BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Inside this Issue

Administrative Update

DHCR Issues a New Renewal Lease Form

By: Martin J. Heistein

Owners and managers of rent regulated housing should be aware that the New York State Division of Housing and Community Renewal has released a new **renewal lease form** to use for rent-stabilized apartments. This new form should be used for all leases that need to be renewed starting November 1, 2009.

There are several changes that are important to note. The changes are intended to help simplify the renewal process and clarify some important rental terms.

The new renewal lease form now contains a separate section for owners to fill in the "frozen" rents of tenants subject to the Senior Citizen Rent Increase Exemption (SCRIE) and Disability Rent Increase Exemption (DRIE) programs.

The new renewal lease form also breaks out the possible tenant responses to the renewal offer in Part B of the form, giving the tenant three choices: (1) a one-year lease at the rent specified by the owner, (2) a two-year lease at the rent specified by the owner, or (3) a choice not to renew the lease.

The new form contains the mark "RTP-8 (10/09)" on the lower left-hand corner.

For more information regarding the new renewal lease form, please contact Martin J. Heistein, a partner in BBWG's Administrative Department.

Litigation Update

When is a Landlord Required to Accept Pets Regardless of a No-Pet Lease Clause?

By: Heela Capell

Many residential rental buildings have a strict "no pet" policy. Among the reasons that owners may adopt a "no pet" policy may be in order to keep common areas cleaner and quieter, rather than run the risk of having a tenant's pet disturb other tenants' quiet use and enjoyment of their apartments. In no-pet buildings, the tenants usually have signed leases that explicitly provide that harboring a pet in the apartment is a material breach of their leases.

New York Courts will enforce the "no pet" clause in a lease as long as the owner has not waived it. The "no pet" clause will be deemed waived if a tenant harbors a pet openly for over ninety days without the owner commencing a proceeding to evict the tenant or remove the pet, or if the owner approved the pet in writing.

Notwithstanding a "no pet" lease clause, owners are required to allow the occasional fur-ball into their buildings if it constitutes a "reasonable accommodation" to a disabled tenant. Pursuant to the Fair Housing Act and the Human Rights Law of New York City and New York

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Attorney Advertising

When is a Landlord Required to Accept Pets. . . *(Continued from page 1)*

State, owners are required to afford disabled tenants a reasonable accommodation necessary to provide them with an equal opportunity to use and enjoy their dwellings. Making reasonable accommodations for tenants with a disability can include allowing the tenants to keep pets in their apartments.

In order for a tenant with a disability to prove entitlement to keep a pet in a building with a "no pet" policy, the tenant must prove that: 1) the tenant has a disability; 2) the tenant has a valid and effective tenancy; 3) that because of the tenant's disability, it is necessary for the tenant to keep the pet in order to be able to use and enjoy the apartment; 4) reasonable accommodations can be made to allow the tenant to keep the pet.

When the tenant seeking to keep the pet has a disability, such as sight impairment, and has a seeing eye dog, the disabled tenant may be permitted by law to harbor the seeing-eye dog in the apartment regardless of a no pet clause in the lease. These pets are classified as "service pets" or pets that actually provide a physical service to their owner. Interestingly, "service pets" can run the gamut from dogs to monkeys to parrots, goats, ferrets, pigs, iguanas, miniature horses who specialize in assisting the blind, and even a duck.

The waters become murky, however, when a tenant alleges the need for an "emotional support" or "therapy pet." In order for a tenant to prove that he or she is entitled to keep a therapy pet in a no-pet building, the tenant must prove that he or she has an emotional disorder that requires him or her to keep a pet in the apartment in order to be able to use and enjoy the apartment. In these instances, courts will require that the tenant submit proof from a qualified doctor that he or she is in fact disabled. The tenant must then prove that he or she has a strong emotional or psychological dependence on the pet that would require him or her to keep the pet in the apartment.

