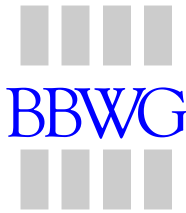

Belkin Burden Wenig & Goldman, LLP

UPDATE

MARCH 2007

Editors
Magda L. Cruz
Aaron Shmulewitz
Edward Baer
Kara I. Rakowski

Special points of interest:

- **Disability discrimination claim against Condo Board members dismissed.**
- **Condo cannot sue sponsor for fraud.**
- **NY Appellate Court holds that incoming tenant can sue hold-over commercial tenant for trespass and damages for its failure to timely vacate.**

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Taxing Questions Affecting Multi-Unit Transfers

By: Craig L. Price

When a one-to-three family dwelling, an individual residential condominium unit or an individual residential cooperative apartment are sold or transferred in New York City, the grantor is typically charged the New York City Real Property Transfer Tax ("RPTT") at the "residential rate" of 1%, when the amount of the taxable consideration is $500,000 or less, and at the rate of 1.425% when the amount of taxable consideration is more than $500,000. All other types of properties in New York City are charged at the "commercial or bulk rate" of 1.425% when the amount of the taxable consideration is $500,000 or less, and at a rate of 2.625% when the amount of taxable consideration is more than $500,000.

The application of the tax rate schedule is ordinarily straightforward for a single transfer of a residential property from a grantor to a grantee. However, the application of the residential rate is called into question where two or more residential properties are conveyed simultaneously from a single grantor to a single grantee. These are called "Bulk Sales," and there are differing opinions on how they should be taxed.

In its Finance Memorandum 00-6 dated June 19, 2000, "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units," the New York City Department of Finance ("DOF") stated that the commercial rate should be applied to Bulk Sales, except if adjacent cooperative apartments or residential condomin-

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Condominium Unit Owners Win Important Cooperative Shareholder Litigation Rights

By: Denise C. DeNicola

Traditionally, cooperative shareholders have enjoyed a right not available to condominium unit owners, namely, the right to commence a so-called "derivative action." A derivative action enables individual shareholders to compel the board of the cooperative corporation to protect shareholder interests and enforce rights affecting the building as a whole. Now, condominium unit owners have that power, too.

In a matter of first impression, a unanimous panel of the Appellate Division, Second Department recently held that a condominium unit owner may bring a derivative action lawsuit on behalf of the condominium to protect an interest in the building's common elements.

In Caprer v. Nussbaum, 2004-02694, the condominium unit owners, individually and derivatively (on behalf of the condominium), brought suit against the sponsor and related entities alleging, among other things, breach of fiduciary duty and waste and mismanagement of the condominium's property.

In the lower court, the unit owners had their case dismissed, but the Appellate Division reversed and held that while a condominium unit owner could not individually sue to protect his interests in the common elements, "the common-law nature of the derivative action offered no

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COOP/CONDO CORNER

By: Aaron Shmulewitz

Aaron Shmulewitz heads our co-op/condo practice. Aaron represents more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties.

Aaron can be reached at 212-867-4466 (ashmulewitz@bbwg.com).

DISABILITY DISCRIMINATION CLAIM AGAINST CONDO BOARD MEMBERS DISMISSED

Pelton v. 77 Park Avenue Condominium, NYLJ 11/29/06, p. 18, col. 1, involved a lawsuit by plaintiff, who suffers from muscular dystrophy, against his condominium and its individual Board members, claiming that their refusal to implement the physical changes to the building that he had demanded in order to accommodate his condition constituted unlawful discrimination against him based on his disability. The Appellate Division dismissed the complaint as against the individual Board members, holding that decisions that they had made in good faith in an attempt to accommodate Pelton's requests, albeit less than he had wanted, were protected under the "business judgment rule". The Court emphasized that such a lawsuit against volunteer Board members must be held to a stricter standard, or the threat of baseless litigation would discourage persons from being willing to serve on boards.

COMMENT—This decision is extremely important and creates significant protections for co-op and condo Board members. The Court recognized the sacrifices that Board members make, and the need to insulate their decision-making from litigation whenever possible. In so doing, the Court extended the recent line of cases that rely on the "business judgment rule" in protecting Board decisions from judicial intervention absent proof of bad faith, self-dealing or other improper conduct. Surprisingly, the Court did so even in the face of a remedial statute intended to prevent discrimination, a principle which is normally accorded great deference by the courts.

CONDO CANNOT SUE SPONSOR FOR FRAUD

Board of Managers of The Chelsea Quarter Condominium v. 129 W. Residential Partners LLC, NYLJ 1/25/07, p. 22, col. 3, was the latest attempt by a condominium to pursue a sponsor for construction defects and other offering plan deficiencies. In following a long line of cases, the Court held that the condo could not sue the sponsor for fraud under the New York State Martin Act, since that was a remedy reserved for the State Attorney General. However, the Court held that the condo could sue the sponsor for breach of contract based on the offering plan and the individual apartment purchase agreements that incorporated the plan. Significantly, the Court held that defects in apartments now owned by secondary purchasers—-who had bought their apartments from initial purchasers—could be included in the suit, even though such purchasers did not have any direct privity of contract with the sponsor.

