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To Our Readers

We hope this newsletter provides interesting and timely information relevant to your real estate concerns. Our next publication will be in September, when BBWG lawyers will continue reporting highlights of our practice and important legal developments. Have a great summer!

The Editors

Transactional Update

Compliance With Local Law 11 — Some Points to Consider

By: Craig Ingber

Sidewalk bridges or scaffolds: it is hard to avoid them while walking the streets of New York City, whether it is in New York's residential or commercial areas. While the larger watertight ones may offer New Yorkers a brief respite on a rainy day, they are every where these days as a result of New York's Local Law 11 of 1998.

Originally enacted into law in 1998, Local Law 11 came about after parts of a building façade fell from a building injuring passers by. The real estate industry, at New York City's behest, was forced to address the maintenance of its buildings, commercial or otherwise, in the interests of protecting the general public from similar future occurrences.

Local Law 11 has inspection cycles. The existing cycle (Cycle 6) is the reason for the sudden surge of sidewalk bridges and scaffolds because owners were obligated to file compliance reports with the New York City Department of Buildings by February 21, 2007 to avoid penalties for failure to comply with the law.

Sidewalk bridges and scaffolds present owners of residential and commercial properties with a myriad of tenant issues. Residential building owners find themselves besieged by tenants who consider their views and sense of security compromised by plywood and barbed wire. Commercial property

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The Need to Review Brokerage Agreements in Advance of Engaging a Broker to Market Your Property

By: Seth Liebenstein

Most landlords engage a licensed real estate broker in order to help lease vacant or soon to be vacant commercial office or retail space. The broker will market and advertise the space to potential tenants. After a suitable tenant is located, the broker typically negotiates the basic "business" terms of a potential lease. These terms are usually then relayed to the landlord's attorney who drafts a lease based on these business terms. However, what often gets lost in the shuffle is the importance of

having a comprehensive brokerage agreement with the broker **before engaging the broker in any capacity.** Having an experienced attorney review and negotiate a brokerage agreement before the broker begins to market the space will eliminate the potential for future dispute with the broker and protect the landlord in the event of any future dispute with any potential tenant's broker.

Once a landlord has decided to engage the services of a broker, that broker

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owners are presented with existing tenants who may claim a decrease in visibility and business and prospective tenants seeking assurances that the specter of sidewalk bridges and scaffolds will not negatively affect their sales.

Sidewalk bridges and scaffolds are usually rented by an owner from one of several companies that specialize in providing that service for an initial up front cost and a monthly rental fee. As expected, sidewalk bridges and scaffolds require permits and due to the length of time that the sidewalk bridges and scaffolds are needed, owners need to keep track of the expiration dates of those permits to ensure that the permits are renewed in a timely manner to avoid the placement of violations and resulting fines and penalties

for failure to renew permits. It is a good idea to have the building's engineer inspect the sidewalk bridges and scaffolds periodically, especially at the time a permits renewal is sought to ensure that the sidewalk bridges and scaffolds are properly maintained and have not fallen into disrepair.

The alarms and security systems that are installed at the time sidewalk bridges and scaffolds are erected are usually installed and maintained by a company other than the one that the sidewalk bridge is rented from, and it typically charges an on-going fee for the maintenance of the alarm and security systems.

It is imperative that owners resist efforts by tenants to extract rent abatements or concessions based on sidewalk bridges and/or scaffolds claimed to be in place "too long" a time, past what others may perceive as reasonable, while

work progresses. Owners may consider some less onerous accommodations, such as agreeing to the placement of signage on sidewalk bridges and scaffolds to maintain the visibility of the stores and restricting themselves from turning their sidewalk bridges and scaffolds into billboards. But, in the end, owners must maintain the flexibility that they need to maintain their buildings and to comply with the law.

Craig Ingber is a partner in the Firm's Transactional Department, experienced in Local Law 11 issues.



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will typically provide its standard agreement. Before doing anything further, it is imperative for the landlord to send this agreement to its attorney for immediate review and negotiation. All too often these standard brokerage agreements are insufficient, are defi-

cient or lack certain clauses and leave the landlord exposed to future liability. Basically they protect the broker's right to earn a commission and little else.

Some important provisions that landlords should consider, include:

- ◆ In the event the broker solicits the cooperation of any other brokers, any commission due and payable to other brokers shall be paid by the landlord's broker. In no event should the landlord be obligated to pay any more than the agreed upon commission to its own broker.
- ◆ A delineated payout schedule

of any commission that may become due to the broker.

