



## Take Two Non-Payments, and Call Me in the Morning

Owners are sometimes faced with tenants that repeatedly withhold rent. Clients ask: "What can be done to make such a tenant pay the rent in a timely fashion?" The client really means: "What can be done to change the tenant's behavior?" and "How can I alter the tenant's perception so he understands that it is his obligation to timely pay the rent?"

Over the years, BBW&G has heard a myriad of excuses from tenants for not timely paying the rent when due. Regardless of the reason proffered for the failure to pay rent, the "psychology" of litigation plays an important role in getting the tenant

to timely pay the rent. In other words, zealous legal representation has the potential of changing the tenant's chronic poor payment pattern.

Case in point: BBW&G represented a cooperative corporation against shareholders of an apartment located in Soho. The shareholders believed that they were entitled to withhold maintenance because of alleged conditions on the roof. The shareholders had withheld approximately \$20,000 in maintenance comprising about one year's worth of maintenance. The co-op began a non-payment

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## Lights! Cameras! Litigation? Dealing With Production Companies

Because New York City is a media center and is often used as the backdrop for films, television programs and commercials, City property owners may be approached by production companies with a request to utilize a portion of a building or an apartment for filming. During Fashion Week, owners are sometimes asked for use of a portion of the property for photography shoots or even as a fashion show venue. Owners should be aware that it is advisable

to obtain a written agreement with the production company, laying out all of the rights and responsibilities of the owner, the tenant and the production company.

We recommend that, at minimum, the owner obtain the production company's proof of adequate insurance (naming of the owner as an additional insured on the policy), appropriate indemnities, sufficient security deposit and, perhaps, a fee for the use of the prem-

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### Special Points of Interest:

- Proof of adequate insurance is crucial when dealing with production companies.
- Landlord-Tenant law continues to evolve in the appellate courts.
- Enforcing your legal fees provision can be a key to enforcing a tenant's lease obligations.

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proceeding against the shareholders. This first case was settled by stipulation, which permitted the shareholders to pay the co-op the \$20,000 in two installments over the course of thirty days. No abatement was given.

The shareholders were, apparently, unhappy with the settlement. So, after they made full payment, they immediately began withholding maintenance again. Bad behavior.

In the second non payment proceeding, the shareholders alleged that there were rent impairing conditions and that they were not obligated to pay the co-op maintenance. After extended motion practice and a three-day trial, the Judge awarded the co-op a money judgment in the amount of \$72,000 in maintenance, without any abatement, a judgment of possession and warrant of eviction. The shareholders' counterclaims and defenses were dismissed, with prejudice.

Despite the co-op's efforts to settle the legal fees and other issues, the shareholders brought a Supreme Court action against the co-op for injunctive relief and damages.

You probably get a sense of where this is going. Despite losing twice, the shareholders' behavior got more aggressive – more bad behavior.

Instead of capitulating, with BBW&G's advice, the co-op aggressively opposed the shareholders' legal action. Ultimately, the shareholders

gave up on their Supreme Court case, BBW&G restored the second non-payment case and obtained an award of \$38,000.00 in legal fees.

However, the shareholders refused to pay the judgment, apparently believing that they were entitled to ignore a judgment – more bad behavior.

The shareholders left the co-op no alternative but to enforce the judgment. BBW&G located the bank



which held a mortgage on the shareholders' co-op and informed the lender that unless the default of the non payment of \$38,000 was paid pursuant to the recognition agreement, the co-op would begin foreclosure proceedings against the shareholders, sell the apartment and thereby recover its legal fees.

Shortly after BBW&G's default notice was served on the lender, the lender paid the entire judgment and several thousand dollars in interest. The co-op was paid the \$72,000 judgment for unpaid maintenance and recovered about \$41,000 from the lender for its legal fees.

Since then, the shareholders have timely paid their maintenance and we have not been back to housing court. No more bad behavior.

