Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

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Inside This Issue

FIRM UPDATE

THOUGHTS FOR THE NEW YEAR

By Howard Wenig, Managing Partner

As 2010 comes to a close, the partners of BBWG would like to express our appreciation of, and gratitude to, our clients who have shown us unwavering loyalty during this most challenging year. The most difficult event that the firm experienced this year was the tragic loss of Ed Baer. We took great solace from the many memories you shared with us about our close colleague and wonderful friend, whom we will deeply miss.

We are beginning to feel the tide turn. Several encouraging signs are beginning to emerge. Our banking clients have re-structured and disposed of many of their problem loans. Our developer clients are once again analyzing new sites in the hope of developing new buildings.

We have also witnessed a significant increase in refinancing activity, as well as more and more interest in purchasing multi-family properties. Likewise, leasing activity has also seen an uptick. Indeed, all facets of our practice have seen an increase in velocity.

We are also encouraged by the Republicans gaining a 32-30 majority in the State Senate, in light of the Republicans' generally pro-development outlook. As we look forward to 2011, we are confident that the real estate industry will continue to strengthen, and we are proud to have the opportunity to help our clients in maximizing the value of their properties.

We continue to stand ready to do anything and everything to better service our clients' needs. Please let us know how we can continue to be a trusted resource for you, our valued clients. Best wishes for a Healthy, Happy and Prosperous New Year.

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 SPONSOR'S FAILURE TO COMPLETE REQUIRED BUILD-OUT BY SPECIFIED DATE ENTITLES PURCHASER OF COMMERCIAL UNIT TO $7,000/DAY LIQUIDATED DAMAGES PER PARTIES' AGREEMENT

225 Fifth Avenue Retail LLC v. 225 5th, LLC *Appellate Division, 1st Dept.*

COMMENT | *Courts are more likely to enforce "penalty" clauses in commercial settings, where the parties are presumed to be sophisticated and to understand the consequences of their agreements.*

PURCHASER'S FAILURE TO INFORM SELLER OF MORTGAGE DENIAL, OR HER SUBSEQUENT APPLICATION FOR MORTGAGE LARGER THAN CONTINGENCY AMOUNT, WAS BREACH OF CONTRACT ENTITLING SELLER TO KEEP DEPOSIT

Meadus v. Rosenthal *Civil Court, Kings County*

COMMENT | *Although this case involved a house, it's holding is instructive for purchasers in co-op and condo transactions that all provisions of mortgage contingency clauses must be complied with strictly, at the risk of losing the contingency.*

SHAREHOLDER SUIT AGAINST CO-OP CLAIMING ERRONEOUSLY HIGH SHARE ALLOCATION DISMISSED AS UNTIMELY UNDER STATUTE OF LIMITATIONS

Akhunov v. 771620 Equities Corp. *Appellate Division, 2nd Dept.*

MARTIN ACT DOES NOT BAR SUIT FOR COMMON LAW CLAIMS SUCH AS FRAUD, BREACH OF FIDUCIARY DUTY AND NEGLIGENCE

Assured Guaranty (UK) Ltd. v. JP Morgan Investment Management, Inc. *Appellate Division, 1st Dept.*

COMMENT | *This case is the latest in a series of sometimes-con□icting decisions that interpret what claims a plaint□ can bring in light of New York State's securities disclosure law, which also governs many suits against sponsors of co-op and condo o□ering plans. More clari□cation must come from the Court of Appeals.*

CO-OP BOARD CAN REJECT PURCHASER BASED ON INADEQUATE PRICE

Harris v. Seward Park Housing Corporation *Appellate Division, 1st Dept.*

COMMENT | This decision is very important, in that it continues and reinforces a recent trend of cases holding in such manner. The Court recognized that a co-op has "a legitimate business interest in procuring the highest possible price for the sale of its units."

