BBWG

# Belkin Burden Wenig & Goldman, LLP

# UPDATE

June 2008



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## Litigation Update

## "All You Need Is Love?" No, You Need Much More To Succeed in New York

***By: Noelle Picone***

While the Beatles may be disappointed, owners should be happy to hear about a recent housing court decision by Judge Peter M. Wendt, *ACP 205 East 78th Street Associates, L.P. v. Ambron*, which reaffirmed the notion that a loving relationship and emotional dependence is not enough for a non-traditional family member to succeed to the tenancy rights of a rent-regulated apartment in New York City.

As many owners may already be aware, under New York statutory and case law, in order to succeed to a rent-regulated apartment, a non-traditional family member has the burden of proving, not only that he or she co-occupied the housing accommodation with the tenant of record for at least two years (or one year if the occupant is a senior) prior to the tenant's permanent vacatur, but also the existence of an emotional and financial interdependence with the tenant. There are several factors to be considered in determining whether such an emotional and financial commitment and interdependence existed, including but not limited to: the sharing of household expenses, intermingling of finances, formalizing legal obligations, and holding themselves out as family members. As a judge's application of this rule involves the weighing of these various factors, it is an extremely fact-specific analysis.

In applying these factors to the facts of

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## Pay Now — Fight Later

***By: Danielle Schilling***

Typically, in commercial leases there are provisions for the payment of rent and additional rent. Additional rent is classified differently in each commercial lease, but often includes items such as electric charges, water and sewer charges and/or real estate tax escalations. Sometimes there is a provision in the lease which allows a tenant to dispute the additional rent charges.

Some tenants will call the landlord to discuss the charges either for clarification or to dispute the charge itself. When the lease requires the tenant to pay the billed amount first and then dispute the charge, it is called "pay now, fight later". It is the tenant who must act first, not the landlord. The landlord has no obligation to notify the tenant of this additional condition.

Later, the parties may end up in court because no payment has been received and the tenant alleges that the landlord waived its rights under lease because the landlord knew that the tenant disputed the amount billed.

In any such waiver claim, it does not matter if the landlord knew that the tenant disputed the amount billed; what matters is if the landlord intended to waive the amount billed. Courts have held that "the intent to waive must be unmistakably manifested, and is not be inferred from a doubtful or equivocal act." Further, courts have also held that the willingness of a party to discuss the merits of a dispute notwithstanding the

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this case, the Court determined that there was no sharing of household or family expenses since the tenant paid for almost all household expenses associated with the apartment and he also paid when the couple dined out and traveled. The only instance in which the occupant paid was for food when she cooked, which was insufficient, the Court found, to constitute a sharing of household expenses.

The Court also found that there was absolutely no intermingling of finances between the occupant and tenant as they did not authorize one another to use each other's credit cards, have a joint bank account or file joint income tax returns. Additionally, the Court noted that they each owed separate residential property, with the other having no rights whatsoever to the property.

The Court also concluded that the occupant and tenant did not formalize legal obligations and responsibilities to one another inasmuch as they had no formal domestic partnership between them and neither of them gave the other power of attorney. Furthermore, the tenant did not name the occupant as a beneficiary under his will, health care proxy or life insurance policy and the occupant was not involved with the tenant's funeral arrangements.

The most telling indication of the status of the relationship between the occupant and the tenant, the Court determined, was the fact that the tenant had asked the occupant to marry him and she refused. The Court did not find the occupant's explanation that marrying the tenant would result in a loss of her deceased husband's social security benefits as credible. While the occupant and tenant may have loved each other, the Court noted, this fact detracts from the type of commitment required in order for a non-traditional family member to be entitled to succession rights.

At trial, the occupant, along with several witnesses, described her relationship with the tenant as a "loving, long-term relationship." Two of the witnesses described the occupant as the tenant's "girlfriend," a title which the occupant also used, and another witness described the couple as "two lovebirds." However, none of the witnesses described their relationship as a spousal type relationship, which the Court noted in its decision.

Last, the Court also concluded that the occupant failed to establish that the subject apartment had been her primary residence prior to the death of the tenant. This conclusion was based on the fact that the occupant had continued to be the rent-stabilized tenant of record of an apartment in Queens, pay the rent and most of the utilities for that apartment and have all of her significant documents, such as credit card statements, sent to her at that apartment.

