BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Important Appellate Decisions

New York's Highest Court Finds DHCR Properly Granted Chelsea Owner's Demolition Application

By: Kara I. Rakowski

After more than five years of litigation, New York's highest court reaffirmed long-standing administrative and judicial definitions of the demolition ground for non-renewal of leases in the Rent Stabilization Law and Code. The Court held that the owner was not required to raze the building to the ground in order to have its demolition application granted by the New York State Division of Housing and Community Renewal ("DHCR"). The owner was represented by Belkin Burden Wenig & Goldman, LLP throughout the administrative, Supreme Court and appellate proceedings.

In Matter of *Peckham v. Calogero*, the owner of a building in Chelsea sought to demolish a three story, eight-unit structure, leaving only the facade intact (for community preservation reasons), in order to construct more housing. A single hold-out tenant threatened the project. Despite having no entitlement to any monetary stipend or relocation benefits under the Rent Stabilization Law or Code, the tenant rejected multiple generous offers to relocate him to comparable or better apartments in Chelsea and other desirable areas in Manhattan, which the owner extended in an effort to forego protracted legal proceedings. The tenant even declined an offer to return him to building after it was newly reconstructed in the same location where his current apartment was situated, and at the same rent stabilized rent.

The owner filed its application with DHCR for permission to not renew the hold-out tenant's lease, submitting plans approved by the New York City Department of Buildings and proof of the owner's financial ability to complete the project. In accordance with well-established agency and court precedent interpreting the demolition criteria, DHCR granted the owner's application, confirmed that a razing of the building was not required, and later affirmed its decision in response to the tenant's Petition for Administrative Appeal. The tenant commenced an Article 78 proceeding challenging the PAR decision. Again, DHCR defended its orders citing the owner's compliance with all regulatory

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New York's Court of Appeals Expands Reach of Judgment Creditors to Force Turnover of Out of State Assets to Satisfy a Judgment

By: William Rifkin

A recurring vexing problem for judgment creditors is attempting to obtain property of a judgment debtor to satisfy the judgment where the property is physically located outside New York and held by a third party (garnishee) who also resides outside New York. This problem has been resolved in favor of the judgment creditor by New York's highest court. On June 4, 2009, the New York court of Appeal in *Koehler v. The Bank of Bermuda Limited*, ruled that as long as a New York court has personal jurisdiction over: (a) a judgment debtor, or (b) a garnishee of the judgment debtor, or (c) even a wholly owned subsidiary of the garnishee, any property of the judgment debtor, even if it is physically located outside New York, is sub-

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Inside this Issue

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.

Dismissal of Mold Claim Against Co-op Upheld

In *Fraser v. 301-52 Townhouse Corp.*, the Appellate Division held that the shareholders had failed to establish that *causation* of their injuries by mold is generally recognized by the scientific community.

COMMENT—This was an important victory for co-ops and condominiums. Since the appellate court split 3-2 on the decision, a future final review by the Court of Appeals is likely.

Co-op Shareholder is a Holder of Unsold Shares Because it Fulfilled Plan Requirement of Sponsor Designation. HUS Can Use Unit for Professional Purposes; Residential-Only Clause in Proprietary Lease Reformed by Court as "Mutual Mistake"

Katsam Holdings LLC v. 419 West 55th Street Corporation

Purchaser Rejected by Co-op Board Entitled to Return of Deposit; Seller Failed to Raise Triable Issue of Fact Regarding Purchaser's Bad Faith Submission to Board

Alter v. Levine

Condo Election Set Aside Because Notice of Annual Meeting Failed to Comply with By-Laws; Commercial Unit Owner Can Vote in Subsequent Election of Condo's Residential Board Members

In companion cases, *Doo v. Board of Managers of Park Regent Condominium,* the Appellate Division held that an initial election was a nullity, but that, in the election subsequently held, the condo's bylaws did not expressly bar the commercial unit owner from voting for residential seats, and the election would not be set aside for its having done so.

COMMENT—These decisions illustrate clearly how parties' rights and obligations in a condo are governed strictly by the provisions of the condo's foundation documents.

