



Get The Rent Right When Bringing a Non-Payment Proceeding

Have you ever commenced a non-payment proceeding against a rent stabilized tenant only to be met with a counterclaim for rent overcharge? You not only do not have your rent, but now you face the prospect of treble damages being imposed. Didn't the tenant agree to the rent reserved in the lease after reviewing the Rent Stabilized Rider which demonstrated how the rent was calculated? The tenant may have even faithfully paid this rent for months or even years, prior to defaulting on his or her obligations. What went wrong?

There are several possible explanations. Either the tenant is making things up in an effort to delay the proceedings, or the landlord miscalculated the rent at the time the lease was prepared. If the tenant is

mistaken, disingenuous, or delusional, then the false allegations may be quickly put to rest, provided that the Owner has maintained the proper documentation to rebut the allegations. However, the owner may have miscalculated the legal rent when the lease was prepared, in which case, a whole host of troubles, including treble damages and the prospect of having to pay the tenant's legal fees, may await.

Upon vacancy of a Rent Stabilized apartment, an Owner is allowed to offer the incoming tenant a "vacancy increase" of 20% for a two-year lease, or, for a one-year lease, a percentage calculated as 20% minus the difference between the increases allowed under the applicable Rent Guidelines Board

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Succession Claim Defeated: Close Friend, But Not Quite Family

Shortly after purchasing a building, an owner determined that one of its rent controlled tenants had, years earlier, vacated the apartment and moved to California to pursue an acting career. The owner commenced a non-primary residence holdover proceeding.

The occupant of the apartment claimed succession rights as a non-traditional family member. During pre-trial discovery, the occupant disclosed that she and the tenant had been close friends since 1963, when they were high school students. The occupant also alleged that the tenant was godfather to

her two children, and that after her divorce, she gave up another apartment in Manhattan and, in 1982, moved into the subject apartment with the tenant, ostensibly to see if their relationship could develop into more than a close friendship.

The tenant and the occupant lived together for approximately ten (10) years, during which time they shared rent and utility expenses, and held numerous dinner parties with their mutual actor friends (when the tenant was not in California pursuing acting jobs). By

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Special Points of Interest:

- Improvements rent increase and long term vacancy increase require careful documentation.
- To create new apartment and obtain "first rent," under Rent Stabilization, appellate court says *obliterate* the old unit.

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Order for a two-year lease renewal and the one-year lease renewal. Depending upon the applicable facts, an Owner may be entitled to other additional rental increases on vacancy, such as for improvements made to the apartment or the long term vacancy bonus.

[Please see Thomas Bannon's article in this Update for a more detailed explanation of the vacancy increase under the most recent Guideline.]

But Owners sometimes run afoul of the permitted increases in their calculation of the rent. The question remains: How can an owner insure that it maximizes the rent increases it is allowed by law, without facing the prospect of an overcharge claim down the road?

Where an owner makes improvements to a Rent Stabilized apartment, as opposed to repairs, the owner is allowed to charge the tenant an "individual apartment increase." Section 2522.4(a) of the Rent Stabilization Code ("RSC") permits an increase of 1/40th of the cost of the "increase in services, or

installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodations."

On vacancy, no tenant approval is required for an individual apartment increase. DHCR's Fact Sheet No. 12, entitled "Rent Increases for New Services, New Equipment or Improvements to an Apartment," specifically states that "the owner does not have to get either prior approval by DHCR or written consent of a tenant to collect the 1/40th increase, for improvements made while the subject apartment is vacant." For improvements made during a tenancy, written consent of the tenant is needed. In neither context is DHCR required to approve the increase.

However, individual apartment increases may be challenged in the context of a tenant overcharge complaint or as a tenant's affirmative defense or counterclaim to a non-payment proceeding.

DHCR's Policy Statement 90-10 delineates DHCR's method for confirming costs on individual apartment improvements (should those costs be challenged by the

tenant) by the owner's submission of one of the following documents:

- (a) cancelled check(s) contemporaneous with completion of the work
- (b) invoice receipt marked paid in full contemporaneous with the completion of the work;
- (c) signed contract agreement;
- (d) contractor's affidavit indicating that the installation was completed and paid in full. In the case of a trial in court, the contractor would have testify and bring original records.

