

## DHCR Permits Surcharges for Tenant-Installed Appliances

**DHCR** recently issued Operational Bulletin, Number 2005-1, allowing Owners to collect a monthly surcharge when a rent stabilized or rent controlled tenant requests permission to install a washing machine, dryer and/or dishwasher and the Owner consents to this usage.

In those buildings where the Owner pays for electrical usage, an Owner may collect the following monthly surcharges:

- ▶ Washing Machine—\$14.92
- ▶ Dryer—\$10.89
- ▶ Dishwasher—\$5.50

If the tenant pays for electrical usage, an Owner may collect the following monthly surcharges:

- ▶ Washing machine—\$13.62
- ▶ Dryer—\$0.00
- ▶ Dishwasher—\$3.77

There is a separate schedule of surcharges that applies to “ETPA buildings,” located outside of New York City.

In addition, where the tenant previously installed the appliance, but it

has now come to the attention of the Owner, and the Owner consents to the continued use of the appliance, the surcharge may be assessed, but on a prospective basis only.

These increases are surcharges and are not part of the base rent. Therefore, these increases are not compounded when the tenant renews the lease or a new tenant signs a lease.

*This article was written by Martin J. Heistein, a partner in the firm’s Administrative Department. Please contact Mr. Heistein if you have any questions regarding these surcharges.*



Martin J. Heistein

## Thinking “Outside the Box” as an Effective Litigation Strategy

**I**n the context of litigation, it is important to formulate the best course of action to achieve the intended results prior to the commencement of litigation or even the onset of a particular stage of litigation. Formulation of an effective strategy in connection with various landlord-tenant disputes sometimes can involve an

alternative forum to the landlord-tenant part of the Civil Court. Circumstances warrant bringing an action in the State Supreme Court.

Although a summary proceeding is usually thought of as a more expedient method to achieve particular results, in many landlord-tenant disputes the

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### Special Points of Interest:

- **A use and occupancy default can result in a money judgment even if litigation is pending.**
- **Effective July 1, 2005, an annual real estate tax liability of \$300,000.00 or more will require payment by EFT or penalties will be imposed.**

## Tenant's Failure to Pay "U&O" Results in \$10,000 Judgment

A Housing Court Judge recently granted an Owner a money judgment and the possibility of possession when the tenant failed to pay "use and occupancy" during the pendency of a holdover proceeding. The Court directed the tenant to pay the unpaid amount within 20 days. If he did not, the Owner was granted the right to request a judgment of possession from the Court -- despite the fact that the statute does not directly provide for such relief.

In *Tribeca M. Corp. v. Kevin Clarke and Janet Hasper*, the Judge had ordered the tenants to pay "use and occupancy" during the pendency of a complicated holdover proceeding. It was one of seven related cases involving a loft building that was converted to residential use in the late 1970s. The group of tenants did not move into the building until the mid 1990s. The Owner claimed that the units are exempt from Rent Stabilization while the tenants claimed coverage.

The case had become protracted due to discovery involving non-party witnesses. Beginning in March 2004, one tenant stopped paying the court-

ordered "use and occupancy." The Owner made a motion seeking a judgment of possession and a money judgment against the tenant pursuant to RPAPL §745(2) (c).

The Court correctly noted that the RPAPL section providing for a money judgment and a judgment in possession only applies to the initial deposit of use and occupancy and not the ongoing payment. The statute provides that if the ongoing payment of use and occupancy is not made, then an immediate trial can be ordered. However, here, the Owner did not want an immediate trial because of its relation to six other cases and the pendency of the discovery.

The Court held that it "cannot ignore the fact that [the tenants] have not complied with the prior order by the Housing Court for ongoing use and occupancy payment...". The Court went on to award the landlord a money judgment for \$10,000.00 and ruled that the tenant's failure to pay the money judgment or further default in the payment of ongoing use and occupancy, would permit the Owner to apply for a possessory



judgment.

This decision gives Owners a potential additional remedy when a tenant fails to pay court ordered "use and occupancy," particularly where the proceeding is complex or protracted.