The burden of proof for tenants alleging the need for a therapy pet is high. A mere affidavit from a doctor may not be sufficient to establish a psychological or emotional dependence on a pet. Courts have stressed the necessity that a tenant provide substantial proof from treating physicians that would establish the necessary dependence to qualify a pet as a therapy pet. Statements from doctors that removal of the pet would not be in the tenant's best interest or would cause anxiety are not enough to meet the legal threshold requirement. Similarly, courts have not accepted general statements from doctors that depressed people may benefit overall from the companionship of a pet.

Heela Capell is an associate in the Firm's Litigation Department.

How Judges Are Made

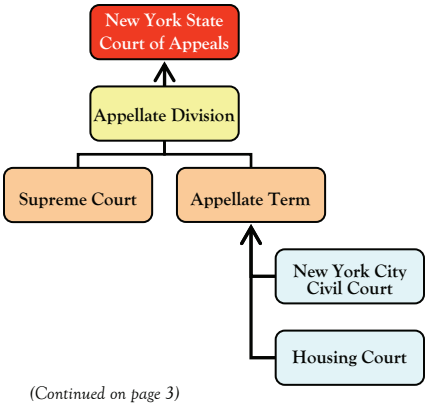
By: Matthew S. Brett

The great judge King Solomon was neither elected nor appointed. He rose to power upon the death of his father.

New York takes quite a different approach in selecting its judges. In New York, judges are either elected or appointed or in some cases both elected then appointed.

To understand how judges make it to the bench, it is important to understand the structure of the court system in New York. To simplify this primer, I have eliminated the Courts that are generally not a part of BBWG's real estate practice (*i.e.*, Court of Claims, Family Court, Surrogate's Court, Criminal Court, etc.).

To visualize the courts in which BBWG generally practices, the following chart may be useful:



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How Judges Are Made. . .
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In New York, the court that has the broadest jurisdiction (meaning the most varied types of cases it can adjudicate) is called the New York State Supreme Court. The word "Supreme" in the Court's name is somewhat misleading. This court is not New York's highest court. Instead, it is a court that has a branch in each county and has the jurisdiction to hear virtually any type of case at the trial level. Adding to the confusion that surrounds this court's name is the fact that the judges of the Supreme Court are called "Justices".

With a few exceptions, Supreme Court justices are elected to the Court for a fourteen year term in a particular judicial district within the county in which the court is located.

As indicated on the chart, appeals from the Supreme Court are taken to the Appellate Division of the Supreme Court. In New York State, the Appellate Division is broken up into four regional departments (*i.e.*, Manhattan and the Bronx are in the First Department, Brooklyn, Queens, Richmond, Nassau, Suffolk and Westchester are in the Second Department, *etc*.). The justices of the Appellate Division are elected judges of the Supreme Court. These Supreme Court justices are appointed by the Governor to sit as Appellate Division justices.

Appeals from the Appellate Division are taken to New York State's highest court—the Court of Appeals. The Court of Appeals consists of seven judges who are called "Judges" and not "Justices." Of the seven judges, six are Associate Judges and one is the Chief Judge (now Hon. Robert Lippman). The judges of the Court of Appeals are appointed by the governor for a fourteen year term. The governor makes the appointment from a list of individuals recommended by a judicial nominating commission.

Thus far, I have outlined the courts as they are organized on the state level. Locally, municipalities have their own courts. For ease of explanation, the chart above only includes the New York City Civil Court (and its subsidiary Housing Court). Not reflected on the chart are the various county, district and city courts that are located in municipalities outside of New York City.

In New York City, cases that involve monetary claims below $25,000 are heard in the New York City Civil Court (claims for sums above $25,000 are generally heard in Supreme Court). Civil Court Judges are elected for a term of 10 years.

Small Claims—those which seek sums of up to $5,000—are handled by Civil Court Judges in the Civil Court, but pursuant to a different set of procedures than those claims that exceed $5,000. In sum, the Small Claims procedure is somewhat more relaxed than normal Civil Court litigation and certainly more palatable for litigants who are not represented by counsel.

The portion of the Civil Court dedicated to residential landlord-tenant proceedings is aptly called the Housing Part and commonly referred to as Housing Court. (Commercial landlord-tenant cases are heard in the general Civil Court and not the Housing Part). While the Housing Court is part of the Civil Court, the judges and procedures are different.

