BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Letter from the Managing Partner

Howard Wenig

As we look forward to 2009, we here at BBWG believe that our experience in dealing with the last downturn in the early 1990's will help our valued clients weather the current downturn.

Our Administrative Department is preparing and filing MCI and J-51 Applications and ensuring that each and every dollar our clients are entitled to is recovered.

Our Litigation Department's expertise in prosecuting non-payment proceedings on behalf of owners and co-ops, and foreclosure actions on behalf of condominium boards and lenders, is more valuable than ever.

Our Transactional Department is experienced in restructuring transactions and working out loans that are delinquent.

As we head into 2009 we continue to believe that our most important attribute is our commitment to our clients to work with them each and every day to achieve their objectives and increase the value of their properties.

We appreciate and are grateful for the confidence our clients have shown us in 2008 and are committed to continue to earn that confidence in 2009.

Appeals Update

"In Occupancy" But Not "Tenants": *Expired Market Lease Holdover Tenants Have No Conversion Rights*

By: Sherwin Belkin

During the high-profile and vigorously litigated conversion of Manhattan House (at 200 East 66th Street) more than two dozen unregulated market rate tenants had claimed that they were entitled to protection under the General Business Law as tenants-in-occupancy.

These tenants, whose market rate leases had expired, were the subject of eviction proceedings when they refused to vacate. When the conversion plan was accepted for filing by the Attorney General's office, the tenants moved to dismiss the eviction proceedings, arguing that once the blackbook came out, as long as they remained in occupancy of their apartments, they must be considered to be "tenants-in-occupancy."

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Attorney Advertising

"In Occupancy" But Not "Tenants". . .

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If this position was accepted, then, under the General Business Law, this would mean that market rate tenants would be entitled to remain in occupancy – even after their leases had expired – at not objectionable rents representing not unconscionable rent increases. In essence, a quasi-form of rent regulation would now protect market rate tenants from eviction.

In *MH Residential, LLC, et al v. Barrett, et al,* the Civil Court ruled in the tenants' favor, holding that, indeed, once the blackbook came out, if these tenants remained in occupancy of their apartments – and they did – they fell within the ambit of the General Business Law's protections.

On appeal, a unanimous Appellate Term, First Department, **reversed**. The appellate court held that the market tenants at Manhattan House whose leases had expired, but who remained in occupancy at the time a plan of conversion was accepted for filing by the Attorney General, were not "tenants in occupancy" for the purpose of obtaining rights under the General Business Law.

The Court reasoned that although such persons may have been "in occupancy," they still were not "tenants". The Court noted that a landlord / tenant relationship is a creature of contract – whether express or implied – which defines the parties' rights and obligations. Once the lease expired, absent a right of renewal or extension having been granted, the tenant's obligation is to vacate, the legal right of possession ends, and the landlord – tenant relationship comes to an end.

The Appellate Term held:

Applying these settled principles to the situation at bar, and given that respondents' unregulated market-rate leases contained no right of renewal and expired prior to the date upon which the plan was accepted for filing, we conclude that no landlord-tenant relationship existed as of the filing date.

The Court found that this group did not constitute "tenants" entitled to protection from eviction under the Martin Act.

This is a vital decision for owners considering conversion and sponsors of extant conversions. Although the decision by the Appellate Term was unanimous, it would not be surprising if this case went to a higher appellate court, and, perhaps, to the State's highest court – the Court of Appeals.

Sherwin Belkin is a partner in the Firm's Administrative and Appeals Departments.

Litigation Update

A Fire Does Not Necessarily Burn Your Right to Full Rent

By: Jeffrey L. Goldman

Unfortunately, tenants accidentally or carelessly cause fires that result in substantial damage to the tenant's apartment and often neighboring apartments. Many times the Department of Housing Preservation and Development will issue a vacate order due to the damage.

Rent Stabilization Code Section 2520.11(e)(7) permits a rent reduction to a nominal amount while the vacate order is in effect. Very often this is $1. What happens when the tenant applies or fails to apply for this reduction? Is the tenant obligated to pay the full rent notwithstanding the vacate order?

A recent decision of the Housing Court held that where the fire was caused by the tenant's family member as evidenced by the Fire Marshall's Report [child playing with matches], the tenant remained obligated to pay the full rent due. This was consistent with DHCR precedent which has held that there was to be no rent reduction where a fire was caused by "careless smoking" by the tenant or the fire was accidentally caused by a lit candle.

