Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

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LITIGATION UPDATE

CERTIFICATION OF CORRECTION OF HPD VIOLATIONS MADE EASIER

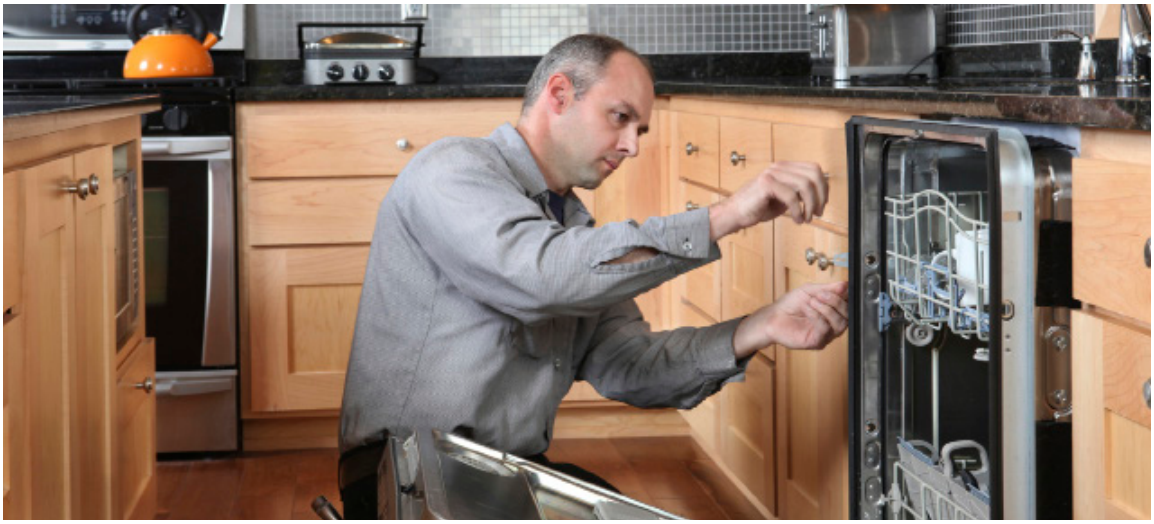
By Jordi Fernandez

Residential landlords are required to cure Housing Maintenance Code violations within statutorily prescribed periods of time. Those times vary from "immediately" (in the case of a "C" violation), to 90 days (in the case of an "A" violation). After curing the violation, the landlord is required to certify the correction of the violation with the New York City Department of Housing Preservation and Development ("HPD"). HPD will not remove a violation which has issued until the landlord certifies that the violation has been corrected. In some instances, landlords have promptly cured the violations, but simply failed to certify that violation as corrected. The failure to file the necessary certification with HPD leads to the accumulation of numerous violations of record in a building, when, in fact, such conditions no longer exist. This has negative ramifications in court proceedings, in administrative proceedings, and in numerous types of financial transactions.

As of July 2010, HPD is permitting an "Authorized Certifier" to certify the correction of a violation electronically. An Authorized Certifier is a registered owner of a building, a registered officer or director of a corporate owner of a building or the registered managing agent of the building; in other words, the individual or individuals so indicated on the Multiple Dwelling Registration that owners must file pursuant to the Multiple Dwelling Law. However, in order to meet HPD's electronic certification requirements, the Authorized Certifier must enroll in the Electronic Certification Program administered by HPD.

A residential landlord or its managing agent would be wise to enroll in HPD's Electronic Certification Program. Certifying the correction of Housing Code violations with HPD electronically makes the process easier, faster, and more reliable. If you need help certifying your building's violations as corrected or registering to certify those violations electronically, please contact BBWG. We can guide you through the procedures and assist in eliminating violations which no longer exist.

Jordi Fernandez (jfernandez@bbwg.com) is an associate in the firm's Litigation Department.



