

Special points of interest:

- Permitting assignment of stabilized lease may be advantageous to owners in certain circumstances.
• Court finds that tenant who lives on street is still primary resident of his stabilized unit.
• Steps owner must take after receiving DHCR order of high income/luxury deregulation.
• Rouge UCC's on unconsummated co-op loans may cause problems down the road for co-op owners.



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Requests to Assign — Should the Owner Ever Consent?

By: Sherwin Belkin

Owners of residential property are frequently confronted with tenants requesting permission to sublet — this is, permission to allow a person other than the tenant to occupy the apartment temporarily, in the tenant's absence, with the tenant returning to the apartment at the end of the sublet term.

Real Property Law §226-b governs both sublets and assignments (in buildings of four or more units). Where rent stabilized apartments are involved, Rent Stabilization Code §2525.6 applies. Taking these two together, there are times when it is

advantageous for an owner to consent to a request to assign.

Unlike the rules pertaining to sublets (which mandate that an owner may not unreasonably withhold its consent to sublet), assignments are totally within the owner's control. The owner can reject the request to assign, and the tenant of record remains the tenant and continues to be obligated for the balance of the lease term.

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A Way to Increase Your Rent and Lower Your Property Taxes

By: Martin J. Heistein

Thinking of upgrading your property? Did you know that many building-wide improvements that are eligible for Major Capital Improvement ("MCI") rent increases under DHCR's MCI Rent Increase Program are also eligible for tax benefits under HPD's J-51 Program?

In most cases, owners receiving MCI rent increases are eligible to receive J-51 tax benefits for units that are subject to Rent Stabilization and Rent Control. The tax benefits include both, abatements and exemptions, to your property taxes for periods ranging from 11 to 20 years.

file for J-51 tax benefits provided that (a) the application is filed within four years of the commencement of the work, and (b) that the work was commenced and completed within a three year time span. As such, it's possible that an MCI obtained several years ago may still be eligible for J-51 tax benefits.

There is a regulation requiring owners to partially offset an MCI rent increase based upon the receipt of J-51 tax benefits if an owner receives benefits under both programs.

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sent to an assignment is deemed unreasonable, then the tenant may vacate on thirty days notice to the owner. As a result, the lease is nullified with no further liability by the tenant under that lease.

Since the owner can always reject a request to assign, why would the owner ever consent? After all, if the owner reasonably rejects, the owner continues to hold the tenant liable to the lease. Even if the owner unreasonably rejects, the tenant can declare the lease over and vacate, giving the owner the opportunity to get the apartment back on the market. If the apartment is in a co-op or condo, the owner can now sell a vacant unit. If the apartment is rent stabilized, the owner can get a vacancy allowance or even possibly bring the legal rent over \$2,000 per month and permanently deregulate the unit. In these financial contexts, certainly assignment requests should be rejected.

So why would an owner ever consent to an assignment? Several scenarios come to mind.

First, the rental value of the unit may not be such that the owner wants to put the normal fix up costs into the apartment once vacated. If the owner consents to an assignment of a rent

stabilized apartment, the rent for the balance of the lease is increased by the vacancy allowance in effect when the lease began. For example, if the lease that is being assigned is a two year lease, the owner who consents to an assignment will get a twenty per cent rent increase for the balance of the lease *without* making any improvements to the apartment or even taking the normal steps (and incurring the normal expenses) of getting an apartment ready for re-renting. Moreover, unlike a consented sublet of a rent stabilized apartment (where an owner presently gets a ten percent increase only if the lease in effect during the sublet is a renewal and only for the term of the sublet itself), the increase that a consent to an assignment generates becomes part of the permanent base rent for subsequent increases.

Second, if the building is receiving a RPTL §421-a tax abatement, the owner will not be able to use luxury deregulation, even if a vacancy puts the rent over \$2,000, the apartment will remain rent stabilized. Under such circumstances, the owner may prefer to receive the rent increase without having to incur the fix up costs since all the owner may be able to receive from a new tenant is a vacancy increase anyway.

Finally, since the owner does get to ask information about the

assignee during the request process, the owner might be pleased with the new tenant and the ability to avoid any down time and lost rent while the apartment is made ready and then placed back on the rental market (as normally occurs on a vacancy). Consenting to the assignment results in no lost time or lost rent because there is continuity of a rent paying tenant under the assigned lease.

Although, more often than not, owners will find that rejecting an assignment will make economic sense, it is not a decision that should be made without considering the context of the request, and the potential benefits to be obtained by consenting.

Sherwin Belkin, founding partner of the firm, counsels clients on all aspects of rent regulation, demolition projects, and negotiated settlements of complex litigation.



A Way to Increase Your Rent and Lower Your Property Taxes. . .
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allowances are based upon a maximum allowance schedule in most instances and computed under a different formula, the MCI offset may not be as large as you think. Owners, if eligible to receive benefits under both programs, will receive full J-51 tax benefits and a partially reduced MCI rent increase. Upon the expiration of J-51 tax benefits, any

MCI offset would be restored.

