

What to Do if Your Residential or Commercial Tenant Files for Bankruptcy

Despite the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Reform Act"), which took effect on October 17, 2005, bankruptcy protection remains available to commercial and residential tenants who wish to discharge their rent arrears or seek to delay their eviction.

Since bankruptcy protection remains readily available, BBW&G recommends that owners keep a close eye on rent ledgers and not allow rent arrears to grow before seeking a money judgment and judgment of possession.

Obtaining a judgment of possession before a tenant files a bankruptcy petition (especially a residential tenant), will provide an owner greater flexibility in terms of money and time.

For example, if an owner has obtained a judgment of possession at the time its residential tenant has filed a

bankruptcy petition, the owner may be able to pursue the debtor-tenant's eviction as early as thirty (30) days following the date the bankruptcy petition is filed. This is because the Reform Act requires debtors in possession of residential property to file a certification, under penalty of perjury, stating that under non bankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor-tenant would be permitted to cure the entire monetary default that gave rise to the judgment of possession.

The Reform Act further requires residential debtor-tenants to deposit with the clerk of the court "any rent that would become due during the 30 day period after the filing of the bankruptcy petition." This deposit must be made to the court clerk within one business day of the debtor-tenant's filing for bankruptcy.

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When the Deceased Owes a Debt

In BBW&G's December 2004 *UPDATE*, we presented an article entitled "A Day In The [After] Life Where There Is No Will, There Is A Way (Part 2)" in which we addressed a procedure to obtain possession of an apartment when a tenant dies intestate (without a will).

Obtaining possession of the apartment is only one step of the equation after the tenant dies and

possession of the apartment is returned to the owner. Whether there is a will or not, tenants often die owing the owner a debt (rent arrears). The fact that the tenant dies does not relieve the tenant's estate from repaying the debt to the owner. If the tenant's estate has assets, it is possible to recover the rent arrears from the estate.

A case in point is BBW&G's

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Special Points of Interest:

- **Deceased Tenant's estate is responsible for repaying Tenant's debt.**
- **Obtaining rent increases from rent controlled tenants.**

Tenant Files for Bankruptcy . . .
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If a residential debtor-tenant makes such a certification and deposit of post-petition rent/use and occupancy, the owner may either (1) consent to receive the debtor-tenant's check or (2) object to the debtor-tenant's certification within ten (10) days.

In order for the debtor-tenant to avoid being evicted, the debtor-tenant must also do the following within thirty (30) days after filing a bankruptcy petition:

- ▶ Pay to the owner ***all*** money due under the judgment of possession; and
- ▶ After making full payment on the judgment, file with the clerk, and serve on the owner, a second certification stating that full payment has been made to the owner.

If a debtor-tenant makes the second certification that it has paid all money due under the judgment of possession, the owner may either (1) consent to receive the debtor-tenant's check or (2) object to the debtor-tenant's certification within ten days.

BBW&G recommends objecting to the certification and separately filing a proposed order directing the Clerk to release funds deposited by the debtor to comply with 11 USC §§362(B)(22) and 362(L)(1). The proposed order may be filed with the Court by Notice of Presentment so that a formal hearing is avoided and the owner's legal costs are minimized (a hearing is generally not required unless a party objects to the proposed order).

If the Bankruptcy Court upholds the owner's objection, the

automatic stay is immediately vacated and the owner may proceed with the debtor-tenant's eviction. The owner will also be entitled to receive the money deposited with the court by the debtor if the court signs the proposed order. If the tenant's certification is sustained, however, the automatic stay remains in place.

If the owner has not obtained a judgment of possession against a residential tenant when the debtor-tenant's bankruptcy petition is filed, BBW&G recommends that the owner file a Notice of Appearance with the Bankruptcy Court to ensure that the owner is advised of all submissions made in the bankruptcy proceeding. A Notice of Appearance is also necessary if the owner wishes to later file a Motion to Compel Payment of Post-Petition Rent or file a Motion to Lift the Automatic Stay.

If a residential or commercial tenant files for bankruptcy, the owner should also keep a close watch on the debtor-tenant's post-petition rent arrears (rent due since the date the debtor-tenant filed its bankruptcy petition).