Unfortunately, the Court refused to permit the owner to pass on the costs of the individual apartment improvements that had to be made by virtue of the fire.

The lesson to be learned is to analyze the basis for the vacate order and to challenge any attempt to reduce the rent, where appropriate, and if not reduced, commence a summary nonpayment proceeding to collect the rent.

Jeffrey L. Goldman is a partner in the Firm's Litigation Department.

Transactional Update

Time is of the Essence

By: Craig Ingber

Much has been written concerning what circumstances and language adequately create what we often refer to as a TIME OF THE ESSENCE ("TOE") closing date. While the term TOE is used casually all too often, a TOE closing date is created either by the terms of a contract or by a written declaration.

The reason to provide for a TOE closing date is to ensure that the obligations of the parties under a contract be performed on or before a date certain. The TOE closing date becomes what is referred to as the 'law date' set for closing, not the ubiquitous 'target date', and establishes the final date upon which the parties to a contract must perform their respective obligations or risk being held in default under their contract for their failure to perform and discharge their respective obligations.

If a TOE closing date was included as part of the contract when executed, or if a TOE closing date was properly declared against a party, the question arises about what to do if either party states explicitly or indicates by its actions that it will not close or is not able to close on the TOE closing date.

More often than not, it is the purchaser who fails to close and the seller that asks its attorney how to protect itself if the purchaser does not close on the TOE closing date. That is the possibility I will explore in the balance of this article.

In such instance, to assure the seller that it can hold the purchaser in default under its contract and retain any deposit or downpayment as liquidated damages after such default, it is imperative that the seller be able to demonstrate that it was ready, willing and able to close and tender title and perform its obligations under its contract.

Almost every case dealing with the retention by a seller of a deposit or downpayment as liquidated damages after a purchaser's default under the contract is based upon the facts of the case and more often than not is decided by the exchange of correspondence between the seller's and the purchaser's attorneys prior to the TOE closing date.

To properly and definitively establish that a seller was prepared to close on the TOE date, the seller's attorney should start early by sending correspondence to the purchaser's attorney regarding the closing preparation and details of the transaction. Sending drafts of documents, closing adjustments and payment instructions for the balance of the purchase price helps establish readiness to close. To ensure that a court can objectively determine that a seller was in fact ready, willing and able to close on the TOE closing date, the seller's attorney should consider having a court reporter attend the closing on the TOE closing date and the seller and its attorney should "conduct" the closing (albeit without a purchaser) to demonstrate that the seller was in fact ready, willing and able to close at that time.

Being prepared for closing (and, especially, a closing that does not actually occur), can mean the difference between retention of a downpayment and protracted litigation.

Craig Ingber is a partner in the Firm's Transactional Department.

Updating the House Rules with Pets in Mind

By: Craig L. Price and Jamie B. Chapman

Cooperative and condominium boards have broad discretion in setting house rules and regulations. Boards should review and update their governing documents and rules periodically to make sure they are still applicable and appropriate. In particular, boards should review their pet policies on a regular basis.

It is not unusual for a building's rules to contain provisions requiring board approval to have a pet and/or other pet restrictions. Noise, cleanliness, and safety are all issues boards must take into account when creating a pet policy. (Some boards even require an incoming pet to attend an interview so that the board members can observe how the pet behaves "in public" before deciding whether to allow the pet.) Common pet restrictions include specific requirements regarding the pet's size and weight, breed, and limitations on the number of pets that can be harbored in a single apartment. Many boards also require pet owners to carry liability insurance in case their pet bites someone.

Boards have to keep in mind that an outright ban on all pets limits the prospective purchaser market and

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could make it more difficult to sell apartments in the building. Moreover, even if a board bans all pets, service animals for people with physical and medical disabilities must be permitted under law. Therefore, in reviewing the governing documents and house rules with regard to pet restrictions, the board must balance the desire to have a clean, quiet and safe living environment with the desire of existing and prospective apartment owners to have pets.

Mr. Price is a partner in the Firm's Transactional Department. Jamie B. Chapman is a Legal Assistant awaiting admission to the bar.

