BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

November 2008

Editors
Magda L. Cruz
Aaron Shmulewitz
Edward Baer
Kara I. Rakowski

Inside this Issue

Litigation Update

Bianca Jagger Still Can't Get No Satisfaction

By: Kristine L. Grinberg

In BBWG's December 2007 newsletter, we reported that the Appellate Division, First Department had ruled in *Katz Park Ave. Corp. v. Jagger* that celebrity Bianca Jagger could not maintain a rent-stabilized Manhattan apartment as her primary residence, because she is a British citizen who is in the United States on a temporary (B-2) tourist visa. Thereafter, the Appellate Division granted Ms. Jagger permission to appeal to the Court of Appeals – New York's highest court. Sherwin Belkin, Magda L. Cruz and Kristine L. Grinberg of BBWG represented Katz Park Avenue Corp. and its successor, Diamond 530 Park Avenue Owner LLC, at the Court of Appeals. The appeal was argued by Ms. Cruz.

On October 23, 2008, the Court of Appeals issued a unanimous decision affirming the Appellate Division's ruling. The Court held that "at least absent some unusual circumstance [which the Court did not define or explain], a primary residence in New York and a B2 visa are logically incompatible. No such unusual circumstance exists here."

In so holding, the Court emphasized that "while the rent regulations require a 'primary residence' in New York, the holder of a B2 visa is required to have a 'principal, actual dwelling place' outside the United States." The Court found that Ms. Jagger had not explained how she could possibly have a "primary residence" in New York City at the same time as a "principal, actual dwelling place in fact" in the United Kingdom.

The Court further noted that the Supreme Court's, and the Appellate Division's dissenting justices' reliance on the distinction between the terms "primary residence" and "domicile" is irrelevant, "because neither defendant's status under the rent regulations

(Continued on page 2)

Control Over Occupancy: Coop is Not Always Best

By: Sherwin Belkin and Diana Strasburg

When asked to describe the advantages of cooperative ownership versus condominium ownership, the answer often centers around "control" – that is, the belief that a cooperative is better able to vet those who may become shareholders and occupy apartments. But is that truly the case? In several instances, due to the nature of cooperative ownership, the coop actually has less control over who (or what) may enter into occupancy than does the condominium.

A coop owner does not own property; rather, the cooperative owner is a shareholder in a corporation. As a shareholder, the coop owner is given a proprietary lease that governs the rights and obligations of the shareholder's occupancy of a particular apartment. It is the fact that the coop apartment owner takes on the dual role of owner and lessee (a proprietary lessee) that triggers the application of several statutes, which the courts have held are inapplicable to condominiums (where no lease is involved).

Additional Occupants

New York's Roommate Law (Real Property Law §235-f) effectively modifies "leases" (which ordinarily place some restriction on who may occupy an apartment) to provide that:

- *If the lease has only one named tenant, the apartment may be also occupied by one additional occupant and the dependent children of that occupant.*
- *If the lease has two or more named tenants, the apartment may be occupied by an equal number of additional occupant(s)*

(Continued on page 2)

Bianca Jagger Still Can't Get No Satisfaction. . .
(Continued from page 1)

nor her immigration status depends on domicile."

In the end, although she tried and she tried and she tried and she tried, Bianca Jagger just couldn't get no satisfaction (to paraphrase a Rolling Stones song) – or her apartment back. More importantly, however, the Court of Appeals' decision confirms that, absent the presence of the yet to be defined "unusual facts," a non-immigrant B-2 tourist visa holder cannot satisfy the primary residence requirement under the Rent Stabilization Law.

Owners may wish to pay more careful heed to the status under which their tenants have entered into and thereafter reside in the USA. The holding in *Jagger* would seem to make this a legitimate area of inquiry.

Kristine L. Grinberg is an associate practicing in BBW&G's Appeals and Litigation Departments.

Coop Is Not Always Best. . .
(Continued from page 1)

and the dependent children of said occupant(s).

- *In no event may any occupant occupy the apartment unless at least one person named in the lease as a tenant also maintains the apartment as his or her primary residence.*
- *The tenant must inform the owner, in writing, of the name of each family member, occupant and their dependent children, if any, within thirty (30) days following either (a) the commencement of occupancy by each such person in the apartment, or (b) the Owner's written request.*

As a result, although the coop may have gone through an extraordinarily diligent approval process concerning the shareholder, once that approval is given, the shareholder then has the right to have various co-occupants reside in the apartment with no Board vetting whatsoever. The only obligations by the shareholder are to (a) primarily reside in the apartment with the other occupants, and (b) provide the Board with the identity of the occupants.

