

The Nuance of a Nuisance

Owners frequently receive complaints about a tenant's conduct. These complaints can include allegations of abusive or anti-social behavior toward other tenants, occupants or building staff. They include excessive noise, intolerable odors, or apartment conditions that create a breeding ground for insects, or give rise to fire hazards, or other potentially dangerous situations. Sometimes the offending tenant is simply unaware of his obligations, has a vendetta against one of his neighbors or the violative conduct can be due to mental health issues. Regardless of the cause or reason for the offending conduct, there are ramifications for the ownership and management of the building, as well as the lives of affected neighbors.

A filthy apartment filled with clutter and debris can pose a fire hazard, or be a source of insect infestation—potentially endangering the welfare of other residents and increasing the extermination costs incurred by the owner. Neighboring tenants (adjacent, above and below) may complain and may demand rent abatements. The conditions may prevent empty apartments from being re-rented.

Similarly, tenants—both with and without children—may make excessive noise at all hours of the day and night; thus, interfering with the peace and repose of neighbors.

A tenant may verbally and/or physically threaten building staff or other tenants; thus compromising staff performance and morale, and causing other residents to fear for their safety.

Owners are also faced with the decision whether to commence a nuisance holdover proceeding where two tenants are complaining about each other. These are very difficult cases to prosecute and to prevail on at trial absent clear evidence and witnesses to identify the wrongdoer. You should carefully review the complaints with counsel to determine the best course of

action.

Not all complaints are *bona fide*. Some tenants' fears are imagined. Some tenants seem to enjoy complaining about others. Some tenants have such low thresholds for noise or odors or other would be offenses that their complaints do not really stem from violative conduct, but from an inability to live in the close quarters that apartment life in New York City presents on a daily basis.

What is an owner to do? Can the owner become judge and jury? Is the owner to act as arbiter determining proper levels of sensitivity? Should the owner become referee? Should the owner run to court every time a complaint is lodged against one of its tenants? Is the offending conduct a one time potentially curable violation of lease, or does the conduct represent an on going course of conduct that constitutes an actionable non-curable nuisance? This article will attempt to address some strategies that owners can adopt when confronted with these difficult issues.

One of the most important things an owner can initially do is to try to document the complaint(s) and conditions. Have tenants who lodge complaints memorialize those complaints with letters. Request that the complainant maintain diaries / logs with the dates and times and description of specific occurrences. Building staff should submit written memos to management and photograph the conditions, if possible. Often, security cameras can be used to document the dates and times of the occurrences. These records should be preserved for future use as evidence. When using video, owners must determine if the equipment being used erases recordings after a certain period of time. If that is the case, then the tape memorializing the offending conduct must be removed and stored. The information collected is necessary both for trial and the preparation of a fact-specific notice of termination.

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Special Points of Interest:

- **What you need to know about recovering attorneys' fees**
- **Neighbors fighting with neighbors; what is a landlord to do?**

*The Nuance of a Nuisance . . .**(Cont. from p. 1)*

The rights of owners in a non-regulated residential or commercial lease are governed by the terms of the lease. Owners should review their non-regulated and commercial leases to insure that they have provided for rights and remedies should nuisance conditions arise. Having often worked with owners that have encountered and/or litigated nuisance issues, BBW&G's Litigation and Transactions Departments work together to provide the necessary protections.

Unlike violations of a substantial obligation of a tenancy, which requires the service of a notice to cure before the service of a notice of termination and which permits a residential tenant to have a post-trial cure pursuant to RPAPL §753, a nuisance claim only requires the service of a notice of termination.

For rent stabilized tenants, the Rent Stabilization Code §2524.2(c)(2) and §2524.3(b) provides for the service of a seven (7) day notice of termination where *"the tenant is committing or permitting a nuisance"* either in the apartment or building or where the tenant *"is maliciously or by reason of gross negligence, substantially damaging the housing accommodation"* or where the tenant *"engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety"*. Rent Control tenants face the same prohibition, but a ten (10) day notice must be served and filed with D.H.C.R. within 48 hours of service upon the rent controlled tenant.