Co-op | Condo Corner

By Aaron Shmulewitz

Aaron Shmulewitz heads the rm's Co-op/Condo practice. Aaron represents more than 300 cooperative and condominium boards throughout the City, as well as sponsors of cooperative and condominium conversions, and numerous purchasers and sellers of cooperative and condominium apartments, buildings, residences and other properties. Some recent noteworthy court decisions in this practice area are discussed below. If you would like to discuss any of the cases in this article or other related matters, you can reach Aaron at 212.867.4466 or (ashmulewitz@bbwg.com).

NEW CONDO BUYER ENTITLED TO RESCIND PURCHASE CONTRACT UNDER ILSA, BECAUSE DESCRIPTION OF PROPERTY IN CONTRACT WAS NOT IN RECORDABLE FORM, INCLUDING NO NOTARIZATION, AS REQUIRED BY ILSA

Bacolitsas v. 86th & 3rd Owner, LLC *U.S. District Court, Southern District of New York*

COMMENT | *This decision continued the trend of decisions allowing purchasers to rescind contracts based on hypertechnically creative (but statutory) grounds. Virtually no purchase agreement in a typical new condo purchase would satisfy this requirement under ILSA.*

ILSA APPLIES TO CONVERSION OF COMMERCIAL BUILDING TO RESIDENTIAL CONDO, AND ASSIGNEE OF BUYER HAS STANDING TO ASSERT ILSA RIGHTS

Nu-Chan, LLC v. 20 Pine Street LLC *U.S. District Court, Southern District of New York*

COMMENT | *The Court held that, while the buyer's automatic rescission rights were barred after two years, the buyer could still rescind since its claims for equitable rescission and damages have a three-year statute of limitations.*

EMAIL EXCHANGES CONSTITUTE AN ENFORCEABLE WRITTEN CONTRACT THAT SATISFIES THE STATUTE OF FRAUDS

Naldi v. Grunberg *Appellate Division, 1st Dept.*

COMMENT | *However, the Court held that no binding contract existed in this case because the emails did not re ect a meeting of the minds as to price.*

COMMERCIAL CONDO UNIT OWNER MUST RELOCATE ILLUMINATED GARAGE SIGN TO COMPLY WITH REQUIREMENTS OF EASEMENT GRANT FOR SIGN

Board of Managers of Hester Gardens Condominium v. Mott Street Joint Ventures, LLC *Supreme Court, New York County*

HOSPITAL (SHAREHOLDER IN CO-OP) CAN HAVE ITS APARTMENTS OCCUPIED BY ITS DOCTOR/NURSE EMPLOYEES AS INCIDENT TO THEIR EMPLOYMENT; SUCH OCCUPANCY DID NOT VIOLATE CO-OP'S SUBLETTING RESTRICTIONS

Lenox Hill Hospital v. 305/72 Owners Corp. *Supreme Court, New York County*

BUYER OF COMMERCIAL CONDO UNIT CAN SUE BOARD FOR PURPORTEDLY WRONGFUL EXERCISE OF INAPPLICABLE RIGHT OF FIRST REFUSAL

Nicosia v. The Board of Managers of The Weber House Condominium *Appellate Division, 1st Dept.*

COMMENT | *Boards that act beyond their permitted authority do so at their own peril and only invite trouble.*

CO-OP CAN REJECT SUCCESSFUL BIDDER AT FORECLOSURE SALE, SINCE TERMS OF SALE SO STATED

LI Equity Network LLC v. Village in the Woods Owners Corp. *Appellate Division, 2nd Dept.*

COMMENT | *The terms of sale at a foreclosure sale are the governing document for that transaction, and form the terms of the "contract" pursuant to which bidders bid.*

CO-OP SHAREHOLDER NOT LIABLE FOR INJURIES TO WINDOW WASHER WHO FELL FROM OUTSIDE OF BUILDING

Agrispin v. 31 East 12th Street Owners, Inc. *Appellate Division, 1st Dept.*

COMMENT | *The Court emphasized that the co-op was responsible for the building's exterior, and the shareholder had no control. The Court held that a broad indemnity provision in the shareholder's proprietary lease in favor of the co-op was inapplicable.*

