Belkin Burden Wenig & Goldman, LLP

UPDATE

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Transactions Update

Change in Borrower's Employment Status and Its Effect on Mortgage Contingency Clauses

By: Daniel T. Altman

Sometimes lost in the broader discussion of stalled credit markets and stunted real estate values are the economic effects on individuals: the sellers, buyers and residential mortgage borrowers who the real estate industry serves.

Real estate transactions are notoriously long-term undertakings--even a simple purchase can take months to progress from offer to contract, and then to closing. Many things can happen during those intervening months. A buyer, unexpectedly beset by serious financial difficulty, who likely has placed in escrow a downpayment representing a large portion of his/her savings, may not be able to close, thereby risking forfeiting the deposit.

Fortunately, New York law provides some protection for a buyer of a single family home or condominium (as opposed to a cooperative apartment) who, after receiving a loan commitment, suffers a serious, involuntary change in employment status that results in the commitment's rescission. As long as the prospective buyer has acted in good faith and otherwise has fulfilled all contractual obligations, the buyer's subsequent job loss, for example, may not result in the forfeiture of the contract deposit.

Some single family home and condo-

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New Buildings Department Policies Impact Alterations in Co-ops and Condos

By: Aaron Shmulewitz

In August, 2008, the New York City Department of Buildings ("DOB") began to require that applicants for certain applications for work permits—including those for alterations in co-op and condo apartments—submit as part of their application a new form (PW-3) Cost Affidavit, in which the applicant must estimate the cost of each category of the work, and—under oath—attest to the accuracy of the estimates. The estimated costs of a project determine the fees due to DOB.

The DOB also now requires the applicant to certify on the revised form (PW1) of application—again, under oath—whether the project will require amending the building's certificate of occupancy. The applicant is also required to submit a final inspection report when the project ostensibly is finished.

The problem is that, in co-op and condo apartment alterations, the co-op or condo (as owner of the building) is typically the applicant, even though the

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Change in Borrower's Employment Status and Its Effect on Mortgage Contingency Clauses. . .
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minium purchase agreements contain a financing contingency clause. The standard contingency clause requires the buyer to apply for and obtain a commitment for a mortgage loan within a short period of time after signing the contract. The contract usually states that when the commitment is received, the buyer is deemed to have waived the contingency whether or not the loan actually closes.

However, New York courts have found that with respect to single family homes and condominiums, a mortgage commitment is "qualified to the extent that earning capacity and conditions remain the same until the time of the closing." (citations omitted). A line of New York cases establish the principle that a deposit must be returned to the buyer if a mortgage commitment is rescinded because of an involuntary change in the buyer's employment status. In one case, a court held that there was no willful breach of the contract by virtue of the fact that the proposed mortgagee, which had issued a mortgage commitment within the time specified in the contract, subsequently revoked the commitment after being advised by the borrower prior to the scheduled closing date that there was a substantial change in his financial circumstances due to his loss of employment.

A mortgage commitment is "qualified to the extent that earning capacity and conditions remain the same until the time of the closing."

Accordingly, if, after obtaining a mortgage commitment, the buyer loses his/her job through no fault of his/her own, all may not be lost and the borrower/purchaser may be entitled to a refund of its contract deposit. Of course, the facts and circumstances in these situations may vary from case to case. Therefore, we suggest that you consult with an attorney to discuss your rights and options in these matters.

Daniel Altman is a partner in the Firm's Transactional Department. Assisting in this article was Jack Lagan.

New Buildings Department Policies Impact Alterations in Co-ops and Condos . . .
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work is being done by and for the apartment owner. The co-op or condo must now submit these new forms, based on information known only to the apartment owner. The problem is compounded by the fact that filing a false statement in either such form is a misdemeanor, punishable by fine or imprisonment.

Co-op and condo boards are now faced with a dilemma:

(i) continue to file applications based on information provided by apartment owners, and face potential civil and criminal liability if any such information is found to be false, or

(ii) allow the apartment owner to complete and submit the forms, and face potential loss of control over the filing process.