The Court's decision makes one thing clear: more than love is needed in order to succeed to the tenancy rights of a rent-stabilized apartment in New York.

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apparent existence of the other party's claims does not justify an inference that the party is waiving that claim. This means that more conversations between the landlord and tenant regarding additional rent charges do not constitute waiver by the landlord.

Landlords who have discussed disputed charges with commercial tenants or have attempted to negotiate a deal with them have not waived their right to seek the full amount due. These situations are fact specific and it is the tenant's burden to demonstrate by means of factual evidence that the landlord intended to waive its right to pursue the entire disputed amount.

In summary, depending upon the terms of the lease, mere discussions between a landlord and a commercial tenant about a disputed charge do not justify the tenant's failure to comply with by its legal obligations under the lease and do not create a waiver of the lease clause.

***This article was written by Danielle R. Schilling, an associate in BBWG's litigation department. For more information about commercial lease default issues, please contact Ms. Schilling or Jeffrey Levine, a partner in BBWG's Litigation Department.***

# The Trial Subpoena

***By: Brian Clark Haberly***

Documents or property, in the possession of an adversary or another party, are sometimes necessary to successfully prosecute or defend against a claim. The simple trial subpoena should not be overlooked as a means to obtain these materials.

There are two different types of trial subpoenas. A subpoena *ad testificandum* directs a specific person to appear and testify in court. A subpoena *duces tecum* commands a party or other specific person to produce documents or property in court on a trial date.

In a recent Supreme Court case handled by this firm, a tenant sued the landlord for alleged property damages. The property involved was a crystal vase (said to be by Lalique), a porcelain basket (claimed to be a Staffordshire), and an Italian painting which the tenant claimed was by a famous artist worth in excess of $22,000.00.

BBWG served a subpoena *duces tecum* directing the tenant to bring the vase, the basket, and the painting to court on the trial date.

The tenant brought the property to court. The landlord's appraiser examined the broken pieces of the vase, the broken basket and the damaged painting. The landlord's appraiser concluded that both the vase and the basket were cheap imitations of expensive items and lacked makers' marks or other identifying characteristics showing they were a Lalique vase or a Staffordshire basket as claimed by the tenant's appraiser.

The landlord's appraiser also found that the tenant's painting was by a completely different artist than claimed by the tenant and her appraiser. The painting was only worth a fraction of the amount claimed by the tenant and her appraiser (roughly $1,500.00, rather than the amount in excess of $22,000.00 claimed by the tenant).

The trial judge also found that having the actual items in court enabled her to examine property first hand, rather than trying to reconcile the conflicting testimony of two different expert witnesses. The judge concluded that the landlord's appraiser was far more credible than the tenant's appraiser and that she would use the values assigned to the property given by the landlord's appraiser. The judge expressed concerns about the veracity of the tenant's appraiser when the judge decided that the tenant's appraiser had incorrectly identified the painting as having been by a famous Italian artist, rather than by the commercial painter who actually did this particular painting.

Serving a trial subpoena on the tenant and compelling the tenant to bring the actual property to court turned out to be very important in the judge's decision in the case and turned out to be an important factor in the judge only awarding the tenant a small fraction of the damages sought.

***Brian Haberly is an associate in the Firm's Litigation Department.***

# BBWG NEWS

**Robert Jacobs** lectured on June 10, 2008, on a panel of legal experts regarding Real Estate Development rights at the NYC Bar Association.

**Sherwin Belkin** was quoted by the *New York Times* in three articles. In the Real Estate Q&A (4/20/08), Mr. Belkin answered a question concerning a tenant renting out a room in his apartment and the amount of rent to charge. In an article (4/26/08) concerning the Brearley School's efforts to acquire more space for much-needed classroom, Mr. Belkin's and the firm's and the firm's legal representation of the School was referenced. In a "Your Home" piece published on May 11, 2008, Mr. Belkin was quoted in connection with advice to landlords seeking to end preferential rents.

**Aaron Shmulewitz** answered an inquiry in the April 6, 2008 Q&A section of the *New York Times* Real estate Section. Mr. Shmulewitz gave his advice concerning parking garage rights when a rental building is converted to a condominium.

**Magda Cruz** began her second year on t NYC Rent Guideline Board representing owners' interests in seeing rents for New York City rent stabilized apartments, hotels and lofts.