QUESTIONS OF FACT BAR SUMMARY JUDGMENT IN SUIT OVER LENGTH OF TERM OF CO-OP'S MASTER COMMERCIAL LEASE

Courtview Owners Corp. v. Courtview Holding, B.V. *Supreme Court, Queens County*

COMMENT | *This case involved a 23-year discrepancy between the expiration date of the initial term of the lease as stated in the lease, and in the o□ering plan, respectively. The Court declined to rule at this point that one predominated over the other.*

NEW CONDO BUYER ENTITLED TO RESCIND PURCHASE CONTRACT UNDER ILSA; DEVELOPMENT NOT ENTITLED TO "100-LOT" EXEMPTION BECAUSE CERTIFICATE OF OCCUPANCY NOT YET ISSUED

Gri□ th v. Steiner Williamsburg, LLC *U.S. District Court, Southern District of New York*

COMMENT | *This decision explicitly disagreed with an opposite holding in an earlier case, Bodansky v. Fifth on the Park. Reconciliation by the Circuit Court of Appeals is necessary.*

BROKER NOT LIABLE TO BUILDING PURCHASER FOR INCORRECT BUILDING CLASSIFICATION

Walker v. Insignia Douglas Elliman *Appellate Division, 1st Dept.*

COMMENT | *The Court noted that the purchaser did due diligence research, including through her attorney, and knew or should have known of the building's actual classi□cation before proceeding.*

CO-OP SHAREHOLDER NOT A HOLDER OF UNSOLD SHARES BECAUSE PURCHASE WAS NOT FROM A HOLDER OF UNSOLD SHARES

Rotblut v. 150 East 77th Street Corp. *Appellate Division, 1st Dept.*

COMMENT | *The Court held that, under the typical non-waiver provision in the co-op's proprietary lease, the co-op never waived its right to assert the shareholder's "regular" status, despite acquiescing to the shareholder's prior actions without having sought the co-op's consent.*

CONDO PURCHASER SUIT TO RECOVER DEPOSIT OVER MATERIAL CHANGES TO UNIT IS BARRED BY RES JUDICATA, SINCE ITS PRIOR SUIT BASED ON THE SAME FACTS WAS DISMISSED ON SUBSTANTIVE GROUNDS

The Plaza PH2001 LLC v. Plaza Residential Owner LP *Supreme Court, New York County*

COMMENT | *The Court also ordered the unsuccessful purchaser to pay the sponsor's legal fees.*

CO-OP SHAREHOLDER'S SUIT AGAINST NEIGHBOR FOR HARASSMENT AND OTHER CLAIMS, BASED ON REPEATED FALSE NOISE COMPLAINTS, DISMISSED

Oxman v. 1100 Park Avenue Cooperative Corp. *Supreme Court, New York County*

COMMENT | *The Court held that the repeated complaints, even if false, were not su□ ciently unreasonable or egregious to support claims for emotional distress or other tortious conduct.*

GUESTS IN CO-OPS

By Aaron Shmulewitz

Co-ops are often faced with the issue of apartments being occupied by "temporary guests," both with and without the shareholder being present simultaneously. While some shareholders may feel that they have an unrestricted right to use their apartments as they wish, that is not the case; co-ops have potent rights and remedies to regulate such occupancy, which have been upheld repeatedly by the courts. (This article does not address the rights of condominiums and their unit owners, which are separate issues.)

A typical co-op proprietary lease provision governing use of an apartment states that the apartment can be used only as "a private dwelling for the [shareholder] *and* [the shareholder's] spouse, their children, grandchildren, parents, grandparents and siblings," and that the apartment may also be occupied from time to time by guests of the shareholder for up to one month, but that no guest may occupy the apartment unless the shareholder is simultaneously in occupancy, absent the co-op Board's consent.

Such a provision establishes two separate categories of potential temporary occupants:

