



Past Pooch Doesn't Permit Present Pup

As most owners are aware, Section 27-2009.01(b) of the Administrative Code of the City of New York (the "Pet Law") permits a tenant to maintain a pet in the tenant's apartment, regardless of a "no pet" provision in the lease, if the owner fails to commence a holdover proceeding against the tenant within three (3) months of the owner first acquiring knowledge that the tenant is harboring the pet. Specifically, the statute says:

Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet or pets, the harboring of which is not prohibited by the multiple dwelling law, the housing maintenance or the health codes of the City of New

York or any other applicable law, and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived.

Unfortunately, it has become increasingly difficult for an owner to overcome the waiver caused by the Pet Law, since several recent cases have held that the knowledge of the building superintendent, porter, doorman, or other employees, is imputed to the owner. Further, building staff do not always report the presence of pets in a timely fashion. Thus, if a doorman knew

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Commercial Landlord Protected By Full Disclosure of Potential Disturbance From Neighboring Manufacturer

In a recent decision by the Appellate Division, First Department, *Girlshop, Inc. v. Abner Properties Company, et al.*, a commercial tenant (Girlshop, Inc.), running a high-end lingerie business, sued the owner and another commercial tenant (a jewelry manufacturer) over excessive noise and vibration caused by the jewelry making machinery. However, the plaintiff found itself without a remedy.

At the inception of the tenancy, the owner had fully disclosed the nature of the other tenants of the building, and in particular, the jewelry manufacturer.

While the lease agreement generally barred tenants from causing disturbances, it did not bar those "arising in the ordinary course of the [tenant's] business."

Girlshop claimed that its lingerie business was suffering due to the ongoing noise and vibrations emanating from the jewelry manufacturer's machines overhead. Despite the evidence of its inability to conduct its business, the Supreme Court dismissed Girlshop's claim. The Appellate Division affirmed,

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Special Points of Interest:

- Does the Pet Law create a waiver for all pets?
- Steps to take to avoid "HP" fines.
- Rents of multiple apartments can be combined to reach luxury deregulation threshold.

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(or should have known) for more than three (3) months that a tenant was keeping a dog in the apartment, the owner is deemed to have known of the dog for the same period of time, even if the doorman did not report it to the owner. The owner will be found to have waived its right to object to the presence of the dog pursuant to the Pet Law.

Furthermore, the Appellate Division, First Department's decision in *Seward Park Housing Corp. v. Cohen*, has made it even more difficult for owners to enforce the "no pet" provisions of their tenants' leases, since the Court held that even the knowledge of an independent contractor (who is not an agent of the owner) can be imputed to the owner, even if the contractor never communicates such knowledge. Therefore, even if an owner hires an "outside" contracting company to do repair work in its building, any knowledge of a pet acquired by the contracting company's employees may be imputed to the owner, even if the contracting company's employees never tell the owner about the pet and even if reporting such knowledge is outside the scope of their contracted duties.

However, owners should not despair, as there is a partial silver lining to the grey "Pet Law" cloud. Just because an owner has waived its right to enforce the "no pet" provision of a tenant's lease with respect to Pet #1, the owner is *not* precluded from seeking to enforce the "no pet" lease provision should the tenant

subsequently acquire Pet #2, 3 or 4.

In *Park Holding Co. v. Emicke*, the Court specifically held that just because an owner had waived its right to object to the presence of one pet, the owner had not waived its right to object to the presence of "future pets not yet in the premises." The Court stated that:

The provisions of the Pet Law do not supersede or vitiate a "no waiver" clause where the landlord has promptly objected to the subsequent violation. Any waiver under the law is more properly limited to existing pets which are part of the household.

In *Emicke*, the tenants improperly maintained a dog, a Great Dane named Xam, in their apartment, but the owner had waived its right to object to the presence of the dog by failing to timely bring an eviction proceeding against the tenants. Xiam died and shortly thereafter, the tenants obtained a new puppy, Xam II. Two days after the tenants obtained the puppy, the owner sent a letter advising the tenants that their new pet was being harbored in the tenants' apartment in violation of the lease. Upon the tenants' failure to remove the new dog from their apartment, and the service of the proper predicate notices, a hold-over proceeding was commenced.

The lower court granted summary judgment in favor of the tenants, holding that by failing to timely object to the first dog, the owner had waived its right to ever enforce the "no pet" provision of the lease. However, in reversing



the trial court, the Appellate Term, First Department, specifically stated that "[a]bsent express language in the Pet Law, a second lease violation should not be "deemed waived" because landlord acquiesced in or waived the first."

The Court's holding in *Emicke* is the law with respect to "replacement pets" in the First Department (Manhattan and the Bronx). Therefore, if an owner has a tenant who has been permitted to keep a pet, the owner should make sure that its building staff is fully aware of the type of pet the tenant has, as well as the breed, height, weight, name of the pet and any other distinguishing features of the pet. That way, should the building employee see the tenant with a pet that differs from the permitted pet, steps can be immediately taken to compel the tenant's compliance with the "no pet" provision of the lease with respect to the replacement pet.

