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News Alert:

Luxury Deregulation in Buildings Receiving J-51 Tax Benefits

On March 5, 2009 the Appellate Division issued a decision with potentially devastating consequences for owners of rent regulated housing who received J-51 tax benefits. The decision also has potentially enormous consequences for the City’s real estate tax base.

In *Roberts, et al v. Tishman Speyer Properties, LP, et al* the Court held that owners can **not** deregulate apartments based upon luxury deregulation (either High Rent/High Income or High Rent/Vacancy) if the building is receiving J-51 tax benefits, even if the building was not made subject to rent stabilization solely due to the receipt of J-51 benefits.

Since 1993, many property owners of buildings receiving J-51 tax benefits have deregulated apartments based upon luxury deregulation. This was predicated upon DHCR’s Operational Bulletin, Fact Sheet, Advisory Opinion, Code amendment and numerous administrative decisions. The Appellate Division’s decision raises numerous questions relating to the ownership and management of the affected apartments.

The Owner in this case will be filing a motion for leave to appeal to the Court of Appeals.

We will keep you posted on future developments regarding this case. In the meantime, if you wish to discuss how this decision affects your property, please call either:

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## Litigation Update

## A Silver Lining for Beleaguered Mortgage Lenders

By: William M. Rifkin

The “sub-prime” crisis and the resulting increase in mortgage foreclosures have caused some mortgage lenders to come under attack over their lending practices. New legislation has been enacted in response to the crisis which has created new issues to resolve when a lender seeks to foreclose a mortgage. Residential mortgagors, empowered with knowledge that mortgage lenders’ practices are now being put under the microscope as never before, have begun to assert defenses that years ago would have been summarily dismissed by a court. Many seek to shift responsibility for their failure to abide by their mortgage agreements by claiming that the lender failed to properly assess the mortgagor’s ability to pay, or that the mortgage broker (who is not an agent for the lender) defrauded the mortgagor.

A recent decision from Supreme Court, Queens County in the case entitled *Emigrant Mortgage Company, Inc. v. Gause*, however, seems to create some balance in the current “anti-lender” environment. The Court held in favor of the lender allowing it to foreclose on its mortgage, finding that it was the mortgagors who defrauded the lender. The holding relied in large part on the lender having provided the mortgagors with (a) a “Counseling Letter” advising the mortgagors that it may be in their best interest to obtain credit counseling before entering into the (refinance) transaction, and (b) a

“Resource Letter” advising the mortgagors of the amount of “regular and dependable income” the mortgagors would need in order to make their regular monthly mortgage loan payments to the lender. These letters were signed by the mortgagors.

In addition, the mortgagors executed an “affidavit of good faith,” wherein the mortgagors represented that the lender considered all representations made by the mortgagors to the lender to be material; and a “high equity loan certificate,” wherein the mortgagors represented that they would have sufficient income in the future to make their monthly mortgage loan payments, and that the mortgagors had consulted with an attorney, financial advisor or consultant.

Based on these sworn representations made by the mortgagors to the lender, the Queens Supreme Court held that the lender did not defraud the mortgagors in any respect concerning the mortgage loan terms, and found that the mortgage loan was not predatory or fraudulent. The Court held, instead, that it was the mortgagors who defrauded the lender by making sworn representations that they presently had, and would have in the future, the financial means to make their monthly mortgage payments (when they, in fact, did not have those means), and that the lender had the right to rely on these representations.

Turning to the mortgagors’ claims

regarding the mortgage broker, the Court held that based on the agreement between the lender and the mortgage broker, the mortgage broker was the agent for the mortgagors, not the lender. Thus, any acts committed by the mortgage broker could not be attributed to the lender. The Court also noted that the mortgagors did not exercise their statutory 3-day right of rescission.

This decision makes it clear that if a borrower executes written representations that he has the financial means to remain current on a mortgage and that he has been provided with the opportunity to consult with an attorney or financial advisor before signing any documents, the court should enforce those representations and not allow a mortgagor to avoid his contractual obligations.

Hopefully, other courts, when faced with similar documents and facts, will enforce mortgage agreements, and bring order and reliability to the new wave of foreclosure litigation.

*William M. Rifkin is a partner in the firm’s Litigation Department, specializing in mortgage foreclosure issues.*



## Litterbug Dumped

By: Nikolaos Preponis

The courts have defined nuisance warranting the removal of a tenant as “a continuing or recurrent pattern of objectionable conduct or a condition that threatens the comfort and safety of others.” Tenants who cause harm to the apartment, the building, and/or other residents, staff, or the public, through gross negligence or intentional acts, repeated over time, may have their tenancies terminated.

When a landlord receives complaints from other tenants concerning a possible nuisance, the landlord should

promptly investigate the alleged nuisance and, if at all possible, stop the offensive or disruptive behavior. Absent corrective action, the landlord may be subject to claims by other tenants that it has breached the “warranty of habitability” -- a statutory protection that requires landlords to maintain livable premises for their tenants – based on their neighbor’s conduct. The statutory warranty of habitability guarantees tenants housing accommodations that are free from conditions that impair their health, safety or wel-

fare.

