Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

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LITIGATION UPDATE

IS THE DEEMED LEASE DEAD?

By Sherwin Belkin

In *Samson Management v. Hubert*, the owner sought to recover unpaid rent from the tenant, pursuant to a "deemed" rent stabilized renewal lease as provided by Rent Stabilization Code §2523.5(c)(2). Unfortunately, the Appellate Division upheld the declaration by the Appellate Term, 2nd, 11th and 13th Judicial Districts, that the Rent Stabilization Code's "Deemed Lease Rule" was unenforceable because it "impairs a right granted to tenants by Real Property Law §232-c."

RSC §2523.5(c) (2) provides that where the tenant fails to timely renew an expiring lease that was properly o□ered, and remains in occupancy after expiration of the lease, the lease may be deemed to have been renewed upon the same terms and conditions, at the legal regulated rent, together with any guidelines adjustments that would have been applicable had the o□er of a renewal lease been timely accepted. This Code section provided owners with an alternative to trying to evict the tenant for failing to renew and holding over.

The Appellate Division held that RPL §232-c superseded the deemed lease option because it provides that if a tenant holds over after the expiration of a lease term, this shall not give to the

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ADDITIONAL THOUGHTS ON THE DEEMED LEASE REMEDY

By Je□rey L. Goldman

In the September 2011 BBWG Newsletter, I recommended that when a tenant fails to accept a renewal lease o□er by signing within the 60 day period provided under the Rent Stabilization Code, the most e□ective and expeditious remedy was to have a Fifteen (15) Day Notice of Termination served prior to, and expiring upon, the expiration date of the tenant's lease term. This would force the tenant to either renew or be evicted.

Another available option at the time was to deem the renewal lease o□er accepted, pursuant to Rent Stabilization Code § 2523.5(c)(2). Many owners elected to deem leases renewed in order to avoid litigation. However, as discussed in the accompanying article, "Is the Deemed Lease Dead?" that option may no longer be viable, as least in Brooklyn, Queens, Staten Island, Nassau, Westchester, and Rockland counties.

The Appellate Division, Second Department, has held in *Samson Management v. Hubert* that the Rent Stabilization Code § 2523.5(c)(2) is not valid because it impaired or diminished a right granted by Real Property Law § 232-c (which protects a

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landlord the option to hold the tenant for a new lease term.

However, RPL 232c says that the new term cannot be deemed **solely by virtue of the tenant's holding over**. In *Samson*, the Owner sought to hold Tenant liable for a new term after numerous acts; *not just solely by virtue* of the Tenant's holding over; to wit:

• Prior to the expiration of Tenant's lease, Owner timely sent Tenant a written offer to renew his lease, for a one or two year term (Tenant's choice), on a form prescribed by DHCR;

• The written offer to renew also included the option that Tenant could mark the box on the renewal lease offer form stating that the tenant was not renewing and intended to vacate

• When Tenant did not respond to the renewal lease offer in 60 days, the Owner wrote to Tenant a letter informing him that it had not received any response to the renewal lease offer, and if Tenant failed to respond and failed to vacate at the expiration of his lease, the Owner would deem his rent stabilized lease renewed pursuant to the Deemed Lease Rule;

• The Owner was obligated to renew the lease on the same terms and conditions as the expiring stabilized lease; The new rent would be circumscribed by the guidelines issued by the NYC Rent Guidelines Board;

• The Tenant remained in occupancy past the expiration date of the stabilized lease; and

• The Tenant paid the increased rent applicable to a one-year renewal lease for a number of months after the prior lease expired.

The legislative history underlying the passage of RPL 232-c specifically references "restrictions provided by rent control statutes" as superseding the limitations concerning holdover tenants created by RPL §232-c. By invalidating the Deemed Lease Rule, a huge number of rent stabilized tenancies across New York City may be impacted. The Appellate Division was asked to either reverse its decision or grant leave to appeal so that the owner could be heard by the Court of Appeals.
In a one line decision, without explanation, the motion was denied.

When the Appellate Term ruled in *Samson*, it remanded the case for a trial on the issue of whether a lease agreement for another term was formed by virtue of the tenant paying the increased rental for a few months, or whether the tenant, via correspondence, sufficiently indicated an intent to vacate by a date certain. Because this case originated in Housing Court and is not final, a motion for leave cannot be made directly to the Court of Appeal.