These programs offer excellent opportunities to offset the cost of upgrading your property, and enjoy long term financial returns.

If you wish to explore the possibility of filing for J-51 tax benefits based on MCI rent increases previously approved or denied, or for MCI applications currently pending at DHCR, you can contact Martin J. Heistein, head of the firm's Administrative Law Department, or

Paul Kazanecki, Legal Assistant, specializing in both these applications.



An Unusual Case of Primary Residence

By: Magda L. Cruz

This one of those cases that causes one to pause and think: How far can the law be stretched? Can a tenant who chooses to live on the streets be entitled to continue renewing his rent stabilized lease?

We have recently been chronicling an area that is heavily litigated in New York City housing courts: the question of whether a rent regulated apartment is maintained as a primary residence. (Nov. '06 *BBWG Update*: "The Nuts & Bolts of a Non-Primary Residence Case," Baer, E.; Dec.'06 *BBWG Update*: "Winning Non-Primary Residence Proceedings," Picone, N.)

The standard seems to be straight-forward: Primary residence requires "an ongoing, substantial, physical nexus with the [regulated] premises for actual living purposes." A recent appellate decision appears to turn this standard on its head.

In *Toa Construction Co., Inc. v. Tsitsires*, an owner sought to recover a single-room-occupancy unit from a tenant who had been living on the

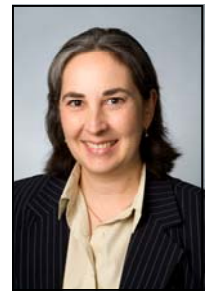
streets for many years. During a six day trial, the owner proved that the tenant used the unit only for storage, as a mail drop, and for occasional showers by his girlfriend, who possessed the only key. Psychiatrists were called to try to explain the tenant's behavior. One testified that the tenant's "homeless lifestyle" was likely caused by substance abuse. Another described the tenant as claustrophobic and found that he hated his apartment. Both psychiatrists stated that the tenant refused to take any medication or undergo any treatment that might cause him to return to the apartment and actually use it as housing.

If the question is whether the tenant is using the apartment for actual living purposes, the answer seems self-evident. But a majority of the Appellate Term side-tracked this question, to find reasons to excuse the tenant's behavior, and conclude that the owner could not recover its property. The dissenting justice aptly noted that the law's objective of protecting the housing stock for persons who

actually need regulated units as homes is undermined by the majority's decision.

Rent regulation is a highly complex effort by legislators to balance property rights with tenant interests. It is critical for the stability of the system that certain expectations be maintained. One that has generally seemed certain is that a tenant must actually live in a regulated apartment; it can not be used merely for convenience, and certainly not as a storage facility. While the tenant's personal situation in this case was regrettable, the extension of the law to accommodate a "homeless lifestyle" is legally unprecedented.

Magda Cruz, a partner in the firm's Litigation Department, specializes in appellate litigation of real estate matters.



DHCR Has Issued an Order of Deregulation — Now What?

By: Joshua G. Losardo

Many owners have contacted BBW&G to ensure the proper collection of their apartments' market rents after being successful in High Income Rent Deregulation proceedings and obtaining Orders of Deregulation. The following is what an owner must do:

- ◆ Rent regulated tenants must be provided with the right of first refusal to re-rent their apartments pursuant to a new lease that is exempt from rent regulation.
- ◆ Many owners offer something they call "deregulated renewal leases." This practice is wrong since tenants are not "renewing" a deregulated lease when they elect

to re-rent their apartments. Tenants are actually signing new leases, typically at much higher rents.

- ◆ After an Order of Deregulation is issued, an owner's offer to rent an apartment must be set "at a rent not in excess of the market rent." The Rent Stabilization Code defines a market rent as "a rent obtainable in an arm's length transaction."
- ◆ The owner must make its offer to a tenant in writing by certified and regular mail and advise the tenant to accept or decline the offer in writing within ten (10) days of receipt of the offer.

- ◆ If the tenant accepts the owner's offer, a new lease should be prepared for the tenant to execute.
- ◆ If a tenant rejects the owner's offer, or does not respond to an owner's offer, the owner may commence legal proceedings to obtain possession of the apartment.

When is an Order of Deregulation effective? It depends on whether the Order deregulates a rent stabilized or rent controlled apartment.

- ◆ **Rent Stabilized Apartments** - Orders of Deregulation provide that an apartment will no longer be subject to rent stabilization

DHCR Has Issued An Order . . .

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upon the expiration of an existing lease.

- ◆ **Rent Controlled Apartments** - Orders of Deregulation provide that an apartment will no longer be subject to rent control as of March 1st in the year following the filing of the Owner's High Income Rent Deregulation petition.

