BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

September 2008

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Litigation Update

The Continuing Battle Over Section 8 Vouchers

By: Edward Baer

Ever since the Court of Appeals decision in the case of *Rosario v. Diagonal*, there has been an ongoing battle between owners and tenants over the issue of whether an owner has to accept a Section 8 voucher from an existing rent-stabilized tenant. *Rosario* resolved the question of whether an owner could discontinue acceptance of a Section 8 voucher from an existing rent-stabilized tenant. Unfortunately for owners, and in a clear denunciation of federal intent, our state's highest court ruled that a Section 8 voucher is a continuing part of a rent-stabilized tenant's lease for the duration of the tenancy.

After *Rosario* was decided, tenants in rent-stabilized buildings, which received J-51 tax abatements, began lawsuits claiming that they could compel an owner to accept a Section 8 voucher from an existing tenant. This claim arose from language in the J-51 Regulations which prohibits housing discrimination against holders of Section 8 vouchers. Several trial courts in New York City ruled in favor of the tenants on this issue and more lawsuits are still pending. The issue has yet to be decided by an appeals court.

To take the problem a step further, the NYC Council, over the Mayor's veto, passed a law in March of this year which added a new class of protected individuals in the housing discrimination area. This new class consists of holders of Section 8 vouchers, and the new prohibition is "source of income" discrimination. The new law prohibits owners from denying housing or refusing to rent to persons based on any "lawful source of income."

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City Council Passes Law Enabling Tenants to File Harassment Claims Against Landlords

By: Heela Capell

On March 13, 2008, the City Council enacted Local Law 7 of 2008 ("LL7"), creating new measures for tenants to assert harassment claims against owners. This article will explain some of the mechanics of LL7, and summarize some of the defenses available to owners in actions brought by tenants under this new law. Owners should be aware of the consequences of this new law, as well as its application.

Until LL7 was passed, Housing Court judges routinely rejected "harassment" claims, since it was well settled by the appellate courts that there was no cause of action for "harassment" in a summary proceeding. Tenants had remedies in other forums for harassment claims.

However, in enacting LL7, the City Council created a new cause of action for harassment that can be asserted in Housing Court. Now tenants of a three or more family dwelling can affirmatively file a harassment claim against an owner in an "HP proceeding" in the Housing Part of the Civil Court. Additionally, tenants can raise a claim of harassment as a defense or a counterclaim in an owner-initiated eviction proceeding in Housing Court.

To establish a harassment claim, the tenant must show that an owner caused, or intended to cause, the tenant to vacate or surrender his

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The Continuing Battle Over Section 8 Vouchers . . .

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After the veto was overridden, new lawsuits were started by the tenants against owners. In these lawsuits, both in State Supreme Court and with the NYC Human Rights Commission, tenants claimed that the new law compels an owner to accept a Section 8 voucher from an existing tenant. Many owners are disputing this claim and have taken the position that the new law only applies to potential and not existing tenants, and that the new law does not require owners to add new contractual obligations with third-party governmental agencies onto pre-existing leases.

The NYC Human Rights Commission views the new law as applying to all tenants. The courts are still grappling with the issue. This issue will continue to be a source of litigation and controversy in the months ahead.

Edward Baer is a partner in the firm's Litigation Department. He and Magda L. Cruz, who specializes in appeals, have been defending many of these Section 8 discrimination claims. Please contact Mr. Baer or Ms. Cruz for any inquiries about the on-going fight over Section 8 voucher acceptance for existing tenants.

City Council Passes Law . . .

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or her rights to occupy the dwelling through the owner's acts or failure to act. The new law enumerates different types of prohibited conduct, including:

1) using force or threatening the use of force against the lawful occupant;
2) repeated interruptions or discontinuances of essential services completely, or for an extended period of time, or which substantially impair the habitability of the dwelling;
3) failing to comply with HPD orders to correct violations;
4) repeatedly instituting baseless or frivolous claims against a lawful occupant;
5) removing the lawful occupant's possessions from the dwelling;
6) removing or changing the entrance door or lock of the dwelling;
7) any other acts or omissions that substantially interfere with the lawful occupant's quiet enjoyment of the dwelling or that cause or are intended to cause the lawful occupant to vacate the dwelling.

For a tenant to prove a counterclaim or defense of harassment based on the interruption of essential services, failure to comply with HPD orders, or substantial interference with occupancy, the tenant must show a violation of record related to one of the three allegations.