If the Board wishes to keep some control on occupancy, even in the face of the Roommate Law, it must make sure that the proprietary lease is properly worded so that the numbers of persons allowed to occupy the apartment do not exceed the number permitted under the Roommate Law. This is needed because the courts have held that, absent such language, a mere recitation of the law itself does not give the lessor the ability to use the limits in the Roommate Law as a restriction on occupancy. Further, the coop must ensure that its shareholder is acting to require that its co-occupants abide by all of the provisions of the proprietary lease.

Pets

The loss of control by coops over occupancy is not limited to humans. New York City's Pet Law (§27-2009 of the Administrative Code) impacts on the ability of a coop to control pets in a building. Just like the Roommate Law, the Pet Law effectively modifies a pre-existing restrictive covenant in a lease (or proprietary lease). Unlike the Roommate Law, which modifies all leases immediately to allow other persons into occupancy, the Pet Law is a modification that occurs via the running of time after the coop knew or should have known about the pet's entry into occupancy. The Pet Law provides:

> Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet or pets, the harboring of which is not prohibited by . . . applicable law, and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived.

As a result, despite a proprietary lease containing an absolute ban on pets, or allowing pets only upon the written consent of the Board, or limiting pets to certain breeds or sizes, (or, frankly, containing any other Pet restriction), if the shareholder brings a pet into occupancy and the Board fails to act within 90 days after it knows or should have known that the pet is being harbored in the apartment, the restrictive provision in the proprietary lease is deemed to have been waived. As a result, if a cooperative wishes to keep a pet-free building or have some control over the type, breed or size of pets that it permits, the coop – and all of its staff– must be vigilant in taking action as soon as there is any awareness that a pet has come into an apartment.

Sherwin Belkin is a founding partner of the Firm.

Diana Strasburg co-authored this article and is a legal assistant awaiting admission to the bar.

Land Use

Gaining Access to Adjoining Property for Development or Repairs

By: Matthew S. Brett

Poet Robert Frost is the author of the well known and often quoted aphorism: "good fences make good neighbors." Upon reading the poem from which the quote is extracted (*Mending Wall)* it actually becomes clear that Frost was not expressing approval of artificial boundaries between adjoining landowners, but rather contempt for them.

In the sphere of modern real estate, property boundaries play a crucial role for a number of important and somewhat obvious reasons—individual property is shielded from trespassers and those who would encroach upon an owner's rights. In overly simplified terms: enforced boundaries protect the value of property.

Oftentimes, however, such boundaries can stand squarely in the way of property development. This is especially true in situations where a landowner desires to develop a lot right up to the property line. These developers often find that temporary access is needed to adjoining land in order to perform certain work on their own property or to implement safety measures (like scaffolding and netting).

In many cases, the adjoining landowners consent to the access. Perhaps they are good neighbors. Perhaps they just have the foresight to recognize that someday they may need reciprocal access. Perhaps they are cognizant of safety concerns.

Unfortunately, however, it should come as no surprise that access is, nonetheless, very often rejected. In fact, in the past year we have seen a measurable upswing in the number of cases where adjoining property owners refuse to grant access to their developing neighbors. Although it is impossible to gauge the root of this trend, a shakier economy could be responsible. It seems that a new type of "holdout" is joining the ranks of the developer's other dreaded holdout: the residential rent regulated tenant.

Simply put: your neighbors may seek to extract money out of your pockets as a result of the development of your own property.

Luckily, the state legislature has provided a statutory remedy for such a situation. The statute, Real Property Actions and Proceedings Law ("RPAPL") § 881, provides that when an owner seeks to make improvements or repairs to real property and such improvements or repairs cannot be made by the owner without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner seeking to make such improvements or repairs may commence a special proceeding for a license to enter.

If the project is a legal, as-of-right project, the court can order a license for access to the adjoining property. In consideration for this license, the court generally conditions access upon assurances that the adjoining property be safeguarded, with a full indemnification of any losses incurred. In fact, RPAPL § 881 specifically provides that the owner seeking access is required to reimburse his or her neighbor for actual damages incurred as a result of the access.