Co-op Shareholder's Refusal of Access by Board to Remedy Lead Paint Condition is Not a Nuisance Warranting Eviction, Since Such Condition Does Not Affect Other Building Residents

Roxborough Apartments Corp. v. Kalish

Remaining Sole Director of 2-Person Co-op Board Entitled to Appoint Replacement to Fill Vacancy; Resultant Board and All of its Actions are Valid for All Corporate Purposes

Matter of McDaniel v. 162 Columbia Heights Housing Corp.

Foreclosing Lender is Not Entitled to Be Recognized by Co-op as New Shareholder

In *Consolidated Resources, LLC v. 210-220-230 Owners Corp.,* the Appellate Division held that a purported transfer by a defaulting shareholder to her lender did not comply with the co-op's proprietary lease transfer requirements.

COMMENT—Co-ops' governing documents and internal procedures must be complied with. This case is important, in light of the higher incidence of foreclosures arising from the current economic climate.

Co-op Shareholder Awarded 20% Maintenance Abatement for Floor Defects is Entitled to Have Attorneys Fees Reimbursed by Co-op, Including Fees Incurred Prior to Co-op's Commencement of Non-Payment Proceeding

Hampshire Owners Corp. v. Sullivan

Open and Notorious Harboring of Cats Defeats Attempted Eviction, Under New York City Pet Law

While involving a rental apartment, *184 West 10th Street Corp. v. Marvits* is important to co-ops—-the Appellate Division expanded the reach of a landlord's imputed knowledge, holding that a landlord's long-standing *independent contractor's* viewing of a litterbox in plain sight would be imputed to the landlord.

COMMENT—This case extended the concept of a landlord's imputed knowledge to parties over whom landlords have little or no control, thus potentially weakening significantly the ability of co-ops to act against shareholders with unauthorized pets.

Condo Board's Refusal to Permit Conversion of Commercial Unit to Residential Use is a Breach of By-Law and Declaration Obligations

In *30 CPS LLC v. Board of Managers of Central Park South Medical Condominium*, the Court held that the

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Co-op/Condo Corner...
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Unit Owner was entitled to summary judgment on the issue of liability, especially in light of indications that the Board may have been motivated by illegal discrimination.

COMMENT—This case illustrates yet again how Board members can create huge potential liability for themselves by allowing personal feelings to trump clear provisions in governing documents.

Rent Abatement Awarded for Bedbug Infestation

In *Bender v. Green*, the Court held that a rental tenant was entitled to a 12% rent abatement for a 16-month period. The Court held that the landlord was strictly liable for the bedbug condition under the warranty of habitability.

COMMENT—While this case dealt with a rental tenant, its holding would be applicable to co-ops, and illustrates that a Board must at least attempt diligently to address complaints of such infestation, or risk a court awarding a maintenance abatement to the affected shareholder.

Shareholder's Motion for Summary Judgment Against Co-op for Leak Damage is Denied Because No Proof as to Source of Leaks; In Light of that, Co-op's Efforts to Address Leaks Could be Sufficient

Loss v. 407-413 Owners Corp.

Rejected Co-op Buyer Entitled to Return of Deposit Because Board's Approval of Her (but not her dog) Did Not Constitute the Unconditional Approval Required Under Purchase Agreement

Lovelace v. Krauss

New York Highest Court Finds . . .
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requirements and legal precedent. Notwithstanding the agency's stance urging the correctness of the orders, the Supreme Court remanded the proceeding back to DHCR. The Supreme Court opined that the agency needed to clarify the standards for granting demolition applications inasmuch as the Rent Stabilization Code contained no precise definition of "demolition." The Supreme Court also stated that the agency should re-examine the owner's proof of financial ability to complete the project.

On the owner's appeal to the Appellate Division, DHCR suddenly changed its position. This change in legal stance came shortly following the election of a new Governor. Instead of defending its orders, DHCR suddenly stated that it needed to "clarify" its standards for demolition, and argued in favor of the remand. In a 3 to 2 opinion, the Appellate Division, chastised the DHCR for what seemed to be a politically motivated flip-flop, reversed the Supreme Court's decision, and affirmed DHCR's original orders granting the owner's demolition application.