Housing Court judges are not elected. Instead they are appointed by New York State's Administrative Judge (now Hon. Ann Pfau) for a five year term. The Administrative Judge makes her selection from a list of qualified applicants selected by the Advisory Council of the Housing Part. The Advisory Council is composed of 14 members, including two real estate industry representatives (of which I am one). The Administrative Judge also takes into consideration the New York City Bar Association's recommendations.

Appeals from the Housing Court (and the Civil Court at large) are taken to the Appellate Term. Only the First and Second Department Appellate Divisions have Appellate Terms. The judges of the Appellate Term are Supreme Court justices who are assigned the task of hearing appeals from these lower courts. Appeals from the Appellate Term are taken to the Appellate Division by permission.

Matthew S. Brett is a partner in BBWG's Litigation Department and a member of the Housing Court Advisory Council. Mr. Brett has also served on the NYC Bar Association Sub-Committee on a Judicial Appointment.

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.

Failure By Condo Purchaser's Attorney To Advise Client That Adjoining Property Owner Intended To Demolish Structure And Build Larger Replacement, Thereby Blocking Purchaser's View, Could Support Malpractice Claim

Romano v. Ficchi

COMMENT—The attorney here had previously represented the seller of the adjoining property, and had actual knowledge of its purchaser's plans. An attorney with such actual knowledge would be well-advised to disclose such information to his new client, if he decides to accept such engagement at all.

Questions Of Fact As To Parties' Obligations Under Conflicting Amendments To Condominium Declaration Regarding Space Constructed By Unit Owner Preclude Summary Judgment

Board of Managers of The 60 Greene Condominium v. Acacia Soho LLC

Co-op Seller Entitled To Keep Deposit Upon Purchaser Refusal To Agree To Board Consent Condition Of Maintenance Escrow

Park v. Zbarsky

COMMENT—The purchaser had agreed to such a condition in the purchase agreement, and had also already signed the form of maintenance escrow agreement promulgated by the Board, prior to the scheduled closing. The purchaser's argument that the economic downturn was an "act of God" entitling him to cancel the contract was rejected outright by the Court, which also awarded attorneys fees to the seller.

Co-op Voids Long-Term Below-Market Commercial Lease As Violative Of Rule Against Perpetuities, Based On Unusual Revival Clause In Lease; Lease Converted To Month-To-Month

Bleecker Street Tenants Corp. v. Bleeker Jones LLC

Co-op Board Decision To Restrict Parking Spaces To One Vehicle Each Is Protected By Business Judgment Rule; Shareholder Cannot Use Such Decision As Justification To Withhold Maintenance

Oakwood on the Sound, Inc. v. David

Condo Not Entitled To Surplus Money On Mortgage Foreclosure Sale Of Unit Because Condo Had Failed To Record Notice Of Lien

Mortgage Electronic Registration Systems, Inc. v. Levin

COMMENT—Condo boards, managing agents, and counsel must be careful to record a notice of lien against any unit that is the subject of a mortgage foreclosure action, to preserve the condo's rights to any surplus monies that may arise in the foreclosure.

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Co-op/Condo Corner...
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Bylaw Amendments Adopted By Homeowners Association Not In Conformity With Bylaw Procedural Requirements Are Invalid, And Not Protected By Business Judgment Rule

Strathmore Ridge Homeowners Association, Inc. v. Mendicino

Disabled Tenant Entitled To Have Hearing Dog Live With Her; Landlord's Refusal To Make Reasonable Accomodation Constituted Disability Discrimination, Entitling Tenant To Damages

Mozaffari v. New York State Division of Human Rights

COMMENT—Although involving a rental apartment, this case is instructive for co-op and condo Boards, as it is likely that its holding would be applied to co-ops and condos as well. Boards should be cognizant of residents' special needs, and the likelihood that a government agency or a court will hold that such needs supersede any restrictions in governing documents.

Co-op Board's Denial Of Shareholder Request To Install New, Larger Roof Deck Is Protected By Business Judgment Rule; Shareholder Could Have Discovered All Relevant Facts Through Due Diligence Before Buying

Woods v. 126 Riverside Drive Corp.