Boards should certainly consult with their counsel. Boards that choose to continue to file applications on behalf of apartment owners should, at a minimum, revise their alteration agreements to include a provision whereby the altering apartment owner agrees to defend and hold the board harmless should any of the information supplied as the basis for any such form be found to be false.

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.

Litigation Update

An Owner Can Prevail Before A Jury In a Succession Case

By: Jeffrey L. Goldman

When evaluating a non traditional family member's claim of succession, the law requires the occupant to establish each of the following three elements in order to prevail: that she was a primary resident together with the tenant of record for a period of at least two years prior to the permanent vacatur or death [or one year if a senior citizen or disabled] of the tenant, financial commitment and interdependence and emotional commitment and interdependence. The failure to establish all three requires a denial of the claim.

Following a six day jury trial in New York County, our firm obtained a jury verdict denying an occupant's claim of succession and awarding the owner possession of the apartment in the West Village. The occupant was a 78 year old disabled man who claimed to be the gay lover of the deceased rent controlled tenant for 50 years. The owner believed the occupant had been living at another rent controlled apartment on Elizabeth Street and only moved into the apartment as a primary resident after the tenant died. After the tenant died, the owner of the apartment on Elizabeth Street commenced a non-primary residence proceeding and recovered possession of the Elizabeth Street apartment.

Although the occupant now had no alternative apartment should he be evicted, we were able to convince the jury that the documentary evidence reciting Elizabeth Street, which included a NYS DHCR harassment complaint in which the occupant alleged to have lived in the Elizabeth Street apartment and answers filed in nonpayment proceedings where the occupant made a claim of the breach of the warranty of habitability outweighed and was more credible that the alleged excuses and testimony of witnesses who claimed he lived with the tenant.

We were also able to overcome the occupant's closing arguments which included his presentation of the box containing the ashes of the deceased tenant; claiming that the family of the deceased tenant presented him with the ashes because of his relationship with the tenant. The jury never needed to address the financial and emotional commitment and interdependence since the first element was not established.

Whether a jury or non-jury trial, an analysis of all the elements are necessary since even if an occupant is the gay lover of a tenant who may have had an emotional and financial commitment and interdependence, absent the element of primary residence, the occupant's claim must fail.

Jeffrey L. Goldman is a co-head of the Firm's Litigation Department and successfully tried this case.

Rent Deposit Law: A Landlord's Remedy to Tenants Who Intentionally Delay Proceedings

By: Martin Meltzer and Jamie L. Lee

When faced with a tenant who is intent on delaying a summary eviction proceeding, what remedy does the landlord/owner have? Well, in 1997, the legislature enacted the Rent Regulatory Reform Act of 1997 that struck a balance between the competing interests of a landlord and tenant. The law applies to both residential and commercial proceedings. One of the most significant amendments to the law was the amendment to RPAPL §745, known as the Rent Deposit Law. The Rent Deposit Law serves as a very useful tool when confronted with a tenant who deliberately delays a summary eviction proceeding. It also provides landlords a temporary resolution to its concern regarding rent accruing during the adjournments and the fear that the tenant may not have any financial ability to satisfy a judgment should the landlord prevail in the proceeding. In short, if the Rent Deposit Law is implicated and the tenant does not

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comply with the Court's order, the tenant will be evicted without the need for any further litigation.

The Rent Deposit Law provides that if a tenant requests a second adjournment in a non-payment proceeding (including an adjournment for the purpose of a *pro se* tenant to retain counsel), or if more than 30 days have elapsed since the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the owner, which ever is sooner, an owner may request that the court order the tenant to deposit into court (or in buildings containing 12 units or less, pay the owner directly), within five days, all rent that has accrued from the date the petition and notice of petition are served upon the tenant and all sums as they become due for rent and use and occupancy.