The Appellate Division for the First Department (which covers Manhattan and the Bronx) has not held the code provision invalid. Owners with properties in those boroughs may choose to invoke the deemed lease remedy. But in light of the *Samson* decision, until there is a decision to the contrary, owners opting to deem rent stabilized leases in effect (even in Manhattan and the Bronx) must recognize that they do so with a potential risk of invalidity.

Sherwin Belkin (sbelkin@bbwg.com) is a founding partner of the firm.

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ADDITIONAL THOUGHTS ON THE DEEMED LEASE REMEDY

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holdover tenant from being liable for a new term). The Rent Stabilization Law of 1969, as amended, states at § 26-511(b) that no provision of the Rent Stabilization Code "shall impair or diminish any right or remedy granted to any party by this law or any other provision of law."

That construction led the Appellate Division, Second Department to conclude that, absent an agreement, the only remedy an owner has when the tenant does not renew the stabilized lease is to commence an action or proceeding to remove the tenant from possession "in any manner permitted by law." This holding also precludes an owner from suing to collect rent for the balance of a deemed renewal lease term.

While this is certainly the law in the Second Department [which excludes New York and Bronx counties], owners in New York and the Bronx must seriously consider that this ruling may also be extended in future cases to properties outside the Second Department. Owners should consult with counsel in each and every instance where a tenant fails to execute a renewal lease to discuss the best course of action in light of the owner's goals, the location of the property, and current state of the law.

Jeffrey L. Goldman (jgoldman@bbwg.com) is a founding partner of the firm and co-heads its Litigation Department.

PRACTICAL POINTERS ON IMPROVING YOUR PROSPECTS AT ECB

By Orie Shapiro

The Department of Buildings, Fire Department, Department of Environmental Protection and other New York City agencies continue to issue violations at a staggering rate. Examples of such violations include work without a permit, occupancy which does not conform to the certificate of occupancy, and unwarranted fire alarms. These violations are often tried at the Environmental Control Board ("ECB").

This article will provide practical pointers to improving prospects of prevailing, or at least limiting penalties, in such proceedings.

1. Showing Up is Half the Battle

The default penalty assessed for failing to appear at an ECB proceeding far exceeds the penalty traditionally imposed if found in violation. It should be noted that issuing agencies often serve what might appear to be duplicative notices of violation, but which are, in actuality, notices of analogous overlapping proceedings, each of which must be defended.

Although in the past, the ECB vacated defaults liberally, recently promulgated rules require that an application to vacate a default be filed within 45 days of the default order. This relatively short deadline carries very few exceptions. ECB has recently proposed an even more restrictive approach to processing vacate applications filed after 45 days.

Accordingly, it is critical that respondents appear or are represented on all hearing dates regardless of whether they believe that the violation is meritless and/or that they are not the responsible party.

2. If the City Gives You an Out, Take It

Some Notices of Violation enable the respondent to avoid a hearing by certifying correction of the condition by a set date prior to the hearing. Such certification is essentially an admission of liability coupled with proof that the condition has been corrected. If the City accepts certification, the respondent may well be able to avoid a fine altogether. It is important to not wait until the cure deadline to file the certification in order to give the City an opportunity to review the application and to enable the respondent to correct any deficiency in the Certification that the City may cite. Even if a hearing is required, proof of timely correction may result in a reduced fine for "mitigation." It is critical to maintain a copy of any submission that is made to the City, as well as proof of filing.

3. Investigate Procedural Defenses

We have been able to procure dismissal of some violations by successfully challenging service---showing that the method in which the City served the notice did not conform to code. There are specific rules and regulations as to how respondents should be served, depending generally on the nature of the respondent, *e.g.*, corporation, partnership, or individual owner, and its relationship to the premises.

As soon as one receives word of a violation, it is important to identify how the notice was received and to retain evidence of such service. The ultimate question is not whether the respondent eventually received a copy of the violation, but, rather, if they received the violation in a manner prescribed by Code.

The Notice of Violation should also be scrutinized for other potential procedural defenses, such as whether the correct ownership name, address, code section and violation class were cited. Counsel should be consulted where warranted.

4. Update Ownership Information

In certain instances, an ECB violation will be dismissed if the respondent's name or address is incorrectly listed on the Notice of Violation. However, the issuing agency is entitled to rely upon the property profiles found in Department of Finance, HPD, and the issuing agency's own records. An owner is responsible for advising the City of changes in ownership and managing agent contact information. If the issuing agency can show that the identity and address of the respondent on the Notice of Violation conforms to data maintained by one of those three municipal agencies, the City will likely be able to defeat the motion to dismiss.