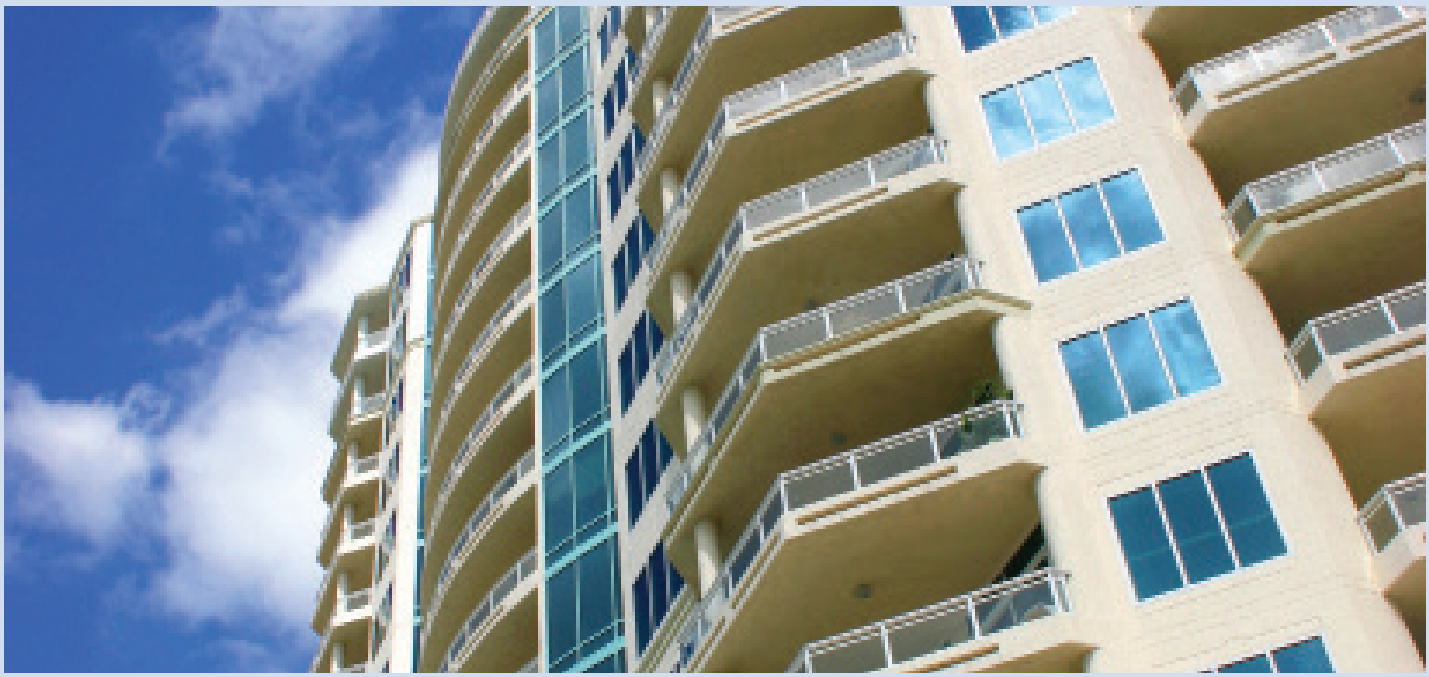
RELATIVES: These persons can stay in an apartment only if the shareholder of record is there simultaneously, or the Board otherwise consents. Several court decisions in the Appellate Division, 1st Department (which governs Manhattan and Bronx co-ops) have uniformly interpreted the word "*and*" in the above provision to mean that the shareholder of record *must* reside there at the same time. A shareholder cannot simply allow his/her relative to stay in the apartment while he/she is away; doing so would constitute a breach of the proprietary lease, for which the co-op could take legal action. (Court decisions involving co-ops outside Manhattan and the Bronx have taken an opposing view, and have ruled that a shareholder's relatives can stay in a co-op in the absence of the shareholder.)

OTHER GUESTS: Persons who do not fit into the specified relationship categories can stay in an apartment for not longer than 30 days, and only if the shareholder is also present, or the Board otherwise consents. A shareholder cannot simply allow a temporary short-term guest to stay in his/her apartment while he/she is away, no matter for how short a period, without Board approval. Doing so would also constitute a breach of the proprietary lease, which could trigger legal action by the co-op.

Not enforcing such rights and remedies could expose a co-op to an increasingly transient environment, which could lead to some apartments effectively being operated as "bed-and-breakfasts," and the concomitant deterioration in the quality of life of other building residents (e.g. general "vacation atmosphere," including: noise, parties, graffiti and other damage to common areas), and potential security risks. Those conditions could, in turn, depress resale values of apartments in the building.