Another unique case required drastic measures to modify a tenant's behavior, and put an end to three years of litigation. In this scenario, a rent-stabilized tenant compelled the owner to bring three non payment proceedings before the tenant's payment pattern changed.

The first non-payment could not be settled and went to trial. The tenant, who lives above a bar, asserted that he did not have to pay any rent because the bar patrons made disruptive noise, cigarette smoke and odors permeated into his apartment, and the noise caused by the dropping of beer kegs on the sidewalk in front of the bar from the delivery truck was disturbing. The tenant also claimed that the building's Certificate of Occupancy was defective; allegedly barring the owner from collecting rent.

This was another tenant who needed a behavioral change.

The case went to trial and the trial judge awarded the owner a judgment of possession for the full amount of rent and dismissed the tenant's counterclaims. As the prevailing party, the owner was entitled to the reasonable legal fees that it incurred. At first, the tenant refused to pay any legal fees. However, at the legal fees hearing, the judge was able

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to persuade the tenant to reimburse the owner for \$3,500 in legal fees.

After going through a losing battle, you would think that this tenant would now comply with his lease. However, immediately after the conclusion of the first case, the tenant withheld rent again—more bad behavior—raising the same reasons as in the first case, plus a complaint of lack of hot water, to explain his refusal to pay rent.

Instead of going to trial, the owner thought it would be best to settle the case, giving an abatement for the lack of hot water and installing a new hot water heater. The owner believed that its good faith efforts to restore a more amicable relationship would be appreciated. Unfortunately, the tenant saw this olive branch as a sign of weakness.

After paying the balance of the rent due, the tenant withheld rent again – more bad behavior. As the saying goes:

“No good deed goes unpunished.”

So, case no. 3 against this tenant ensued. The tenant, represented by new counsel, asserted that the owner was not entitled to collect any rent because the building’s Certificate of Occupancy was not in conformance with its current use and that there were unsafe and dangerous structural damages to the building adversely affecting the tenant’s health and safety. Like the first case, the tenant refused to settle and a trial ensued.

After a three day trial, with an expert engineer and architect testifying on the owner’s behalf, the court granted a judgment to the owner for the full amount of rent, dismissing all of the tenant’s defenses and counterclaims, with prejudice. Ultimately, the tenant agreed to pay \$25,000.00 to compensate the owner for its legal fees.

Since then, the tenant has been paying his monthly rent

on time. It took three cases and the tenant’s payment of the owner’s legal fees – but, no more bad behavior.

These tenants thought that they were justified in withholding their rent. However, the courts eventually agreed that the owner’s legal position was correct. These tenants’ behavior drastically changed for the better after they lost their respective cases and were made to pay legal fees. They realized that by asserting unrealistic or unproven positions they would not only end up paying their rent, but they would also have to pay thousands of dollars in legal fees and have judgments entered against them; judgments that could potentially hurt the tenant’s future credit rating.

By enforcing the lease and pursuing the legal fee provision, it is possible to change a tenant’s bad payment behavior. An owner should not sit idly by and wait until the tenant decides to pay the rent that is owed. Vigorous legal

## 2003: An Appealing Year

### I. Introduction

Several significant decisions in landlord-tenant law were issued in 2003 by New York State’s highest court (the New York Court of Appeals) and the Appellate Division for the First Judicial Department (which covers Manhattan and the Bronx). Two of those decisions – *Devlin v. New York State Division of*

*Housing and Community Renewal* [pertaining to “newly created apartments”] and *Zvink, Horton, Guibord, McGovern, Palmer & Fognani v. Sheraton Holding Corp.*, [pertaining to constructive eviction] – have been addressed in prior issues of BBW&G’s UP-DATE. Other cases of interest to owners include the following.

### II. Co-ops

*40 West 67<sup>th</sup> Street v. Pullman* was a case in which the Court of Appeals reiterated its holding, first articulated in *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, that the business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corpora-

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ises.

When a production company comes into a building, various employees may enter, and equipment may be used which makes demands upon the electrical usage of the building. The production company's presence may disrupt other tenants in the building or may cause damage to the building. These issues must be addressed, in advance, to avoid disputes later on.