CONDO BUYER NOT ENTITLED TO REFUND OF DEPOSIT UPON DISCOVERY THAT HIS DESIRED CONSTRUCTION OF SLEEPING LOFT WOULD BE ILLEGAL, DESPITE PRIOR BROKER REPRESENTATIONS TO CONTRARY

Casano v. New 19 West LLC *Supreme Court, New York County*

COMMENT | *The Court held that "merger and integration" clauses in the purchase contract barred reliance on third-party representations, and a clause in which the buyer represented that he had examined the condo's bylaws barred him from claiming unfair surprise.*

BROKER NOT LIABLE TO PROSPECTIVE CONDO TENANT FOR TENANT BEING UNABLE TO MOVE IN BY DESIRED DATE DUE TO BOARD WAIVER NOT HAVING BEEN ISSUED BY THAT DATE

Reiter v. Columbus Real Estate, Inc. *Supreme Court, New York County*

COMMENT | *The Court held that the tenant should have known that moving in by the desired date was impossible, since the tenant's submission of its Board waiver package triggered the Board's 30-day review period, which had not yet expired by the desired move-in date.*

CONDO BOARD CANNOT BAR DOG BY ADOPTING NEW HOUSE RULE IF BYLAWS PERMIT DOGS

Board of Managers of Village View Condominium v. Forman *Appellate Division, 2nd Dept.*

COMMENT | *This Board understandably tried the expedient approach, since doing it the right way—-amending the bylaws—-would have required 80% Unit Owner consent. Once again, Boards that exceed their authority normally have little to show for it.*

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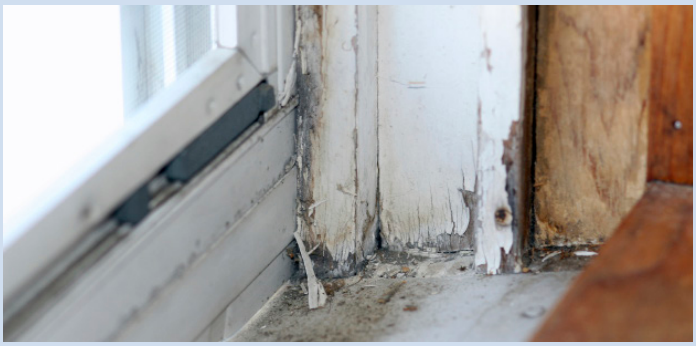
TIME TO SEND LOCAL LAW 1 LEAD PAINT NOTIFICATION

By: Kara I. Rakowski

Local Law 1, New York City's Lead Paint Law, requires, (among other things), that each year an owner of a multiple dwelling erected prior to January 1, 1960 present to the occupant of each dwelling unit no earlier than January 1 and no later than January 16 a notice inquiring as to whether a child under the age of six resides in the unit. (*Helpful note, for convenience, many owners send the Local Law 1 Notice with the annual Window Guard Notice. Owners may also deliver the Notice with the January rent bill if delivered after December 15th.*) Upon receipt of the annual notice, the occupant must provide the owner with a written response by February 15 of that year. If the owner does not receive a written response by February 15, and does not otherwise have actual Notice as to a child of applicable age residing in the unit, then the owner must inspect the occupant's dwelling unit to ascertain whether a child of applicable age resides there. If a child of applicable age is found to reside in the unit, then the owner must conduct a visual inspection to determine whether there are any lead hazards (i.e., peeling paint) which require abatement. Owners are required to retain copies of all notices, proof of delivery and inspection records or reports for a period of ten (10 years).