In sum, RPAPL § 881 provides owners with a remedy for dealing with intractable neighbors who wish to stand in the way of as-of-right development for their own pecuniary gain, or other less-than-neighborly reasons.

Matthew Brett is a partner in the Firm's Litigation Department.

Administrative Update

Filing An MCI Application for Pointing and Waterproofing

By: Paul Kazanecki

As many owners know, in order to qualify for Major Capital Improvement ("MCI") rent increases, an improvement or installation must be building-wide and directly or indirectly benefit all tenants. For example, an owner replacing a roof must affirm that 100% of the total roof area including all setbacks and terraces was resurfaced. In another example, the rewiring of a building requires that every apartment be rewired. One of the few exceptions to this rule is the pointing/waterproofing of the building. DHCR does not require that 100% of the building be pointed or waterproofed but does require that all of the necessary pointing/waterproofing be performed *as required.* As such, if only two sides of a building require pointing/waterproofing, the work may be deemed eligible for MCI rent increases if that was the only work that was required to make the building water tight.

However, the key issue for an owner is to think long term before submitting an MCI application for pointing/waterproofing. If you are thinking

(Continued on page 6)

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.

Co-op Buyer's Refusal to Submit Full Financial Information For Board Review Constituted Breach of Contract

In *Hovav v. Loew*, the Court held that a buyer's redacting of her tax return, and failure to provide verification of her assets, as required by the co-op Board, constituted a breach of her purchase contract, entitling the seller to keep the downpayment.

COMMENT—A co-op buyer must follow the Board's submission requirements, or risk losing the downpayment. The requirements here appeared to be very standard; the buyer's refusal to comply, apparently following numerous warnings by the seller's attorney, is inexplicable.

Knowledge of Pet by Co-op's Employees Imputed to Investor Shareholder, Prevents Shareholder From Evicting Tenant

1725 York Venture v. Block held that knowledge by a co-op's employees that a tenant had a dog was imputed to the holder of unsold shares that owned the tenant's apartment, and the holder's failure to commence eviction proceedings within 90 days after the dog's arrival barred the holder from doing so, under the NYC Pet Law.

COMMENT—It would seem unfair and impractical to impute to an absentee shareholder knowledge by employees of a totally unrelated entity who may have no duty to the shareholder.

Sellers' 24-hour Notice to Buyer of Time-of-Essence Closing Insufficient and Unreasonable

In *Iannucci v. 70 Washington Partners, LLC*, the Court held that such a short notice was inadequate to establish a time-of-the-essence closing, for which the buyer's failure to attend would allow the seller to keep the downpayment.

COMMENT—Courts generally disfavor forfeitures and will try to avoid them whenever possible.

Co-op Buyer Failed to Demonstrate Financial Responsibility, so Co-op Board Turndown Was Reasonable

Gleckel v. 49 West 12 Tenants Corp. held that the Board was justified in examining the buyer's financial responsibility, and in declining consent to the transfer after finding no evidence of same, all in protection of the welfare of the co-op.

COMMENT—This decision was noteworthy in that the buyer was the nephew of the deceased shareholder, and was trying to purchase from the estate. Most co-ops' proprietary leases provide that, in such cases, consent cannot be unreasonably withheld to a transfer to a financially responsible relative of the decedent.

Failure by Buyer (a Lawyer) to Read Contract Before Signing Bars Him from Asserting Fraud Based on Seller's Unilateral Reinsertion of a Previously Deleted Clause

Sorenson v. Bridge Capital Corp. repeats the lesson to read what you sign, especially if you're a lawyer. While the Court noted the improper conduct by the seller in surreptitiously reinserting a previously-deleted clause, the Court could not permit the buyer to sue for fraud, since he had not read it.

COMMENT—The Court did, however, allow the buyer to sue on other grounds.

(Continued on page 5)

(Continued from page 4)

Condo "Profit on Resale Fee" Upheld as Valid

In *Raimondi v. Board of Managers of Olympic Tower Condominium*, the Court held that a condo could condition its waiving of its right of first refusal for a sale on the buyer agreeing to pay the condo 7.5% of any profit if he resold within five years. The Court held that the condition and fee were a valid exercise of the Board's powers under the business judgment rule, and did not violate the condo's bylaws.

COMMENT—This decision could potentially have enormous implications for condos that wish to enact fees akin to co-op flip taxes, to generate much-needed revenues.