Thus, when a landlord commences a proceeding against a tenant for non-payment of rent, the Rent Deposit Law is only applicable on the second court appearance of the proceeding when the tenant has already requested an adjournment on the first court date and is again requesting an adjournment or the second court date is at least 31 days after the first court appearance. Only in these two instances may the landlord make an application to the Court to order the tenant to deposit rent into the court that has accrued since the first appearance in the proceeding and for ongoing rent to be paid. Upon the landlord's application, the court is obligated to enter such an order unless the tenant can prove at an immediate hearing that the landlord is not a proper party; or the Court lacks jurisdiction over the proceeding, or that the tenant has been actually or constructively evicted, or that there are outstanding rent-impairing violations at the premises or that a portion or the entire amount of the tenant's rent is paid by social service. It is the tenant's burden of proof at the hearing to establish one of the defenses at the "immediate hearing." Thereafter, the Court will either deny the landlord's application or grant the landlord's application and order the tenant to deposit the money in court (or directly to the landlord if the building contains 12 or less apartments) within five days of the date of the order or the Court will deny the landlord's application. If the Court denies the landlord's application the Court must state the reasons for the denial on the record. If the Court grants the landlord's application and the tenant fails to pay the required amount then the tenant's defenses and counterclaims are dismissed without prejudice and the landlord is granted a judgment of possession. However, if the tenant initially pays but does not thereafter for the current rent or use and occupancy, then the landlord can request an immediate trial which continues day to day until the completion of the trial. Moreover, the only issues that will be tried will be those contained in the tenant's answer. Lastly, if the court grants the landlord's application, it cannot thereafter extend the time for a tenant to make a deposit or payment without the owner's consent, nor waive any of the provisions of the Rent Deposit Law.

When we have relied on the Rent Deposit Law, we have been very successful. The Courts, in general, have adhered to the requirements of the law. When the law was first enacted it was unknown as to how the courts would apply the law. It has been over a decade since the Rent Deposit Law went into effect.

In a 2007 Brooklyn, commercial non payment case, we successfully invoked the Rent Deposit Law when it became obvious that the tenant was delaying the proceeding. The tenant was ordered to pay the owner $212,241.15 and ongoing rent in the monthly amount of $123,160.60. When the payments were not made, we made a motion to the court under the Rent Deposit Law. As a result, the tenant's defenses and counterclaims were dismissed without prejudice and judgment was entered in favor of the owner for $1,244,988.78. The 1.2 million dollar judgment represented all rent sued for in the petition and all rent due through the date of the decision. The tenant had not paid the money into court and the court was constrained to enter judgment. As a result of the judgment, the landlord got possession of its warehouse, and the tenant was more receptive to discussing an amicable lease termination.

Without having this leverage, the tenant would never have entered into settlement discussions with the owner. It would have continued to withhold rent and continue to operate its business. Likewise, without the Rent Deposit Law and the owner's ability to ask the court to order the tenant to pay rent during the proceeding the rent arrears would have continued to grow without the owner having any recourse until the end of the case.

Since the Rent Deposit Law went into effect, judges have more uniformly applied the law. Shortly after the law was enacted when it was new to judges and attorneys alike it was difficult to know how the law would be applied. Judges and attorneys had to become more familiar-

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Rent Deposit Law: A Landlord's Remedy . . .
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ized with the Rent Deposit Law. Now that over ten years have passed there is a special Housing Part in the Civil Court specifically for the Rent Deposit Law. Not many cases get decided in this special Housing Part because the issue usually gets resolved without the need for a hearing.

Martin Meltzer is a partner in BBWG's Litigation department, and Jamie L. Lee, is an Associate in the Department.

Administrative Update

Enhanced Enforcement of Building and Fire Department Regulations

By: Martin J. Heistein and Orie Shapiro

The year 2008 may ultimately be remembered for the meteoric rise of obscure political candidates, and the rapid demise of venerated financial institutions. However, local headlines have also been dominated by an unprecedented spate of construction accidents, crumbling facades, zoning issues and increased concerns about building safety. The resulting clamor has led to a proliferation of violations issued by the Department of Buildings ("DOB") and Fire Department.

In particular, we have seen an increase in the issuance of violations for failure to protect neighboring property owners during construction; work without permit; occupancy contrary to the Certificate of Occupancy ("CofO"); deficient fire alarm system; lack of fire safety director, etc.