Any owner who violates a provision of Local Law 1 shall be guilty of a misdemeanor, punishable by a ne of up to $5,000.00 or imprisonment for up to six months, or both. In addition, any violation shall subject the owner to a civil penalty of not more than $1,500.00 per violation. Thus, it is imperative that owners of Target Housing (i.e., housing built prior to 1960) make every e ort to comply with the annual notice/inspection requirements of Local Law 1.

Kara I. Rakowski, Esq., is a partner in BBWG's Administrative Department. For more information regarding lead paint hazards and compliance with Local Law 1 and the EPA Rules regarding lead paint, please contact Kara I. Rakowski.



Notable Achievements

CRAIG INGBER, a partner in BBWG's Transactional Department, co-authored the cover page featured article in the November, 2010 edition of *Commercial Lease Law Insider* on limiting a landlord's damages against a commercial tenant's claimed lack of access due to renovations. MR. INGBER proffered advice on various steps that an owner can take when faced with such a potential claim and how to avoid such claims with careful drafting of the lease.

MARTIN HEISTEIN, head of BBWG's Administrative Law Department, authored an article that appeared in the November/December edition of *The Mann Report* on the decision in *In the Matter of Casado v. Markus*, in which the Court had invalidated a low-rent supplement order that had been issued by the City Rent Guidelines Board. MR. HEISTEIN examined the effect of the current unsettled status of the litigation on owners of affected housing throughout the City.

AARON SHMULEWITZ, a partner in BBWG's Transactional Department and head of the firm's co-op/condo practice, responded to an inquiry in the November 28 Sunday Real Estate Section of *The New York Times* regarding the rights of sponsors to sell apartments without Board approval. Mr. Shmulewitz also participated in a seminar on legal issues involving bedbugs in co-ops and condominiums, sponsored by *Cooper Square Realty* on October 26.

WHAT CONSTITUES LENDER "GOOD FAITH" WHEN DEALING WITH DEFAULTING MORTGAGORS?


By William M. Rifkin and Jamie B. Chapman

In an e ort to ease the residential mortgage crises in New York, e ective August 5, 2008, as amended on February 13, 2010, the Legislature enacted CPLR § 3408. This statute mandates that settlement conferences be held in all foreclosure actions in New York State, when the mortgagor (debtor) resides in the residential property that is being foreclosed by the lender. The mandatory settlement conferences are to be held within sixty days after the date when the a davit of service of the foreclosure complaint on the mortgagor is led with the county clerk. Although the statute is aimed at nancial institutions, the wording of the statute is broad enough to cover any residential mortgage loans made by individuals and purchase money mortgages. The purpose of this statute is for the court to attempt to have the mortgagor and the lender "reach a mutually agreeable resolution" so that the mortgagor does not lose his/her home. To that end, the courts have mandated that the lender "act in good faith" when engaged in these conferences. The problem that arises is what constitutes "good faith"?

It stands to reason that when a residential mortgage loan is in signi cant default, or when the collateral (the residential property) has signi cantly depreciated in value, it is in the best interest of the lender to seek an accommodation with the mortgagor in the hope that the lender will receive at least some payment and avoid the expense and time of foreclosure. However, if the mortgagor is unemployed or lacks the nancial ability to either repay the arrears pursuant to a repayment plan, or comply with a loan modi cation agreement, then a work-out proposal by the lender is of no help. This situation is not uncommon. According to the *New York Times*, out of 4.2 million mortgages that are now in or near foreclosure, only approximately 500,000 mortgages have been modi ed over the past 18 to 24 months.