If the tenant cannot show that an agency has issued a violation against the owner, the court is required by law to dismiss the counterclaim or defense without prejudice. Another defense to claims based upon the interruption of essential services, failure to comply with HPD orders, or substantial interference with occupancy, is that the owner did not intend to cause the tenant to vacate and had tried to correct the violation in good faith.

Owners have some remedies against tenants who misuse the new law. For instance, if a court finds a harassment suit brought by the tenant against the owner is frivolous, the court may award the owner attorneys' fees. (Notably, LL7 does not expressly award attorneys' fees to tenants under any circumstances.)

Furthermore, if a tenant brings three frivolous harassment suits against an owner in a ten-year period, an owner can force the tenant to seek the court's permission before filing an additional suit.

The consequences of violating LL7 are still unclear. Whether court imposed penalties will be negotiable, or if owners will be able to settle the penalty amounts privately with tenants, remains to be seen.

In the first case handled by this firm involving the new law, BBWG was faced with a tenant claiming harassment because the owner commenced a holdover proceeding based on the tenant harboring an animal in violation of a no-pet clause in the tenant's lease. The Housing Court dismissed the harassment claim because the commencement of one case is not harassment.

BBWG recommends that owners be diligent about recordkeeping in response to LL7. Owners should keep detailed records of complaints, communications to and from tenants and the owners' response. Also, records regarding access and documentation of conditions, before and after a complaint, must be maintained.

While the mechanics and effects of this new law are discouraging for owners, to say the least, there is a silver lining in that a recent lawsuit by several owners and the Rent Stabilization Association has been filed challenging the constitutionality of LL7. We will certainly apprise our readers of the outcome of that litigation, but until then, the future of LL7 and its effect on landlord-tenant litigation remain open questions.

Heela Capell is an associate in the Firm's Litigation Department.

Administrative Update

Appellate Division Finds Scope of Demolition Required for DHCR Demolition Proceeding Does Not Require Razing of Building

By: Kara I. Rakowski and Stewart S. Smith

The Appellate Division First Department in Matter of *Peckham v. Colagero*, WL 2522084, 2008 NY Slip Opinion 05823, (1st Dept. 2008), recently held that a building owner need not raze its building to the ground in order to qualify for an order from the New York State Division of Housing and Community Renewal authorizing the owner to refuse to renew the lease of a rent stabilized tenant, or to commence a proceeding to evict a rent controlled tenant based upon the owner's good faith intent to demolish the building. BBWG represented the Owner in the litigation.

In 2004, the Owner filed an application with DHCR for permission to refuse to renew the lease of the sole rent regulated tenant in its building so it could demolish the structure. The Owner demonstrated that the scope of its project included the removal of the roof, and the entire interior of the building, including all partitions, floors, sub floors, floor joists, and ceilings, as well as the electrical and plumbing systems. The Tenant argued that the work constituted a reconstruction or alteration, and not a demolition because the building was not being razed to the ground.

DHCR's Rent Administrator issued an Order granting the Owner's Application based upon its findings that "the owner has satisfied the conditions set forth under Section 2524.5(a)(2)(i) of the New York City Rent Stabilization Code."

The Tenant filed an administrative appeal, which was denied by DHCR's Deputy Commissioner. The agency found that the Owner had met all administrative requisites for granting its application.

The Tenant challenged DHCR's ruling in an Article 78 proceeding in NYS Supreme Court. In his petition, the Tenant alleged that DHCR lacked appropriate standards of what is required to meet the demolition requirements and that anything short of razing the building to the ground would be insufficient. Both DHCR and the Owner defended the Deputy Commissioner's order as rational and supported by documentary evidence in the record as well as judicial and administrative precedent. Nevertheless, the Court remanded the matter back to DHCR "to clarify the standard used to determine a 'demolition' and whether this project is a 'demolition' and to clarify the financial ability of [the Owner] to complete the project."

The Owner, represented by

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DHCR Proposes Revised Demolition Rules

By: Kara I. Rakowski

On August 12, 2008, the Division of Housing and Community Renewal commenced public hearings on proposed revised rules defining "demolition" for purposes of applications by owners seeking permission to not renew a stabilized tenant's lease or to proceed with eviction of a rent controlled tenant based upon the owner's good faith intent to demolish the building. Although there has been decades of judicial and administrative precedent on what the term "demolition" means for purposes of such applications, DHCR sought to further clarify that term.