The escalation in the number of violations issued by New York City inspectors is not confined to safety issues.

We represent several owners who have received multiple DOB violations for leasing rooms on a transient basis in apparent contravention of the CofO or zoning resolution. The same owners have also been served with Fire Department violations for failure to employ costly fire safety measures required in cases of such transient occupancy.

DOB has also expanded efforts to enforce arcane regulations concerning outdoor signs. Although many of the violations are issued directly to the outdoor advertising companies that lease space from owners, DOB has also tried to subject building owners to such regulations.

In the coming months, this area of our practice will take on an even greater importance not only because of the heightened enforcement by city agencies, but due to the promulgation of new Codes governing building and fire department violations. The Codes which went into effect on July 1, 2008, include, among other things, a vast increase in fines for certain types of violations.

BBWG offers experienced representation before the Environmental Control Board ("ECB") and the Criminal Court Summons Part where such violations are typically heard.

In order to assist owners who receive DOB or Fire Department violations, we would like to suggest the following pointers:

- The default penalty for failing to appear at an ECB or criminal court proceeding greatly exceeds any fine imposed for a finding of guilt. Accordingly, your staff should be instructed to immediately advise management upon receipt of such violations or summonses. It is important to note the date of the hearing to ensure that the cases do not result in default.
- Agencies often issue what might appear to be duplicative notices of violation, returnable on the same day, but which, in reality, are separate proceedings, each one of which must be defended. Thus, it is important to note the violation number, and arrange the defense of each proceeding.
- Careful attention should be paid to the cure dates contained on <u>some</u> DOB and Fire Department Notices. If the building owner can demonstrate that the condition was rectified by the cure date, he may not have to appear at an ECB hearing. Similarly, the Fire Department will generally

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Enhanced Enforcement of Building. . .
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not issue a summons alleging failure to cure a violation order before inspecting the premises to determine whether the condition alleged in the violation has been rectified.

- Even if the violation raises the same allegations as a different proceeding brought in that forum or another forum, it must be defended. (The city may agree at some point to withdraw a proceeding that is duplicative of another proceeding, but an owner which ignores what it considers to be a duplicative, or, for that matter a trivial violation risks the issuance of a default order).
- Although one does not have to be an attorney to appear at ECB, given that some defenses require knowledge of controlling law, or the ability to find procedural technicalities, on which a defense can be predicated, it is advisable to consult with counsel upon receipt of the violation.
- In determining whether counsel should be retained to appear at ECB, an owner should not only consider the cost of the fine but the cost of potential compliance. This analysis is required because the payment of a penalty does not close the proceeding at ECB. Upon a finding or admission of guilt, the proceeding is only deemed closed when the owner files a certificate of correction demonstrating that the underlying condition has been rectified. The more expensive the cost of correction, the greater the need to consult counsel.

In sum, there is every indication that the trend to greater enforcement of DOB and Fire Department violations will continue. Owners can take steps to minimize their costs by assuring that violations are addressed promptly, and that counsel is consulted as warranted.

Martin J. Heistein is a Partner and Orie Shapiro is an Associate in Belkin Burden Wenig & Goldman's Administrative Law Department. Mr. Shapiro specializes in practice before the ECB and other administrative agencies, and also regularly appears in the summons part of criminal court.

Prepare Now for the Removal of HPD Violations

By: Martin J. Heistein and Thomas J. Bannon

It is not too soon for owners of buildings that contain rent control units to begin preparing for the upcoming 2010/2011 Maximum Base Rent (MBR) Cycle.

During the spring of 2009, owners who are currently in the MBR program will receive the 2010 / 2011 MBR packet sent by the DHCR. This packet will contain the Violation Certification and Operation and Maintenance and Essential Service Certifications as well as a Violation Report issued by the New York City Housing Preservation and Development ("HPD") setting forth all violations on record as of January 1, 2009.

