an individual electric meter is installed for each individual apartment and the tenant purchases electricity directly from Con Edison or Key Span. The tenant is responsible for paying the monthly utility bill; not

the owner.

In order to implement direct metering, the owner must first rewire the building as part of the electrical conversion process. DHCR requires the owner to adequately rewire the building in order to ensure that the electrical infrastructure is safe and to ensure that the tenants are provided with the energy necessary to run modern appliances. (In some instances, the work carried out by the owner to rewire may qualify for a Major Capital Improvement rent increase or a J-51 tax abatement.)

All of the tenants must provide access to the owner to carry out the rewiring work. If the tenant fails to provide access, after being given proper advance notice, the owner may commence a summary proceeding, seeking an order from the Civil Court to be allowed to enter the individual apartment in order to perform the necessary work.

After the electrical rewiring work is completed throughout the building, with a licensed electrical contractor, the owner files an application with DHCR seeking permission to modify services and permit the conversion of electrical usage from master meter to direct meter. DHCR will then notify all of the tenants of the impending change and allow the tenants to respond to the application. Under DHCR policy, tenants cannot defeat the modification application by simply arguing that they wish the owner to continue to pay for all electric costs.

If DHCR grants the application to convert from master meter to direct metering of electricity, DHCR will issue an order permitting the modification of services, and will adjust each individual apartment's rent, in accordance

with a published schedule. In New York City, the adjustment is a permanent reduction, as follows: For 1 and 2 room apartments, the rent would be reduced by \$40 per month; 3 room apartments are reduced by \$45 per month; 4 rooms apartments are reduced by \$50 per month; and for each additional room, the rent is reduced by an additional \$5 per month. Though the rents are reduced, the owner's electrical costs are also reduced and in many cases, substantial savings are achieved.

This article is intended to provide a general overview of the rules and regulations permitting the conversion of master metered buildings to direct meters. Obviously, the particular details of the plan to convert should be discussed with your attorney. However, as the costs associated with electricity continue to increase – and with rent increases remaining relatively flat – the application to pass on the costs of electric usage to your tenants is a measure that should not be overlooked by property owners.

Martin J. Heistein heads the Firm's Administrative Law Department and has filed numerous electrical conversion applications, as well as hundreds of MCI and J-51 applications. Mr. Heistein handles all types of proceedings before DHCR, and other New York State and City administrative agencies.





Robert A. Jacobs and Kara Rakowski have both become registered lobbyists for conducting lobbying activity under the New York State and New York City lobbying laws. At the present time, their activities include actions before the New York City Planning Commission. Ms. Rakowski plans on lobbying before the City Council in the near future.

Craig L. Price spoke at the Harlem Office of the Corcoran Group about the purchase and sale of townhouses and also at the Tribeca Office of Prudential Douglas Elliman about the recent rise of transactions including mortgage contingencies.

Aaron Shmulewitz was featured in the November 25, 2007 Q&A column in the Sunday *New York Times* Real Estate section. Aaron gave some advice on a co-op issue involving the right of a sponsor of a conversion to be an officer of the cooperative. Aaron also provided expert commentary in the December 9, 2007 Q&A Column in the Sunday *New York Times*. In that column, advice was given regarding a condo unit owner's ability to require a commercial tenant to move an air-conditioning unit from the roof of a building. Aaron was also quoted in the December 6, 2007 edition of *The New York Sun* in a story about the issue of second hand smoke in co-op buildings.

Martin J. Heistein was sought for a comment in the December 4, 2007 *New York Times* in a story about the Imperial Court. The story related to a City Council bill to increase fines against landlords who turn apartment buildings into transient hotels. Mr. Heistein has been asked to speak at a seminar sponsored by the New York County Lawyers Association. The seminar program is entitled "Signing and Renewing Leases with Rent Stabilized Tenants".

Sherwin Belkin answered an inquiry in the November 14, 2007 web edition of the *New York Times*. Mr. Belkin's answer appeared in the Real Estate Q&A section and dealt with an issue of tenant security deposits.

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