Fired Doorman's Libel Action Against Shareholder Dismissed

In *Cincu v. Asadorian*, the Court dismissed a libel suit brought by a fired doorman against a co-op shareholder over a letter that the shareholder had written to the managing agent regarding the doorman's videotaped theft. The Court held that the letter was privileged, since it pertained to a matter of general concern within the co-op.

COMMENT—This decision continues the trend of encouraging "open and robust" dialogue in co-ops and condos over matters of concern to constituents.

Landlord Has No Duty to Mitigate Damages by Reletting Space After Tenant Default

While not involving a co-op, *Rios v. Carrillo* could be significant for co-ops, since it held that a landlord of a residential apartment has no duty to minimize its damages by trying to find a new tenant quickly, and could seek the full amount of rent (for the entire lease term) from the former tenant.

COMMENT—In extending the previously-enunciated commercial doctrine to residential leases, the Court may have strengthened the ability of co-ops to hold defaulting shareholders fully accountable for all amounts due to the co-op, including prospectively.

Condo Unit Owners Can Sue Sponsor for Offering Plan Omissions and Misrepresentations

Caboara v. Babylon Cove Development LLC continued the recent trend of permitting suits against sponsors. The Court held that, even though the claims asserted by the Unit Owners were similar to those that could have been brought by the Attorney General, the Unit Owners should not be barred from suing.

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

Uninhabitable Apartment Entitled Shareholder to 100% Maintenance Abatement

In *Granirer v. The Bakery, Inc.*, the Court held that the co-op's failure to make necessary repairs breached the co-op's warranties of habitability and quiet enjoyment to the shareholder, entitling him to a full maintenance abatement, including the portions of maintenance attributable to the building's mortgage and real estate taxes.

COMMENT—Co-op Boards and managing agents must make necessary repairs as quickly as possible, to avoid situations similar to this.

Shareholders Are Not Holders of Unsold Shares, Since Never Designated by Sponsor

In *Sassi-Lehner v. Charlton Tenants Corp.*, the Court held that the offering plan and the proprietary lease must be examined to determine if a shareholder satisfies all definitions of holder of unsold shares. Since the offering plan here required a designation of that status by the sponsor, which the shareholder did not have, she was not a holder of unsold shares.

COMMENT—This case continues the somewhat confusing and conflicting trend in recent decisions. Clarification by the Court of Appeals is necessary.

Condo Motion to Dismiss Unit Owner Suit Arising from Managing Agent's Transfer of Condo Funds Granted

In *Ash v. Board of Managers, The 155 Condominium*, the Court held that the Unit Owner could not prove wrongdoing by the Board. The Court also held that the Board's prior decision to settle amicably with the managing agent, rather than litigate, was protected by the business judgment rule.

COMMENT—This case illustrates the great latitude that is generally accorded co-op and condo Boards in their decision-making processes.

Transactional Update

Prorated Capital Gains Exclusion for Residential Real Estate: Understanding the Reduced Home Sale Exclusion Under the Housing Assistance Tax Act of 2008

By: Craig L. Price and Jennifer Apple

Responding to the slowdown in the housing market, rising unemployment rates and weakening credit markets, Congress has passed the *Housing and Economic Recovery Act of 2008* (H.R. 3221) (the "Act"). Signed by President Bush on July 30, 2008, the Act includes significant tax law changes on a variety of housing matters.

One such change limits the amount of gain from the sale of a primary residence that can be excluded from gross income. Previously, the tax law allowed an individual homeowner to exclude up to $250,000 in gain (or $500,000 for those married and filing jointly) as long as the homeowner owned and lived in the house for at least two of the five prior years. However, the 2008 change will no longer permit gains to be excluded for periods that the home was not used as the owner's principal residence ("non-qualifying use"). In other words, on and after January 1, 2009, the amount of profit from the sale of a house that can be excluded will now be based on the percentage of time that the house was used as a primary residence.

For example, Bob purchased a house on January 1, 2009 for $500,000 and rents it for two years. Thereafter, Bob moves into the house and uses the property as his primary residence for the next three years. At the end of the fifth year, Bob decides to sell the home for $750,000. Under the Act, the first two years that Bob rented the house would be deemed non-qualifying use. The three years when Bob resided in the house would be deemed qualifying use. Of the $250,000 gain, only 60 percent (three years out of five years owned), or $150,000, would be eligible for exclusion, thereby leaving Bob with tax liability on the remaining $100,000. (Under the former tax law, Bob would have been able to exclude the full $250,000.)