Co-op Alterations Agreement Clause Requiring Shareholder To Pay Co-Op's Legal And Engineering Fees Is Enforceable

Batsidis v. Wallack Management

Development Agreement Between Condo Unit Owner And Sponsor Gave Unit Owner Exclusive Air Rights To Portion Of Terrace, But Did Not Allow Unit Owner To Block Sponsor's Sale Of Additional Air Rights To Developer Of Adjoining Hotel

RM Realty Holdings Corp. v. Moore

3-Year Delay Between Co-op's Notice Of Objectionable Conduct And Termination Notice To Shareholder Is Too Long, Insufficient To Support Pullman Eviction Proceeding

F.T. Apartments Corp. v. Barbara L.

COMMENT—Co-op Boards and managing agents should document, and act aggressively upon, each incident of objectionable conduct by a shareholder.

Property Owner Ordered To Perform Repairs Specified By Court-Appointed Engineer To Stop Water Seepage Into Adjoining Property, Following Property Owner's Failure To Make Adequate Repairs In Response To Long-Standing Complaints

In re Laub v. Parklex-Madison A.G.

COMMENT—While not involving a co-op or condo, Boards should take heed of this case, and make repairs as and when needed, especially to conditions affecting adjoining properties.

Co-op Liable As "Owner" Under State Labor Law For Buzzsaw Injury Suffered By Employee Of Shareholder's Contractor

Valdovinos v. Shore Road Apartment Corp.

COMMENT—This case illustrates yet again how co-ops and condos can be held liable for actions by private contractors, whom they did not engage and over whom they have no control. Boards and managing agents must ensure that constituents sign alteration agreements and comply with building insurance requirements.

Co-op Must Credit Shareholder With State "Star" Tax Abatement, Cannot Order That Abatement Ends Upon Sale Of Apartment

Village in the Woods Owners Corp. v. Powles

City Pet Law Bars Holder Of Unsold Shares From Taking Action Against A Tenant Regarding A Nuisance Pet; Knowledge Of Pet By Co-op's Employees Imputed To Shareholder

1725 York Venture v. Block

COMMENT—This case extended existing case law, to hold that an absentee investor is bound by the actions and knowledge of the co-op's employees, with whom there may be no contact, and over whom there is no control.

Transactional Update

Tenant Leasing Due Diligence—Part 1—Certificate of Occupancy

By: Allan L. Gosdin

Although a prospective tenant may take for granted that its intended use of a space complies with the building's certificate of occupancy, it is imperative that the tenant make an informed determination for itself of this fact before executing a lease.

The REBNY preprinted form office, store and loft leases commonly used by commercial landlords in New York City each contain broad, boilerplate clauses stating that the landlord is not making any representations or warranties regarding the space and that, generally, the tenant is accepting the space "as-is" subject only to latent defects.

In addition, landlords' lease riders usually contain a disclaimer whereby the landlord states that it makes no representation or warranty regarding the existence or substance of the certificate of occupancy for the building that houses the space. If a tenant signs a lease with this disclaimer without first investigating whether the certificate of occupancy permits the tenant's intended use, the tenant risks being fined, having a violation filed by the New York City Department of Buildings ("DOB"), or, in extreme cases, even shut down by DOB's Padlock Unit, all without recourse against the landlord.

If a landlord is unwilling to represent that a tenant's proposed use of a space is permitted under the building's certificate of occupancy, the tenant must obtain and analyze a copy of it on its own. Certificates of occupancy are public records and may be obtained from the DOB; the DOB maintains a public website where a building's certificate of occupancy can be viewed online at no charge. Tenants are strongly urged to consult with an attorney to ensure that an intended use is permitted under the existing certificate of occupancy.

If a certificate of occupancy does not exist for the building, it is possible that the building predates the requirement for the issuance of a certificate of occupancy. In such event, tenant's intended use may still be permitted, depending upon the building's zoning classification. The tenant should have an experienced zoning attorney conduct a zoning analysis of the building to determine whether its zoning classification permits the intended use. This would include reviewing the zoning maps and zoning texts, which are accessible through the Department of City Planning's website.