An area of frequent trouble is that the 1/40th increase is only allowed for improvements. Repairs and/or maintenance will not provide the basis for a 1/40th rental increase. The Rent Stabilization Law and Code do not provide much guidance as to the distinction, nor are "improvement" or "repair" defined terms in the statute. Therefore, while replacing the countertops and cabinets in the kitchen or installing new appliances has been held to be an improvement, replacing a worn linoleum floor in the kitchen or

Reduction in One Year Vacancy Allowance

Rent Guideline Board Order (RGO) No. 35 commences October 1, 2003. One change that should be noted is that the Vacancy Allowance for a **one year vacancy lease** has been reduced from 18% to 17%. The two year vacancy allowance remains at the statutory 20%.

Specifically, the Vacancy Allowance increase authorized by the Rent Regulation Reform Act of 1997 (RRRA) established a 20% vacancy allowance over the prior legal regulated for all two year vacancy leases. For a one year vacancy lease, the vacancy allowance is calculated by taking the difference between a one year and two year renewal lease increase, as promulgated by the RGO, and subtracting that from the 20%.

Since 1997 (RGO# 28) through the RGO# 34 (which ends September 30, 2003) the difference between one and two year renewals has always been 2%, resulting in a 18% vacancy allowance for one year vacancy leases. However, RGO #35 authorizes a 7.5% increase for two year renewals and 4.5% for one year, a difference of 3% (7.5% less 4.5%=3%). It is this 3% difference that reduces the vacancy allowance for all one year vacancy leases, commencing on or after October 1, 2003 through September 30, 2004, to 17% (20% less 3% = 17%).

This article was written by Thomas J. Bannon, a Legal Assistant in BBW&G's Administrative Law Department.

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painting the apartment is generally not. A review of administrative and judicial precedent is necessary in order to discover how particular items have been treated.

DHCR often disallows 1/40th increases based upon labor performed by the owner's employees. There are exceptions. For example, where an owner can demonstrate that the work performed was not within the scope of the employee's regular duties, that the employee was paid separately for such work and the amount paid is reasonable, the employee's labor cost may be recoverable as part of the 1/40th increase. Even then, the owner may encounter difficulty in being awarded the increase. The owner may face similar difficulties if it has a relationship with the contractor who performed the work. In order to have a chance of prevailing on a challenge, it is imperative that the owner keep detailed records and ample documentation.

An equally perplexing problem arises where the owner replaces an improvement which had recently been made. DHCR has determined that some improvements have a "useful life", in other words, the period of time during which DHCR deems a particular improvement should last. While there is no set schedule for the useful life for particular improvements made to an individual apartment, DHCR will most likely look for guidance in the "useful life" schedule for Major Capital Improvements as codified at RSC §2522.4(a)(2)(i) (d). The purpose behind such "useful life" schedule is to prevent an owner from obtaining

successive rental increases for making the improvements which are not necessary because the same work had recently been done. Therefore, it is imperative that the Owner is familiar with the last time a particular improvement was made.

Whether an owner has properly claimed 1/40th increases pursuant to Rent Stabilization Code § 2522.4(a) frequently arises in the context of a civil court non-payment proceeding. This overcharge claim can arise years after the tenant has been in occupancy. Therefore, it is imperative that an owner accurately record and maintain records in connection with the improvements, materials and goods in connection with the apartment. This includes retaining contracts, invoices, statements, receipts, checks used for payment, detail of the work performed, and other indicia of what was done to the apartment, the cost of such work, and the payment of such cost.

Another permitted rent increase pertains to a tenant, who has occupied a Rent Stabilized apartment in excess of eight (8) years and then vacates the premises. The owner is entitled to collect a "long term vacancy bonus" pursuant to RSC §2522.8 (a), which is in addition to the vacancy allowance. The long term vacancy bonus is calculated at the rate of 0.06% multiplied by the number of years since the owner last took a vacancy increase. For example, if the last vacancy increase was twelve years ago, and the rent at the time the long term tenant vacates is \$200 per month, the increase is arrived at as follows: $.06\% \times 12 \text{ years} = .72\% \times \$200 = \$14.40$ long term vacancy bonus.