If a debtor-tenant fails to pay post-petition rent, the owner may file a Motion to Compel the Payment of Post-Petition Rent and Additional Rent. Alternatively, the owner may file a Motion for Relief from the Automatic Stay.

Even if a debtor-tenant is paying post-petition rent, owners should continue to monitor the debtor-tenant's actions so that the owner may preserve its right to collect what is due. For example, an owner must not allow the time to file a proof of claim to expire without filing one. A proof of claim advises all other creditors about the debt owed to the owner and whether the

owner has priority over other creditors to be paid the amount due.

Although the Reform Act does not require a debtor in possession of commercial property to make certifications as stated above, the Reform Act does impose limits on the deadlines in which these debtors must assume or reject their non-residential real property leases.

U.S. Bankruptcy Code §365 (d)(4) states that if a debtor-tenant fails to assume an unexpired lease of non-residential real property within 120 days of its bankruptcy filing, the lease is automatically rejected unless the debtor obtains a one time ninety (90) day extension from the court or obtains written consent from the owner.

In sum, the Reform Act has made it easier for owners to obtain more economical and faster relief from the automatic stay.

Owners should still follow the steps outlined above in order to preserve their right to collect a debt owed to them, seek a debtor's eviction or compel the debtor to pay post-petition rent and additional rent.

This article was written by Joshua Losardo, an associate practicing in BBW&G's Administrative Law and Bankruptcy Departments. For questions relating to bankruptcy issues, please call Joshua Losardo, Stewart Smith or Daniel Altman.



Joshua Losardo

When the Deceased Owes a Debt . . .
(Cont. from p. 1)

representation of an owner who sought to recover possession of an apartment after the death of the rent stabilized tenant. The tenant's lease did not expire until several months after the tenant's death. Since an unexpired lease term becomes the personal property of the estate of the deceased tenant, in order to recover the apartment, a fiduciary must be named as a representative of the deceased tenant's estate. However, in this instance, the tenant had no family that the owner was aware of, nor did the owner know of the existence of a will naming an executor/trix to represent the tenant's estate.

As a result, the owner requested that BBW&G seek the appointment of the Public Administrator of New York County (the "PA") as the Administrator of the tenant's estate so that the owner could seek to recover the apartment from the PA, acting as the administrator of the tenant's estate.

Because the tenant had no family, the owner assumed, albeit incorrectly, that the tenant also had no money. Therefore, the owner's focus was on regaining possession of the apartment. The owner assumed that the significant

rental arrears that the tenant had accrued, both before and after his death, would simply go unpaid.

BBW&G filed a petition to have the PA appointed as the Administrator of the tenant's estate. Since the tenant had no family, the request went unopposed. Once appointed, the PA sends out investigators to

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inspect the deceased tenant's apartment, marshal the tenant's belongings and search for assets. In the course of conducting its investigation, the PA's office discovered that the tenant actually had bank accounts in excess of \$200,000.00. The PA's office advised the owner of this fact. The owner signed a Claim Against (the tenant's) Estate, stating the amounts owed by the dead tenant. This form requested that the Surrogate (the Judge who oversees estates) permit the PA to pay the owner the rental arrears. The Claim asked for the payment of almost \$11,000.00 as of the date of the filing of the Claim.

In this instance, the Claim was only filed one (1) month

ago, so it has not yet been paid. Pursuant to the Surrogate's Court Procedures Act, the fiduciary of an estate has ninety days from the date of receipt of a Claim against an estate to either pay it or reject it. If no response is made within the 90 day period, it is deemed a rejection. If a Claim is rejected, the party seeking payment can file a request with the Surrogate's Court for an accounting to force the fiduciary to explain why the request for payment went unpaid. We expect that our client will be paid shortly. As a result, monies that were assumed to be lost upon the death of the tenant will now be received by the owner.

This article was written by Stacey Bender and Martin Meltzer, partners in BBW&G's litigation department.



Stacey Bender



Martin Meltzer

Rent Control Increases Under the Maximum Base Rent Program

The Maximum Base Rent (MBR) Program, which began in 1972, and has been administered by the DHCR since 1984, is a program whereby owners are permitted to file for rent increases for their rent controlled apartments. It is a program that runs on a biennial cycle beginning with the even numbered year. If owners qualify, they will be issued Orders of Eligibility granting rent increases to pass along to their rent controlled tenants.