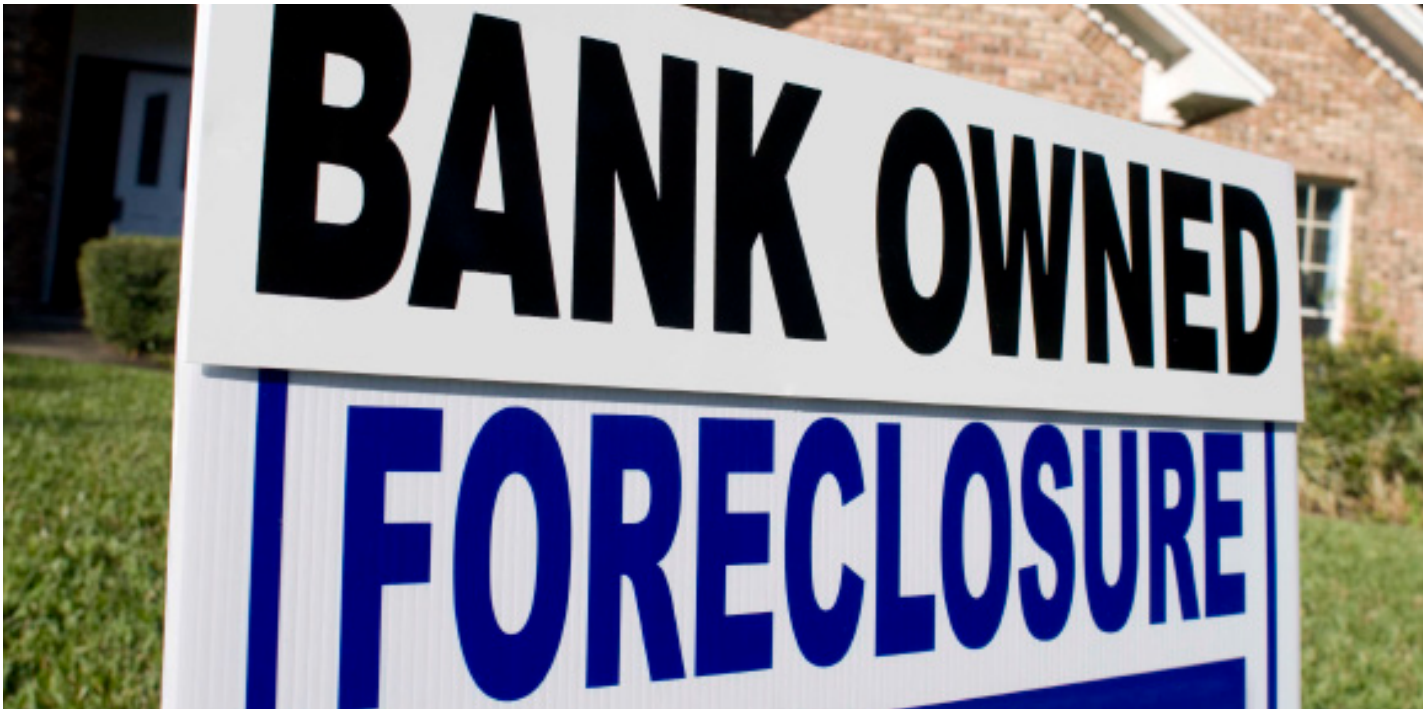
The more troubling issue arises when the market value of the residential property does exceed the mortgage debt, so that there is equity in the property, yet the lender is urged by the court to negotiate a work-out agreement with the mortgagor for less than the full amount of the loan. Must a lender bargain away full recovery of its mortgage debt so that the mortgagor can remain in the property, even if the mortgagor lacks the nancial ability to repay the mortgage loan, pay the real estate taxes or meet the nancial requirements pursuant to a work-out agreement? Put another way, can a court nd that a lender has acted in bad faith if the lender refuses to modify the loan or enter into a work-out agreement with the defaulting mortgagor where if the foreclosure action is allowed to proceed to sale the lender will be paid in full?

The statute does not address any of these issues and does not give a road map on how the courts, the attorneys, the lender, or the mortgagor should comport themselves in the mandatory settlement conferences. Although some courts have been overzealous in attempting to protect mortgagors from foreclosure, including threatening to use sanctions against counsel for the lender and the lender if they do not "act in good faith" as seen in the eyes of the court, the statute does not authorize the court to penalize the lender if it fails to reach an accommodation with the mortgagor.

