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UPDATE

BBWG

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WE'RE GOING GREEN

We are now offering the BBWG Newsletter online. If you would still like to receive a print copy, please contact Larry Tricerri at **ltricerri@bbwg.com.**

LITIGATION UPDATE

SANDY'S AFTERMATH: WHAT DOES IT MEAN FOR YOU, THE LANDLORD?

By David Skaller and Craig Gambardella

In the wake of "superstorm" Sandy, residential and commercial landlords throughout the New York City metropolitan area have contacted us with various questions and concerns regarding the challenges faced by them and their colleagues since the "superstorm" first touched down on our shores on Monday, October 29, 2012. Most importantly, it is our hope that you, your families and friends are all safe and have fully recovered or are in the process of fully recovering from the storm, the likes of which have never been seen by this City. Please know that we are here to help you with any issues or problems you may have encountered because of Sandy.

This article is intended to highlight some of the issues confronting New York City landlords who have been impacted by Sandy. Resolution of

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LITIGATION UPDATE

IS THERE A WAY TO EVICT A TENANT FOR FAILURE TO PAY RENT OTHER THAN THE NONPAYMENT PROCEEDING?

By Martin Meltzer

When a tenant does not pay rent, an owner will request its attorney to prepare a rent demand to start the nonpayment eviction process. There are times when an owner is confronted with a tenant who does not pay rent many times during the year or over the course of many years. As a result of the multitude of nonpayment proceedings and the legal expenses associated with bringing multiple proceedings over many years, clients often ask their attorney if they just have to accept the constant rent delinquencies as a "cost of doing business."

The answer is absolutely not. There is a type of holdover case that can be brought against a tenant for

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these issues will necessarily vary based on the facts of each particular case, so we encourage you to contact us to discuss particular circumstances in greater details, as there are no conclusive answers in many of these unprecedented situations.

Many, if not all, New York City buildings south of 40th Street in Manhattan went without power for days, if not weeks, after Sandy dissipated. Moreover, some of these buildings, as well as many buildings in the outer boroughs, still do not have power. Additionally, many buildings, particularly those close to coastal areas, lost heat, hot water and natural gas services. Some of these buildings were also flooded, causing tremendous damage to building systems which, in some cases, triggered the City and State to declare such buildings "uninhabitable." These "uninhabitable" buildings were required to be evacuated by all tenants.

Based upon these events, the questions most frequently posed to our attorneys since Sandy include:

- Does the warranty of habitability apply to events such as Sandy, which are out of a landlord's control (i.e. natural disasters)?
- Does a tenant get an abatement if s/he chose to remain in his/her rented apartment without electricity, heat and/or hot water during Sandy?
- Would there be a 100% abatement if the tenant chose to leave, although the building only lost electrical service? Does it make a difference what floor the tenant was on?
- Is a tenant who sublet his/her apartment entitled to a rent abatement?
- Is there a difference, with regard to liability under the warranty of habitability, if the tenant chose to leave the apartment as opposed to being required to leave through an order issued by a governmental agency?
- What effect, if any, does an abatement have in a business interruption insurance claim which a landlord may make to its insurance carrier?
- What effect, if any, is there to a business interruption insurance claim if a landlord permits and accepts a tenant's surrender of possession?

- Should a landlord offer all of its tenants rent abatements/credits or should it only offer rent abatements/credits to those tenants who ask for one?
- Is a tenant entitled to terminate the lease based upon a building being rendered temporarily uninhabitable? Does it make a difference if the tenant is subject to rent regulation, free market tenant or commercial?
- Is a landlord entitled to terminate a residential or commercial lease, based upon a building being rendered temporarily uninhabitable?
- What is a "one (1) dollar order" issued by DHCR?
- Can rules limiting hours when work can be performed in a building be suspended so that emergency repairs can be performed early morning or late night?

These are just a sampling of the many issues that "superstorm" Sandy has presented to our clients. Therefore, it is imperative that you communicate with your attorneys prior to speaking about your buildings' situation with your tenant(s) so that a well thought-out global strategy is implemented.