Co-ops and managing agents faced with the issue of unauthorized or excessive temporary occupancy should seek the advice of counsel regarding their legal rights and remedies, and practical ways to enforce them.

Aaron Shmulewitz heads the firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City. If you would like to discuss any of the issues raised in this article, or other related matter, you can reach Aaron at 212-867-4466 or (ashmulewitz@bbwg.com).



THE NEW YORK STATE LEGISLATURE EXPANDS THE LOFT LAW

By Joseph Burden and Lisa Gallaudet

The New York State Legislature recently expanded the Loft Law, effective June 21, 2010 (the "New Loft Law"). Under the New Loft Law, hundreds of lofts formerly exempt are now covered by the Loft Law. Coverage under the Loft Law has been expanded to include buildings that don't have a certificate of occupancy for residential use and have 3 or more residential units for 12 consecutive months between January 1, 2008 and December 31, 2009.

The Legislature also included some restrictions in the New Loft Law. The eligible units must:

1. *have at least one window opening onto a street, lawful yard or court;*
2. *be at least 550 square feet in area;*
3. *not be located in a basement or cellar;*
4. *not be in an industrial business zone other than Greenpoint/Williamsburg, North Brooklyn and certain areas of the Long Island City's industrial business zone; and*
5. *not be in a building that, on June 21, 2010, contained certain uses listed in Use Groups 15 through 18 of the Zoning Resolution which the Loft Board determines to be inherently incompatible with residential use.*

The New York City Loft Board has now proposed regulations to interpret and implement the New Loft Law. These new regulations are not yet in effect, since the Loft Board will be receiving comments and conducting a public hearing on January 20, 2011, before voting to finalize the regulations.

Under the proposed amendments, the initial registration application form must be filed for all buildings, or portions thereof, seeking Article 7-C coverage within six (6) months from the date the regulations become final. The regulations also specifically define what units are covered under the New Loft Law and whether buildings that were covered by the Old Loft Law and have units that were converted to residential use years later, may be covered by the New Loft Law.

The proposed regulations also clarify what uses in Use Groups 15 through 18 of the Zoning Resolution are "inherently incompatible" with residential use and will bar a building or unit from coverage under the New Loft Law. However, consistent with the Loft Board's intention to enlarge the scope of coverage under Article 7-C, the proposed amendments will permit a non-residential use within the unit so long as it is incidental to the residential use. The regulations are silent as to what types of non-residential uses are permitted within the unit.

The proposed regulations are published on the New York City Loft Board website at: www.nyc.gov/nycrules. A public hearing was held on January 20, 2011 to discuss the public comments. Upon a final vote by the Loft Board, the rules will become final after 30 days from the date they are accepted. In the event the rules are not accepted, the rules will be redrafted and go through an additional voting procedure.

If you are a building owner which might be affected by the New Loft Law, you should consult counsel experienced in the Loft Law to see if the proposed regulations affect you.

Joseph Burden is a founding partner in the firm.

Lisa Gallaudet is an associate of the firm's Litigation Department.

OWNER OCCUPANCY NOTICES

By Jeffrey L. Goldman

In a recent decision by the Appellate Term, First Department argued by Jeffrey L. Goldman, the Appellate Term reversed the lower Court's dismissal of two owner occupancy proceedings and found that the notices of non renewal complied with the specificity requirements of the Rent Stabilization Code and governing case law.

Mr. Goldman represented an owner who sought to convert an entire building to a single family dwelling for him, his fiancée and her two children. The building consisted of 13 apartments of which 5 were vacant and 8 others were occupied by tenants who had rent regulated leases expiring at varying times. The notices provided detailed facts such as the current living arrangements of the owner and his fiancée, how each floor was to be utilized once the building was converted and that notices of non renewal would be served on the other tenants as they became due.

The tenants unsuccessfully argued that the notices were defective since they were based upon "factors dependent upon future contingencies which may or may not occur." This included the claim that the owner and his fiancée may never marry, the owner's ability to effectuate a building-wide renovation plan given the number of tenants who had to be removed and that the owner failed to state in the notice that it was to immediately begin construction on the tenants' apartments and thereafter take possession of each apartment as it became available. The tenants also unsuccessfully argued that the owner must plead that it will immediately begin work once it recovers possession and that a tenant should not be permitted to be evicted when the work will not begin until other apartments are ultimately recovered.