This article was written by Stacey E. Bender, who is a partner in the firm's Litigation Department.

How to Mitigate Fines During the Heating Season

Spring may be here, but winter does not end for City owners until May 31st. The City's Department of Housing Preservation and Development (HPD) inspectors continue to be out in full force to enforce the Housing Maintenance Code (HMC) with regard to tenant complaints of lack of heat and hot water.

Owners need to continue to provide heat to its residents during the heating season which runs from October 1st through May 31st every year. During this eight month period, owners are obligated to maintain every portion of their buildings used or occupied for living purposes in compliance with the rules and the regulations of the HMC for heat and hot water, among other required services.

This obligation can put owners at risk for undeserved civil penalties when a mechanical breakdown to a boiler or furnace occurs. HPD's inspectors immediately respond to tenant complaints of cold apartments or no or sporadic hot water. If an HPD inspector finds that the temperature in the apartment deviates from the required temperature set in the HMC (at least 68 degrees Fahrenheit when the outside temperature falls below 55 degrees Fahrenheit between 6 a.m. and 10 p.m. and at least 55 degrees Fahrenheit when the outside temperature falls below 40 degrees Fahrenheit between the hours of 10 p.m. and 6 a.m), a violation will be placed for every HMC deviation. Once a violation is placed, this triggers HPD's code compliance unit (the City's attorneys) to begin legal proceedings against the property

owner. This is called an "HP" action.

HPD does not re-inspect the building or apartment to determine if the owner conducted the remedial work. Rather, the case commenced against the owner is often brought days or even weeks after the violation(s) have been corrected. The City will seek civil penalties in the amount of \$250.00 a day for each lack of heat or hot water violation recorded from the date in which the violation(s) was/were placed by HPD's inspector.

Despite an owner's diligence in immediately remedying the violation and restoring heat or hot water to the building's apartment(s) the City will, nonetheless, continue with its action against the owner. The City routinely requests that a minimum fine be imposed regardless of the owner's immediate repairs.

Property owners can take two paths to deal with this type of City enforcement. The owner can settle the case with the City, paying what is usually a nominal fine (\$250.00). Or, the owner may seek dismissal of the action.

For owners who want to defend the action there is hope. Section 27-115(k)(3)(ii) of the HMC provides property owners with a defense to unwarranted fines. Section 27-2115(k)(3)(ii) provides: "the owner shall be responsible for the correction of all violations placed pursuant to article eight of subchapter two of this code, but in actions for civil penalties pursuant to this article may, in defense or mitigation of such owner's liability for civil penalties, show that he or she began to correct the condition

which constitutes the violation promptly upon discovering it, but that full correction could not be completed expeditiously because of technical difficulties, inability to obtain the necessary materials, funds or labor, or inability to gain access to the dwelling unit wherein the violation occurs, or such other portion of the building as might be necessary to make the repair."

Thus, the fine or civil penalties can be avoided when, for example, there is a sudden mechanical failure to a boiler or furnace and the owner has promptly taken action to correct the condition responsible for the lack of heat or hot water to the building's residents. If an owner can show that it began to correct the violation promptly after the breakdown was discovered, the owner can effectively mitigate the amount of the fine or avoid having to pay the fine altogether. If the owner's attorney can demonstrate to the court that the owner immediately restored hot water or heat to the building in compliance with the HMC, the court is unlikely to permit the City to collect the fine.

Recently our firm successfully defended a property owner which was cited with a violation for its failure to provide heat to an apartment. The City was seeking \$250.00 per day from the date the City's inspector recorded the violation — a period of 46 days. Despite the violation having been corrected on the same day that the violation was recorded, the City, without re-inspecting the building, brought the case. The owner's boiler contractor restored heat to the building within four

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holding that Girlshop was aware of the existence of the jewelry manufacturer before it signed its lease. The noise and vibration that Girlshop found objectionable were direct incidents of the jewelry manufacturer's operations, which Girlshop must accept and adapt to. As the Appellate Division explained:

Goldman is a jewelry manufacturer and, as the

lease acknowledges, its ordinary operations include the casting and stamping of jewelry. Disturbances arising from these operations – the very disturbances about which plaintiff complains – are thus not actionable under the lease.

In this case, full disclosure protected the owner's interests. The complaining tenant remained liable under its lease agreement, and the owner was not required to impair another tenant's operations,

or to make costly renovations to diminish the disturbance. The Court held an incoming commercial tenant accountable when it is made fully aware of the nature of neighboring businesses. So long as those other business operations are consistent with the neighboring tenants' businesses, the existence of those operations will not be actionable by the new tenant.

This article written by Appeals

How to Mitigate Fines . . .
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days of the initial breakdown. The owner did not want to pay any fine and felt that the City was unreasonable in its demand for payment. We presented evidence to the court that the cause of the lack of heat to the building was promptly fixed. The evidence was not rebutted by the City. The judge dismissed the case.

