



Abandoned Tenant Property: What's An Owner to Do?

Residential and commercial owners often find that tenants do not vacate leased premises in "broom-clean" condition after an eviction or lease expiration. Tenants frequently leave some personal property behind, including furniture, fixtures and equipment. What is the owner to do?

Generally, most commercial and residential leases provide that when a tenant surrenders possession or vacates leased premises without removing its fixtures, title to all fixtures remaining on the premises becomes the property of the owner. However, this doctrine does not apply to the tenant's moveable personal property.

Simply because a tenant vacates possession without removing all of its personal property does not

automatically transfer ownership rights of that property to the owner. Instead, a constructive bailment is created because the law imposes an obligation on the possessor of the personal property to return the property to its rightful owner.

Under New York law, an obligation is imposed upon the owner to provide the former tenant with (i) notice and (ii) a reasonable opportunity to remove the property. The law is unclear, however, as to what constitutes reasonable notice and opportunity to remove the property. The courts tend to analyze each matter on a case-by-case basis depending upon the circumstances.

For example, where a owner stored its former tenant's personal

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Special Points of Interest:

- What responsibility does an owner have when a tenant leaves possessions in the vacated apartment?
- Do owners who have been assessed penalties under Local Law 38 have potential remedies in light of its having been struck down?

Lead-Based Paint Law: An Uncertain Update

In 1999 New York City enacted Local Law 38 of 1999, otherwise known as the New York City Lead Poison Prevention and Control Act ("Local Law 38"). Among other things, Local Law 38 required building owners to conduct annual inspections for lead-based paint hazards in apartments in which children under the age of six (6) years reside, required owners to correct all lead-based paint hazards, including those discovered in vacant apartments, and provided that if the New York City Department of Housing Preservation and Development ("HPD") conducts an inspection and discovers a lead-based paint hazard in an apartment, the owner

would be served with a violation notice for a Class C, Immediate Hazardous violation, which the owner would be required to correct within a specified period of time.

Local Law 38 proscribed safety standards for lead-based paint abatement less burdensome than the steps mandated by §173.14 of the New York City Health Code, and provided that if the owner failed to correct lead-based paint violations in the required time-frame, the owner could get more time to correct the violations using the more burdensome standards mandated by §173.14 of the New York City Health

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property for seven (7) months, the Court found that the owner acted reasonably and held that the tenant had no cause of action against the owner for conversion or negligence. The court indicated that at most, the owner became a gratuitous bailee, liable only for gross negligence.

Depending upon the circumstances, volume and nature of the property left at the premises, our firm typically recommends giving thirty (30) days notice to the tenant to come and remove their personal property from the unit or storage facility.

If safeguarding a tenant's property at the owner's building is not feasible, an owner, at its initial expense, may store the property at an independent facility. Under

these circumstances, the owner has a duty to exercise reasonable care in hiring and supervising the independent contractors moving and storing the property. In addition, the law implies an obligation on the part of the tenant to reimburse the owner for the reasonable cost for removal of the property.

These rules vary when a tenant is in bankruptcy or where the owner knows that third parties have duly filed UCC liens against a tenant's property. For instance, if the tenant abandons possession of its rented premises while in bankruptcy, an owner, or a bankruptcy trustee, must do more than just provide notice and an opportunity for the tenant to remove the property before it may be discarded.

Under Section §544 of the Bankruptcy Code, a party must

provide notice to the debtor, its creditors, and any UCC lien holder that property of the debtor's estate will be abandoned/discarded by filing a notice and scheduling a tentative hearing date with the Bankruptcy Court. Although a formal hearing is often not necessary, the notice requirement is mandatory in order to notify all parties that some of the debtor's property may be discarded.

With respect to duly filed UCC lienors, a owner should consult with counsel if the third party has a valid UCC lien against the tenant's property to determine if that property should be turned over to the UCC lien holder.

This article was written by Daniel Altman and Joshua Losardo

BBW&G NEWS



“MAY I QUOTE YOU?”