- ◆ It should also be made clear that the broker is obligated to present **any and all** offers it receives for the space to the landlord.
- ◆ Specify which party is responsible for paying specific costs in connection with the marketing of the space (e.g., advertising, design, printing, mailings)
- ◆ State whether or not a commission is due in the event of a renewal or exercise of an option.
- ◆ Finally and most importantly

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(and most typically not included in the standard brokerage agreement used by brokers), the broker must indemnify the landlord against any claims made by any other broker who may have dealt with the landlord's broker in connection with the leasing of the landlord's space. This indemnity should include attorney's fees and give the landlord the right to select defense counsel.

As every space and circumstance is unique, the above list is not intended to be comprehensive, but merely to pose some suggested guide-

lines to protect landlord interests. Investing time and money in obtaining professional review of a brokerage agreement before embarking on a leasing transaction may provide much higher returns and peace of mind in the event a future dispute arises.

Seth Liebenstein is an associate in the Firm's Transactional Department and regularly handles brokerage agreement matters and commercial leasing issues.



Change in RPIE Filing Procedures

The New York City Department of Finance has changed its regulations to require **mandatory online filings** of Real Property Income and Expense Statements ("RPIE") for 2006 for properties that are subject to the RPIE filing requirements. The filing deadline for 2006 RPIE's is Tuesday, September 4, 2007. *The New York City Tax Commission will deny a hearing on an Application for Correction of the Tentative Assessed Valuation for any property for which an RPIE is required, but not filed by the filing deadline.*

Recent Transactions of Note

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

- Dan Altman successfully negotiated a sublease for 25,000 square feet of office space with a value in excess of \$10 million for MRU Holdings, Inc., a nationally recognized student loan provider, at 590 Madison Avenue; the sublandlord was IBM.
- As highlighted in The New York Post, Dan Altman successfully negotiated the purchase of a 14,700 square foot townhouse on the Upper East Side for \$35 million for his client, Keith Rubinstein.
- Aaron Shmulewitz negotiated the purchase and leaseback of a townhouse on the Upper East Side for \$20 million.
- Aaron Shmulewitz and Denise DeNicola represented a Park Avenue cooperative corporation in the refinancing of its underlying mortgage.
- Robert Jacobs handled a tax lot merger of five tax lots in Brooklyn to enable a large rental complex to be constructed.
- Howard Wenig and Craig Price negotiated the purchase of two mixed-use buildings on Hudson Street for a combined purchase price of nearly \$16 million as part of a 1031 exchange.
- Aaron Shmulewitz, Denise DeNicola and Rosa Lombardo represented the successor sponsor of a condominium conversion in the sale of 45 units to date, with a value in excess of \$22 million.
- Craig Price represented a sponsor on the sale of a commercial condominium unit to foreign government for \$4.1 million.
- Craig Price and Dan Altman negotiated a lease for 14,000 square feet of office space in downtown with an aggregate value in excess of \$5.5 million.

Co-Op / Condo Corner

By: Aaron Shmulewitz



Aaron Shmulewitz heads the Firm'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.

CO-OP SHAREHOLDER DEEMED NOT A "HOLDER OF UNSOLD SHARES"

In *Sassi-Lehner v. Charlton Tenants Corp.* (New York Law Journal, April 25, 2007 p. 18 col. 1), the Court ruled that a shareholder did not enjoy the special status of a "Holder of Unsold Shares" (*i.e.*, exempt from having to obtain board approval for sales and sublets, among other rights), since the shareholder had never been designated in writing as a Holder of Unsold Shares by the conversion sponsor. In so holding, the court deliberately distinguished this case from a 2005 decision by the State Court of Appeals, *Kralik v. 239 East 79th Street Owners Corp.*, by emphasizing that all documents that govern a cooperative conversion must be examined in order to determine if the shareholder qualifies for such special status. The court held that, since the designation requirement was in the con-

version offering plan itself, it was a controlling factor and, since the shareholder did not comply with it, the shareholder could not be a Holder of Unsold Shares.

COMMENT—The *Kralik* decision, by the State's highest court, emphasized compliance with the requirements of the cooperative's proprietary lease alone. This case expanded the review to include all governing documents. It is unclear to what extent the holding in this case will withstand reversal on appeal, in light of the holding in *Kralik*.