Creating further uncertainty is the recently adopted Regulation 419.11 that became e ective October 1, 2010 dealing with loss mitigation e orts by lenders. This Regulation was promulgated by the New York State Banking Department. The last sentence of Regulation 419.11(a) states that "nothing in this Part shall be construed to require a [mortgage loan] Servicer to perform services in a manner inconsistent with the terms of the note, mortgage or contract for the servicing of a mortgage loan." This Regulation appears to be completely contradictory to the stated purpose of CPLR § 3408. On the one hand, the Banking Department is rea rming basic legal principles which hold that the legislature generally cannot modify, alter or void a private contract, and that a lender has the right to its bargain and demand that all of its terms be complied with by the mortgagor regardless of economic conditions. On the other hand, the lender is faced with CPLR § 3408 which mandates that a lender act "in good faith" in attempting to resolve the ongoing mortgage foreclosure sinkhole that shows no signs of abating any time soon.

Given these two apparent contradictory rules, lenders are being placed in di cult positions when confronting foreclosure proceedings. BBWG works to ensure that despite these challenges, logic and common sense will prevail in the statutory settlement conferences it handles.

William Rifkin is a partner in the firm's Litigation Department. Jamie Chapman is an associate in the firm's Transactions Department.



DANIEL ALTMAN OF BELKIN BURDEN WENIG & GOLDMAN LLP REPRESENTS SHAKE SHACK IN FOUR NEW LOCATIONS

Transactional partner Daniel Altman represented Shake Shack in executing four new leases for locations in Battery Park City, Washington D.C., Brooklyn and Westport, CT., which are scheduled to open in 2011. Belkin Burden Wenig & Goldman LLP is excited about its new relationship with Shake Shack Enterprises and Union Square Hospitality Group and wishes them much success at their new locations.

CASES AND TRANSACTIONS OF NOTE

JOSEPH BURDEN, co-chair of BBWG's Litigation Department, and LISA GALLAUDET, an associate in the department, were victorious in two separate summary judgment motions on behalf of a condominium against its sponsor for unpaid common charges and other amounts due, including with regard to units that have not yet been built by the sponsor, totaling approximately $300,000.

ROBERT JACOBS and MAGDA L. CRUZ, partners in the firm's Appeals Department, prevailed in an Article 78 proceeding involving a multi-party dispute over Loft Law rights, which was transferred to the Appellate Division. The appellate court rejected one tenant's claim for Loft Law coverage of a unit that had not fallen under the Loft Law's original terms, and held that a subsequent amendment to the local zoning laws, permitting residential use, did not result in the unit subsequently being regulated. In addition, the appellate court rejected efforts by another tenant to increase a rent overcharge award. The appellate court found that the Loft Board acted rationally and in accordance with its own precedent in taking into account the number of months that the tenant had failed to pay rent as an offset to any overcharge award. DAVID BRAND, an associate of the firm's Litigation Department, also worked on the appellate brief.

MAGDA L. CRUZ, partner in the firm's Appeals Department, successfully represented owners of a Midtown townhouse to obtain possession of the last remaining occupied unit for the personal use of one of the owners, following an appeal by the tenant. The appellate court held that although an earlier owner use petition by another one of the co-owners had been denied, a different co-owner could establish his entitlement to possession in a later proceeding. JEFFREY L. GOLDMAN, co-chair of the firm's Litigation Department, represented the owners at trial.

CRAIG INGBER, a partner in BBWG's Transactional Department, represented an institutional investor in the purchase of two multifamily properties in Washington Heights valued in excess of $13 million.

DENISE DENICOLA, a partner in BBWG's Transactional Department, represented four Manhattan cooperatives in refinancings of their underlying mortgages, totaling approximately $17 million.

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