Additionally, in the event

there has not been a vacancy bonus since the date the premises became subject to the Rent Stabilization Law, the owner has the option of taking the long term vacancy bonus as described above, or basing such increase at the .06% for each year there has been no increase since the premises fell within the jurisdiction of the Rent Stabilization Law. In addition, if the prior rent was below \$300.00, the owner is entitled to take an additional \$100.00 per month increase. In the event the prior rent was between \$300.00 and \$500.00, the Owner is entitled to increase the entire vacancy bonus so that it is no less than \$100.00 per month. [See, RSC §2522.8(a); section 19 of the Rent Regulation Reform Act of 1997, section 26-511(c)(5-a) of the New York City Administrative Code.]

The percentage of the increase allowed pursuant to the vacancy increase and long term vacancy bonus may be added together and then used to multiply the prior rent. For example, where the long term tenant had resided in the premises for 12 years and had a rent of \$500.00 per month, and the new tenant executes a two-year lease, the vacancy increase is calculated as follows: $.06\% \times 12 \text{ years (long term vacancy bonus)} + 20\% \text{ (vacancy allowance)} = 20.72\% \times \$500 = \$103.60$ (for a new pre-improved rent of \$603.60). Thereafter, for allowed improvements, add 1/40th of the cost of each allowed improvement to the pre-improvement lawful rent.

In order to avoid being on the defensive, calculate your rent increases carefully, and where improvements are made or long term vacancy increases are claimed, be sure to keep copious

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the early 1990's the tenant's acting career saw him spending more and more time in California, so he purchased a house in California and stopped returning to Manhattan.

Over the next seven (7) or (8) years, the occupant lived alone in the apartment, but neither the tenant nor the occupant told their landlord that the tenant had left or that the occupant was claiming rights to the apartment. The occupant paid the utility charges herself. To pay the rent, she deposited money in the tenant's checking account, and then the tenant mailed rent checks, in his own name, each month.

At trial, the owner, represented by BBW&G partner Robert T. Holland, argued that although the tenant (who appeared to testify on the occupant's behalf on her succession claim) and occupant had a long-standing, close friendship, their relationship had not risen to the level of "non-traditional family members", because there was no proof of both a financial and emotional commitment and interdependence.

Judge Maria Milin agreed, finding that the trial testimony established that the tenant and occupant's relationship was not really that of "non-traditional family members", but rather "life-long 'best friends'". Judge Milin pointed to trial testimony which established that during the latter period of their co-occupancy of the apartment, the tenant and occupant were involved in long-term romantic relationships with other people. In fact the tenant had formalized his relationship with an individual in California by registering as domestic partners and transferring his California home into joint ownership with his domestic partner.

Moreover, Judge Milin observed that the trial testimony established that the tenant and occupant had never formalized their relationship with each other, had never co-mingled their finances, held joint bank accounts, or owned property jointly, and had never formalized legal obligations by naming each other as executors or beneficiaries under wills or by granting each other powers of attorney.

Although finding that the tenant and occupant were "close,

devoted and life-long friends", and that the importance of each to the other was credibly testified to by the tenant, the occupant and the occupant's son (who was also the tenant's godson), Judge Milin ruled that, nevertheless, the occupant was not entitled to succession rights as a "non-traditional family member", because she had failed to demonstrate the necessary emotional and financial interdependence between herself and the tenant. As a result, the owner was granted a judgment of possession.

This case demonstrates that succession rights by a would-be non-traditional family member places the burden upon the claimant to establish more than just long term co-occupancy and a close relationship. The nature of the relationship is at issue, and must be borne out by proof of *both* financial *and* emotional interdependence. Absent all of those elements being proven, the succession claim must fail.