The Appellate Term recently upheld a finding of nuisance in *ST Owner LP v. Yeremenko*. This case involved complaints about a tenant throwing bags of garbage out of his window, some of which contained human feces. The bags would land on the air conditioner of a ground floor tenant, or in front of his window, or in the building’s courtyard, on a regular basis. After numerous complaints made over a substantial period of time, establish-

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*Litterbug Dumped. . .**(Continued from page 2)*

ing that the offensive conduct was not just an isolated incident, the landlord directed its security officers to maintain regular surveillance of the building, so that the person who was throwing the garbage bags could be identified. On two separate occasions, the security officers saw garbage bags come out of a sixth floor window and immediately matched up the window to the apartment of the offending tenant. Upon further investigation, the interior of the apartment was found to be filled with debris and contained a terrible stench of human waste. Garbage bags, like those seen coming out of the sixth floor window and landing in the building courtyard, were also

discovered in the apartment. A hold-over proceeding was commenced against the offending tenant, and after trial, a judgment of possession was awarded to the landlord. The appellate court affirmed.

Typically in these types of cases there is a post-judgment ten (10) day opportunity to cure as provided by Real Property Actions and Proceedings Law §753(4). However, in the *Yeremenko* case, the court found the conduct by the tenant to be non curable “based on the grave risk to public health” and the tenant’s refusal to acknowledge responsibility. The court provided no post-judgment opportunity to cure.

Because of liability for breach of the warranty of habitability, a landlord should investigate complaints made by tenants about conduct being com-

mitted by another tenant. If an investigation shows that there is a pattern of behavior or repeated acts that impair the health, safety, or welfare of neighboring tenants, a nuisance proceeding should be considered. By starting the nuisance case, a landlord is potentially putting itself in a “win-win” position.

*Nikoalos Preponis is an associate practicing in the firm’s Litigation Department and successfully represented the owner in the Yeremenko case before the Housing Court.*



## Transactional Update

### Defer, Forgive or Maintain the Status Quo— What to Do When a Commercial Tenant Requires a Rent Reduction or Abatement

*By: Daniel T. Altman*

**L**andlords are now coming to terms with the new financial world order and economic crisis facing many different local businesses, including the retail, manufacturing, restaurant and entertainment sectors. Although commercial tenants have been adversely affected to varying degrees, a common theme is that they are informing their landlords that the crisis is impacting their ability to pay rent. Our firm has been inundated with requests from clients to counsel them on what to do when a commercial tenant requests a rent abatement or deferral of rent. Most clients find it difficult to distinguish legitimate requests made by financially distressed tenants from those being made by financially sound tenants in an attempt to take advantage of their landlord given the current state of the economy.

This article will discuss an objective approach you can take with your com-

mercial tenants to determine whether a deferral or abatement of rent is warranted and how, with the assistance of counsel, you can structure an agreement with your tenant.

Initially, as landlord, you should seek to determine the legitimacy of a tenant’s request for an abatement or deferral of rent. This should not be done by simply taking the tenant’s word for it. Similar to a prospective co-op buyer sharing information with a co-op board, a landlord should have a commercial tenant bare its “fiscal soul” to you to confirm the severity of its financial predicament. This should include a commercial tenant providing the landlord the following documentation, at a minimum:

- (i) The last 2 years of income tax returns;
- (ii) Monthly bank statements over a 24 to 36 month period, or for retail tenants, other internal store financial reports;
- (iii) Daily revenue reports, payroll

history, history of operating hours, calendar of store-wide sales or discounting of prices; and

(iv) Recent credit history or credit report.

A landlord’s ability to obtain this information and examine this documentation objectively will go a long way toward giving the landlord a sense of whether the tenant’s request to defer or abate its rent is genuine. For example, a reduction in operating hours, a drastic decrease in store revenues over the last 6-12 months, a cut in payroll, a firing of employees or a reduction in inventory are all tell-tale signs of a tenant’s business suffering. However, landlords should be suspicious of a tenant who is unwilling to provide any of the referenced documentation or to share information and says “take my word for it, we are not doing well.”

Once a landlord is able to evaluate and determine that a rent reduction or

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## Administrative Update

# New “Indoor Air Contamination” Law Imposes Strict Tenant Disclosure Requirements on Some Residential and Commercial Property Owners

By: Alyssa D. Sandman

On December 3, 2008, a new law, Section 27-2405 of New York’s Environmental Conservation Law (“ECL”), became effective which requires some New York State property owners to notify their tenants and other occupants about certain air contamination reports affecting their property.

### Owners Subject to Disclosure Requirement

The pre-existing ECL required certain parties remediating a site under New York’s Super Fund program or some other remedial programs to give property owners copies of air contamination reports. However, the pre-existing ECL did not require owners to, in turn, disclose such reports to tenants or occupants. The newly enacted ECL Section 27-2405 takes that next step.