It is the Violation Certification that is critical to the owner's success in having his maximum base rent application granted and the issuance of an Order of Eligibility. In the owner's Violation Certification, he must certify that all rent impairing violations and at least 80% of the non-rent impairing violations set forth in the HPD violation report have been cured.

Based on the DHCR's stringent processing of these Violation Certification applications, owners should be prepared to submit specific documentation in support of the removal of those violations on record. Specifically, owners must establish that the violations that are on record as of January 1, 2009 have been removed.

DHCR may require that owners produce contracts/proposals for labor and invoices for materials utilized for the removal of the violations that are on record. If the work was done by a building employee, they should be prepared to submit their work logs or an affidavit outlining the work they performed and most importantly, the dates the repairs were completed. Owners must demonstrate that the work was done prior to January 1, 2009, or six months prior to the filing of the Violation Certification, if the Certification is being filed late. The DHCR will accept late filings, but owners will be penalized by a later effective date of the Order of Eligibility.

Owners may have to retain the services of a licensed architect or engineer who has inspected those

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Prepare Now . . .
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areas where the violations previously existed and can certify that they have since been cured. The key element in the granting of the Violation Certification is for owners to establish that all the rent impairing and 80% of the non-rent impairing violations on record with HPD have been timely cured.

Another option for owners who know that the violations on record have been cured, is to file for a Priority Inspection with HPD, whereby HPD will come to your building and inspect those violations on record. As long as the work has been carried out and HPD can gain access to those areas where the violations existed, they will remove them from the HPD violation database.

For owners who are seeking re-entry into the MBR Program, we strongly urge that you review the HPD violation report currently on record for your building and commence a course of action to have the violations removed and documented so you will be in compliance with the violation criteria at the time of filing.

Martin J. Heistein is a partner and Thomas J. Bannon is a legal assistant in BBWG's Administrative Law Department.

Sherwin Belkin, Howard Wenig, Jeffrey L. Goldman, Aaron Shmulewitz and Lewis Lindenberg were selected for inclusion on the *New York Super Lawyers – Metro Edition* list for 2008.

Sherwin Belkin, head of BBWG's Administrative and Appeals Departments, was quoted in *The New York Law Journal* September 3, 2008 Realty Law Digest, concerning the definition of "demolition" under the Rent Stabilization Law. Mr. Belkin commented on a recent appellate victory achieved by the firm for an owner seeking to enforce a DHCR order granting its demolition application without having to raze the entire building to the ground. Mr. Belkin was also quoted in a September 25, 2008 *New York Times* article, "Applications and Identity Theft", regarding precautions that owners and co-op/condo boards take in handling personal information of apartment applicants.

Aaron Shmulewitz, head of BBWG's Co-op and Condo Department was quoted in the Real Estate Section of the Sunday *New York Times*. In the Q & A column on August 31, 2008, Mr. Shmulewitz discussed the rights of a medical office in a co-op building. In the Q & A column on September 28, 2008, Mr. Shmulewitz answered a question regarding a condominium board's right to regulate garage spaces in a condominium building.

Magda Cruz, a partner in BBWG'S Litigation and Appeals Departments, was quoted in an on-line story published by The Press Association on September 5, 2008 regarding Bianca Jagger's appeal to the Court of Appeals of the decision finding Ms. Jagger not to be a primary resident of a New York City rent stabilized apartment. Ms. Cruz, who represented the owner in the appeal, was quoted saying that Ms. Jagger should not use New York State courts in order to circumvent U.S. immigration laws.

Jeffrey L. Goldman, a partner in BBWG's Litigation Department, was quoted in a September 21, 2008 *New York Times* article, "The Valets Work. The Garage Doesn't", reporting on the temporary garage closing at The Apthorp. Mr. Goldman, representing the owners of The Apthorp, commented on the progress of repairs and negotiations with Rapid Park Industries, the company which operates the parking garage. Mr. Goldman was also quoted in *The Village Voice* on October 1, 2008. The Voice reported on an owner occupancy case that Mr. Goldman is handling in Brooklyn. Mr. Goldman defended the right of the owners to recover an apartment for their personal use.

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Legal Update
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