This article was written by Robert T. Holland, who practices in BBW&G's Litigation Department, and successfully represented the owner at trial in the above-described case, Riverside Holdings, LLC v. Jansen, et. al.

BBW&G's Transactional Department Closes Air Rights Transfer

In mid-October, BBW&G successfully represented a seller of "air rights" to the developer of an upper East Side condominium high-rise.

Under the New York City Zoning Resolution, a property owner with excess floor area is permitted to transfer that excess floor area as development rights to the owner of a parcel contigu-

ous for at least 10 feet in the same (or less restrictive) zoning district. The excess floor area is commonly known as "air rights" or "development rights", which is actually a more appropriate term. The transferred floor area can be used by the purchaser to increase the size of its building beyond that otherwise allowed under the Zoning Resolution.

The transaction was structured for the seller as a tax-deferred like kind exchange under Section 1031 of the Internal Revenue Code.

This article was written by Robert Jacobs. The air rights transaction described in this article was handled by Mr. Jacobs, along with BBW&G's Ann E. Ryan.

Appellate Ruling on “First Rent” For “Newly Created Unit”: Part 2

The October *Update* discussed the Appellate Division’s decision in *Devlin v. DHCR and 302 East 3rd Street Associates, LLC*. You will recall that Justice Peter Tom, writing for the unanimous Court, had opined that an apartment that had been reconfigured, such that it was 86 square feet smaller, was not a newly created unit, and, therefore, was not entitled to be assigned a “first rent” because the reconfiguration had not resulted in “the obliteration of the prior apartment.”

This decision reversed DHCR’s having ruled that the owner was entitled to a first rent, because DHCR had found that a “newly created unit” had resulted from the reconfiguration. The decision represents a stunning departure from long-standing administrative and case precedent.

What is an owner to do in light of this decision? Certainly, the decision has created uncertainty as to the rental ramifications of a reconfigured apartment. But, by focusing upon the factors that the Court seized upon, some guidance can be obtained.

The Court focused upon the fact that, although the prior one bedroom apartment was now nearly 90 square feet smaller, it had remained a one bedroom apartment. The Court compared this reconfiguration with other instances where not only had the dimensions of an apartment been changed, but the room count had been changed as well.

Therefore, pending further clarification of this issue by the courts and/or DHCR, owners wishing to reconfigure a vacant apartment so as to create a new

unit and an entitlement to a “first rent” should consider not only a significant increase or decrease in the square footage of the apartment (which was the criterion that DHCR had historically looked to), but also an increase or decrease in the number of rooms in the new apartment as well (which seems to be a key factor in the *Devlin* Court’s analysis). In addition, if an owner is unsure if the proposed reconfiguration will suffice to create a new unit, the Owner may want to consider seeking an Advisory Opinion from DHCR before proceeding.

This article was written by Sherwin Belkin, who practices in BBW&G’s Administrative Law Department.

BBW&G NEWS

The New York Times described a recent decision by Judge Cyril K. Bedford regarding the rights of owners to recover loft apartments. Judge Bedford held that an “owner occupancy proceeding” could only be brought on behalf of an owner for the owner or a family member that qualified as a certified artist. BBW&G’s **Joseph Burden**, who represented the owner, was quoted as stating that the owner will appeal this decision inasmuch as this requirement has largely been ignored by the City’s Department of Buildings regarding tenant renters (as confirmed by various City officials in *The Times* article), but now was being selectively and strictly imposed against a would-be owner occupant.

Sherwin Belkin was a guest speaker at the New York State Bar Association’s Committee on Landlord and Tenant Proceedings. **Mr. Belkin** spoke about the recent legislative changes affecting rent regulation.

WELCOME ABOARD!

Ms. Romina Matlis has joined BBW&G as an association in the firm’s Transactional Department. **Ms. Matlis** will be working on conveyances, leasing and financing.

Ms. Rachel A. Rabinowitz has joined BBW&G as an associate in our Litigation Department. **Ms. Rabinowitz** has been a litigator for nine years and has appeared in the Civil Court, Supreme Court, Appellate Division, DHCR and HPD.

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