We recommend that an owner have an agreement between itself and the production company, restricting the manner and use of the premises. This may mean that filming can only be done at certain times and at certain hours and on certain days. It may also mean that only certain portions of the building can be utilized by the production company.

It is also important that the owner be certain that all of the employees and/or contractors involved with the production company are covered by the production company's insurance. In the event that there is a personal injury on the premises, the owner does not want to have a claim asserted against it by one of these outside contractors. Proof of insurance is an important ingredient to any of these types of agreements.

In recent months BBW&G has been ap-

proached by several owners whose tenants were asked to appear in reality television shows. These suddenly popular reality television shows often use the tenant's apartment for a "makeover." This "apartment makeover" can include painting with nonconforming colors, wallpapering, carpeting, built-ins or other items of a similar nature. Does this constitute an im-



permissible alteration? Who is responsible for restoration when the tenant vacates? These potential violations of a tenant's lease must be addressed, in advance, to avoid disputes later on.

It is important to realize that an owner does not have to allow a tenant to make changes to an apartment or, to allow a production company to make use of common areas of the building without permission. Owners certainly have the leverage necessary to try to extract the elements of an agreement that will protect an owner from any damage caused by the production company.

We also recommend that the owner obtain a security deposit so that if there is any damage to the property, the security deposit can be utilized to compensate for the damage which occurs. Owners may also want to ask for an administrative fee from a production company to cover any expenses associated with having the production company in the building.

Owners should also be mindful of the changes and alterations that any production company intends to make in a tenant's apartment. The lease may restrict the types of work that can be done in the apartment without the owner's permission. The owner should require the production company to be specific about the scope of work to be done in the tenant's apartment before allowing any such work to be done.

An owner should certainly be aware of and closely guard its rights and obligations when allowing a production company to utilize a building or an apartment.

*This article was written by BBW&G partner, Edward Baer, who practices in the firm's Litigation Department. Mr. Baer has represented various owners in their dealings with production companies.*

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tions.

*Pullman* involved a decision by a cooperative corporation to terminate a shareholder's tenancy on the grounds that the shareholder had engaged in objectionable conduct by commencing a series of lawsuits against the tenant who lived above him, the president of the cooperative corporation, and the cooperative management. After the shareholder ignored the Notice of Termination that had been sent by the Board of Directors requiring him to vacate, the Board commenced an action in the Supreme Court, New York County, for possession and ejection. The Supreme Court dismissed the complaint, finding that the cooperative was required to prove its claim of objectionable conduct by competent evidence to the satisfaction of the Court.

The cooperative appealed, and the Appellate Division, First Department, reversed, and granted summary judgment to the co-op on its causes of action for ejection. Two Justices of that Court, however, dissented, thereby allowing the shareholder to file an appeal with the Court of Appeals, as of right.

The Court of Appeals subsequently agreed with the majority of the Appellate Division, holding that the business judgment rule applied, and that therefore, the cooperative could terminate the shareholder's tenancy without having to prove to a judge that the tenant's conduct was objectionable.

In another case involving a

cooperative housing corporation, *James v. Jamie Towers Housing Co., Inc.*, the Court of Appeals ruled that the cooperative could not be held liable for injuries suffered by the guest of a tenant who had been attacked while in the building. The Court held that the cooperative discharged its common-law duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties by providing locking doors, intercom service and 24-hour security.

### **III. Rent Stabilization**

#### **I. Statutes of Limitations**

On a procedural issue of particular importance to owners of rent-stabilized apartments, in February 2003, in *Crabtree v. DHCR*, the Court of Appeals reiterated its position that DHCR cannot review matters that arose more than four years prior to the filing of a rent overcharge complaint.