In the past, the DHCR and the courts have held that the term "demolition" under the rent laws does not require the razing of the building to the ground. Instead, owners were permitted to leave the exterior walls, structural supports and commercial space in tact. . The proposed new rules state that at a minimum, the work must involve the complete gutting of all interior space from the ground floor up and must include the removal of the building's roofs and of all internal building systems. However, a "demolition" does not require the removal of the building's outer walls and structural support, which was a critical factor for landmarked buildings, which cannot alter their exterior structures.

In addition, the proposed rules also

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Appellate Division Finds Scope . . .
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Sherwin Belkin, Magda Cruz and Kristine Grinberg of BBWG's Appeals Department, appealed the Supreme Court's decision to the Appellate Division, First Department. The Owner showed how the standard of demolition required for approval under the rent regulatory regimen has been established through nearly 50 years of administrative and judicial precedent. The Owner also demonstrated the adequacy of its financial ability to complete the project. In an abrupt about face, DHCR submitted opposition to the Owner's appeal.

In a 3 to 2 decision, the Appellate Division reversed the Supreme Court's determination, and dismissed the Tenant's Article 78 proceeding. The Appellate Division majority found that DHCR's Deputy Commissioner's determination, granting the Owner's demolition application, was lawful.

The Appellate Division Determines Appropriate Scope of Demolition

The Appellate Court held that "there is no true uncertainty as to the agency's definition of demolition."

The Court went on to analyze both past and present judicial and administrative precedent and determined that DHCR was bound by such precedent. While the Court found that a "demolition" unequivocally takes place where the interior of a structure is demolished, with the exterior walls remaining in place, it also acknowledged that demolition has been found where only residential portions of a building have been demolished. The Court stated that "even assuming that the agency can be said to lack a conclusive definition of the term demolition to clarify all possible circumstances, that lack would be irrelevant to this matter, because there can be no question that in this case the owner's plans constituted demolition." The Appellate Court explicitly held that demolition does not require that a building be razed to the ground.

The Court went on to note that while the absence of a definition has not "caused any confusion or hampered decision making," in the future DHCR can issue operational bulletins or advisory opinions defining with greater particularity the scope of demolition required under RSC 2524.5(a)(2)(i).

The Tenant is appealing the Appellate Division's order to the Court of Appeals.

Kara I. Rakowski is a partner and Stewart Smith is an associate in BBWG's Administrative Law Department.

DHCR Proposes Revised Demolition Rules. . .
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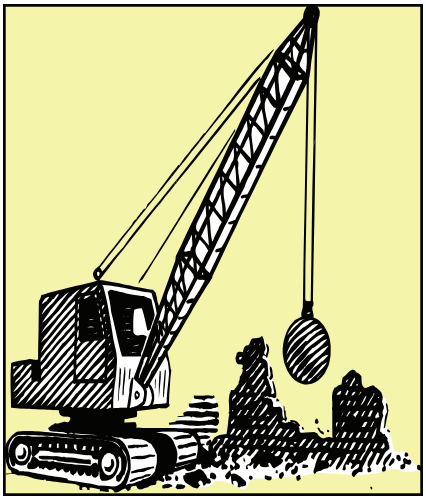
change the method for calculating the statutory stipend that owners must pay to tenants who are required to vacate pursuant to a DHCR order granting the owner permission to not renew the tenant's lease or to proceed with eviction based upon demolition. The proposed change in the calculation of the stipends was an attempt to address tenant concerns that the per-room formula currently utilized by DHCR to determine stipend requirements did not allow for the disparity in per-room value in different areas throughout the City. DHCR proposes to calculate stipends based upon the difference between the tenant's current rent and the mean per room registered rent for apartments in the zip code in which the tenant resides, plus 20 percent. Since DHCR will be basing the stipend calculation on the mean of registered rents of regulated units in the apartment's zip code area, it is questionable as to what impact, if any, this proposed change will actually have on stipend requirements.



Ms. Rakowski is a partner in BBWG's Administrative Law Department. For more information on DHCR's proposed new rules, please contact Ms. Rakowski or Sherwin Belkin.

Transactional News

Market Effects on New Construction Condominiums

By: Seth Liebenstein

As most of us are aware, the New York City real estate market has been adversely affected by recent events, though not to the extent of other areas of the country. Prices have largely remained stagnant and, in some areas (primarily the outer boroughs), are falling. Furthermore, a heightened sense of caution by lenders has made mortgages more difficult to obtain and in smaller amounts than in the recent past. Prospective purchasers of new construction condominium units need to be aware of how these market conditions might affect their ability to purchase, and the condition of the units after closing.