Although the magnitude and scope of the damage caused by Sandy may have been devastating for many, it is our objective to help mitigate the damage through the exercise of considered legal counsel.

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IS THERE A WAY TO EVICT A TENANT FAILURE TO PAY RENT OTHER THAN THE NONPAYMENT PROCEEDING?

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the tenant's chronic, habitual rent defaults. It is called a holdover proceeding. There are two courses of action that an owner can take to pursue chronic rent defaults. One seeks to have the tenant cure his or her rent defaults. The other seeks to terminate the lease and tenancy.

For background purposes, prior to May 8, 1997, the courts permitted tenancies to be terminated based on facts where an owner was compelled to bring case after nonpayment case against a tenant just to collect rent. The law changed as a result of the May 8, 1997, decision by the Court of Appeals in *Sharp v. Norwood*. In this case, the landlord claimed that the tenant's chronic tardiness in meeting her monthly rental obligations constituted a "nuisance" warranting eviction pursuant to the New York City Rent and Eviction Regulations (Rent Control Laws). The housing judge dismissed the case and the landlord appealed to the Appellate Term. The Appellate Term reversed and sent the case back to the housing judge, on the ground that "chronic late payment and nonpayment of rent may constitute a nuisance warranting eviction if not adequately explained by the tenant." After the trial, the housing judge again dismissed the case, concluding that the landlord did not prove any conduct by the tenant that "would rise to the level of nuisance behavior." At the next level of appellate review, the Appellate Division agreed with the Appellate Term and housing judge. The judgment of dismissal stood. The landlord continued to appeal and was granted permission to appeal to the Court of Appeals, the state's highest court. The Court of Appeals agreed that the landlord failed to prove its claim of nuisance. The specific harm the landlords claimed to have suffered as a result of the tenant's conduct was that it was repeatedly forced to institute nonpayment proceedings and to serve rent demands on the tenant to collect chronically late rental payments.

THERE ARE TWO COURSES OF ACTION THAT AN OWNER CAN TAKE TO PURSUE CHRONIC RENT DEFAULTS. ONE SEEKS TO HAVE THE TENANT CURE HIS OR HER RENT DEFAULTS. THE OTHER SEEKS TO TERMINATE THE LEASE AND TENANCY.

The Court of Appeals suggested that the facts might have supported an eviction proceeding on the ground that the tenant violated a "substantial obligation" of her tenancy. The landlord did not assert this ground in its holdover petition. The Court of Appeals further observed that the landlord opted to pursue its remedy in the context of a nuisance case and that it was required to establish that the tenant's conduct "interfere[d] with the use or enjoyment" of their property. The record having been absent of any evidence on this issue required the dismissal of the case. The Court went on to say that it did not and do not decide whether chronic late payment or nonpayment of rent, when combined with aggravating circumstances, could ever support an eviction proceeding for a "nuisance" within the meaning of the New York City Rent and Eviction Regulations.

With this backdrop, cases for chronic rent delinquencies are commonly brought as a breach of a substantial obligation of tenancy case, as opposed to nuisance cases. In a breach of substantial obligation of tenancy case, the remedy, whether the case goes to trial or settled by stipulation, is a probationary period where the tenant is given strict parameters to pay the rent over the length of the probationary period. If the tenant abides by the terms of the probation and pays the rent on time, the lease and tenancy will be reinstated. If the tenant defaults under the probation stipulation or court order, the tenant may be subject to being evicted.

In the nuisance case, the goal is to obtain the termination of the lease and tenancy. In order to prevail in this case, similar to the breach of the substantial obligation of tenancy case, an owner must be able to prove to the court the prior rent defaults, prior court cases resulting in unabated judgments and that there were no rent impairing conditions in the apartment during the relevant period of time. Additionally, as a result of the 1997 Court of Appeal's decision, an owner is required to prove that the chronic rent defaults interfered with the owner's use and enjoyment of its property combined with aggravating circumstances, in order to prevail in this type of nuisance case.