The complained of conditions or occurrences can be in the premises, or the public areas of the building and be caused by the tenant or the apartment's occupants or family members under the tenant's control, inside or outside of the premises, even if the guests or family

members only visit the tenant.

Is a single instance of objectionable conduct sufficient to terminate a tenancy? Generally "no." Sometimes even two instances are insufficient. The courts uniformly require a pattern of continuity or reoccurrence of objectionable conduct in order to find a non-curable nuisance. This is a fact-laden analysis and will depend upon the type and number of occurrences, the effect of the behavior and the nature of the proof.

That does not mean that you should not communicate with your tenants. We suggest that after consultation with your counsel, a letter should be sent to the complaining tenant(s) advising the tenant(s) that they should document the problem and that you are looking into the situation. Another letter should be sent to the tenant alleged to be causing the problem advising that you have received certain complaints, stating what the allegations are, stating that if these allegations are true they would constitute violative conduct, and that such conduct, if it is occurring must immediately cease and desist. If the conduct refers to an apartment condition, BBW&G suggests that you request access for an inspection on a date certain. You should also advise the tenant that if the allegations are true, the tenant may be liable for all damages associated with the behavior, and that the tenant will be subject to eviction (and potentially attorneys' fees) if the violative conduct continues. You should frame the complaint in terms of allegations, and then refer to the conduct "if true." The owner is in a difficult position. You cannot ignore the complaint, but at this juncture, you also cannot know if the allegation is accurate in whole or in part or at all.

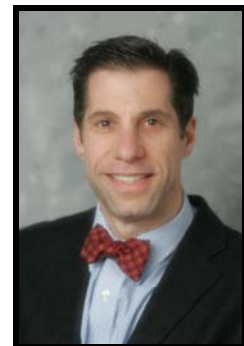
If you determine that there is an immediate threat or danger to life or property, an owner can commence an action in Supreme Court for injunctive relief to stop the behavior or condition from continuing.

To prepare for the commencement of litigation, owners and counsel should speak with building staff and tenants who are willing to

be witnesses, marshal the evidence and discuss what is likely to occur. If tenants complain, but are unwilling to cooperate by testifying in court, it is unlikely that an owner can prevail absent other demonstrable evidence or credible witnesses. Courts often recommend settlements with a probationary period to give the tenant an opportunity to exhibit good behavior and protect his/her tenancy. Even after trial, the courts have used CPLR 2201 to stay execution of the warrant of eviction on "appropriate terms".

Whether it is an aging population with more seniors living alone who may no longer be able to care for themselves, or young people living in apartments who maintain hours that are later than the norm, or people who are less sensitive to the needs of neighbors, or the results of an increasingly litigious society, or simply the increased pressures of daily life, BBW&G has seen an increase in allegations of nuisance behavior by tenants, coming from neighbors and management alike. We anticipate that such conduct will continue to have an impact on the management of apartments, which will necessitate that owners jump into the fray in a planned and strategic manner.

This article was written by Jeffrey L. Goldman, a BBW&G partner practicing in the firm's Litigation Department. Please call Mr. Goldman or any of our Litigation Department partners if you are experiencing nuisance conduct or other tenant issues that may create the potential for legal proceedings.



Jeffrey L. Goldman

Attorneys' Fees? Clause or Not: That is the Question

At the outset of residential landlord-tenant disputes, clients will ask BBW&G whether it will ultimately be reimbursed for the attorneys' fees it has spent on litigation with a tenant. The answer, of course, depends on a number of factors.

As a threshold matter, New York's courts generally follow what is known as the "American Rule" which provides that unless there is a specific statute, rule or contract that authorizes the recovery of attorneys' fees, there is no basis for such an award.

In the context of residential landlord-tenant litigation, we generally look to the lease between the parties to determine whether attorneys' fees are recoverable. In most leases, there is a provision that is entitled "Legal Fees" or "Fees and Expenses." In some leases, the legal fees provision is tucked away in a "Default" provision or a "Remedies of Owner" provision. The rider to the lease, if any, should also be examined for any modifications of the attorneys' fees provision.