5. Correcting a Misconception: The Limitations of the Blame Game

A property owner may be inclined to disregard an ECB violation based on the incorrect assumption that if its tenant or contractor caused the condition, the owner will not be held liable at ECB. Indeed, the reverse is true. The ECB is generally not interested in allocating responsibility between an owner and a third party. The fact that an owner may be contractually or statutorily entitled to indemnification by a third party for the underlying condition is generally not a defense in ECB cases. Subject to certain statutory exceptions, the owner and/or the party in control of the property, in most instances, will be held liable at ECB, even if the condition was caused by, or falls within the contractual responsibility of, a third party.

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6. Correcting a Second Misconception –The Case Does Not End When the Check Clears

Some may be under the impression that the spate of violations is a municipal attempt at revenue enhancement. That cynical (although not necessarily untrue) view may lead some respondents to the incorrect and often costly conclusion that payment of the fine resolves the proceeding. A violation is not closed until the respondent files a certificate of correction attesting to, and demonstrating rectification of, the underlying condition. If a respondent does not promptly file a certificate of correction, the issuing agency can issue a violation for "Failure to Certify Correction". These violations often carry larger fines than the underlying predicate violations. The issuing agency may issue such Failure to Certify Correction violations at regular intervals until it approves respondent's Certificate of Correction.

It is hoped that this article will assist property owners and other interested parties in confronting the challenges of ECB. Although an owner can appear at ECB without legal representation, there are certainly many instances -- depending on the potential fine, the cost of remediation or effect of a negative judgment on the method in which respondent conducts its business -- when counsel should be consulted.

Orie Shapiro (oshapiro@bbwg.com), a partner in the Administrative Law department of the Firm, regularly defends violations at ECB and Criminal Court.

TRANSACTIONAL UPDATE

DISABILITY COMPLIANCE – WHEN AND WHEN NOT REQUIRED

By Robert Jacobs

When performing renovations to existing buildings in New York City, the question of what triggers disability compliance often arises. Disability compliance increases the complexity (and cost) of the work, so the necessity of complying with the disability laws should be considered at the outset when estimating the time and cost of the proposed renovations.

As a general rule, before performing any renovations to an existing building, a work permit is required under the Buildings Code. The work permit is obtained by filing an alteration application with the Department of Buildings ("DOB"). An alteration to an existing building involving a change in egress or use is called an Alteration Type I Application. Changes to a building's certificate of occupancy require the filing of an Alteration Type I Application. A less extensive alteration that does not involve changes to egress or use is filed as an Alteration Type II Application. In either case, once the application is approved, the work permit can be issued.

Disability compliance is governed by Section 27-123.1 of the Buildings Code, which is a part of the New York City Administrative Code. The section provides that, when the aggregate costs of any alterations, additions or repairs (other than ordinary repairs) made within the twelve months immediately following the filing of the application for the work permit exceed 50% of the cost of the replacement of the building with one of similar size, the owner is required to bring the entire building into disability compliance. The cost is estimated by the DOB based on the scope of work in the application.

If the cost of work, as estimated by the DOB, does not exceed 50% of the replacement cost of a similar building, then disability compliance is only required with respect to the specific work being performed. For example, if an apartment has two bathrooms and work requiring a permit is being performed on one of the bathrooms, only the work being done to that bathroom need comply with the disability requirements. Nothing would prevent an owner from making both bathrooms disability-compliant but only the bathroom being renovated under a work permit is required to be made so compliant. In fact, the Buildings Code section specifically states that nothing in the section is meant to discourage such compliance in other parts of a building, although there is no actual incentive in the Buildings Code to do so.

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DISABILITY COMPLIANCE – WHEN AND WHEN NOT REQUIRED

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It should be noted that compliance with New York City's disability laws is not necessarily tantamount to compliance with the Federal Americans with Disability Act or the Fair Housing Act, which are far more extensive.

Owners contemplating work that may trigger the need for disability compliance would be well-advised to consult with competent, experienced counsel before doing so.

This article was written by Robert Jacobs (rjacobs@bbwg.com), a partner in the Transactional and Administrative Departments at BBWG. For more information on disability compliance or related issues, please contact Mr. Jacobs.

NOTABLE TRANSACTIONS

DANIEL T. ALTMAN, CRAIG L. PRICE and ALLAN GOSDIN represented an owner on the refinancing of a $17 million mortgage portfolio of mixed-use buildings in the Allerton section of The Bronx.