Daniel T. Altman, who practices in the firm's Transactional Department, was asked by *The Cooperator* to describe how to determine if a co-op or condo board is doing a good job. Mr. Altman suggested:

“First and foremost, ask if a building is run well from an operations standpoint. Is the super responsive? Are systems in good order? Are there good doormen and porters? Secondly, look at financials; is money spent efficiently? Is the board constantly asking for maintenance increases? That's usually a red flag.”

Mr. Altman did caution, however, that judging financial management must be in the

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context of today's economic environment, including skyrocketing real estate taxes and increased insurance and fuel costs.

Sherwin **Belkin** was quoted in a number of publications this past month.

The New York Times article "Less Space but More Rent? Court Says No" described the appellate decision in *Devlin v. DHCR and 302 East Third Street Associates*. This case, written about in the October and November issues of *BBW&G Update*, reversed DHCR and the State Supreme Court and denied an owner "a first rent" on a "newly created apartment" when the owner had reduced the former apartment by 86 square feet. Mr. Belkin stated that this decision "is absolutely precedent setting. It's undoing years of DHCR and judicial rulings." Mr. Belkin also advised owners:

... if you are unsure if your proposed reconfiguration will create a new unit you should consider obtaining an advisory opinion from DHCR before starting the construction.

Due to the *precedent* setting nature of the *Devlin* decision, it was also featured on *NY-1* as part of its "In the Papers" feature.

The Real Estate Weekly, in its article "Controversy Grows Over Mitchell-Lama" described the number of projects *soon* eligible to leave the M-L Program, and the proposals being floated by both the City Council and the Mayor to impede the "as of right" exit from Mitchell-Lama. Commenting on the two proposal, *REW* reported:

My reaction to both proposals is the same," said **Sherwin Belkin**, who recently negotiated a successful conversion agreement at Waterside Plaza ...When the government makes a bargain with private industry to develop housing, the government ought to honor that bargain. When it made the bargain 20 years ago, it said "At the end of the 20 year period you can leave." When you reach the 20th year and the government tried to change the rules, there is something wrong with that. I think these proposals are just different shades of the same problem.

The New York Times also quoted Mr. Belkin in its article "The Knottiest Cases of Owner v. Tenant." Describing a non-primary residence trial that had been won by BBW&G's **Jeffrey L. Goldman** for client **Mann Realty Associates**, in large part, via use of a hidden motion activated video camera focused upon the apartment door, Mr. Belkin stated:

But the tape demonstrated that the tenant was only seen entering or exiting 17 times over the three months [the very period that the tenant had testified, at a pre-trial deposition, that she was residing, full time, in the apartment]...Needless to say, the court found that the apartment was not her primary residence.

The Times' "Q & A" column also asked Mr. Belkin to explain which charges, in addition to a rent stabilized tenant's base rent, would be included in determining if the tenant had reached the \$2000 threshold where the tenant might be subject to luxury deregulation. Mr. Belkin described the difference between charges included in the rent

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(like electricity) and surcharges (like air conditioning) which are not part of the legal regulated rent.

The Apartment Law Insider described Mr. Belkin's having obtained an advisory opinion from DHCR confirming the right of owners, by virtue of the change in law this past June, to discontinue a preferential rent on renewal of a rent stabilized lease, even if the prior lease explicitly stated that renewal rents would be limited by the reduced rent.

Martin J. Heistein was certified as a Real Estate Instructor by the New York Department of State. **Sherwin Belkin**, also a Certified Real Estate Instructor, taught **The Real Estate Board's** course on rent regulation; part of its qualifying series for obtaining a broker's license.

Kara Rakowski was quoted in the *Apartment Law Insider's* regarding DHCR's new Fact Sheet pertaining to preferential rents, rent concessions and pro-rated rent discounts.

Lead-Based Paint Law:
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Code, or HPD would correct the violations at the owner's expense.

Local Law 38 also provided for imposition of civil penalties against owners of \$250.00 per day per violation, from the date originally set for correction of the violation until the date the violation is corrected, up to a limit of \$10,000.00 per violation, and fines of no less than \$10,000.00 and no more than \$25,000.00 for each false certification made to HPD by an owner that lead-based paint violations have been corrected.