Many (but not all) older standard form residential leases contain a provision that essentially states that the landlord is entitled to the recovery of attorneys' fees in the event that there is a "lease default" or "breach of covenant" by the tenant. In newer leases, the language is often reciprocal: providing both landlord and tenant the right to recover attorneys' fees when the other has defaulted.

Nonetheless, an owner should not get overly enthusiastic about a lease provision that provides fees for a landlord alone: the Legislature enacted Real Property Law ("RPL") §234 many years ago which "leveled the playing field" by ensuring that whenever there is a lease provision that provides that an owner is entitled to recover attorneys' fees, that provision is implicitly made reciprocal. As such, if the owner commences an eviction proceeding, but then loses the proceeding, the owner is on the hook for the tenant's "reasonable" attorneys fees.

Conversely, an owner should not get overly distraught by an

attorneys fees clause that appears to be limited to "lease defaults" or "breach of covenant." Some courts have extended these provisions to cases that are not straight lease defaults, such as non-primary residence cases and succession disputes. Courts, however, will unlikely extend those provisions to cases that fall outside of the normal landlord-tenant disputes and into the area of tort law, such as personal injury cases.

On occasion, the question arises as to whether attorneys' fees can be recovered when there is no lease provision that permits such recovery. Some courts have indicated that where a party has merely asserted a cause of action for attorneys' fees (without any lease clause) that party cannot then refuse to pay attorneys' fees when it loses and the other party seeks fees. In essence, the losing party is equitably estopped from using the absence of a fees clause as a shield, when the losing party originally sought fees in a sworn pleading. However, other appellate decisions hold that notwithstanding the pleading, demonstrable proof of an applicable lease provision is a prerequisite to an attorneys' fees award.

Additionally, a party can seek fees pursuant to a court rule that prohibits "frivolous conduct." Such fees, which are really sanctions, will only be levied against a party who engages in conduct that is completely without merit, cannot be supported by a reasonable legal argument or is designed to delay the proceeding or to harass. Take note, however, parties can be sanctioned for making frivolous sanction motions.

It goes without saying, of course, that in order to recover attorneys' fees, the owner must actually be the prevailing party in the litigation. While this rule might seem obvious, whether a party is in fact the prevailing party in litigation is sometimes not clear. The general rule is that absent the resolution of a proceeding by judicial means (a judgment of the court), neither party attains the status of prevailing party. In holdover proceedings, the prevailing party is the one that wins

possession of the premises.

Non-payment proceedings are more difficult, in that often, a tenant may assert that it is entitled to an abatement based upon a breach of the landlord's obligation to maintain the premises in a habitable condition. This poses a problem for owners in attaining "prevailing party" status, in that although they are recovering a portion of the rental arrears, the tenant may receive an abatement and, in essence, also prevail. In such cases, courts will consider the true scope of what is being litigated and evaluate what was achieved by the parties within that scope. Courts look at the specifics of what each of the parties was seeking and make a case-by-case determination as to which party prevailed.

When preparing new leases for new tenants, an owner may wish to consider whether it is advisable to include a fees provision. If such a clause is included, then the owner creates the possibility of recovering fees if it prevails in litigation, but it also opens up the possibility of owing fees if the tenant wins. Conversely, if the owner does not include a fees clause in the lease, although it generally will not recover fees if it wins, the owner does gain some solace in the fact that it will usually not owe the tenant fees if the owner does not prevail. There is no right or wrong in deciding whether or not to include the attorneys' fees clause in a new lease, but it is a decision that should be made based upon a full analysis of all of the ramifications of your decision.

This article was written by Matthew Brett, an associate who practices in BBW&G's Litigation Department.



Matthew Brett

The Poetry Corner

Owning property in NYC requires familiarity with the endless string of administrative agencies that seem to regulate every facet of property ownership. Below, a cautionary tale set to rhyme. (Where hyphenated, the reader should spell out the words. Where not hyphenated, read the words phonetically as spelled.)