# Co-Op / Condo Corner

***By: Aaron Shmulewitz***

*Aaron Shmulewitz* heads the Firm's Co-op/Condo practice. Aaron represents more than 300 cooperative and condominium boards throughout the City, as well as sponsors of cooperative and condominium conversions, and numerous purchasers and sellers of cooperative and condominium apartments, buildings, residences and other properties. Some recent noteworthy court decisions in this practice area are discussed below.

## CONDO BOARD IS NOT A "DEBT COLLECTOR" UNDER FEDERAL LAW, AND CAN PURSUE DELINQUENT UNIT OWNER

*Barry v. Board of Managers of Elmwood Park Condominium II* held that a condominium Board was not barred by the federal Fair Debt Collections Practices Act from pursuing a unit owner's unpaid common charges, since: the common charges run with the unit, the Board falls within the fiduciary relationship exception of the Act, and the Board is not a "creditor", since the common charges are technically owed to all other Unit Owners as well.

**COMMENT**—While this case originated in Small Claims Court, it could have far-reaching impact on condominiums' ability to collect arrears from delinquent Unit Owners, since it affords sweeping support of condominiums' rights.

## CO-OP PURCHASER APPLYING FOR LOAN HIGHER THAN CONTINGENCY AMOUNT IN CONTRACT IS ENTITLED TO RETURN OF DEPOSIT AFTER BOARD TURNDOWN

In *Gorgoglione v. Gillenson*, the Appellate Division held that the purchaser's earlier rejection of a lower loan amount that had satisfied the contract's financing contingency, and subsequent reapplication for a loan amount higher than the contingency amount, did not constitute a breach of the purchaser's obligations under the contract, and the co-op Board's subsequent turndown of the purchaser trumped all, cancelling the contract and entitling the purchaser to a refund of the downpayment.

**COMMENT**—It is hard to imagine how a purchaser's application for—and eventual receipt of—a commitment for more than the minimum loan amount in a purchase contract could ever be deemed a breach of the contract.

## CO-OP ENTITLED TO INJUNCTION PROHIBITING SHAREHOLDER FROM ENGAGING IN OBJECTIONABLE CONDUCT

In *Trump Plaza Owners, Inc. v. Weitzner*, the Appellate Division upheld the ability of a co-op to enjoin a shareholder from yelling (including within her apartment if audible outside it), threatening and harassing neighbors or building employees, or interfering with neighbors' quiet enjoyment of their apartments.

**COMMENT**—In what is a not-uncommon scenario, this co-op obtained very powerful relief, although the Court directed that the injunction order be refined so as to refer expressly to what specific conduct is prohibited.

## CONDO UNIT OWNER CANNOT BAR THE LEASING OF COMMON AREA FOR CELLPHONE TOWER

*DiFabio v. Omnipoint Communications Inc.* held that a condominium Board's decision to do so was a legitimate exercise

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of the Board's fiduciary powers under the "business judgment rule" to maximize the condominium's income and assets.

**COMMENT**—This case demonstrates the balancing of an individual's rights against those of the Board, on behalf of all other Unit Owners.

## CONDO AND UNIT OWNERS CAN SUE SPONSOR'S ARCHITECT FOR CONSTRUCTION DEFECTS IN NEW CONDO BUILDING

In *Bridge Street Homeowners Association v. Brick Condominium Developers LLC*, the Court held that the Condominium and its Unit Owners were third-party beneficiaries of the contract between the sponsor and its architect, based on the architect's certification of the offering plan.)

**COMMENT**—This case continues a recent swing in favor of purchasers and Boards in their quest to address construction defects and other issues in new construction condominiums.

## FLIP TAX ADOPTED AS AMENDMENT TO CO-OP BYLAWS VALID

*Weigel v. 30 West 15th Street Owners Corp.* held that a flip tax may be adopted as an amendment to the bylaws, as well as to the proprietary lease, and that an increase to the flip tax adopted as a bylaw amendment by the co-op's Board was also enforceable.

**COMMENT**—The flip tax was initially adopted by the requisite vote of shareholders to amend the bylaws, and the increase was adopted as an amendment by the Board.