The decision reinforces the importance of sitting down with experienced counsel when considering the acquisition of a building for owner occupancy needs and before the service of any notices of non renewal.

Jeffrey L. Goldman is a founding partner of the firm.

DHCR RULES THAT RE-WIRING OF ONLY 80% OF A BUILDING'S APARTMENTS WILL ENTITLE THE BUILDING OWNER TO AN MCI INCREASE

By Phillip Billet

Pursuant to the Rent Stabilization Law and Code (the "Code"), a building owner that installs a major capital improvement at its building will be entitled to file an "MCI Application" with DHCR, requesting permission to increase the rent of each rent-regulated apartment at its building by an amount equal to a percentage of the cost of the improvement.

The Code sets forth various requirements, which a major capital improvement must meet in order to warrant such rent increase (commonly known as an "MCI Increase"). One requirement is that the improvement must inure "directly or indirectly to the benefit of all tenants" of the building. DHCR, however, has established certain exceptions to this rule. For example, pursuant to longstanding DHCR policy, a building owner that wishes to replace windows at its building will only be required to replace 80% of the building's windows in order to be entitled to an MCI Increase.

DHCR has now extended this "80% rule" to rewiring under certain circumstances. The Code provides that in order to be entitled to an MCI Increase based upon re-wiring, a building owner must install "new copper risers and feeders extending from (the) property box in (the) basement to every housing accommodation."

DHCR, however, has established a policy which provides that a building owner will only be required to rewire 80% of the apartments in its building in order to be eligible for an MCI Increase if it can demonstrate that the other 20% of the apartments were not in need of re-wiring at the time.

In Matter of 133-135 West 13th Street, Docket No. SG-410034-RO, decided August 19, 2010, a building owner filed an MCI Application, in which it requested an MCI Increase based upon rewiring that it performed in nine out of the building's eleven apartments. DHCR's Rent Administrator denied the application, finding that the rewiring did not include the installation of "subfeeders." The owner then filed a PAR against the denial of its application, in which it argued that it did in fact install subfeeders in nine of the eleven apartments, and that it did not perform rewiring work in the other two apartments because these apartments had been rewired two years earlier "when adequate power for those apartments was installed with the new service to the building."

Upon review, DHCR's Deputy Commissioner granted the owner's PAR and granted the MCI Application, finding that the work which the owner performed was sufficient to warrant an MCI Increase. The Deputy Commissioner noted that the Owner had not rewired all of the building's apartments, but nevertheless ruled that:

> *(a)lthough all of the upgrading in the building may not have been performed under this application, the Commissioner acknowledges that there are limited circumstances where the replacement of previously installed risers, panels and double outlets would be unnecessary and unwarranted.*

The Deputy Commissioner there upon concluded that: *(w)here an owner has earlier rewired apartments, and the condition of the installations are such that replacement is not required, then the subsequent rewiring of all other apartments totaling at least 80% of the total number of apartments as part of a unified plan and consecutively timed project completed within a reasonable time frame would substantially comply with the requirements of a major capital improvement.*

Significantly, DHCR's granting of the owner's MCI Application was not based solely on the fact that the owner rewired 80% of the building's apartments. Rather, DHCR granted the application because the owner rewired 80% of the apartments and because the other 20% of the apartments were not in need of wiring at the time, having been sufficiently rewired earlier when new power was installed to those apartments.

Accordingly, a building owner that only re-wires 80% of the apartments in its building and does not have a valid excuse for its failure to re-wire the other apartments, should not rely on this exception. However, if an owner has a legitimate reason for failing to re-wire 20% of the building's apartments at the time it re-wires the other apartments, this failure should not prevent it from applying for an MCI Increase based upon its re-wiring of the other apartments.

Phillip Billet is an associate in the firm's Administrative Law Department.

Notable Achievements

We congratulate CORINA STREEKMAN, who was promoted on January 1, 2011 from litigation associate to a partner of the Firm.