Anytime an owner considers bringing a chronic nonpayment holdover it is very important to fully analyze the facts, including the effect of the tenant's chronic rent delinquencies. Unfortunately, the Court of Appeals did not give any guidance as to what the Court meant by "aggravating circumstances," thereby leaving a great deal of latitude for the trial court to determine whether this undefined burden has been met.

Martin Meltzer (mmeltzer@bbwg.com) is the head of BBWG's Nonpayment Department and a partner in the Firm's Litigation Department.

ELECTRONIC RECORDING COMES TO NEW YORK

By Craig L. Price and Michael Shampan

As you may recall from our article on electronic recordings in New York State in our January 2012 newsletter, on September 23, 2011, Governor Cuomo signed legislation (Senate Bill 2373A and Assembly Bill 6870A) which authorizes county recorders to record instruments affecting real property that are submitted as a "digitized paper document" or as an "electronic record."

This law provides that signatures made via electronic means will be just as legally binding as handwritten signatures are now. According to the Electronic Signatures and Records Act ("ESRA"), an electronic signature is an electronic sound, symbol or process attached to or logically associated with an electronic record and adopted by a person as their signature.

The new law, codified as Real Property Law section 291-i ("Validity of Electronic Recordings"), took effect on September 29, 2012. Although several counties have instituted this legislation, there are still counties that do not yet accept electronic recording of digitized paper documents or electronic records.

As of September 24, 2012, the Westchester, Rockland, Monroe and Erie County Clerks are accepting all land records electronically. However, counties in New York City are not expected to permit electronic recording until 2013, at the earliest. Other counties will continue to follow in implementing electronic recordings as they prepare and implement their budgets for the upcoming year.

New York State standards require each submitter of electronic records to register with each separate recording office, in order to participate in electronic recordings. Electronic delivery also requires electronic payment of filing fees with a pre-authorized debit account. For example, when submitting electronic records for recording, Westchester County requires the submission of a registration agreement, which will take approximately one week to process, before one can begin electronic submission. Counties such as Westchester County are also setting up classes designed to train users interested in learning more about electronic recording.

As rules are further refined in the upcoming months, BBWG will continue to provide further details to our clients.

Craig L. Price (cprice@bbwg.com) is a partner and Michael Shampan (mshampan@bbwg.com) is an associate in the Firm's Transactional Department.

TRANSACTIONS AND CASES OF NOTE

MATTHEW BRETT, a partner in BBWG's Litigation Department, obtained a favorable decision in a non-primary residence holdover case against a hotel stabilized tenant. The tenant had sought dismissal of the case based upon a DHCR order in which the owner was directed to issue a renewal lease to the tenant. The tenant argued that because the owner had not issued a renewal lease in accordance with the DHCR order, there was no relevant *Golub* period and, therefore, a non-primary residence case could not be commenced. The Court rejected this argument based upon MR. BRETT'S demonstration that the Rent Stabilization Code does not require owners to issue renewal leases to hotel stabilized tenants. In a non-primary residence case where there is no renewal lease in place for a hotel stabilized tenant, the owner may serve the tenant with a 90-Day Notice of Termination, in lieu of a *Golub* Notice. Given that the owner had appropriately served a 90-Day Notice of Termination in this case, the Court denied the tenant's motion to dismiss. KARA RAKOWSKI and ALYSSA SANDMAN, a partner and an associate, respectively, in the Firm's Administrative Law Department, prepared a DHCR Request for Reconsideration challenging the legality of the underlying DHCR Order. The Request for Reconsideration was granted by DHCR.

RENT DEPOSITS AND RPAPL § 745(2)

By Brian Clark Haberly

Many landlords are by now familiar with the rent deposit requirements of RPAPL § 745(2). Specifically, this statute provides that in a summary proceeding, upon the second request for an adjournment by a tenant (or after the proceeding has been pending for thirty days), the Court, upon an application by the landlord, shall direct the deposit with the Court (or if the building has twelve or fewer units, payment directly to the landlord) of the amounts of rent or use and occupancy which have come due since the proceeding began. The statute also allows the Court to direct that the rent or use and occupancy should be paid directly to the landlord, rather than deposited with the Court.