Shortly after the Appellate Division's ruling, DHCR proposed new rules on demolition (which, to date, have not been adopted). However, even under the proposed new rules DHCR continued to subscribe to its pre-existing policy of not requiring owners to raze buildings to the ground in order to sustain demolition applications. Thus, even under the proposed new rules, the owner's application in *Peckham* was compliant.

Nevertheless, the tenant appealed the Appellate Division's decision to the Court of Appeals, insisting that the owner's application should be denied. This time, DHCR did not appear on the appeal, informing the Court that it intended to abide by the Appellate Division's ruling.

On May 7, 2009, the Court of Appeals unanimously upheld the Appellate Division's ruling. The Court of Appeals stated that the Rent Stabilization Code did not need to have an express definition for what constitutes a "demolition" in order for DHCR to properly process demolition applications. There are many terms in the Code that are undefined and that does not preclude DHCR from administering the law. The Court emphasized that the owner is entitled to rely on existing policy and procedure when submitting a demolition application. DHCR may not change the rules after it has issued a final order and then require the owner to recommence the administrative process. An owner that complies with existing regulations is entitled to finality on its application.

The Court of Appeal's decision in *Matter of Peckham v. Calogero* is vital in securing owners' rights in administrative determinations. Parties seeking delay of proceedings in the hope that a change in agency standards will later benefit them shall not be rewarded at the expense of those who relied upon the agency's pre-existing standards.

Kara I. Rakowski is a partner in the firm's Administrative Department. Ms. Rakowski successfully handled the owner's demolition application at DHCR.

The appeals at the Appellate Division and the Court of Appeals were successfully handled by partners Sherwin Belkin and Magda L. Cruz, who argued both appeals.

Court of Appeals Expands Reach of Judgment. . .

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ject to a turnover order. This decision reverses a long held doctrine that a New York court cannot attach property to satisfy a judgment where the property is not physically located in New York. The facts in *Koehler* reflect the long reach that judgment creditors can now exercise in attempting to satisfy their judgments

Koehler (a non-resident of New York) had commenced an action in federal court in Maryland against A. David Dodwell, a citizen of Pennsylvania and was awarded a default judgment in excess of $2 million. Koehler docketed the default judgment in New York, and then proceeded to commence a turnover proceeding in New York against the Bank of Bermuda, seeking the turnover of share certificates that Bank of Bermuda was holding as collateral for a loan it had made to Dodwell. Although Bank of Bermuda did not have an office in New York (its office was located solely in Bermuda), its wholly owned subsidiary, Bank of Bermuda (New York), Ltd., was doing business in New York.

The New York Court of Appeals held that "the principle that a New York court may issue a judgment ordering the turnover of out-of-state assets is not limited to judgment debtors, but applies equally to garnishees," and concluded "that a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 5225(b)."

Thus, so long as either the judgment debtor or any person that holds property of the judgment debtor is subject to personal jurisdiction in New York, the judgment creditor can restrain and obtain a court order directing the turnover of the judgment debtor's property to satisfy the judgment even where the property is physically located outside New York. Clearly, this decision adds a major tool in a judgment creditor's efforts in locating property of the judgment debtor to satisfy the judgment.

William Rifkin is a partner in the firm's Litigation Department.

Housing Court Update

Tenant Petition Must be Served in the Same Manner as Landlord Petitions

By: Joseph Burden

In an "illegal lockout" case brought by a tenant who had been evicted from a hotel room, the Housing Court ruled in favor of the owner and dismissed the tenant's petition. The tenant claimed that he was rent regulated and entitled to be restored to possession of the hotel room. However, since the tenant had rented the hotel room for less than 30 days, the owner maintained that he was not subject to any rent regulation protection and could be evicted.

After the tenant vacated the hotel room, he commenced an illegal lockout proceeding in Housing Court. The case was commenced by Order to Show Cause and the owner was served with the papers by mail as directed by the Housing court Judge. On behalf of the owner, Belkin Burden Wenig & Goldman, LLP claimed that the Court lacked personal jurisdiction over the owner because the papers were served by mail rather than attempting service like any other Housing Court proceeding.