SHERWIN BELKIN, a partner in BBWG's Administrative Law and Appeals Departments, authored an article in the December 15 edition of *Real Estate Weekly* entitled "Bedbug Disclosure Law Provides More Questions Than Answers," in which MR. BELKIN pointed out numerous failings of the new statute. MR. BELKIN also responded to an inquiry in the December 19 Sunday Real Estate Section of the *New York Times* regarding the effect that taking on a roommate would have on a rent-stabilized tenant's status under luxury decontrol regulations.

MARTIN MELTZER, a partner in BBWG's Litigation Department, authored an article in the December edition of *The Mann Report* entitled "The Problem of Bedbugs in New York Buildings," in which MR. MELTZER examined the obligations and rights of building owners and tenants.

AARON SHMULEWITZ, head of BBWG's co-op/condo practice, responded to an inquiry in the December 19 Sunday Real Estate Section of the *New York Times* regarding potential claims against a former condominium Board member who sold his unit before a condominium vote on proposed borrowing.

DOUG DAVIS, a member of BBWG's Office Services staff, rescued a burning man from a house fire on December 26, which was reported in the *New York Post* on December 27.

CORRECTION

Update to "Certification of Correction of HPD Violations Made Easier,"

By Jordi Fernandez, Esq., Article published in December 2010 BBWG Update

BBWG would like to note that although HPD promulgated rules in November 2010, electronic certification of violations is not operational yet. However, conventional methods remain available for certification. Owners and managing agents should check HPD's web site at http://www.nyc.gov/html/hpd/html/home/home.shtml to determine whether the electronic filing system is operational before e-filing their certifications. If you need help certifying your building's violations as corrected, contact BBWG. We can guide you through the procedures and assist in eliminating violations which no longer exist.

CASES AND TRANSACTIONS OF NOTE

JOSEPH BURDEN, co-chair of BBWG's Litigation Department, and DAVID BRAND, an associate in the department, are representing firm client Katz 737 Corp. in an action brought against rent stabilized tenants Lester and Carol Cohen in Supreme Court, New York County based on the assertion that the Cohens were misrepresenting their annual income in an effort to maintain their rent regulated apartment despite luxury decontrol laws. The suit contends that Carol Cohen — a successful real estate broker who consistently ranked in the top 100 brokers in the country — had misrepresented the couple's household income to the Department of Housing and Community Renewal. The filing of the suit was reported in both *The New York Post* and *The Real Deal*.

HOWARD WENIG, DANIEL ALTMAN and ALLAN GOSDIN of BBWG's Transactional Department concluded a sophisticated transaction in a two-week period which entailed negotiating a contract for, and closing on, the purchase of a multifamily apartment building on the Upper West Side on behalf of a group of investors. MARTIN HEISTEIN, JOSHUA LOSARDO, VLADIMIR FAVILUKIS, DIANA STRASBURG and ALYSSA SANDMAN of BBWG's Administrative Department conducted due diligence on this rent stabilized building that was subject to J51 tax benefits.

DANIEL ALTMAN, ROBERT JACOBS, CRAIG L. PRICE and JAMIE CHAPMAN closed on a $23 million bulk purchase of approximately 340 condominium units in Boca Raton, Florida. The transaction, which was concluded in an incredible six business days, involved preparing several layers of operating agreements for this multiparty transaction, negotiating purchase money financing with the seller/former lender which foreclosed on the units, and closing the transaction in escrow with seller's counsel in Florida.

CRAIG INGBER, a partner in BBWG's Transactional Department, represented borrowers on Fannie Mae mortgage refinancings of six multifamily properties in Brooklyn with an aggregate mortgage amount in excess of $36 million.

CRAIG L. PRICE and HOWARD WENIG represented the purchaser of a commercial building on the Upper East Side. Mr. Price also represented the purchaser of an estate in Pound Ridge, the seller of a commercial condominium unit in Manhattan, and the borrowers on mortgage refinancings of commercial and multifamily properties in the Bronx and Brooklyn. Mr. Price was also a panelist at a roundtable discussion on "Residential Transactional Issues Facing New York City," sponsored by Prudential Douglas Elliman on November 17.

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