If a tenant fails to comply with the Court's order requiring the tenant to deposit an amount with the Court or to make a payment to the landlord, the Court, upon an application by the landlord, "shall" dismiss without prejudice the defenses and counterclaims raised by the tenant and grant a judgment in favor of the landlord, unless the tenant can show that the required court-ordered amount has been paid to the landlord or that the tenant has previously raised the defense of payment.

A recent decision in Manhattan Housing Court in a case handled by this firm, *Park 80 Holding LLC v. Amalia Dardouni*, shows the consequences that tenants face if they fail to comply with an Order to pay rent or use and occupancy.

In the *Dardouni* case, the landlord brought a holdover proceeding against an occupant of an apartment. During the case the attorneys for the landlord and the tenant entered into a so-ordered stipulation which required the tenant to pay two months' use and occupancy to the landlord. The tenant failed to pay and, following an application by the landlord, the Court dismissed the tenant's defenses without prejudice and awarded the landlord a final judgment of possession along with the issuance of a warrant of eviction.

Nearly three months later, and on the eve of the scheduled eviction, the tenant filed an order to show cause seeking to vacate the prior Order of the Court and offering to pay the back rent/use and occupancy.

The Court denied the tenant's order to show cause and allowed the eviction to proceed. The Court stated that even though the tenant was now tendering the full amount owed, under the language of RPAPL § 745(2), the Court lacked the authority to extend the time frame for the tenant to make the payment required under RPAPL § 745(2).

The Court's holding in *Dardouni* is a useful illustration of just how valuable an Order in a summary proceeding directing the payment of rent or use and occupancy by a tenant can be and the consequences that can befall a tenant who fails to comply with the Court's Order directing the payment of rent or use and occupancy.

Brian Clark Haberly (bhaberly@bbwg.com) is a partner in the Firm's Litigation Department. He was assisted in this article by Michael Battema, a third year law student attending St. John's University School of Law, who is clerking for the Firm.

Co-op | Condo Corner

By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or ashmulewitz@bbwg.com.

CONDO BUYER'S FAILURE TO CLOSE IS BREACH OF CONTRACT, ENTITLING SPONSOR TO KEEP DEPOSIT; BUYER CANNOT CLAIM DENIAL OF FINAL INSPECTION AS DEFENSE

184 Joralemon LLC v.Brklyn Hts Condos LLC Supreme Court, Kings County

COMMENT | *The buyer had inspected the apartment 43 prior times, and made this final request the evening before the scheduled closing, seemingly unreasonably.*

CO-OP LIABLE TO SHAREHOLDER FOR BREACH OF PROPRIETARY LEASE AND BREACH OF WARRANTY OF HABITABILITY ARISING FROM WASTE LEAK INTO APARTMENT

Gorman v. 151-161 Owners Corp. Supreme Court, New York County

COMMENT | *The Court held that the issue of the amount of damages was in dispute, to be resolved at a subsequent trial.*

SPONSOR ENTITLED TO KEEP DEFAULTING BUYER'S $4.7 MILLION DEPOSIT SINCE TCO WAS ISSUED; UNCOMPLETED PUNCHLIST ITEMS NOT A DEFENSE

Campbell v. Mark Hotel Sponsor, LLC United States District Court, Southern District of New York

COMMENT | *In an outright victory for the sponsor, the buyer was also ordered to pay the sponsor's legal fees in seeking the recovery.*

CO-OP ENTITLED TO SUMMARY JUDGMENT AGAINST HOLDER OF UNSOLD SHARES ON AMOUNTS WITHHELD FROM MAINTENANCE TO OFFSET PRIOR NON-CREDITING OF SCRIE CREDITS

20 Plaza Street Corp. v. 20 Plaza East Realty Supreme Court, New York County

COMMENT | *In barring the shareholder from withholding maintenance, the Court relied on the typical proprietary lease "no setoff" clause.*