ALPHABET SOUP

*I once met an owner of an S-R-O¹
 He needed a C-O-N-H,² but he didn't know where to go
 I gave him the answer, which he accepted with glee
 So we filed an application with H-P-D³*

*This owner had recently installed an M-C-I⁴
 He didn't know what to do and he didn't know why
 I told him about the application, and the possible P-A-R⁵
 So we filed an M-C-I application with D-H-C-R⁶*

*This owner got a violation from the D-O-B⁷
 The building had four apartments when it
 should only have three
 I explained the legal route that he must go
 So we filed an application to amend the C-of-O⁸*

*The owner then received a notice from the E-P-A⁹
 There was too much noise and too much garbage in the way
 That it was the store tenant's fault was easy to see
 So we filed a complaint with the N-Y-P-D¹⁰*

*The owner is a member of the R-S-A¹¹
 He joined A-B-O¹² and A-R-A-M¹³ only yesterday
 His broker's license is via REBNY¹⁴
 And his friends are all in CHIP¹⁵
 Owning property in N-Y-C¹⁶ is an alphabetical trip.*

*There's I-C-I-P¹⁷ and B-I-D¹⁸
 There's J-51¹⁹ and E-E-O-C²⁰
 There's the R-S-C²¹ and the E-T-P-A²² too
 It's an alphabetical array of anagrams and legal gooble-dee-goo*

¹ Single Room Occupancy
² Certificate of No Harassment
³ NYC Dept. of Housing Preservation and Development
⁴ Major Capital Improvement
⁵ Petition for Administrative Review
⁶ NYS Division of Housing and Community Renewal
⁷ NYC Department of Buildings
⁸ Certificate of Occupancy
⁹ Environmental Protection Agency
¹⁰ NYC Police Department
¹¹ Rent Stabilization Association
¹² Association of Builders and Owners

¹³ NY Association of Realty Managers
¹⁴ Real Estate Board of New York
¹⁵ Community Housing Improvement Program
¹⁶ New York City
¹⁷ Industrial and Commercial Incentive Program
¹⁸ Business Improvement District
¹⁹ J-51 Tax Abatement Program
²⁰ Equal Employment Opportunity Commission
²¹ Rent Stabilization Code
²² Emergency Tenant Protection Act

This poem was written by Sherwin Belkin, a BBW&G partner practicing in the firm's Administrative Law Department.



Sherwin Belkin

BBW&G NEWS

MAY I QUOTE YOU?



Kara Rakowski of BBW&G's Administrative Law Department was quoted in *New York Magazine's* "Intelligencer" column regarding an application filed by BBW&G seeking DHCR's permission to refuse to renew the leases of the rent stabilized tenants so that the owner may demolish the residential building above the owner's restaurant located on the street level of the building. The article noted that DHCR had granted the owner's application and that the matter was now on PAR before the agency's Commissioner. The article, which with all due respect to *New York Magazine*, seemed incredibly skewed in its presentation, quoted Ms. Rakowski as noting that DHCR's decision was not "precedent setting"—correctly meaning that DHCR and its predecessor agencies have granted similar applications to other owners. Instead, the article seemed to continue the tenants' strategy of litigating this case in the media, even quoting from BBW&G's past *UPDATE* describing the victorious DHCR decision, as if this constituted some contrary precedent or adverse position.



Aaron Shmulewitz, who heads BBW&G's Co-op / Condo Department, was quoted in *The New York Times* "Q&A" column regarding the question from a reader who had noticed that his co-op was not paying down the mortgage, and wanted to know if it was true that co-ops only pay interest, never principal. Mr. Shmulewitz noted that whether or not a co-op has an interest-only mortgage is "a business decision." He explained that "Interest-only mortgages are attractive to some co-op boards because they provide a way to help keep maintenance payments as low as possible for current shareholders." However, some choose to have the principal amortized "out of a desire to reduce the amount of the principal that will ultimately have to be refinanced." No matter which type of mortgage, Mr. Shmulewitz stated that it "would have no effect on the co-op's legal status as a co-op."

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