There are several important exceptions to this new law. First, as mentioned above, the rule applies to home sales after December 31, 2008 and is based only on nonqualified use periods that begin after January 1, 2009.

Second, the new law does not affect property that is ***first*** used as a primary residence and ***later*** converted to investment property. For example, Bob owns and lives in a house for ten years. After ten years, Bob moves out of the house and rents it for two years before selling it. Because Bob's investment use occurred ***after*** the property was first used as his primary residence, he may exclude all of the gain accumulated over his twelve year ownership of the property, up to $250,000 (or $500,000 if filing jointly).

The above is intended as a general guide, and not as specific tax advice; taxpayers should consult their tax advisors for specific tax advice.

Craig L. Price is a partner and Jennifer Apple is an associate in the firm's Transactional Department.

Pointing and Waterproofing. . .
(Continued from page 3)

of submitting an MCI application for pointing/waterproofing work that was done at a cost of $100,000 for a small section of the building, but know that $1,000,000 of additional work may be required in just a couple of years, it is recommended that you forego the $100,000 work as an MCI rent increase. The reason lies in another section of the MCI rules. That is, if you obtain an MCI for the smaller job, you will need to wait the useful life of 15 years of that work before filing another MCI application for pointing/waterproofing, even if the additional work involves an area that was not part of the smaller job.

It is recommended that an owner seek the counsel of a qualified engineer or architect to ascertain all the variables when planning to undertake a pointing/waterproofing project. For maximum recovery potential, an owner should investigate whether additional pointing/waterproofing may be required in the immediate future.

Paul Kazanecki is a legal assistant in the Firm's Administrative Department. Mr. Kazanecki assists owners in all aspects of MCI and J-51 applications.

BBWG NEWS

***Magda L. Cruz*,** a partner in BBWG's Litigation and Appeals Departments, was quoted in *The New York Law Journal*, *The New York Times*, and many other publications, websites and wire services, following the issuance on October 23 by the New York State Court of Appeals of a decision upholding the right of a landlord to evict Bianca Jagger due to her non-primary residence status in such apartment. **Ms. Cruz, Sherwin Belkin,** and **Kristine Grinberg** represented the owner in the successful appeal.

Sherwin Belkin, a partner in BBWG's Administrative and Appeals Departments, answered an inquiry in *The New York Times* on-line edition on October 22 regarding the rights and obligations of parties when a tenant chooses to leave before a lease's scheduled expiration date. Mr. Belkin noted that, in most cases, the tenant could be held liable for the aggregate rent due for the balance of the lease term.

Robert A. Jacobs, a partner in BBWG's Transactional and Administrative Departments, has been reappointed to the Land Use Planning and Zoning Committee of the Association of the Bar of the City of New York.

***Craig Ingber, Aaron Shmulewitz and Denise DeNicola*,** partners in BBWG's Transactional Department, were instructors of a Continuing Legal Education Course in negotiation of commercial real estate contracts, and loan commitments, at the First Annual Commercial Real Estate Institute sponsored by The New York County Lawyers Association, on September 26.

Craig L. Price, a partner in BBWG's Transactional Department, presented seminars at three different real estate brokerage offices in September and October on topics including assignment of contracts, transactional fundamentals, and federal disclosure requirements.

David M. Skaller, a partner in BBWG's Litigation Department, will be an instructor of a Continuing Legal Education Course in Discovery in Landlord/Tenant Practice, sponsored by the New York State Bar Association, on November 13.

Lewis A. Lindenberg, a partner in BBWG's Litigation Department, has been appointed to the Board of Trustees of YAI/National Institute for People with Disabilities, a not-for-profit health and human services agency that has been serving disabled persons and their families for 50 years.

BELKIN BURDEN WENIG & GOLDMAN, LLP

www.bbwg.com

New York Office

270 Madison Avenue
New York, NY 10016
(Tel) **(212) 867-4466**
(Fax) **(212) 867-0709**

Connecticut Office

495 Post Road East, 2nd Floor
Westport, CT 06880
(Tel) **(203) 227-1534**
(Fax) **(203) 227-6044**

BBWG

Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue
New York, NY 10016

Legal Update
November 2008