## CONDO BUYER CANNOT SUE SPONSOR, SALES AGENT AND SPONSOR'S ATTORNEY FOR FRAUD AND MISREPRESENTATION FOR INABILITY TO USE TERRACES

In *Pappas v. New 19 West LLC,* the Court held that such claims must be dismissed, since the offering plan clearly indicated that the apartment's terraces were not legally useable; the Court ruled that the sales agent's alleged verbal statements that the sponsor would try to legalize them were insufficient, and were barred.

**COMMENT**—This decision extends the long line of New York cases which hold "caveat emptor" if the purchaser knew of facts, or written representations, contrary to alleged verbal representations.

## CO-OP CAN CONSTRUCT ROOF GARDEN, DESPITE OPPOSITION FROM SHAREHOLDER

*Baker v. 16 Sutton Place Apt. Corp.* held that the Board's decision to do so was a valid exercise of the Board's rights under the "business judgment rule", and did not constitute a breach of the co-op's obligations under its proprietary lease with the shareholder living beneath it.

**COMMENT**—In balancing comparative rights, this case upheld the broad discretion of a Board to act in what it believes to be the best interests of its constituents, in the absence of any contractual provision with a particular shareholder that would prohibit it.

## FLIP TAX ADOPTED AS AMENDMENT BY BOARD TO CO-OP BYLAWS INVALID

In *Pello v. 425 E. 50 Owners Corp.*, the Court held that a flip tax that was adopted as an amendment to the bylaws by the Board alone, and subsequently amended by the Board alone, was not enforceable. The Court held that, since the flip tax could have been adopted as an amendment to the proprietary lease by a vote of 2/3 of the shareholders, the actions of the three-person Board in amending the bylaws (to adopt the initial flip tax and then later to increase it) without a shareholder vote were not fair to the other shareholders.

**COMMENT**—This Court emphasized that the proprietary lease and bylaws must be read together, and that the higher, most shareholder-protective standard must be satisfied. This decision is at variance with the *Weigel* decision, above.

**Transactional Update**

# The Sponsor's Duty of Disclosure

***By: Craig L. Price and Jennifer Apple***

In the April 2008 issue of BBWG Update, we explored some key potential risks and due diligence concerns of prospective purchasers of newly constructed condominium units. As a follow-up, this article will discuss a recent decision of the Appellate Division, First Department, which highlights a newly expanded risk of new construction from the perspective of condominium and cooperative sponsors.

The holding of *Kramer v. W10Z/515 Real Estate Ltd. Partnership,* 844 NYS2d 18 (1st Dep't 2008), has broad implications for sponsors of newly constructed or converted condominium and cooperative apartments, who now face greater exposure to purchasers in new construction buildings, who believe they may have been subject to misrepresentations under an offering plan. In holding that the Martin Act (General Business Law, Art. 23-A) does not preclude a claim for common law fraud, the *Kramer* Court expressly overturned a series of decisions that operated to bar private litigants from bringing suit against sponsors who make fraudulent representations in their real estate offerings.

The Martin Act authorizes the Attorney General to investigate and bring suit against parties who engage in fraudulent securities offerings, including the sale of condominium and cooperative apartments. Before *Kramer*, the authority granted by the Martin Act was interpreted as being an exclusive right of the Attorney General – an interpretation which effectively precluded private parties from bringing a common-law fraud claim in connection with the sale of condominium and cooperative interests.

For example, in *Whitehall Tenants Corp. v. Estate of Olnick*, 213 AD2d 200, 623 NYS2d (1st Dept 1995), *lv denied*, 86 NY2d 704, 631 NYS2d 608 (1995), it was held that a private litigant could not use "artful" pleadings to "press any claim based on the sort of wrong given over to the attorney general under the Martin Act." However, the *Kramer* Court noted, the reasoning of *Whitehall* had been erroneously extended to cases in which plaintiffs had properly pleaded all of the elements of fraud, but were nonetheless being thrown out of court "merely because the Attorney General would be entitled to relief under the Martin Act." In response, the *Kramer* Court held that as long as a plaintiff can plead all of the elements of fraud, there is nothing in the Martin Act, or any court decision, to bar that plaintiff from bringing an action for common-law fraud.

In the lower court's opinion, Justice Solomon recognized that allowing private litigant fraud claims to go forward will have "broad policy repercussions on every sponsor of a condominium project." Undoubtedly, *Kramer* has both significantly increased the disclosure liability of sponsors, and, as a by-product, opened the door for private claims by individuals who may have been subject to misrepresentations under an offering plan. The challenge for sponsors will be in determining where to draw the line of how much and when they need to disclose an issue during the offering process.