Purchasing a new construction condominium unit is unique in that the purchase agreement is usually signed well before the date that the unit will be available for occupancy. As many purchasers who are closing on new construction units in today's market are aware, much can happen during that period of time. Purchasers who, when they signed their purchase agreements, anticipated having no difficulty securing financing at affordable levels and rates are now faced with a different lending market. Nevertheless, they are locked into contracts (which are almost always not contingent on financing) and are obligated to close, at the risk of forfeiting their down-payment. Consequently, prospective purchasers must now be prepared for a less favorable lending environment when they close than when they signed their contract.

The current less favorable lending environment and a slowed pace of unit sales have also adversely affected the ability of sponsors to obtain and maintain construction financing. This is likely to lead to a slowdown in the pace of construction, which can further delay the closing. Purchasers need to be increasingly aware of this possibility and prepare accordingly.

In addition, a side effect of the slowed pace of unit sales is that purchasers might move into buildings in which a smaller percentage of the units have actually been sold. It is common for offering plans to allow a sponsor to delay providing certain amenities such as gym facilities and rooftop recreational areas until a certain percentage of units have actually closed. This could lead to a situation in which a purchaser is forced to close on a unit in a building in which the purchaser paid a premium for services which will not be provided on the purchaser's move-in date. Purchasers' monthly common charges are generally not lowered due to the lack of amenities. Consequently, purchasers may be paying more but getting less.

It is imperative for purchasers to consider the effects of changing market conditions when purchasing new construction condominium units. Purchasers should ensure that their counsel examine offering plans carefully, and advise purchasers accordingly of the attendant risks.

Seth Liebenstein is an associate in BBWG's Transactional Department.

What Clients Can Do To Help Their Attorneys Efficiently Close A Residential Transaction

By: Denise DeNicola

Your attorney has just negotiated your contract to either purchase or sell your current residence. Here are some things that you can do to help your attorney ensure a smooth closing.

1. *Certificate of Occupancy*

When selling an apartment, or a one-, two- or even three-family house, please advise your attorney in advance if you have made any improvements or additions to your home (i.e., an in-ground pool, shed, deck, new room) so that she can ascertain in advance if you are missing any certificate of occupancy or of compliance, so as to

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What Clients Can Do To Help Their Attorneys Efficiently . . .
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avoid having to give a credit at the closing table or a reduction in the purchase price.

2. Home Equity Loans

When you are the seller, you must let your attorney know in advance about any mortgages encumbering the property, *especially* home equity loans. While a title report will reveal recorded mortgages, home equity loans present an added issue in that they must be formally "frozen" before the closing. It can sometimes take up to thirty days for a bank to "freeze" such a loan. If your attorney does not have advance notice of such a home equity loan, and if the account is not frozen before the closing, then at closing the entire amount of the unused portion of your loan may have to be deposited in escrow with the title company until termination of the loan can occur. This could mean waiting for weeks after your closing for the title company to refund your money.

3. *Loan Conditions*

When you obtain financing, you must work with your lender to satisfy any loan conditions that appear on your commitment letter. Your attorney cannot help you if the bank is asking for personal tax returns, W-2 forms or an explanation of a large deposit of money. The sooner these conditions are cleared with your lender the sooner you can close.

4. Real Estate Brokers

Your real estate broker is your best source for getting documents to and from the managing agent of your cooperative or condominium. They can help you assemble your board package and can prepare you for that all-important cooperative board interview. Work closely with your broker to satisfy all board conditions.

5. *Contract Deadlines*

You must pay very careful attention to the timelines set forth in the contract to avoid being in default in your obligations, specifically with respect to any loan contingency or the submission of a board package for a cooperative or condominium purchase. When the contract is signed, your attorney should advise you of when your loan contingency expires and when your board package is due. If your loan contingency deadline is approaching, or if you cannot yet submit your board package within the time provided in your contract, you *must* advise your attorney so she can get you an extension of time. Also, if you learn that you will be unable to close by the closing date stated in the contract, you *must* immediately notify your attorney. She can try to get an extension of that closing date or work out some arrangement with the other side so that you do not incur cost or penalty.

These are but a few of the ways that an attorney and her client can work together to ensure a smooth closing. Communication between an attorney and client is key to an efficient closing process.

Ms. DeNicola is a partner in the Firm's Transactional Department.