Property owners should be aware that getting this type of case dismissed means that proper documentation of the repair must be kept. Evidence which supports a showing that a violation was

corrected includes: (a) dated repair receipts from a contractor specifying the type of work performed; (b) proof of payment of the repair; (c) an affidavit from the owner, its superintendent or even the complaining tenant which states the date the repair was made, or that the tenant is pleased with the repair. In some cases, where the mechanical failure occurs in a larger building where the repair may be more complicated or a part unavailable, proof that the necessary parts were ordered may be sufficient. In instances where the owner knows that heat may not be restored

within 24 hours, it may be prudent to provide space heaters to tenants and keep the tenants informed about the owner's efforts to fix the problem. Maintenance records and contracts are also useful to show that an owner has exercised prudent care in providing essential services to its residents.

Of course, the best way to avoid problems is to take good care of the building and building systems. Preventive measures will, undoubtedly, reduce the number of tenant complaints and law suits brought by the City.

This article was written by

Reach Luxury Deregulation Threshold by Total Legal Rent

One interesting issue concerning high rent/high income deregulation concerns tenants that occupy multiple rent stabilized apartments in a building, but the legal rent for each unit is less than \$2,000. Are such apartments subject to potential deregulation? Yes!

If the multiple apartments are used as a single family residence, and the combined legal rent is \$2,000 or more, then all of the apartments are subject to potential deregulation if the \$175,000 income threshold is met.

In an appeal our firm recently won, *Bianchi v. DHCR, Mayfair York,*

LLC and 36 Gramercy Park Realty Associates, LLC, the Appellate Division issued a unanimous reversal on this very issue. DHCR had combined the rents of two apartments it determined were used as a single family unit and found that the income exceeded the threshold, such that a deregulation order was issued. However, the Supreme Court annulled DHCR's deregulation order on judicial review.

On appeal, the appellate court found that the two apartments constituted a single residence for regulatory purposes and were subject to deregulation by the

combining of the rents to reach the \$2,000 threshold even though the apartments were separately leased, separately registered, separately billed for rents and had different tenants of record.

Although this may seem to be an arcane situation, owners who become aware of multiple apartments being used as a single family residence should consider petitioning all of the apartments for deregulation if the combined rent exceeds \$2,000.

This article was written by Sherwin Belkin, who, with Magda Cruz and Philip Billet, represented the victorious

“May I Quote You?”

David M. Skaller was quoted in a *New York Times* article pertaining to the practice of “apartment swapping.” Mr. Skaller cautioned that such a practice constituted a sublet, such that the rules and regulations mandating prior written notice to the owner, owner review and prior consent applied.

Robert Jacobs offered his advice in *The New York Times* article regarding garages in residential buildings; noting that both the C of O and the Multiple Dwelling Law could impact that ability to offer garage spaces to non-residents.

The Apartment Law Insider quoted **Kara Rakowski** regarding the notice requirements under the new lead paint law.

ALI also quoted **Martin Meltzer** pertaining to compliance with the expanded SCRA and its impact upon the filing of an “affidavit of non-military investigation” regarding a defaulting tenant.

The Cooperator quoted both **Daniel T. Altman** and **Errol A. Brett**. Mr. Altman discussed the importance of communication between a co-op board and its shareholders, as well as the process of evaluating a managing agent for experience and expertise. Mr. Brett addressed the requirements under the Business Corporations Law to ensure that a board election is conducted properly and fairly.

Both **Martin J. Heistein** and **Sherwin Belkin** were featured speakers at **The Rent Stabilization Association’s** recent seminar “Managing Rent Regulated Property in NYC: Increasing the Bottom Line / Maximizing Your Return.” Mr. Heistein discussed major capital improvements, individual apartment improvements rent increases, as well as exemption from rent regulation via substantial rehabilitation. Mr. Belkin addressed high rent/high income deregulation and high rent/vacancy deregulation.

Mr. Heistein also lectured at **The Real Estate Board** regarding the history and impact of rent regulation upon NYC housing.

The New York Times “Q & A” column posed several questions that were addressed by **Sherwin Belkin**. As to the tenant complaining about too much heat, Mr. Belkin noted that “The law regarding heat refers to minimum temperatures, not maximums...Therefore, while it does not appear that the owner is violating the [heating] law, he does seem to be wasting money by creating heat beyond the legal minimum.” As to the market rate tenant who said she had been told that her landlord could not raise her rent beyond certain limits on renewal, Mr. Belkin advised that the tenant has been misinformed because “a non-regulated rent is basically determined by what the owner wants to receive and what a tenant is willing to pay.”

Matthew Brett, who practices in the firm’s Litigation Department, was appointed to the **Housing Court Committee of The Association of the Bar of the City of New York**.

Joshua Losardo was quoted in the *New York Post’s* “Don’t Panic” column pertaining to a tenant’s question regarding the effect of an exhaust vent on an adjoining property. Mr. Losardo noted that it is unlikely that the tenant would have a viable claim under the warranty of habitability as to a condition neither caused, controlled nor owned by the tenant’s landlord.

Our firm was noted in *Development NY* as counsel to **Elad Properties** (which was featured as “Firm of the Month”) regarding its development at 655 Sixth Avenue.

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Legal Update
May 2004