Sponsors need to be sensitive to the realities of new construction and conversion and take into consideration that purchasers sign their contracts subject only to what is disclosed in the offering plan. New construction is a long and tedious process in which there are inevitably problems along the way. Moreover, purchasers are executing contracts either during the construction or conversion phase, or sometimes well before the construction process has even begun, without the opportunity to inspect the premises or their particular unit.

Due to the reliance by purchasers on the disclosures in an offering plan, it is imperative that sponsors, via amendments to their plans, continue to make full disclosure of problems or issues that arise during the construction or conversion phase so as to avoid any claims of misrepresentation or omission. Of course, issues of a de minimis nature need not be disclosed, but determining materiality is not necessarily the easiest of tasks. Based on the *Kramer* Court's decision, sponsors should err on the side of disclosure.

***BBWG encourages all sponsors that have questions regarding their disclosure obligations to contact either Craig L. Price or Jennifer Apple of BBWG's Transactional Department.***

# Tenant Estoppels — How to Avoid Pitfalls

*By: Allan Gosdin*

You are a tenant in an office building. This morning you received a package from your landlord, which includes a letter stating that it is in the process of refinancing its mortgage on the building and that the bank requires you as tenant to execute the enclosed estoppel certificate within ten days after the date of the cover letter.

What do you do? By all means, **do not** ignore the demand.

Estoppel certificates are typically utilized by lenders or a purchaser of a property to confirm the basic terms and conditions of the lease--that the lease is in full force and has not been modified, the accuracy of the amounts of monthly rent and other amounts payable to the landlord, whether the tenant is current in making such payments, the amount of the security deposit held by landlord, and whether any defaults or other claims exist which may entitle tenant to withhold its rental payments.

Commercial leases usually contain a clause which requires a tenant to execute an estoppel certificate within a certain amount of time after the request, typically ten days.

Some of these estoppel clauses include a provision stating that tenant's failure to execute and deliver the estoppel certificate within the required time is deemed tenant's certification that the facts contained in the estoppel certificate are correct, and that tenant will be bound by the information in the estoppel certificate.

In this situation, if you fail to respond, you will be bound by the information contained in the estoppel certificate. If you have actual claims against the landlord, but the estoppel certificate states that there are no defaults by landlord and tenant has no claims, you will be precluded from raising those claims in the future if you fail to object now within the required time.

Some estoppel clauses are even more draconian and provide that tenant will be in default under the lease for failure to execute and deliver the estoppel certificate.

Either way, a tenant faces a potentially-serious downside should it ignore such an estoppel certificate demand.

Besides contacting your attorney, and forwarding a copy of the request package, as soon as possible, you should also review the estoppel clause in your lease (or whether there is any estoppel clause at all) to determine what your obligations are.

The estoppel certificate clause contained in the REBNY standard form lease reads as follows:

> Tenant, at any time, and from time to time, upon at least 10 days prior notice by Owner, shall execute, acknowledge and deliver to Owner, and/or to any other person, firm or corporation specified by Owner, a statement certifying that this lease is unmodified and in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified and stating the modifications), stating the dates which the rent and additional rent have been paid, stating whether or not there exists any defaults by Owner under this lease, and, if so, specifying each such default and such other information as shall be required of Tenant.

Often, a landlord's form estoppel certificate is considerably more expansive than the requirements contained in the lease. In such cases, there is no reason to sign such an expansive estoppel certificate. In the event that the scope of the proposed estoppel certificate presented to you exceeds what is required by the lease, you should not hesitate to consult with your attorney to discuss deleting those excess items.

In addition, it is important to check the estoppel certificate for accuracy. For example, if it states the wrong amount of rent or security or if you are paid up to a different month than indicated, you should correct the certificate. If landlord has not completed any repairs or improvements to the space, you should delete any clause which states that landlord has performed all of its obligations under the lease. It is imperative that you correct the information on the estoppel certificate, or you risk being bound by the incorrect information.

In short, although a one or two page estoppel certificate may look innocuous at first glance, if you are not diligent in reviewing and responding to the request, you may pay for it in the future. A tenant faced with having to sign an estoppel certificate should consult counsel immediately.

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# *Legal Update*
# *June 2008*