CONDO LIEN NOTICE VALID DESPITE MINOR TECHNICAL DEFICIENCY IN NOTARIZATION

Board of Managers of 33-44 82nd Street Condominium v. Roman Supreme Court, Queens County

COMMENT | *To avoid getting entangled in expensive and time-consuming litigation like this over arrears (even if ultimately successful), Condo Boards should be scrupulous in ensuring that lien notices comply with all procedural requirements.*

QUESTIONS OF FACT AS TO WHETHER MEMBERS OF SPONSOR'S FAMILY RESIDED IN APARTMENTS BARS SUMMARY JUDGMENT AS TO WHETHER THE APARTMENTS ARE STILL DEEMED UNSOLD SHARES

Queens Unit Venture, LLC v. Tyson Court Owners Corp. Supreme Court, New York County

COMMENT | *This case involved a common proprietary lease provision, but one that is rarely invoked.*

CONDO CAN DENY NON-ESSENTIAL SERVICES TO DELINQUENT UNIT OWNER

Board of Managers of The Heywood Condominium v. Wozencraft Supreme Court, New York County

COMMENT | *While the Court, inexplicably, ruled that questions of fact existed as to this Unit Owner's arrearage, the decision upholds an increasingly common tactic that beleaguered condominiums are using against non-paying Unit Owners.*

FAILURE TO HAVE CO-OP RECOGNIZE TRUST TRANSFER INVALIDATES THE PURPORTED TRANSFER MADE 15 YEARS AGO

Towbin v. Towbin Supreme Court, New York County

COMMENT | *This decision underscores the principle that a transfer of record ownership of a co-op apartment only occurs when recognized on the co-op's books, regardless of any internal or private understandings between the parties.*

CO-OP LIABLE TO COMMERCIAL TENANT FOR INTERFERENCE WITH TENANT'S OPERATIONS CAUSED BY CO-OP'S LOCAL LAW 11 REPAIRS

Town Tennis Member Club, Inc. v. Plaza 400 Owners Corp. Supreme Court, New York County

COMMENT | *The parties' lease did not give the co-op the clear right to enter the premises, so the co-op was held liable for trespass and nuisance too.*

CONDO UNIT OWNER CANNOT SUE MANAGING AGENT FOR DEFECTS IN COMMON ELEMENTS

Davis v. Prestige Management Inc. Appellate Division, 1st Department

COMMENT | *However, the Court held that the Unit Owner could bring a derivative action on behalf of all Unit Owners.*

CONDO SUPER NOT LIABLE TO UNIT OWNER FOR PRIVATE NUISANCE ARISING FROM NOISE DURING APARTMENT RENOVATION

Carroll v. Radoniqi Supreme Court, New York County

COMMENT | *This case smacks of an increasingly common vendetta-like atmosphere that exists in some buildings.*

BBWG NOTABLE ACHIEVEMENTS

SHERWIN BELKIN, a partner in BBWG's Administrative Law and Appeals Departments, was asked to participate in an emergency meeting called by the City's Department of Housing Preservation and Development regarding creating temporary housing for New Yorkers displaced by Hurricane Sandy. The meeting included numerous City and State officials, non-profit organizations, REBNY and the Rent Stabilization Association. MR. BELKIN addressed the problems posed by New York's rent regulations insofar as they conflict with the notion of temporary housing. MR. BELKIN also responded to an inquiry in the on-line edition of the *Sunday Real Estate* section of the *New York Times* on November 9 regarding tenant rights regarding an apartment damaged by the hurricane.

AARON SHMULEWITZ, head of BBWG's co-op/condo practice, was quoted in articles in the on-line editions of *The Real Deal* and *Real Estate Weekly* on October 24 discussing issues involving exotic pets in apartments.

CRAIG INGBER, a partner in BBWG's Transactional Department, was the moderator of a Continuing Legal Education seminar on "Basic Commercial Leases" sponsored by Lorman Education Services on November 13.

NICHOLAS M. DAVID, an associate in BBWG's Litigation Department, has been appointed to the Housing and Urban Development Committee of the Association of the Bar of the City of New York.

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