The Appellate Division, First Department came to the same conclusion in *Hatanaka v. Lynch*. In *Hatanaka*, the Supreme Court had granted a tenant's petition to vacate a determination by DHCR, upholding the initial stabilized rent charged by the landlord. The Supreme Court remanded the matter to the agency to consider the rental history of the subject apartment for more than four years prior to the filing of the rent overcharge complaint by the tenant. The Appellate Division unanimously reversed adhering to a strict four year rule

standard.

In another statute of limitations case, the Appellate Division, First Department, held that a tenant's claim that her landlord had falsely assured her that her apartment was rent stabilized when, in fact, it was not, was untimely. In *Suero v. Fort I Group, LP*, the Court held that since the alleged misrepresentation had been made when the tenant signed her first lease in 1977, her fraud claim was time barred. The Court further found that the tenant did not have standing to challenge the conversion of the building into a co-op because she did not live there at the time.

#### **2. Luxury Decontrol**

The Appellate Division also clarified the Luxury Decontrol Law in two key decisions handed down in 2003. In one case, *Classic Realty LLC v. New York State Division of Housing and Community Renewal*, the Appellate Division held that when a landlord makes an initial unsuccessful application to decontrol an apartment under the Luxury Decontrol Law, the landlord was not entitled to a further inquiry when the tenant, thereafter, amends a previously submitted tax return which is then administratively certified to qualify the tenant to remain rent stabilized.

In the other case, *A.J. Clark Real Estate Corp. v. DHCR*, the Court held that the relevant date for determining the number of permanent occupants primarily residing in an apartment for purposes of determining

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ing the aggregate, household income, is the date that the landlord serves the Income Certification Form (“ICF”) on the tenant. Thus, the Court found that DHCR could only consider the income of the one person who was living there in March 2000, when the ICF was served.

### **3. Primary Residence**

There were two interesting decisions on the issue of primary residence in 2003. In the first case, *Herald Towers LLC v. Sun Lord International, Inc.*, the Appellate Division held that, notwithstanding the fact that the nominal tenant was a corporate entity not entitled to a renewal lease, there was a question of fact as to whether the individuals actually occupying the apartment were the “contemplated tenants.” That question of fact could only be resolved at trial.

In that connection, the Court noted that the lease provided that the “Apartment shall be occupied only by the Tenant and the immediate family of Tenant, for living purposes only”; and that for twenty years, the rent had been paid by the occupant—not the corporation. Accordingly, the Court refused to grant the owner a judgment of possession without a trial, simply because the lease was in the name of the corporation.

Interestingly, in the second case, *501 East 87<sup>th</sup> Street Co., LLC v. Ole Pa Enterprises, Inc.*, which was decided just four weeks later—albeit, after a trial—the Court came to the

opposite conclusion: *i.e.*, that despite the fact that the individual occupants had resided in their rent-stabilized apartment for twenty years, because the tenant named on the lease was a corporation, and because the lease did not specify a particular individual as the occupant, the landlord was entitled to possession. The Appellate Division affirmed the judgment of possession entered by the trial court. In addition, the Appellate Division upheld the trial court’s award of attorneys’ fees and use and occupancy to the owner.

### **4. Nuisance**

In January 2003, a majority of the Appellate Division held in *Domen Holding Co. v. Aranovich* that three incidents of objectionable conduct by an occupant of a rent-stabilized apartment over a five-year period did not, as a matter of law, constitute a nuisance under the Rent Stabilization Code. The objectionable conduct involved three altercations—one with another tenant; one with the doorman; and one with the superintendent of the building which necessitated police intervention, and resulted in the filing of a criminal complaint. Notably, two of the justices of the Court dissented, finding that the complained of conduct did raise an issue of fact, such that the case should not have been summarily dismissed but should have gone to trial.

In November 2003, the Court of Appeals reversed, and restored the complaint. Agreeing with the two dissenting justices of the Appellate Division,

the Court of Appeals held that the owner should be given the opportunity to prove at trial that the occupant’s conduct posed a threat to others in the building, such that the tenant should be evicted.