*This article was written by Joseph Burden, a partner in BBW&G's Litigation Department, who handled the case described in this article.*



Joseph Burden

## Required Services: A Result of Lease, License or Law?

The Appellate Division recently issued a decision that has not received enough attention. On its face, the case involved a dispute whether a certain space had been leased or licensed to a tenant by the Owner. But, on more careful reading, the Appellate Division may have just carved out certain

new rules pertaining to rent stabilized required services.

*Kohman v. Rochambeau Realty & Development Corp.* pertained to litigation between the rent stabilized tenant of a ground floor apartment and the Owner of the building. The tenant was the successor to his family's lease that dated back to 1971. The

tenant alleged that his family had had exclusive use of a yard found at the rear and on the side of the building since the original lease was executed more than 30 years ago.

The Owner alleged that the lease made no reference to the yard. Accordingly, it was the

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*Thinking “Outside the Box”...  
(Cont.. from p. 1)*

Supreme Court provides certain remedies that are not typically available in landlord-tenant court and which may provide an Owner with a more effective means for achieving its goals; whether those goals are the removal of a tenant from the occupied premises or the restraint of a tenant from engaging in certain objectionable activity.

In a recent case, BBW&G represented an Owner that had undertaken a multi-million dollar residential condominium conversion of a prime Manhattan loft building, in which the sole remaining tenant occupied a residential unit and a separate space used as a commercial woodworking shop.

Significantly, the tenant’s commercial use constituted a violation of the New York City Zoning Resolution (the “Zoning Resolution”) and the Certificate of Occupancy respecting the subject building and impeded the Owner’s ability to obtain a new Certificate of Occupancy for the building, which was necessary in the context of the conversion project.

After unsuccessful efforts at negotiation, BBW&G commenced an action in Supreme Court seeking the following remedies:

(i) a declaration that the tenant’s use of the commercial space was in violation of the Zoning Resolution and the Certificate of Occupancy,

(ii) ejectment of the tenant from the commercial space, and

(iii) a permanent injunction restraining the tenant from using the space in any manner inconsistent with the Zoning Resolution or the Certificate of Occupancy.

The Supreme Court action was pursued instead of a summary proceeding despite the fact that a summary proceeding may have been commenced based upon the tenant’s violation of the lease agreement by using the space in violation of the Certificate of Occupancy.

After commencing the action in Supreme Court, the Owner moved by order to show cause for a preliminary injunction, seeking to restrain the tenant from using the premises in any manner that violated the Zoning Resolution or the Certificate of Occupancy pending the ultimate outcome of the underlying action. Included in the order to show cause was a proposed temporary restraining order, seeking to immediately restrain the tenant from using the premises in a manner that violated the Zoning Resolution or the Certificate of Occupancy until the court rendered a decision on the Owner’s application for the preliminary injunction.

The Supreme Court signed the order to show cause and issued the temporary restraining order pending the court’s hearing on the motion for an injunction, thereby immediately restraining the tenant from engaging in the commercial activity that the Owner wanted restrained. As a result of this restraint against the tenant’s income producing activities, the tenant relocated its commercial business and signed a new lease at alternate premises.

The court subsequently granted the preliminary injunction, thereby restraining the tenant from engaging in the objectionable activity pending the litigation of the underlying action, although the tenant had already relocated its commercial activities. In

granting the preliminary injunction, the court noted, among other things, that the tenant’s activities may affect the Owner’s ability to obtain a Certificate of Occupancy for the building and, therefore, decrease the property value or otherwise harm the Owner.

The Owner quickly and effectively achieved its goal of restraint against the tenant by commencing litigation in Supreme Court, which is often viewed as a more costly and time-consuming forum. This case demonstrates the benefits of formulating an effective strategy, which may involve a somewhat less familiar approach, before resorting to the more routine course of action when confronted with a landlord-tenant dispute.

*This article was written by Lewis Lindenberg and Jeffrey Levine, a partner and an associate in BBW&G’s Litigation Department. Both attorneys handled the litigation of the case described in this article.*



Lewis Lindenberg



Jeffrey Levine

**Required Services: . . .**  
(Cont. from p. 2)

Owner's position that the tenant's use of the yard was a mere revocable license – which the Owner then acted upon by revoking the tenant's right to use the yard area.

The Appellate Division's majority found that it could not discern from the lease if the use of the yard was a lease right or a license that had been granted. As a result, the Appellate Division affirmed the lower court's denial of summary judgment, holding that a trial was necessary. The issue of rent stabilized required services is not mentioned by the majority's opinion.