CONDO CAN EVICT A RENTAL TENANT BASED ON NUISANCE

In *Zipper v. Haroldon Court Condominium* (New York Law Journal, April 19, 2007 p. 29 col. 2), a condominium was permitted to evict the rental tenant of a Unit Owner due to foul odors regularly emanating from her apartment, and the existence of

a "Collyer's Mansion" condition (extreme accumulation of clutter and debris) in the apartment.

COMMENT—While it is unclear from the decision whether the tenant was rent-regulated or free-market, the decision reflects the growing recognition of the powers of condominiums to act to safeguard the health, welfare and safety interests of their unit owners and other building residents.

PURCHASER OF CONDO APARTMENT ENTITLED TO ATTORNEYS FEES IN PUNCHLIST ENFORCE- MENT ACTION

In *Sykes v. RFD Third Avenue I Associates* (New York Law Journal, April 12, 2007 p. 27 col. 3), a purchaser who sued his sponsor to compel the enforcement of punchlist items established at the purchase closing was entitled to recover his attor-

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neys' fees incurred in doing so. At the closing, the parties had entered into an agreement whereby \$75,000 was deposited in escrow to secure the sponsor's obligation to complete certain specified items within a set time period. The sponsor failed to do so, the escrow was released to the purchaser, who then sued successfully to recover his legal fees.

COMMENT—This case points out the importance of entering into written "post-closing com-

pletion" agreements, and the significance of escrow retention as a means of enforcing sponsor construction obligations.)

CO-OP'S FAILURE TO INSTALL SMOKE ALARM IN AN APARTMENT DID NOT RENDER CO-OP LIABLE FOR SMOKE AND WATER DAMAGE TO NEIGHBORING APARTMENT

Jamison v. 157-61 W. 105th Street Housing Development Fund Corp. (New York Law Journal, March 28, 2007 p. 20, col. 1) held that the co-op's failure to install a smoke alarm in an upstairs apartment

was not the proximate cause of smoke and water damage to another apartment below it. The court held that the purpose of the smoke alarm was to warn residents of the apartment in which it is installed of the presence of a fire to enable them to escape, and not to expedite the calling of the fire department so as to minimize damage to other portions of the building.

COMMENT—Compliance with smoke alarm installation requirements is an important fire safety obligation of all building owners. This decision discusses the scope of liability in the event of non-compliance.

Co-op's Ejection of Shareholder, a Real Estate Attorney, Upheld

By: Edward Baer

In a 2003 Decision, the New York State Court of Appeals allowed the eviction of a shareholder for objectionable conduct without compelling the co-op to prove the allegations of objectionable conduct to a court. In that case, commonly known as the *Pullman* decision, the Court of Appeals stated that the decision of a residential cooperative which elected to terminate a shareholder's tenancy for objectionable conduct would be reviewed under the "Business Judgment Rule." Courts would not be allowed to substitute their judgment for that of the cooperative board of direc-



tors and shareholders so long as the cooperative's decision making was in the co-op's legitimate interests and was also taken in

good faith.

In a case decided by the Appellate Division, First Department on April 24, 2007, *___name of case___*, there was a significant follow-up to the *Pullman* decision. The First Department allowed the eviction of Steven Lapidus, a well-known real estate attorney, and his wife, from their cooperative apartment based upon long-standing "objectionable conduct" as found by the co-op shareholders.

The objectionable conduct included: chronic non-payment of maintenance obligations; installa-

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tion of a water cooling air conditioning unit which caused substantial water damage to both the apartment and the property of the shareholder tenant living below; and failure to comply with obligations pursuant to both the proprietary lease and various court ordered stipulations.

The cooperative met at a special shareholder meeting to consider whether or not Lapidus' proprietary lease should be terminated. Ninety-eight percent of the shares voted in favor of a resolution terminating Lapidus' proprietary lease. When the Lapiduses refused to vacate their co-op apartment, the cooperative com-

menced an action for eviction and sought attorneys' fees.

The trial court granted an eviction order and awarded the cooperative attorneys' fees. The important part of this decision is the Appellate Division's restatement of the Pullman rule. It reaffirmed that the court's judgment will not override the interests of the shareholders and board of directors as expressed by a valid resolution of the co-op. The court specifically held that there was no public policy interest in allowing a court to second guess a co-op's decision to terminate the proprietary lease of a shareholder who had engaged in prolonged and harmful objectionable conduct. Courts must defer to cooperative boards who act in good faith to protect and enforce the interests of

their greater constituencies vis-à-vis a single difficult shareholder, even if that shareholder is a seasoned and well-known real estate litigator.