### **IV. Lofts/Land Use**

The Appellate Division also handed down two significant decisions relating to lofts and land use in 2003. In the *Mason v. Dept. of Buildings of the City of New York*, the Court held that a tenant who had rented out a portion of his residential loft as a recording studio to third parties was not engaged in a “home occupation.” Accordingly, the Court held that the tenant’s use of the loft violated the applicable Zoning Resolution.

In *Wolinsky v. Kee Yip Realty Corp.*, the Court held the tenants’ lofts were not covered under the Emergency Tenant Protection Act (“ETPA”), since the lofts were located in an M1-5B zoning district permitting use only for light manufacturing and joint living-work quarters. Because the tenants did not claim to be artists or covered by the Loft Law, the Court held that they could not claim protection under the ETPA, since ETPA coverage does not extend to tenancies that are illegal due to the zoning restriction and incapable of becoming legal.

### **V. Commercial Tenants**

There were two interesting decisions in the area of commercial landlord-tenant law in 2003. In the first case, *Bombay Realty Corp. v. Magna Carta, Inc.*

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the Court of Appeals held that the term “gross sales” in a lease for a retail store that sold cellular telephones, pagers, charges, and other related accessories, did not include the full value of service contracts with wireless providers that were sold by the store. Since the store’s customers paid the wireless provider directly, the Court of Appeals reasoned that the retailer’s gross sales only included the commissions it received from the sale of the plans.

In another notable commercial case decided last year, *The Vermont Teddy Baer Co. Inc. v. 538 Madison Realty Co.*, the Appellate Division held that a commercial tenant was entitled to cancel its lease after a partial building collapse rendering the space unusable. The collapse occurred on December 7, 1997. The lease provided that the tenant could cancel it if the premises were not restored within

one year after notification to the landlord. The lease did not require the landlord to formally notify the tenant when the restoration was complete.

The tenant’s notice of its intention to cancel the lease in one year was sent on December 16, 1997. In response, in January 1998, the owner advised that the repairs had begun and that it would notify the tenant when the building was ready for occupancy. However, the owner never sent the notice. Accordingly, the tenant canceled the lease.

In the ensuing litigation, the Appellate Division—with one justice dissenting—agreed with the tenant. While acknowledging that the lease did not specifically require the owner to notify the tenant when the restoration was complete, the Court held that in viewing the lease as a whole, it was clear that the tenant was entitled to formal notification that the store was ready. Since no formal notification had

been sent, the Court held that the tenant was within its rights in canceling the lease one year after it had notified the owner of its intentions.

## **VI. Conclusion**

These are but a sampling of the significant landlord-tenant cases decided by the Court of Appeals and Appellate Division in 2003. If these decisions demonstrate any consistent theme, it is that landlord-tenant law is constantly evolving. If, indeed, further evidence is needed that the evolution will continue in 2004, three of the cases decided by the Appellate Division in 2003, and discussed in this article [*Classic Realty, Vermont Teddy Bear and Wolinsky*], will be heard at the Court of Appeals in the coming year.

*This article was written by Magda L. Cruz and Jay H. Berg, who handle BBW&G’s appellate practice.*

## **BBW&G NEWS**

### **“MAY I QUOTE YOU?”**

**Errol Brett**, who heads BBW&G’s Coop/Condo Department, was asked by *The New York Times*, in its “Q&A” Column, to comment on the potential for removal of a co-op’s board members, whom the letter-writer suggested were not fulfilling their responsibilities. Mr. Brett explained that most co-op bylaws do not permit the board itself to remove members; rather “That can only be done by the shareholders.” Mr. Brett also explained the special rules that come into play if the building’s bylaws call for cumulative voting. **Mr. Brett’s** representation of a shareholder against his board was also the subject of a *New York Times’* article “A Dog’s Gotta Bark And Tenants Gotta Fuss.” The board claimed that the shareholder’s dog was a nuisance because it barked excessively. However, after a six day trial before Judge Peter Wendt, the shareholder prevailed. Noting that complaints were lodged against the dog even while it was away from the building (at a pet boarding center), Mr. Brett stated: “The dog had an alibi.”

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