BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Inside this Issue

Democratic Control of State Senate Could Impact Housing Laws

This past Election Day, the decades old control that the Republican Party had held over the State Senate appears to have been lost. (As of the writing of this Update, there is reported to still be some political wrangling among the Democrats that could affect that). If the Democrats control both houses of the State Legislature, as well as the Governor's Office, BBW&G anticipates that this could have some significant impact upon housing generally, and rent regulation in particular. While we do not suggest that we have a crystal ball, if you would like to discuss potential scenarios, as well as steps that you might consider in anticipation of these potential changes, please contact the BBW&G partner with whom you normally work.

Litigation Update

Insurance Matters: *Be Sure You Report a Claim Correctly*

By: Joseph Burden

Most property owners know that they must report any accident or threatened litigation to their insurer in order to make sure that "adequate" notice is given and the insurance company can investigate. This is required so that the insurance company can defend the litigation and pay any claims.

Most owners when threatened with, or in receipt of a claim, call their broker and report it to the broker. They follow the phone call with any relevant paperwork they may have on the threatened or actual claim. However, the Appellate Division, Second Department has ruled that notice to the broker, who fails to timely send copies of the documents to the actual insurance company, is not sufficient to protect the insured party.

The case of *2130 Williamsbridge Corp. v. Interstate Indemnity Company*, involved a "trip and fall" accident at the owner's residential building. The accident was immediately reported to the broker. However, the broker did not notify the insurance company.

Several months later, a summons and complaint was served. The owner, again, immediately notified the broker; but the broker did not send the papers to the insurance company, until more than seven months after the accident. The insurance company disclaimed coverage stating that timely notice was not given.

The Court ruled that notice merely to the broker and not to the insurance company was insufficient to put the insurance company on notice and thereby absolved the insurance company of its obligations to defend and pay the claims.

So a word to the wise. An owner, who is reporting a potential claim, should send it to the broker and insist the broker send it immediately to the insurance company, with a copy of the transmittal letter to the owner. In the alternative, the owner should send the claim directly to the insurance company, in addition to any notice given to the broker. Taking these extra steps can protect the owner from being left without coverage on what may be a serious claim for property damages and personal injuries.

Joseph Burden is a founding partner of the Firm and practices in the Litigation Department.

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Litigation Update

How to Best Screen Prospective Residential Tenants

By: Martin Meltzer and Sophie Lambrou

Many owners have had the unfortunate experience of dealing with "professional tenants" who move from apartment building to apartment building, leaving behind a trail of disaster -- be it in unpaid rent, property damage, or the disturbance of the quiet enjoyment of their fellow tenants. From a business perspective, the proper screening of potential tenants is paramount to avoid the costs and aggravation such tenants can cause.

First and foremost, it is important to be cognizant of the delicate balance that must be struck between thoroughly screening potential tenants and not violating federal or local fair housing laws or the Fair Credit Reporting Act. The best solution to this potential problem is retaining a professional screening service. Such services perform an investigation on the tenant through the various credit bureaus, sexual offender registry, Patriot Act database, eviction records and criminal records. The use of a professional service helps to shield the owner from potential liability.

All owners should establish a uniform rental application for all prospective tenants to complete in order to qualify for an apartment. The application should include a consent form for the applicant to sign authorizing the owner to perform investigations into the applicant's background. Owners should strive to approve (or deny) rental application within 7 to 10 days after the submission of the application.

While a professional screening service can advise the owner on the prospective tenant's credit history, criminal background, and any past housing court litigation, an owner should take certain additional steps to verify the credentials of the prospective tenant. It is important that the owner contact prior landlords of the prospective tenant (and not the prospective tenant's current landlord, who may give a glowing recommendation for a problematic tenant because he wants the tenant to move out of his building, or give a negative review for a model tenant because he does not want the tenant to move out of his building). Prior landlords can advise the owner if the prospective tenant paid the rent in a timely fashion, whether the tenant was ever brought to court and the reasons, whether the tenant was disruptive to other tenants and in what condition the tenant left the apartment when the tenant vacated.

It is also imperative that the owner obtain verification of the prospective tenant's employment, income and assets in order to ascertain if the prospective tenant will have the financial wherewithal to afford the monthly rent payments. This can be accomplished by requesting pay stubs for the previous several (or more) months and contacting the prospective tenant's employer. After obtaining this information and comparing it to the apartment application, a face-to-face interview with the prospective tenant is encouraged.