In July 2003, the New York Court of Appeals, in *New York City Coalition to End Lead Poisoning v. Vallone*, declared Local Law 38 unconstitutional, on the grounds that proper procedures were not followed by the City Council in the enactment and passage of the subject legislation.

As a result, and until the City Council enacts new legislation governing lead-based paint in New York City, this very important topic is in a state of flux as the

various special interest groups attempt to ensure that their respective interests are adequately protected by whatever new legislation is enacted.

Both the Court of Appeals and the litigants in *New York City*



Coalition to End Lead Poisoning v. Vallone acknowledged that with Local Law 38 being struck down, the less than ideal Local Law 1 was revived. Local Law 1, which requires a "lead-free" environment, was nearly universally acknowledged as not creating a viable approach to protecting children, as that law required covering or removing all lead-based

paint, including the walls or trim on which it was affixed, whether the paint was intact or not, thereby often causing the occurrence of the very contamination that the abatement techniques were aimed at curing.

From a practical standpoint, building owners who have been assessed civil penalties for lead-based paint violations which have not been corrected, as required by Local Law 38, or have been assessed civil penalties for falsely certifying lead-based paint violations as corrected, may be entitled to try to have the Court that imposed the penalty revoke it and direct a refund of penalties paid, because the penalties were assessed pursuant to Local Law 38. Since that law was declared unconstitutional, it would seem to also be unconstitutional to assess penalties based on the legislation. In fact, earlier this Fall, citing the Court of Appeals decision, an appellate court in Brooklyn reversed civil penalties of \$30,000.00 assessed against an owner for false

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certifications of corrections.

However, the fact remains that even if the civil penalties under Local Law 38 are voided, owners may still have liability for civil penalties under other provisions of law. For example, Housing Maintenance Code §27-2115 provides for civil penalties of \$170 to \$225 per day per violation, from the date for correction of the violation until the date the violation is corrected, and there is no cap on penalties under §27-2115. In addition to penalties which may be incurred under Local Law, an owner may be subject to liability for damages incurred by a child contaminated by lead. Therefore, depending on how much time has elapsed between the original date for correction of the lead-based paint violations and the date the viola-

tions are corrected, there is the possibility of exposure to civil penalties far in excess of those imposed under Local Law 38.

At this time, with Local Law I requiring that an owner “remove or cover in a manner approved by the department [the lead-based paint]”, if an owner suspects lead paint in an apartment with a child six (6) years old or younger, or if a violation is issued for presumed lead-based paint violations in such an apartment, it is imperative that immediate steps be taken to retain a qualified lead paint abatement company to abate the lead-based paint.

Until the City Council acts and new legislation is put in place governing abatement of lead-based paint in New York City, the method of abatement to follow will depend on the particular facts of the situation, (such as whether

a violation has issued, whether children age six or under are in the affected apartment, and whether any prior steps for lead-based paint abatement have been undertaken).

We do suggest that owners with potential lead paint issues (a) discuss the situation with their attorneys, (b) that any abatement follow the safety standards mandated by either Local Law 38 or by §173.14 of the New York City Health Code, and (c) that building owners be proactive and continue to conduct annual inspections for lead-based paint hazards in apartments in which children under the age of six (6) years reside.

This article was written by BBW&G partner Robert T. Holland, who practices in the firm’s Litigation Department. For more information concerning the abatement of lead-based paint violations, please contact

THINK YOU KNOW THE LAW?

**Many laypersons fancy themselves experts
when it comes to the Law.**

Can you answer these “legal” questions?

1. Who played the robotic gigolo in Steven Spielberg’s “*AI: Artificial Intelligence?*”
2. Who is the defensive star unceremoniously cut by the New England Patriots just prior to the beginning of the 2003 football season?
3. Who is the New England Patriot defensive back who remained with the team?
4. Who is the sassy UK chef who now shares her recipes each week with readers of *The New York Times*?
5. What is the Boston based chain of oceanic restaurants?
6. Who was one of the starting pitchers for the 1960 World Series winning Pittsburgh Pirates?

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