Ed Baer is a partner in the Firm's Litigation Department and can assist cooperatives who are facing similar types of situations involving shareholders who are engaging in "objectionable conduct" as defined by their proprietary lease.



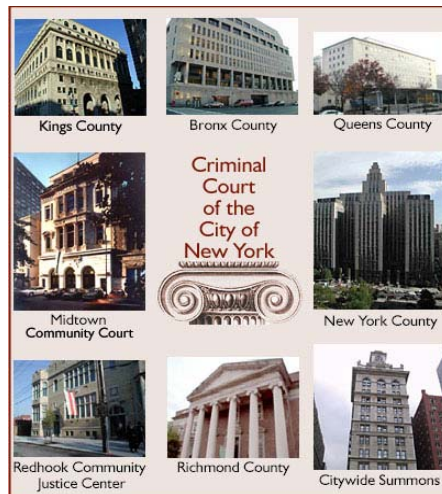
Administrative Update

Confronting Criminal Court

By: Ori Shapiro

Many owners are familiar with the Environmental Control Board, an administrative tribunal that adjudicates a variety of "quality of life" violations issued by the Fire Department, and the Departments of Buildings, Environmental Protection, Health, Parks, and other municipal regulatory agencies.

In recent years, New York City has resorted to a new forum for penalizing owners for Building and Fire Code violations – the



summons part of Criminal Court. Owners may unexpectedly find themselves part of the criminal justice system, in some instances, regarding conditions for which they have already paid an ECB fine. Considering that Criminal Court is uncharted waters for most owners, this article will help navigate the system for the uninitiated.

If served with a Criminal Court summons, an owner should

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identify the appearance date to assure proper representation in court. The owner should appear, or arrange representation, even if the owner believes that the conditions in question were already corrected, or are the subject of a proceeding pending in another venue. Ownership entities that are either corporations or partnerships must be represented by counsel in criminal (or any) court, and if necessary will be permitted to procure an adjournment for the purpose of obtaining counsel. Failure to appear at a Criminal Court hearing could result in the issuance of not only a default order but an arrest warrant.

The summons should be reviewed to determine whether there may be technical grounds for dismissal. Such grounds could include failure to correctly identify the ownership entity or the controlling statute, or improper service of the summons.

On the return date, and any subsequent adjourned date, the case will first be conferenced with an attorney from the office of the City's corporation counsel (or in some instances, with a Fire Department liaison), in an attempt to resolve the dispute. Cases are conferenced on a first-come, first-serve basis. The City will request evidence that the condition was

rectified, and will generally permit the case to be adjourned on at least two instances for proof of compliance. During these conferences, counsel may ask that the City dismiss the summons for one of the "technical" reasons stated above, or because owner can demonstrate that the condition was

Expeditious compliance could obviate the need for owners to confront the criminal justice system

rectified before the issuance of the summons.

Generally, before a matter is closed the owner will be asked to prove that the condition has been rectified. After the owner has demonstrated compliance to the corporation counsel's satisfaction, the parties negotiate a settlement which typically involves pleading guilty to a lesser offense, (an administrative code violation as opposed to a criminal code infraction), and agreement to pay a fine. Although, the maximum fine is prescribed by the Administrative Code, the City has discretion to accept a lesser amount based upon the severity of the violation and the speed in which the condition was corrected. Nearly all cases in this criminal summons part are ultimately settled and the judge will generally accept whatever pleas are negotiated between

counsel.

If the defendant named in the summons is an individual, the court will usually grant a "corporate substitution" changing the name of the defendant to the appropriate corporate entity, upon payment of the fine.

Having described the procedure for defending Building Department and Fire Department proceedings in criminal court, an important cautionary note should be sounded. Many of these proceedings and concomitant charges could be avoided if compliance deadlines set by the issuing agency are met in a timely fashion.

If an owner is unable to meet those deadlines, it should, at a minimum, document its efforts at compliance and be prepared to justify the lapse of time between notification of the underlying condition and its correction. Expeditious compliance could obviate the need for owners to confront the criminal justice system.

Orie Shapiro is an associate in the Firm's Administrative Department, and regularly handles these enforcement matters in the various administrative agencies and before the Criminal Court.



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