Even if a building's zoning classification does not match precisely the tenant's intended use, if prior tenants have used the space for the same use, it is possible that such use has been "grandfathered". In such a situation, the building owner or a prior tenant may have obtained a "letter of no objection" from the DOB whereby the DOB stated that it does not object to that use of the premises. If a letter of no objection has previously been issued, the tenant should request a copy from the landlord. If a letter of no objection has *not* been issued, the tenant, in consultation with its attorney, should consider applying for its own letter of no objection from the DOB.

In situations where either: (i) the existing certificate of occupancy for the building clearly does not allow tenant's intended use or (ii) there is no certificate of occupancy for the building and the zoning classification does not permit the intended use, a prospective tenant may wish to consider different space.

In summary, unless a landlord makes an affirmative representation in the lease that a tenant's intended use of the space is permitted under the building's certificate of occupancy, a tenant must obtain a thorough understanding of the uses permitted for the space before entering into a lease, since the consequences of not doing so could be disastrous.

Allan L. Gosdin is an associate in BBWG's Transactional Department.

BBWG NEWS

Sherwin Belkin, a partner in BBWG's Administrative and Appeals Departments, responded to an inquiry in *The New York Times* Sunday Real Estate section's Q&A feature on August 23 regarding the rights of a subtenant in an unregulated rental apartment, noting that, since the apartment was unregulated, the amount of rent paid by the subtenant, as well as his income and age, had no bearing on any rights to continued occupancy, which would be governed solely by the terms of his sublease. **Mr. Belkin** was also featured in the Real Estate section's Q&A feature on October 4, responding to an inquiry regarding a landlord's right to enter an apartment for inspection following a tenant's arrest, noting that, if there was no emergency reason to enter, the landlord probably did not have the right to do so.

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 August 16 and October 9, discussing, respectively, the rights of a condominium to force a rental tenant of a defaulting unit owner to pay his rent directly to the condominium, and a co-op shareholder's ability to force his Board to divulge the reasons for declining consent to a sublease. **Mr. Shmulewitz** was also featured in an article in the *Times* Sunday Real Estate section on August 23 entitled "Buying and Selling in Bedbug City", regarding the impact of bedbug complaints on the sale and purchase of co-op and condominium apartments. **Mr. Shmulewitz** and **Brian Epstein**, a partner in BBWG's Litigation Department, were also mentioned in an article in *The New York Observer* on August 18 regarding a lawsuit brought by a condominium against its commercial unit owner for unauthorized construction. **Mr. Shmulewitz** was also quoted in the September edition of *The Real Deal* in an article discussing discrimination by co-op Boards, and in an October 5 posting on *brickunderground.com* discussing issues involving complaints of secondhand tobacco and marijuana smoke. **Mr. Shmulewitz** also participated as an instructor in a seminar on September 25 on "Rescinding Condominium Purchase Agreements—the Sponsor's Perspective", sponsored by the New York County Lawyers Association.

Magda L. Cruz, a partner in BBWG's Litigation and Appeals Departments, was quoted in *The New York Times* on October 15 in an article that examined the effects of market-driven factors on the availability of housing for the poor in New York City. **Ms. Cruz** and **Mr. Belkin** also successfully represented an owner of a residential property in Westchester County challenging as unconstitutional a local ordinance which declared the property subject to rent stabilization. The appellate court held on October 6 that the Supreme Court should not have dismissed the constitutional challenge to the new law targeting the property.

Craig Ingber, a partner in BBWG's Transactional Department was quoted as an expert commentator in an October special issue of *Commercial Lease Law Insider* on the topic of lease termination due to eminent domain.

Howard Wenig, a partner in BBWG's Transactional Department, was reappointed to the Business Development Board of Hudson Valley Bank for the period ending June 30, 2010.

Orie Shapiro, an associate in BBWG's Administrative Department, participated as an instructor in a seminar on October 14 on "Procedural Defenses in Environmental Control Board Hearings," sponsored by the New York County Lawyers Association and CHIP.

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