The new law does not distinguish between commercial and residential property owners and requires disclosure to tenants and occupants where an owner receives indoor air contamination “test results” from an “issuer.”

“Issuer” is defined as:

- A party subject to an order issued pursuant to the state Super Fund program, the Navigation Law, or Public Health Law Title 12-A;
- A “participant” under the Brownfields Cleanup Program (“BCP”);
- A municipality operating under an ECL Title 56 Environmental Restoration Program contract; or
- A party subject to an order issued by the Department of Environmental Conservation (“DEC”).

Notably, the term “issuer” does not apply to a “volunteer” under the BCP or DEC’s previous Voluntary Cleanup Program.

Indoor air contamination “test results” include not only actual indoor air sampling results, but also the results of any tests conducted on sub-slab air, ambient air, subslab groundwater samples, and subslab soil samples.

Importantly, the new law does not require property owners to conduct their own tests or to perform any re-testing.

### Notification Requirements

Under the new disclosure requirements, a property owner who receives indoor air contamination “test results” from an “issuer,” as defined above, must give all tenants and occupants the following items within 15 days of receipt of the “test results”:

- A generic fact sheet, prepared by the Department of Health (“DOH”), which identifies contaminants of concern, gives their reportable detection levels and the associated health risks, and provides notice of resources where additional information regarding contaminants may be obtained;

- Upon request, the test results and any closure letter received by the owner; and

- Timely notice of any public meetings required to be held to discuss the test results.

Where an “engineering control,” as defined by the BCP, is in place to contain, stabilize, or monitor contamination, or if the property is subject to ongoing monitoring pursuant to an ongoing remedial program, the

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### *Defer, Forgive or Maintain the Status Quo...*

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abatement for the tenant is justified, the landlord must then decide what type of an agreement it would like to enter into with its tenant. Our firm has developed and negotiated many different types of agreements with tenants where the landlord can defer or forgive the tenant’s rent. Depending upon the nature of the tenant’s request to defer or abate rent, we typically incorporate different concepts into our

agreements. Usually, in consideration for entering into a Deferral or Abatement Agreement, the landlord requires the tenant to increase its security or provide other collateral to the landlord. Alternatively, the landlord may require the tenant to give or modify an existing personal guaranty. Deferral or Abatement Agreements come in many different shapes and sizes and these security and guaranty options are just a few examples of how the Deferral or Abatement Agreements can be structured.

**Daniel Altman**  
heads the Firm’s  
Transactional  
Department and  
can counsel you  
on this and other  
transactional  
matters in the  
current market-  
place.



*New "Indoor Air Contamination" . . .*  
(Continued from page 4)

owner must provide to any *prospective* tenant the same above items given to existing tenants prior to the signing of a new lease or rental agreement.

Further, any property owner subject to the disclosure obligations must now include a disclosure notice in

their rental or lease agreements, stating in 12-point bold face type: "NOTIFICATION OF TEST RESULTS The property has been tested for contamination of indoor air: test results and additional information are available upon request."

In light of the unexplored legal consequences of new ECL Section 27-2405, a property owner who receives contamination test results should consult counsel to determine

whether the new disclosure requirements apply.

*Alyssa D. Sandman is an associate in BBWG's Administrative Department.*



## BBWG NEWS

**Sherwin Belkin**, a partner in BBWG's Administrative and Appeals Departments, answered a question in *The New York Times* on-line Real Estate Q&A feature on February 18, about a tenant's desire to sublet her apartment a second time, noting that the tenant's best option might be to request landlord consent to an assignment of the lease, which would be within the landlord's discretion to decline.

**David M. Skaller**, a partner in BBWG's Litigation Department, was cited in an article in the February 9 edition of *New York* magazine on non-primary residence enforcement efforts that he leads at two large residential complexes in Manhattan.

A \$25 million townhouse purchase by a client of **Aaron Shmulewitz**, a partner in BBWG's Transactional Department, was discussed in *The New York Times* Sunday Real Estate section on January 18. **Mr. Shmulewitz** was also quoted in an article in the Sunday Real Estate section on February 8 regarding the rights of condominiums to pursue payments from delinquent unit owners, and in an article on *The New York Times* on-line City Room feature on February 13 about a landmark-protected neon sign having been removed by a tenant vacating an Upper West Side bar.

**Craig Ingber**, a partner in BBWG's Transactional Department, moderated a continuing legal education seminar on commercial leasing on January 30.

**Howard Wenig, Daniel T. Altman, Craig L. Price, Allan L. Gosdin, and Jamie Chapman** of BBWG's Transactional Department, represented the seller of a 100-unit apartment building with four retail spaces in Manhattan's Garment District for \$45 million, financed in part through the purchaser's assumption of the seller's \$25 million mortgage and \$4 million mezzanine financing held by the seller.

**Denise DeNicola**, a partner in BBWG's Transactional Department, represented an Upper East Side co-op on the acquisition of an unsecured financing facility from National Cooperative Bank.

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