In his dissent, Justice Joseph Sullivan found that the lease was unambiguous; that is, the yard space was not leased. Therefore the tenant only had a license which the Owner was free to revoke. The dissent would have awarded summary judgment on

that issue.

Unlike the majority that did not even mention "required services", Justice Sullivan discussed the concept and rejected it. The dissent seemed to hold that absent a DHCR determination having found the yard to be a required service, the Court would only look to the lease itself. Since the lease provided no right to use the yard, it was a mere license.

What is striking is that "required services" under the Rent Stabilization Code has generally been assumed to mean that if the Owner provides a service or permits it, even if not reflected in the lease, this becomes a "required service" that the Owner cannot revoke or eliminate absent prior DHCR approval (unless the service is *de minimis* -- meaning that it is of such little import to the tenant's quality of life that it does not rise to the level of required services).

This recent decision may provide a basis for Owners to claim greater leeway in removing or modifying certain services that may have heretofore been thought of as required. Of course, this is a recent decision, such that we have not yet seen how any other courts or DHCR applies its teachings. But, it certainly does provide Owners with a concept worth pondering, if not acting upon.

*This article was written by Sherwin Belkin, a partner in the firm's Administrative Law Department.*

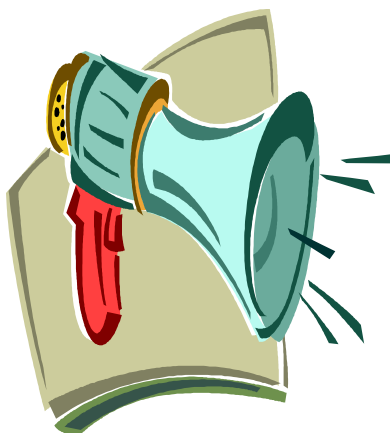


Sherwin Belkin

## **TAX ALERT: Owners Required to Pay Taxes Electronically**

**E**ffective July 1, 2005, the NYC Department of Finance ["DOF"] is requiring property owners with an annual real estate tax liability of \$300,000 or more to pay their real property taxes by means of an Electronic Funds Transfer ("EFT"). Failure to pay by EFT will result in a penalty of 1% of the tax installment due.

The \$300,000 threshold refers to annual **net** real



property tax liability as of July 1<sup>st</sup> of each year. The regulations refer to net after exemptions, abatements and/or other reductions that lower the tax liability. In calculating the total tax liability, BID Assessments will not to be considered in the \$300,000 threshold.

Prior to the law's effective date, the DOF will send property owners (or any other

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**Tax Alert: . . .**  
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party named to receive the tax bill) notice of the new law, including the date the owner must enroll in the program. The EFT payments may be made either by:

- a. Taxpayer initiated payment by EFT, including wire transfer; or
- b. Enrollment in an

automatic debit program for the amounts due by executing an EFT agreement with the Department of Finance.

The DOF will generate a Record of Transaction as proof that payment has been made.

*This article was written by Robert Jacobs, a member of BBW&G Transactional Department.*



Robert Jacobs

## BBW&G NEWS

**Kara Rakowski's** successful representation of an Owner in a proceeding before the NYS Division of Human Rights was a featured decision in *New York Landlord v. Tenant*. Ms. Rakowski had demonstrated that an employee had been terminated "for cause" and not due to any discriminatory reason.

**Sherwin Belkin** was called upon by both *The Washington Post* and *Good Morning America* to provide background and legal analysis pertaining to NYC's rent regulations and complex landlord-tenant laws.

Litigation Department Partner **David Skaller** was interviewed by Fox 5 television regarding a situation where a tenant in one of BBW&G's client's buildings died of natural causes in his apartment, but the death was only discovered days later as a result of strong odors emanating from the apartment. The Fire Department removed the body and the NYPD secured the apartment with police tape, which effectively prevented the Owner from entering the apartment to clean it, much to the dismay of the neighboring tenants. Mr. Skaller explained that the Owner took appropriate action in Surrogates Court to have a Public Administrator appointed (which can be a protracted process) so that the Owner could recover possession of the apartment. In addition, BBW&G made an emergency application to gain access for the limited purpose of cleaning the apartment.

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