MR. PRICE also handled the following transactions:

-with SETH LIEBENSTEIN, represented a Gramercy Park area co-op on the negotiation of a new 15-year lease with its garage tenant, with an aggregate value of $6 million;

-with JAMIE B. CHAPMAN and ALANA WRUBLIN, handled the $7 million sale of an Upper West Side townhouse for its estate owner;

-represented a sponsor on the sale of a full-floor commercial condominium unit in Lower Manhattan to a non-profit organization for $8.4 million

BBWG NOTABLE ACHIEVEMENTS

Matthew Brett, a partner in the firm's Litigation Department, was appointed to a three year term on the Committee on the Judiciary of the New York City Bar Association. The Judiciary Committee evaluates candidates for election, reelection, appointment, reappointment, designation and certification to judicial office and other offices connected with the administration of justice in state and federal courts in New York City. Mr. Brett previously served as an Owner's Representative on the New York City Housing Court Advisory Council, which evaluates candidates for Housing Court judicial positions.

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.

TENANT'S TOXIC MOLD COMPLAINT SURVIVES DISMISSAL; EXPERT TESTIMONY SATISFIED RECOGNIZED SCIENTIFIC STANDARDS ON PROVING CAUSATION

Cornell v. 360 West 51st Street Realty, LLC *Appellate Division, 1st Dept.*

COMMENT | *Even though this case involves a rental, it may be bad news for co-ops and condos. The Court seemed to retreat from its landmark 2008 Fraser decision, which had imposed a much tougher standard for proving causation; this new decision will make it easier for tenants to bring successful mold suits.*

BUYER'S SUIT FOR SPECIFIC PERFORMANCE SURVIVES DISMISSAL-- DESPITE LACK OF FULLY-SIGNED CONTRACT

Aristone Realty Capital, LLC v. 9 E. 16th Street LLC *Appellate Division, 1st Dept.*

COMMENT | *Even though the seller never signed the contract (and, therefore, the statute of frauds should have barred the suit), the Court found questions of fact arising from the parties' communications, the seller's counsel emailing an execution copy of the contract and wire instructions, and the buyer's signing and tendering the deposit. Troubling.*

DEFAULTING CONDO PURCHASER ENTITLED TO REFUND OF DEPOSIT BECAUSE SPONSOR FAILED TO SERVE DEFAULT NOTICE AS REQUIRED BY CONTRACT

Kaplan v. Madison Park Group Owners, LLC *Appellate Division, 1st Dept.*

COMMENT | *In this latest of numerous litigations spawned by this failed condo offering, the Court seemed to exalt form over substance in the face of an undisputed closing default by the purchaser.*

QUESTIONS OF FACT AS TO CAUSE OF LEAKS BAR DISMISSAL OF CO-OP SHAREHOLDER CLAIMS AGAINST NEIGHBOR

Samson v. 91st Street Tenants Corp. *Supreme Court, New York County*

COMMENT | *The Court cited conflicting deposition testimony as to whether the leaks emanated from the neighbor's bathtub, and whether the co-op had knowledge of roof leak conditions.*

SPONSOR CANNOT VOTE IN CONDO ELECTION

Natt v. White Sands Condominium *Appellate Division, 2nd Dept.*

COMMENT | *Inconsistencies in the offering plan were construed against the sponsor; the Court chose the provision that restricted the sponsor's rights to designating two Board seats.*

DELINQUENT CONDO UNIT OWNER CANNOT ENJOIN LIEN FORECLOSURE OR ACTIONS BY RECEIVER

Board of Managers of St. James Tower Condominium v. Kutler *Supreme Court, New York County*

COMMENT | *The Court rejected the Unit Owner's argument that she was entitled to a preliminary conference under the new mortgage foreclosure law, ruling such that law was inapplicable to condo lien foreclosures.*

CO-OP BOARD CAN ADOPT AND ENFORCE NEW SUBLETTING RESTRICTIONS, EVEN AGAINST SHAREHOLDER SUBLETTING FOR MANY YEARS

Bregman v. 111 Tenants Corp. Appellate Division, 1st Dept.

COMMENT | *The Court reiterated that, under the Business Corporations Law, a shareholder cannot be granted special subletting rights. The Court also held that a Board can adopt and enforce a policy that impacts only one shareholder, without being deemed discriminatory.*

CO-OP DIRECTORS CANNOT BE SUED FOR INJUNCTION ARISING FROM THEIR REFUSAL TO APPROVE SHAREHOLDER'S ALTERATIONS

Weinreb v. 37 Apts. Corp. Appellate Division, 1st Dept.

COMMENT | *The Court distinguished the injunction sought here against the directors individually from injunctions sought against co-op corporations as entities.*

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