Craig L. Price

Administrative Update

Identity Crisis: Making Sure that the City and State Administrative Agencies Know Who You Are

By: Vladimir Favilukis

While the commercial real estate market sits in a lull, poised for a rebound on the heels of the already oncoming "fire-sales" in the residential market, some owners have already taken advantage of the potential bargains by purchasing property at relatively low cost.

In purchasing new property, new owners generally observe the requirements of registering the property with the New York City Department of Finance ("DOF") and Department of Housing Preservation and Development ("HPD"), since the former is integrally connected with the payment of real estate taxes and is generally done concurrently with recording the purchasing deed with the City Register, while the latter is an explicit requirement of the Administrative Code of the City of New York and carries a potential penalty of $250 to $500 for failing to register. Owners forget, however, that a new owner identity registration is also required by the New York State Division of Housing and Community Renewal ("DHCR").

Being that the economy is still bogged down, tenants who are hoping to obtain a rent reduction and/or abatement are filing complaints with the DHCR more frequently than ever before, especially tenants residing in buildings that have recently undergone a change in ownership.

Tenants in such buildings are typically more prone to filing complaints with DHCR because they either anticipate an increased rent due to a new owner's propensity to maximize the potential collectible rent at the building, or because they believe is easier to take advantage of a new owner who may not have access to the old owner's records and, thus, may be unable to defend against a potential complaint (*e.g.*, overcharge, fair market rent appeal, etc.).

Therefore, when purchasing a new building, it is imperative that the new owner take all proper steps to record its identity with all of the New York City and State agencies as the fee holder for the property -- not just the DOF and HPD, but also the DHCR.

Registration with the DHCR is a fairly simple process which involves only a single form entitled, not surprisingly, "Report of Change in Identity of Owner/Agent" (any change in the managing agent for the building must also be recorded by the filing of a separate copy of the same form).

The Form must be filed with the DHCR's Central Information Services Unit, located at the agency's Gertz Plaza office at 92-31 Union Hall Street, Jamaica, New York 11433. ***The Form must be filed within thirty (30)***

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days after the filing party has acquired the property. (Incidentally, this is the same time period within which a new owner or managing agent is required to register their identity with the HPD.)

Although there is no penalty for registering a building past the 30-day mark, it is important that a new owner register its identity with the DHCR as soon as possible because the new owner will not receive any notices from the agency until the form is filed (*e.g.*, notices of complaints, orders, etc.). Failing to do so, may hinder, or even preclude, a new owner from obtaining important building records from the agency, answering a complaint, or filing an administrative appeal of a prior DHCR order -- the DHCR has previously held that a new owner who fails to inform DHCR of its identity within the allotted time period may be precluded from appealing a prior order even where the owner never received notice of the adverse order.

Failing to file a change of identity form with the DHCR may have resounding repercussions on owner's ability to manage and obtain maximum value from a newly acquired property. It's easy and simple. File expeditiously, and avoid the crisis mode.

Vladimir Favilukis is an associate in the Firm's Administrative Law Department.

Deregulate Your Rent Regulated Apartments Through High Income High Rent Deregulation in 2009

By: Joshua G. Losardo

High Income High Rent Deregulation (or "Luxury Deregulation") is an administrative procedure resulting in the deregulation of a rent stabilized or rent controlled apartment if the apartment's legal or maximum monthly rent is $2,000 or more, and the ***household*** income (*i.e.* the income of all persons occupying an apartment as a primary residence) exceeded $175,000 in both years preceding the year that the petition is filed with the New York State Division of Housing and Community Renewal ("DHCR"). If you have a rent regulated apartment with a legal or maximum rent of $2,000.00 or more, you may serve an Income Certification form on the tenant by May 1, 2009 to commence the process. On or before June 30, 2009, owners must file a "Petition by Owner for High Income Rent Deregulation" with DHCR for each apartment the owner seeks to deregulate. In 2009, DHCR shall consider the household income for 2007 and 2008.

When reviewing rent rolls, owners should also consider petitioning apartments which will reach the $2,000 monthly rent level for the first time on or before May 1, 2009. It does not matter if a tenant is paying a preferential rent of less than $2,000, as long as the apartment's legal rent is $2,000 or more on or before May 1st. An owner may also combine the legal rent of different apartments rented by the same family in order to reach the $2,000 threshold.

For more information about Luxury Deregulation, please contact Mr. Losardo, a partner in BBW&G's Administrative Law Department.

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