The same judge who authorized service by mail agreed with the owner's position finding that she was not authorized to allow service by mail of the petition. Accordingly, she granted the owner's motion to dismiss the case. As a result, the tenant was not restored to possession.

Thus, in any illegal lock-out case, the tenant must serve the papers in a manner that is in conformance with the statute, rather than some unauthorized methodology crafted by a judge which does not accord with the statute.

Joseph Burden is a partner in the firm's Litigation Department. Mr. Burden successfully handled this matter on behalf of the hotel owner.

Transactional Update

Buying Property in a Declining Market

By: Jennifer Apple

In the April 2009 BBWG Update, we explored the challenges facing sellers in a declining market. As a follow-up, this article will shift the focus to the other side of the closing table--to buyers who are now facing increasing opportunities and leverage in the real estate marketplace.

Viewing the Recession as a Buying Opportunity

The legendary investor Sir John Templeton was known for his "avoid the herd" and "buy when there's blood in the streets" philosophy. He is credited with saying: "To buy when others are despondently selling and to sell when others are greedily buying requires the greatest fortitude and pays the greatest reward." If you are a prospective buyer that adheres to this type of investment philosophy, you might just view this recession as a buying opportunity. It all goes back to supply and demand, the laws of which dictate that when there is an abundance of supply, prices must come down. As discussed in "Selling Property in a Declining Market," tightening credit markets have decreased the pool of qualified buyers, thereby decreasing the demand for property and increasing the inventory of available properties. Here are some strategies that prospective buyers can use to help to take advantage of the declining market:

Buy Low

Some prospective buyers see declining property prices and believe they should wait for the market to bottom out before purchasing. Unfortunately, no one has a crystal ball that can time the market perfectly, and the reality is that we only know when the market has hit the bottom after it starts to come back up. Right now both property prices and interest rates are low, but if you keep waiting for prices to bottom out, you might miss a great opportunity.

Tightening credit markets have decreased the pool of qualified buyers, thereby decreasing the demand for property and increasing the inventory of available properties

Find a Motivated Seller

"Motivated sellers" have a very strong need to sell their properties for one reason or another--for instance, they may have purchased another home and are now carrying two loan payments, or they may have been transferred for their job and need to move. A motivated seller will likely be more receptive to negotiating and may offer a greater price reduction or other concessions.

Secure your Financing

It can be difficult to obtain financing in a declining market. As a result of the credit crisis, underwriting guidelines have tightened and fewer people qualify for loans. Because the rules for getting financing have changed so dramatically, so too should the rules for negotiating financing contingencies with sellers. For example, in a hot seller's market, a confident buyer might waive a financing contingency to stand out from the competition and present herself as the best possible buyer to a seller looking for a firm deal. Conversely, in a slow market like the current one, prospective buyers should be demanding not only financing contingencies, but "funding" contingencies which would enable them to walk away from their deal in the event their lender refuses to fund the loan for a reason not within the buyer's control (e.g. financial condition of the building in which they are purchasing, violations against the building, etc). While loan

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Buying Property in a Declining Market...
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commitments are, to one degree or another, available for people with strong credit scores, job security and the ability to put money down, a potential buyer/ borrower should never assume that they will be approved for a loan, and that any loan commitment will ultimately actually be funded.

Also, in securing financing, it is probably safest to stick with a more stable and conservative loan program like a 30-year fixed rate loan as opposed to an adjustable rate loan, which could potentially adjust when property values are declining, making refinancing more difficult. The important thing is to make sure you end up with financing you can afford over the long term.

These are just a few tips to consider when seeking buying opportunities in today's market. Of course, home ownership in both good times and in bad means taking on large financial risks. Figure out what makes financial sense for you, and always consult your financial advisor and attorney before taking the leap.