While High Income Rent Deregulation proceedings are pending at DHCR, owners of rent stabilized apartments may complete and attach DHCR's "Renewal Lease Form Rider for Renewal Leases to be Offered During Pendency of High Income Deregulation Proceedings" to renewal

leases offered to tenants being petitioned for High Income Rent Deregulation. DHCR's rider advises tenants that a high income deregulation proceeding is pending before DHCR and that if DHCR grants the petition for deregulation, the renewal lease "shall be cancelled and shall terminate after sixty (60) days from the date of issuance of an order granting such petition."

In other words, if DHCR's Rider is attached to tenants' renewal leases, owners of rent stabilized housing accommodations who prevail in the luxury deregulation proceeding do not have to wait up to two (2) years for a renewal lease to expire before collecting the market rent of an apartment.

Unfortunately, there is no special way to expedite the deregulation of a rent controlled apartment. The law

essentially provides a one-year grace period to the tenant before the apartment becomes decontrolled.

For copies of DHCR's Rider, or if you have any questions about High Income Rent Deregulation, contact Joshua G. Losardo, an associate in the firm's Administrative, Bankruptcy and Transactional Departments.



Unconsummated Co-Op Loans Can Result in Unremoved Liens: "The Rogue UCC"

By: Craig L. Price and Nadia Hutchinson

If you are the owner of a cooperative apartment and have ever sought out a loan for your apartment, either on your own or through a mortgage broker, a possibility exists that the lender you decided to take a loan with may have filed a financing statement (known as a "UCC-1") against your stock and lease for the apartment. While this occurrence may seem to be "part of the process" at first glance, it can turn out to be a major problem if you decide midstream not to move forward with the loan, but forget to have the lien removed.

A UCC-1 financing statement is a form which is filed in the County Clerk's office, (or in New York City, in the City Register's Office) which "perfects" the lending institution's security interest and prevents other creditors of the borrower from getting rights in the collateral (the cooperative apartment) which would be superior to the lending institution's interest. Further, it puts the world on notice that the lender has a lien against the stock

and lease for this apartment. This prevents persons from selling their apartments, or refinancing their cooperative loans, without paying off the lenders first.

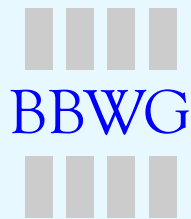
Under normal circumstances when a cooperative loan is fully repaid, the lender, or secured party, issues a UCC-3 termination statement that terminates the lien which was created by filing the UCC-1. However, if a borrower decided not to move forward with the loan and does not request a UCC-3 termination statement from the bank, the UCC-1 remains of record and is often long forgotten by the time that the person decides to either sell or refinance his or her apartment. This situation can create a very difficult and potentially costly problem for the then seller or borrower.

Therefore, if you have been involved in an unconsummated loan transaction, it would be prudent for you to have a lien search conducted to determine if a "rogue" UCC-1 exists against your apartment. This simple


and inexpensive search may save you headaches down the road. If you discover that a UCC-1 is filed against your apartment, with no corresponding loan, you need to contact the lender or secured party named in the UCC-1 statement and go through the process of obtaining the necessary UCC-3 termination statement.

Craig L. Price is a partner, and Nadia Hutchinson is a legal assistant in the firm's Transactional Department.





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NEWS

MAY I QUOTE YOU?

David Skaller was quoted in an article in the January 2007 “Chip Advisor” regarding nuisance holdover cases. Mr. Skaller discussed the propensity of housing court judges to allow tenants a second chance even when they were committing nuisances in a building. Mr. Skaller made specific reference to certain court decisions which allow nuisance type behavior to be “cured” by the offending tenant, thus enabling such tenants to prolong their occupancy.

Joseph Burden, a partner in the Litigation Department, addressed a question in “Time Out New York” Magazine of January 2007. Mr. Burden was asked a question regarding changing the parties on a residential lease agreement during the term of the lease. Mr. Burden noted that tenants can have roommates regardless of the person’s name on the lease. There is no obligation to add the names of roommates to a lease.

Aaron Shmulewitz addressed a question posed in the *New York Times* Real Estate Q&A section regarding pets in cooperative apartments. The question dealt with the subject of new rules adopted by a Board of Directors regarding the keeping of pets in apartments. Mr. Shmulewitz made reference to the New York City Pet Law and the ability of co-ops to amend their rules and regulations, including adding a weight limitation for dogs that could be kept in apartments.

Martin J. Heistein, head of the firm’s Administrative Department, has been named to sit on the legal committee of CHIP (“The Community Housing Improvement Program”).

Craig L. Price, a partner in the firm’s Transactional Department, spoke to real estate brokers at Warburg Realty Partnership on January 25, 2007. Mr. Price addressed the subject of “The Purchase and Sale of Real Estate in New York State.”

Edward Baer, a partner in the Litigation Department, was the featured speaker at a continuing legal education seminar presented by the First American Title Insurance Company of New York. Mr. Baer spoke on the topic of “Landlord/Tenant Law and Primary Residence Case Studies.”

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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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