For owners who own multiple residential buildings, cross-checks should be performed to verify that an individual who has been evicted from one building does not attempt to apply for an apartment at another building owned by the same owner. Such owners should set up a "do not rent to database," containing information about problem tenants so that they can make informed decisions about prospective tenants. It is also essential to keep the information that the owner has obtained during the application process. If the rejected tenant files a discrimination complaint the owner will then have the information that it relied upon to support its decision in lawfully rejecting the prospective applicant as a tenant.

An owner can do much to eliminate problematic tenants during the screening process, if this process is performed correctly. In the long run, passing up a problematic tenant and keeping an apartment vacant until a qualified tenant is found will prove to be a financially sound decision for the owner.

Martin Meltzer is a partner, and Sophie Lambrou is an associate in the Firm's Litigation Department.

Appellate Division Reaffirms That Regulated Units Must Be Used for Actual Living Purposes

By: Ally Hack

In a recent decision, the Appellate Division, First Department, held that a tenant who, due to mental illness, chose to live on the streets rather than in his apartment --and presented no evidence that he would ever actually live in his apartment -- cannot indefinitely retain his right to a rent stabilized tenancy. *TOA Construction Co., Inc. v. Tsitsires.* BBWG Update previously discussed this case in February 2007, when the Appellate Term (the state's intermediate appellate court for housing court proceedings) had ruled in the tenant's favor (*"An Unusual Case of Primary Residence" by Magda L. Cruz*). Now, the Appellate Division has reversed and ruled in the owner's favor.

According to the decision, the 59-year-old tenant had been the occupant of a single-room occupancy unit ("SRO") in the landmarked Windermere, located at 400 West 57th Street in Manhattan since 1970. The Court found that the tenant suffers from a mental illness, including a panic disorder, which "has resulted in his feeling compelled to spend virtually all his time away" from the SRO. The Court further found that the tenant, whose sole source of income is Supplemental Security Income, lived on the streets in a "psychologically 'safe' area" near the Windermere, while using the SRO for storage and as a mailing address.

The three justice majority was steadfast in its conviction that the tenant had abandoned his apartment and was properly subject to eviction. The majority observed that "[i]t is the responsibility of this Court to dispassionately apply the law to the facts as found, notwithstanding the well intentioned impulse to protect the interests of a mentally ill individual or the desire to rule against … a party characterized by newspapers as a 'slumlord'."

The majority opinion rejected the tenant's argument claiming that the landlord "has the legal obligation to establish not only that the tenant does not reside in the subject apartment but also that the tenant has an alternative primary residence." The majority held that while a landlord can meet its evidentiary burden by showing that a tenant has an "alternative primary residence," the Rent Stabilization Code does not require such a showing. The majority explained that under the Code, it is a tenant's lack of an "'ongoing, substantial, physical nexus with the [subject] premises for actual living purposes'", which a owner must demonstrate. The owner in this case successfully made that showing by virtue of the uncontested proof that the tenant lived on the streets and not in the SRO.

In a lengthy dissent, the minority opinion observed that "awarding possession to a landlord who, the record establishes, allowed the premises to become virtually uninhabitable while making concerted efforts to empty the premises of all tenants would be contrary" to the purpose of the Rent Stabilization Law.

The majority countered: "the landlord's conduct and intentions, whatever we think of them, had no impact on [the tenant's] virtual abandonment" of the SRO. Although the majority conceded that the Windermere had, in fact, fallen "into a state of chronic disrepair", and the tenant's apartment was declared "uninhabitable," they also found the "evidence [to] establish[] that [tenant's] absence from the premises was due to his mental illness, not the condition of the apartment."

This decision has many implications for landlords in New York City. Perhaps most prominently, it reinforces the principle that to recover an apartment on non-primary residence grounds, an need not prove where the tenant's primary residence is actually located (although doing so, if such evidence is available does help a landlord's case). Rather, a landlord's burden is to show that the tenant has no ongoing, substantial, physical nexus to the subject premises.

Ally Hack is an associate in the Firm's Litigation Department.

Transactions Update

Paying the Broker's Fee: Mandatory, Not Optional

By: Craig L. Price and Jamie B. Chapman

It should go without saying that a broker who produces a ready, willing and able buyer and fulfills all other requirements of a written brokerage contract is entitled to collect his/her broker's fee. However, there are times when a seller refuses to pay the broker's fee even though the broker fully performed his/her part of the bargain. In an effort to deal with this issue, Real Property Law (RPL) 294-b was enacted by the New York State legislature.