Jennifer Apple is an associate in the Firm's transactional Department

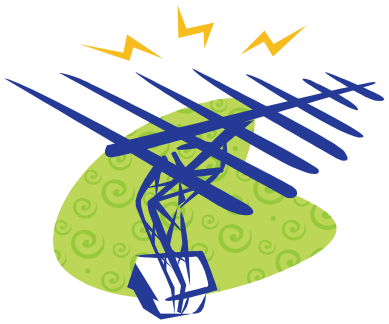
Administrative Update

Conversion to Digital TV Affect Owners Who Provide Master Antennas on Their Buildings

By: Martin Heistein

The Division of Housing and Community Renewal (DHCR) has recently announced new requirements resulting from the federal mandate to convert from analog to digital television broadcasting that takes effect on June 12, 2009. If an owner provides a master antenna on its building, and it is considered a "required service," a problem can arise if the master antenna is not capable of transmitting digital broadcast signals. Tenants who rely on the master antenna for their television reception, rather than on cable, satellite, or similar services, may lose their reception. Rent regulation laws require the owner to continue to provide required services to tenants or risk a rent reduction.

DHCR has posted an informative "Q&A" on its website that owners may find helpful in understanding their new obligations in this new digital age. http://www.dhcr.state.ny.us/Rent.



In addition, there is a DHCR opinion letter dated January 27, 2009, which clarified that the owner is responsible for determining what technological alternatives are available when the master antenna is not capable of transmitting digital broadcast signals. The owner must update the master antenna so that rent-regulated tenants can continue to have their present or enhanced television service. However, sometimes updating the master antenna may not be enough for tenants to get digital broadcast television reception. According to DHCR, in this situation, the tenant is responsible for buying, at his or her own expense, an analog to digital converter box for the television. The federal government has established a television converter box coupon program that can be accessed at www.dtv2009.gov/.

Avoid potential rent reduction complaints by taking steps to determine whether the master antenna conforms to the new digital broadcasting requirements. Understand that in some circumstances the tenant is obligated to obtain a converter box.

Martin Heistein is a partner in the firm's Administrative Law Department.

BBWG NEWS

Jeffrey L. Goldman, co-head of BBWG's Litigation Department, was quoted in *The AmLaw Daily* on May 15 regarding a litigation commenced by a Manhattan cooperative against a large commercial tenant represented by BBWG, and the lawsuit brought by the commercial tenant in response over the cooperative's failure to make necessary repairs.

Sherwin Belkin, a partner in BBWG's Administrative and Appeals Departments, answered a question in *The New York Times* Sunday Real Estate section's Q&A feature on May 17 about the relative economic advantages to a rent-stabilized tenant in choosing renewal terms of one year or two years, noting that, over the long term, successive two-year renewals would likely produce a smaller overall increase in rent.

Aaron Shmulewitz, a partner in BBWG's Transactional Department, was quoted in *The New York Times* Sunday Real Estate section's Q&A feature on April 26 on the fact that a condominium unit owner is responsible for behavior by his tenant that violates house rules. Mr. Shmulewitz was also quoted in *Crain's New York Business* on April 19 on the effect of impending increases in ground rents payable by condominiums in Battery Park City on common charges payable by those condominiums' unit owners.

Magda L. Cruz, a partner in BBWG's Litigation and Appeals Departments, was quoted in *TimeOut New* York on April 23 on assertions that owners are keeping vacant apartments off the rental market.

Martin Meltzer, a partner in BBWG's Litigation Department, was a panelist in a seminar on April 29 sponsored by the New York Association of Realty Managers on the issues of owner responsibility regarding bed bug complaints and its interplay with tenant rights under the warranty of habitability.

Heela Capell, an associate in BBWG's Litigation Department, participated in coordination of the quarterly Forum at the Top event sponsored by the B'Nai Brith Young Development Group Forum on March 12.

Congratulations to **Daniel Altman, Howard Wenig, Craig L. Price** and **Allan Gosdin** of BBWG's Transactional Department who, as reported in *Eastern Consolidated's May 2009 "Manhattan Market Indicators,"* represented the seller of the largest recorded sale of a commercial property in Manhattan in the first quarter of 2009. The mixed-use Garment District building sold for $45.3 million which worked out to a price of approximately $510 per square foot. The building contained approximately 100 residential units and 4 commercial units.

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