Belkin Burden Wenig & Goldman, LLP

UPDATE

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Sherwin Belkin, Editor

LOFT TENANT WHO OVERCHARGES

A recent decision by the Appellate Division held that a landlord may seek to evict a loft tenant who overcharges a subtenant, even though New York's Loft Law does not contain a specific provision permitting eviction for rent gouging. In *BLF Realty Holding Corp. v. Kasher*, the Appellate Division applied the Rent Stabilization Code's penalty of lease termination regarding tenants who charge a subtenant more than the legal rent.

In *BLF Realty*, the tenant occupied a 2,300 square foot loft and sublet 1,500 square feet to a third party. The tenant only paid $550.00 per month in rent, but he charged the subtenant $1,600.00 per month. Following a dispute and litigation between them, the subtenant vacated.

Several months later, the landlord initiated litigation against the loft prime tenant based upon the illegal rent charged to the subtenant. The tenant argued that there was no provision under the Loft Law which permitted termination of a tenancy based upon the rent gouging. However, the Appellate Division held that the similarity between the Rent Stabilization Law and the Loft Law with regard to subletting supported a right by the landlord to terminate the tenancy covered by the Loft Law.

The Appellate Division would not permit rent gouging to go unpunished. This could be a signal that, where public policy is concerned, other provisions of the Rent Stabilization Law may be extended to units covered by the Loft Law.

If you have any questions concerning the Loft Law please speak to Joseph Burden, Robert Jacobs or Mary Donovan.

DHCR GRANTS BBW&G DEMOLITION APPLICATIONS WITHOUT A HEARING

Owners who have filed applications with DHCR seeking a Certificate of Eviction (against rent controlled tenants) or permission not to renew leases (for rent stabilized tenants) based upon an intention to demolish the building, have long been confronted with many obstacles. In order to prove that the application is made in good faith, the Owner must submit a phalanx of documentation showing what will be built, the financial ability to build and the *bona fide* nature of the Owner's intention. But, perhaps most daunting of all was the delay that an Owner would encounter as a result of the administrative process which would include a protracted adjudicatory hearing before DHCR. Suffice to say, tenants and their counsel viewed the hearing as a tool for delay. By endless and often needless questioning and subpoenaing of witnesses, the hearing would become protracted, all in the hope of causing the Owner to capitulate to the tenant's (often exorbitant) settlement demands.

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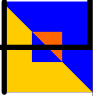
Special Points of Interest:

- DHCR grants BBW&G demolition applications.
- Warrant requests must be accompanied by a non-military investigative affidavit.
- How Owner calculates the rent for a new tenant when the vacating tenant had a rent reduction.



Issues That Warrant Your Attention — About Warrants

Owners are often baffled about how slowly the Court issues a default warrant of eviction ("Warrant"). A default Warrant comes into play when the tenant has not responded to the non payment petition and the owner then seeks to remove the tenant from possession of the apartment with the court's permission.

To get the court's okay to proceed with an eviction when a tenant has not responded to the non payment petition, a warrant request must be made. The warrant request must be accompanied by a non military investigative affidavit ("Non Mil.") Basically, the Non Mil is a statement made under oath by the owner or someone employed by the owner who has personal knowledge about the tenant's military status.

In order for the Warrant to issue, the Non Mil must state that the tenant is not in any branch of the active military service of the United States or the State of New York and that no occupant in the apartment is a dependent of anyone who is in the active military service.

Parenthetically, one of the practical by-products of September 11th is that it has become even more difficult to get the Court to issue a default Warrant.

It is not uncommon for judges to be quite technical in finding reasons to reject the Warrant is violating the requirements of Real Property Actions and Proceedings Law §732. Pursuant to RPAPL §732(3), the judge reviewing the Warrant must direct the issuance of the Warrant and has limited discretion. The only discretion the judge has is to stay the issuance of the Warrant ten days from the date of the service of the petition. This ten day stay period should rarely come into play because it is usual that more that ten days elapses before the Warrant request comes before the judge. Thus, the Warrant should issue without any stay or further delay.

Notwithstanding the legislative intent of RPAPL §732, some judges have, nonetheless, rejected Warrant requests. As a result of the different standards that judges have employed to review Warrant requests, we have encountered delays in Warrants being issued. As a side note, Warrants ordered after a trial or after a settlement are generally issued without delay.