COMMENT—This decision points out the difficulty that condominiums have in pursuing offering plan claims against sponsors through the courts. While many court decisions have held that only the Attorney General's office can pursue claims for fraud under the Martin Act, that office's relatively passive approach in recent years has forced condos to try to enforce their rights through costly and time-consuming litigation, often with mixed results, as here.

CO-OP CANNOT RECOVER ATTORNEYS FEES FROM SHAREHOLDER WHO IS NOT IN DEFAULT

In *Horwitz v. 1025 Fifth Avenue, Inc.*, NYLJ, 11/1/06, p. 30, col. 1, a co-op was held not to be entitled to reimbursement of nearly $70,000 in attorneys fees and expenses that it had incurred in a litigation brought by a shareholder. The Court, in reversing a lower court's award of such fees, held that the parties' proprietary lease allowed the co-op to recover attorneys fees only if the shareholder was in default under the lease. The Court held that, since the litigation did not arise from a default by the shareholder, the co-op could not recover reimbursement of its attorneys fees.

COMMENT—The lease provision here was fairly standard, in allowing recovery of legal fees only upon the shareholder's default. Courts generally construe proprietary lease provisions very narrowly, especially against the co-op. Co-ops involved in, or contemplating, litigation against a shareholder should examine their lease provisions closely to determine if recovery of fees may be likely in any such litigation. Alternatively, co-ops should consider amending their proprietary leases to expand their rights to recover fees.

UNLICENSED CONTRACTOR CANNOT RECOVER AMOUNT DUE UNDER CONTRACT

In *CLE Associates v. Greene*, NYLJ, 11/22/06, p. 27, col. 3, a contractor that had performed renovation work in a co-op apartment sued the shareholder of the apartment for monies unpaid under the contract. 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, even if the work was done pursuant to permits issued by the Buildings Department and was supervised and approved by the shareholder's architect. Since this contractor was not so licensed, it had no standing to sue the shareholder.

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.

Condominium Unit Owners Win. . . .

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reason to refuse to recognize the same capacity for the owners of condominium units to bring such suit against the condominium."

The statutory authority to bring a derivative action is found in Business Corporation Law, Section 626, as well as in the Not-for-Profit Corporation Law and the Partnership Law. Shareholders in cooperative corporations have the statutory right under the Business Corporation Law to assert derivative claims against the cooperative corporation on behalf of all shareholders to protect their corporate interests. None of these statutes apply to condominiums or individual unit owners, and the Condominium Act is silent with respect to these type of actions. However, the Court in *Caprer v. Nussbaum* held that "like the management of a corporation … the members of the board of managers of a condominium owe a fiduciary duty to the individual unit owners in their management of the common property", and thus, an individual unit owner could bring a derivative lawsuit.

Caprer v. Nussbaum represents a significant expansion of condominium unit owners' rights. They can now bring derivative lawsuits on behalf of fellow unit owners in the face of boards who may not be properly or sufficiently protecting the interests of their unit owners.

Denise DeNicola is a partner in the firm's Transactional Department, specializing in cooperative and condominium law.

Taxing Questions . . .
(Continued from page 1)

ium units are being transferred and have been physically combined into a single residence.

The position of the DOF had caused confusion in many transactions involving apartments being transferred which had not yet been physically combined, but whose purchasers actually intended to use them as a single residence. It was also unclear how simultaneous transfers of residential apartments together with ancillary units such as servants rooms and storage bins would be considered for transfer tax purposes.

Recently, the DOF's restrictive position was challenged in three separate cases in which there was more than one uncombined condominium unit being transferred by a single grantor, with the intention of the grantee to use the units as a "single residence." The administrative law judge presiding in each of the three cases held that the sale of multiple condominium units between the same parties IS subject to the lower residential rates. The DOF appealed all three decisions to the New York City Tax Appeals Tribunal ("Tribunal").

The Tribunal upheld all three decisions on the basis that in each case the condominium units involved were intended to be used as a "single residence." The Tribunal found that the fact that the units were not physically combined prior to the transfer did not render the transaction a conveyance of more than one residential condominium unit for purposes of computing the RPTT.

While the decision of the Tribunal has clarified somewhat the situation for condominium conveyances where the units are adjoining and the purchaser intends to use the condominium units as a "single residence," the Tribunal did not accept the ALJ's conclusion that a sale of multiple residential condominiums units could never be subject to the higher bulk rate. It appears that the Tribunal expressly restricted its rulings to the specific facts of the three cases before it, which limits the holdings' precedential value.