Recent Transactions of Note

BBWG's Transactional Department highlights some of the significant deals which we have handled recently:

Craig Ingber, Dan Altman and Jack Lagan closed on the purchase of four Bronx apartment buildings containing 203 residential units and eight commercial units for an aggregate purchase price of $18.3 million. The portfolio consists of three elevator buildings and one walk up building in the Norwood section of the Bronx. The transaction involved the preparation and negotiation of five separate operating agreements, including the negotiation of a joint venture operating agreement with an institutional equity partner as well as the negotiation of financing documents with New York Community Bank.

Dan Altman, Denise DeNicola, Robert Jacobs, Allan Gosdin and summer associate Nicholas David completed the purchase of three upstate New York shopping centers for a consortium of Canadian and Israeli investors for an aggregate purchase price of $30 million. The transaction involved the purchasers' assumption of the prior owner's three securitized loans and the formation of twelve different limited partnerships and limited liability companies to own and operate the properties.

Dan Altman, Howard Wenig and Allan Gosdin completed the negotiation of two long-term garage leases on the Upper East Side having an aggregate value of $12 million.

Howard Wenig and Craig L. Price represented the seller of two New York City parking garages.

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Recent Transactions of Note . . .
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Craig Ingber represented the borrower on an $18 million construction loan and permanent financing for a mixed-use project in Brooklyn.

Craig Ingber represented the purchasers of three apartment buildings in Washington Heights for an aggregate purchase price of $30 million, and the purchase of an apartment building in Brooklyn for $5 million.

Craig L. Price represented a developer on the refinancing of a $5.4 million mortgage for the renovation of an Upper West Side property.

Howard Wenig and Craig L. Price represented the purchaser on the acquisition and financing of two mixed-use buildings in Brooklyn for over $2 million.

Howard Wenig and Seth Liebenstein handled three lease extensions and modifications at a Midtown office building, and a new restaurant lease in the West Village.

Denise DeNicola and Aaron Shmulewitz represented three cooperatives on the refinancing of their underlying mortgages.

BBWG NEWS

Sherwin Belkin was quoted in the *New York Law Journal* of June 27, 2008 after BBWG's successful appeal of an Article 78 decision which resulted in an owner's right to demolish a multiple dwelling on the west side of Manhattan. Mr. Belkin was also asked to comment for an article on DHCR's newly proposed demolition rules by *The New York Times* on August 13, 2008 ("State's Take on Demolition Roils Renters and Owners." In the July 13, 2008 Real Estate Q & A section of *The New York Times*, Mr. Belkin was asked about an owner's right to change locks on a tenant's door. Mr. Belkin was also quoted in the July 20th Real Estate Section of the Sunday *New York Times* in an article about Rep. Charles Rangel's use of four stabilized apartments in a Harlem apartment building.

Kara I. Rakowski was quoted in the July/August edition of the CHIP New York Housing Journal regarding DHCR's proposed new demolition rules.

Aaron Shmulewitz was quoted in the June 1 and July 6 Real Estate Q&A section of *The New York Times*. On those occasions, his knowledge of co-op law was put to the test by questions involving the use of a terrace and disclosure rules. Mr. Shmulewitz was also sought for expert opinion by the *New York Sun* in its July 10th and July 24th editions.

Craig L. Price and Denise DeNicola took part in a "mock" commercial real estate loan negotiation sponsored by the Benjamin N. Cardozo School of Law Alumni Real Estate Practice Group. They will be reprising their roles on September 26th as part of a CLE program at the New York County Lawyers Association. Mr. Price also spoke at the offices of Massey Knakal Realty Services on the topic of "From Contract to Closing: Ways for Brokers and Attorneys to Interface Effectively to Effectuate a Transaction."

David M. Skaller was a lecturer at the 2008 Judicial Seminar sponsored by the New York State Judicial Institute, and attended by Civil Court and Supreme Court judges throughout New York. Mr. Skaller also participated in a mock trial, training judges on proper evidentiary rulings.

Robert A. Jacobs gave a CLE lecture on Development Rights at the New York City Bar Association on June 9, 2008.

Magda L. Cruz will be the keynote speaker on September 9, 2008 at the New York County Lawyers' Association CLE Institute program entitled "How to Defend Against Tenant Complaints at DHCR." Ms. Cruz's commentary on the new rent guidelines was published in the July/August CHIP New York Housing Journal.

Howard Wenig has been reappointed by the Directors of Hudson Valley Bank to its Business Development Board for the period ending June 30, 2009.

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Legal Update
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