There are two dollar figures that govern a rent controlled unit. The first is the Maximum Base Rent (MBR); the second, and more important figure, is the Maximum Collectible Rent (MCR), which is the amount the rent controlled tenant actually pays each month.

Owners who qualify, are permitted to collect a 7.5% increase above the MCR for the first year of the two year cycle, and another 7.5% for the second year. The sole caveat is that the MCR can be equal to, but can never exceed, the MBR. Provided that the MBR amount is high enough, an owner stands to collect the full 15% increase over the term of the two year cycle. When compared to Rent Guideline Board adjustments for Rent Stabilized units, in recent years

the increases for rent controlled apartments have been significantly higher.

The first step for entry into the MBR program is to file a Violation Certification. The owner must certify that all rent impairing violations of record with the NYC Department of Housing Preservation and Development (HPD) have been cured. Additionally, at least 80% of the non-rent impairing violations must also be cured.

After filing the Violation Certification, the next step is to submit to the DHCR an Operation and Maintenance of Essential Services Certification (commonly referred to as the O&M Statement). This is a series of calculations that will determine whether the owner qualifies for a rent increase. The formula is essentially premised on the rent roll for the building as compared to the operating expenses over a 12 month period.

DHCR sets filing deadlines for both the Violation Certification and the O&M Statement. However, late filings will be accepted and processed, but with a penalty imposed. The penalty for a late filing that an effective date for the increase will be set prospectively, six months from the date of filing the Violation Certification, or three months from the date of filing the O&M Statement, if



there are no violations of record with HPD.

Upon the issuance of an Order of Eligibility, the owner will have sixty days to prepare the appropriate notice forms (Notice Form RN-26 or RN-26S), to serve upon each rent controlled tenant. The owner will also be required to prepare and file the Master Building Rent Schedule (Form RMB) with DHCR for each year of the cycle. The Master Building Rent Schedule sets forth a summary of the increases of both the MBR and MCR for each rent controlled tenant for each year of the cycle.

This article was written by Thomas J. Bannon, a Legal Assistant in BBW&G's Administrative Law Department. To discuss the MBR Program or re-entry into the MBR Program, please contact Martin Heistein or Thomas Bannon.

BBW&G NEWS

MAY I QUOTE YOU?



BBW&G Litigation Partner **Edward Baer's** "Post Eviction Remedies: Tenants Seek to Regain Possession" was the lead article in the April 2006 edition of "Landlord Tenant — New York; A Legal Reporter for New York Landlords." In addition to discussing tenant attempts to be restored to occupancy following eviction, Mr. Baer also addressed owner occupancy proceedings, settlement via stipulation and New York's "Pet Law." As to the Pet Law, Mr. Baer discussed *Gidina Partners LLC v. Marco*, where the court noted that the tenant seeking to cause the waiver of a "no pet" covenant in a lease must not only show that the pet had been in the apartment for 90 days prior to the owner objecting, but that the harboring of the pet must have been "open and notorious." A tenant who harbors the dog secretly in an apartment for 90 days will not be protected by the Pet Law, and the lease prohibition will be enforced.



Sherwin Belkin was quoted in Josh Barbanel's cover article in *The New York Times*' Sunday Real Estate Section "A New Chapter in the Face-Off Between Tenants and Landlords" regarding owner application to DHCR seeking to oust regulated tenants based upon an intention to demolish. After noting that BBW&G was handling more demolition applications than in the past [which he attributed to a busy real estate market], Mr. Belkin stated: "There is nothing dramatically new that is happening here...This is part of the balancing between tenant protections and private property rights." Mr. Belkin also responded to a question in Jay Romano's *New York Times*' Sunday Real Estate Section "Q&A" column regarding a co-op owner's right to have a standard TV antenna on the roof, despite the co-op's demand that it be removed. Mr. Belkin noted that "... unless the letter writer has some exclusive interest in a specific part of the roof, he would not have protection under the [Telecommunications Act of 1996]."



Aaron Shmulewitz also provided an "A" to a *New York Times* Real Estate Section "Q". Responding to the query concerning a co-op resident that had caused floods and fires, Mr. Shmulewitz said: "The co-op has the right to terminate a proprietary lease on the grounds that a shareholder's continued tenancy is undesirable, and to commence a holdover eviction proceeding to remove him from the apartment."

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