Indeed, many title companies have taken the position that, until a broader appellate ruling is issued, transfers of multiple condominium units, especially those that are non-adjoining (including servants rooms and storage bins), will be taxed at the higher commercial or bulk rate in order for the deed to be recorded, and the party paying the tax would then be free to pursue a refund from the DOF, if it wished to challenge that classification.

Therefore, until further cases unfold and guidance is provided, parties to a transfer of multiple residential properties that are not intended as "single residences" should be prepared to pay the RPTT at the higher commercial or bulk rate.

Craig Price is a partner in the firm's Transactional Department.

Upping the Ante — Reducing Landlord's Risk that a Tenant Will Not Timely Vacate

By: Lewis A. Lindenberg

Landlords are continually faced with the age-old problem of commercial tenants who do not timely vacate the premises when their leases have expired. Landlords are routinely being offered a host of excuses by tenants as to why they cannot not find suitable new space, or having found suitable new space, claiming it is not yet available, or it believed that the landlord was bluffing and that the landlord really wanted it to remain.

Landlords, on the other hand, need to know with certainty that outgoing tenants will timely vacate when their leases expire so that the premises will be available for the incoming tenants. Historically, commercial leases provide for a multitude of protective provisions — a "good guy" guaranty, use and occupancy at two to three times the amount of rent reserved in the lease, and, of course, the right to commence a holdover proceeding to evict the tenant.

Recently, a New York appellate court upheld another powerful remedy. The court in *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd*., held that an incoming tenant could sue the outgoing holdover tenant for trespass, and recover significant damages for the harm suffered by the outgoing tenant's failure to timely vacate the premises. The damages to the incoming ten-

Upping the Ante Fire . . .
(Continued from page 4)

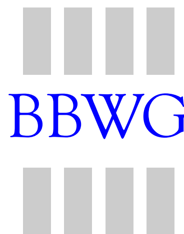
ant could include the cost of finding temporary space, storage, additional rent, and potential liability to its current landlord and that entity's incoming tenant for not timely vacating. (The damages to the landlord are the loss of rent that would have been paid by the incoming tenant.) The incoming tenant's trespass action was in addition to the holdover proceeding that was commenced by the landlord seeking the holdover tenant's eviction, which was vigorously contested by the holdover tenant resulting in a 14 month delay before the holdover tenant was finally evicted.

This case adds an additional arrow to the landlord's quiver: exposure to damages in the form of trespass for a tenant's failure to timely vacate the premises. In addition, this case chips away at the inherent uncertainty as to whether a landlord can timely deliver possession of the premises to a new incoming tenant. From the landlord's perspective, it puts additional pressure on the outgoing tenant to vacate timely. From the incoming tenant's perspective, it gives some measure of additional security that the space will be available once the outgoing tenant's lease expires.

In view of this decision, landlords may wish to re-examine and re-draft their leases to provide for this additional remedy of damages for trespass if the tenant does not timely vacate.

All told, this decision is an important new tool for landlords, since the potential increased risk to the holdover tenant can only benefit the landlord – providing the landlord with greater certainty that it will timely recover possession of its space at the end of a lease.

Lewis A. Lindenberg is a partner in the firm's Litigation Department, specializing in commercial litigation of real estate matters.



BBWG NEWS

BBWG Represents Purchasers in Record Setting Price For a Home Below Canal Street, and in Major Brooklyn Development

Transactional Department partners, ***Daniel Altman and Craig L. Price*** **and paralegal** ***Nadia Hutchinson*** recently represented developer Keith Rubenstein in his record setting contract to purchase a 6,000 square foot "Sky-house" condominium apartment at 101 Warren Street, New York, New York. The apartment is being purchased from Edward Minskoff Equities, LLC for Twenty Million Dollars ($20,000,000.00). As reported in the New York Post Home Real Estate Guide on February 15, 2007, the contract purchase price set a record for a residence located below Canal Street. This new construction condominium is scheduled to close in the Spring of 2009.

In another transaction of note, Transactional Department partners ***Robert Jacobs, Howard Wenig*** **and** ***Craig L. Price***, represented Zachary Kerr, a principal of M&R Management on the acquisition of five parcels of land with separate air rights in Brooklyn. The transaction involved simultaneous closings with three different sellers, and was accomplished in two weeks. The properties are located on Bedford Avenue and will be used for future development and construction of an apartment building.

BELKIN BURDEN WENIG & GOLDMAN, LLP

www.bbwg.com

New York Office

270 Madison Avenue
New York, NY 10016
(Tel) **(212) 867-4466**
(Fax) **(212) 867-0709**

Connecticut Office

125 Main Street
Westport, CT 06880
(Tel) **(203) 227-1534**
(Fax) **(203) 227-6044**

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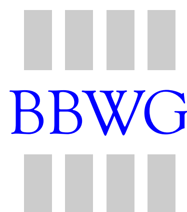

Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue
New York, NY 10016

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