When conducting the military investigation, sometimes it is very difficult, if not impossible, to have a direct conversation with the tenant or an occupant of the tenant's apartment in order to ask the tenant the "magic words" as to his/her military status. Thus, establishing a basis for the owner's belief regarding the tenant's military status may be difficult or simply unobtainable -- ultimately delaying the Warrant request and the owner from recovering the apartment after the tenant's failure to pay rent and default in court..

An owner can try to address this potential issue before

the tenancy begins. On the lease application and the lease itself, an owner may request that a prospective tenant attest to the tenant's military status and require that the tenant notify the owner in writing if there is any change in the tenant's military status.

Alternatively, when a case is already in court and the owner is unable to conduct the military investigation, the courts have accepted a letter from Defense Manpower Data Center as proof of the military status of the tenant in *lieu* of the Non Mil. The letter states that the person is or is not in the military service. Obtaining the letter from this Arlington Virginia company can take up to two weeks.

Using these methods to obtain information about an owner's tenant may prove useful and help to reduce the delay in obtaining default Warrants.

If you have any questions about non payment proceedings, please contact Martin Meltzer

DHCR Grants BBW&G Demolition
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DHCR recognized that a hearing was not required on each and every demolition application that came before it. As of December 2000, DHCR determined that the holding of a hearing on demolition applications was no longer mandatory; instead, the agency would use its discretion to determine when and if a hearing would be held.

Just recently, DHCR revised its Operational Bulletin regarding demolition applications, including the updating of the stipend schedule for payments to tenants, in lieu of relocation. Once that Bulletin was completed, BBW&G became the recipient of three (3) orders granting our demolition applications – each was granted without the necessity of holding of a hearing -- instead, the applications were granted predicated solely upon the written submissions of the parties.

The potential elimination of the hearing makes the demolition application process at DHCR even more viable than before and, just perhaps, will enable fewer projects to be held hostage by unreasonable buy-out demands which are premised, in large part, upon the tenant's perceived belief that he or she can drag out the DHCR process indefinitely.

To discuss demolition applications at DHCR, please contact Sherwin Belkin or Kara Rakowski,

The Effect of Outstanding Rent Reduction Orders

Owners of rent regulated properties must be aware that any outstanding rent reduction order in effect at the time a tenant vacates could spell trouble in determining the next tenant's lawful rent. The failure to properly calculate the next tenant's vacancy lease could result in a rental overcharge and the possible assessment of treble damages. Specifically, DHCR has held that, until such time as the rent is fully restored, an Owner is precluded from collecting any "1/40th increases" (for improvements made during the vacancy period, or even those consented to by the tenant), any MCI increase or any Rent Guideline Board increases at the time of renewal.

To avoid this pitfall, BBW&G recommends that Owners request a "Docket Inquiry Report" from DHCR. This report will list all docket activity, both opened and closed proceedings, dating back to 1984. The key in determining if a rent reduction is in effect is to check the suffix of the docket (that is, any docket ending in "S" is an individual service complaint and "B" is a building-wide service complaint). Second, under the heading of "Disposition," if the word "Granted" is listed, this could spell *trouble.*

A question that frequently arises is how an Owner calculates the rent for a new tenant when the vacating tenant had a rent reduction in effect at the time of his or her vacatur? Based upon an opinion dated December 3, 1999, issued by Charles Goldstein, DHCR's Associate Counsel, DHCR takes the following position:

"Any rent reduction order would provide that a Rent Restoration Application is necessary for termination of the rent freeze, must be complied with, and remains in effect until the owner's application for rent restoration has been granted. However, the "frozen" ***rent may be adjusted by the vacancy increase permitted pursuant to Rent Stabilization Law, § 26-511 (5-a)…."***

As set forth above, the rent will remain frozen, and no other increases will be permitted, which includes MCI increases, individual apartment increases 1/40th increase or renewal guideline increases until such time as the rent is fully restored. However, an owner is permitted to collect the statutory vacancy allowance above the legal rent.

BBW&G recommends that a prudent Owner obtain a Docket Inquiry Report from DHCR to make certain that no rent reduction orders (both Individual and Building-Wide)have previously been issued that could affect the lawful stabilized rent of tenants currently in occupancy.

This article was written by Thomas J. Bannon, a Legal Assistant in BBW&G'S Administrative Law Department. To discuss any DHCR-related issues, please contact Administrative Law Department Partners Sherwin Belkin,

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