Under RPL 294-b, brokers who fully perform their obligations under the brokerage contract but do not receive their commission can file an Affidavit of Entitlement to Commission (the "Affidavit") with the county clerk of the county in which the property is located

To this end, RPL 294-b was recently amended to provide more protections for brokers, with such amendments to become effective on January 1, 2009. Under the amended RPL 294-b, a broker can still file the Affidavit, but there are now additional measures the broker can take to collect his/her commission. For example, once an Affidavit is filed, if the agreed upon commission has still not been paid (if the property is a 1 to 4 family house or a condominium, or, now, a cooperative unit), the seller must pay the unpaid portion of the broker's commission into an escrow account with the county clerk until there is a written agreement or a court order determining the parties' rights to the escrow monies. Although the filing of the Affidavit does not create a lien, it is recorded in the "lien docket." Moreover, a broker can now file an Affidavit for a claim for a commission in connection with the transfer of an interest in a cooperative unit. In sum, the recent amendments to RPL 294-b provide brokers with the safeguards needed to ensure they receive all commissions they rightfully earn.

If you would like any further information on this topic, please contact Craig L. Price. Mr. Price is a partner in the Firm's Transactional Department. Jamie B. Chapman is a Legal Assistant awaiting admission to the bar.

Transfer Taxes and Mortgage Recording Taxes for Charitable IRC §501(c)(3) Organizations: When Exempt?

By: Daniel T. Altman and Jamie B. Chapman

Corporations organized and operated exclusively for charitable, religious, educational, scientific or literary purposes are classified as "501(c)(3) organizations" under the Internal Revenue Code so long as no part of their net earnings benefits any private shareholder or individual. Assuming an organization satisfies that test, it is exempt from the payment of federal income taxes.

Charitable organizations sometimes confuse a 501(c)(3) exemption from the payment of federal income taxes with the payment of other types of taxes (i.e., transfer taxes and mortgage recording taxes) that may be due in connection with the sale or refinancing of real property held by such an organization. This article attempts to clarify when such taxes are due, and when an exemption applies.

The New York City Administrative Code imposes a Real Property Transfer tax on a conveyance when the consideration exceeds $25,000. 501(c)(3) organizations are exempt from payment of the New York City transfer tax. (In fact, a transaction is exempt from

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the City transfer tax even if the purchaser is a 501(c)(3) organization, meaning that a seller can reap a windfall selecting such an organization as its purchaser.)

Similarly, New York State imposes a Real Estate Transfer Tax equal to $2 for every $500 in consideration on every conveyance of real property. However, unlike with regard to the City transfer tax, 501(c)(3) organizations are not exempt from the payment of this State transfer tax.

In addition, New York State and City impose a 2.8% mortgage recording tax on commercial mortgages over $500,000 in New York City (with lower rates applicable to properties elsewhere in New York State). 501(c)(3) organizations are also not exempt from the payment of this mortgage recording tax.

A party entering into a transaction should consult competent counsel to determine whether any portion of the transaction may be exempt from taxes that might ordinarily apply.

Daniel T. Altman is the head of BBWG's Transactional Department. Ms. Chapman assisted in the writing of this article. She is awaiting admission to the New York State bar.

RECENT TRANSACTIONS OF NOTE

BBWG's Transactional Department highlights some of the significant deals which we have handled recently:

Dan Altman, Craig Ingber and Seth Liebenstein represented an Upper East Side cooperative in a lease negotiation with Duane Reade, which resulted in a 12-year lease with an aggregate rental value of over $28 million. The lease included the complete remodeling of the store, and installation of a new storefront, all at the tenant's expense. The transaction resulted in the cooperative gaining a multiple-fold increase in its cash flow from the store while retaining a reputable tenant despite the declining market for retail leasing.

Dan Altman, Craig Price, Howard Wenig and Allan Gosdin represented the owner in a $25 million refinancing of a 100-unit apartment building with four commercial stores in midtown. In conjunction with the refinancing, BBWG was able to negotiate with the lender the right for a specific buyer of the property to assume the refinanced loan within 90 days of the refinancing without payment of an assumption fee, as well as the obligation of the lender to approve mezzanine financing in conjunction with the resale of the property provided the sale of the property took place within 90 days of the refinancing.

Craig Ingber represented the seller of two buildings in Chelsea that sold for an aggregate price in excess of $7 million, and the seller of a mixed-use building in the West Village that sold for more than $4 million.

Howard Wenig and Craig Price handled the purchase of a multi-family building with commercial space in Brooklyn, which included financing by Valley National Bank.

Aaron Shmulewitz and legal assistant Rosa Lombardo represented the sponsor of a new construction condominium on Lexington Avenue on unit sale closings.

Robert Jacobs, Denise DeNicola and Jennifer Apple represented the sponsor of a new construction condominium on the Upper West Side on the first unit sale closings.

Administrative Update

Preferential Rents - Ensuring Your Legal Rent is Safe

By: Joshua Losardo and Diana Strasburg

There are many circumstances in which an owner may find it necessary to charge less than the legal regulated rent for a rent stabilized apartment. For example, in some areas of the New York City, the legal regulated rent may be higher than the market rent at a particular point in time. In other instances, an owner may want to temporarily discount an existing tenant's rent. In either event, an owner may charge a preferential rent (*i.e.,* a rent ***less*** than an apartment's legal rent), but should take steps to ensure that the apartment's legal rent is preserved. If the legal rent is properly preserved, the owner may discontinue charging the preferential rent at the expiration of the tenant's lease and resume charging the higher legal regulated rent at renewal.

In order to ensure that a preferential rent is temporary only, owners should follow these steps:

- On the lease form, separately record the apartment's legal rent and preferential rent. By separately recording both figures, the owner may choose whether to charge the full legal rent at the commencement of the next lease term.
- The lease form should also contain a clause which states that "**the preferential rent shall be offered only for the term of this lease."** The language may be inserted on the lease form or on a rider to the lease.
- We also recommend recording **both** an apartment's legal and preferential rents on DHCR Annual Apartment Registrations.

Never include language stating that the "the preferential rent shall be offered for the term of the tenancy**."** If a lease contains this language, the preferential rent must be charged on all renewal leases and the legal regulated rent will not be able to be reinstated.

Owners who fail to follow these steps may find that the preferential rent they have been charging tenants may be construed to be the apartment's legal rent. This situation is something that should always be avoided.

Joshua Losardo is a partner in BBWG's Administrative Law Department, specializing in rent regulatory issues. Diana Strasburg is a Legal Assistant awaiting admission to the bar.

Note from the Editors:

As we reach year-end during a time when the future of our city, state and country face many challenges, we wish to express our sincere thanks to our clients, colleagues, and friends for their support and trust in our work. May you all achieve good health, sound judgment, and prosperity in the coming year.

BBWG NEWS

Sherwin Belkin, a partner in BBWG's Administrative Department, responded to an inquiry in *The New York Times* Sunday Real Estate section on November 23 on the rights of a rent-regulated tenant to evict an unwanted roommate, noting that the tenant of record had the right to do so, absent a written agreement to the contrary between them.

Aaron Shmulewitz, a partner in BBWG's Transactional Department, answered a question in *The New York Times* on-line edition on November 5 regarding a cooperative board's rights to regulate shareholders' borrowing, noting that boards generally have great latitude in this area. Mr. Shmulewitz also responded to an inquiry in *The New York Times* Sunday Real Estate section on November 23 on the rights of a cooperative to force a sponsor to sell, rather than rent, unsold apartments as they become vacant, noting that recent court decisions had strengthened cooperatives' positions in this regard.

Craig L. Price, a partner in BBWG's Transactional Department, took part in a panel discussion sponsored by the Real Estate Board of New York on strategies to deal with the changing Manhattan real estate market. Mr. Price also presented a seminar at the office of Prudential Douglas Elliman brokerage on assignment of contracts and mortgage contingencies.

Martin Heistein, a partner in BBWG's Administrative Department, will be an instructor at a seminar on Ancillary Services: Profits and Pitfalls, sponsored by the Community Housing Improvement Program, on December 2.

Lewis A. Lindenberg, a partner in BBWG's Litigation Department, has been elected to membership in the International Network of Boutique Law Firms.

Kristine L. Grinberg, an associate in BBWG's Appeals and Litigation Departments, was the real estate law representative at Brooklyn Law School's Career Conversations Fair on November 6.

Jamie Chapman and **Diana Strasburg**, legal assistants in BBWG's Transactional and Administrative Departments, respectively, passed the New York State Bar examination and are now awaiting admission to the Bar.

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