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UPDATE

BBWG

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Inside This Issue

LITIGATION UPDATE

BETTER FOR THE TENANT TO BE "GOOD" PURSUANT TO THE "GOOD GUY" GUARANTY

By Lewis A. Lindenberg

The "Good Guy" Guaranty is a document made a part of a commercial lease, which grants landlords the right to recover rent and additional rent from the principal ("guarantor"). This instrument was initially created to deter corporate tenants from defaulting in the payment of its rent obligations and attempting to delay landlord's efforts to recover legal possession of the premises. The guarantor of the lease remains personally liable for the payment of rent for the period prior to vacating the premises, and the tenant should be motivated to act prudently and make every effort to return possession not owing rent to the landlord. The Good Guy Guaranty is more limited in nature than an unconditional guaranty and therefore more likely to be accepted by the tenant as an additional document to the lease.

In more recent years, landlords have expanded the scope of the Good Guy Guaranty and included an additional provision which not only requires the tenant to vacate the premises in "broom clean" condition, but also requires that the tenant pay the outstanding rent owed through the vacate date. If the tenant fails to pay

continued on page 2

TRANSACTIONAL UPDATE

COOPERATIVE CORPORATIONS – ARE YOUR BY-LAWS UP-TO-DATE?

By Seth A. Liebenstein

As the vast majority of cooperative corporations in New York City were formed in the 1980's or early 1990's, the original by-laws which were drafted in connection with those conversions could now be outdated. There are a number of provisions that are typically in a co-op's by-laws that the current board of directors should ask counsel to review in order to ensure that they are still enforceable and appropriate. In addition, it is important that all directors be familiar with their co-op's by-laws so that they do not run afoul of relevant legal provisions.

First, and most importantly from the perspective of a current member of the board, a co-op's by-laws typically include a provision indemnifying directors and officers against liability incurred in connection with their duties on behalf of the co-op. In addition, some co-ops' by-laws also contain an additional exculpation provision, which provides that, under most circumstances, directors are not personally liable for the consequences of their decisions. Litigation against board members is not uncommon in New

continued on page 2

BETTER FOR THE TENANT TO BE "GOOD"

continued from page 1

what is owed upon vacating of the premises, the guarantor would remain liable for rent as it accrues. It is important to remember that the tenant always remains liable for rent through the end of the term of the lease, but shell corporate tenants generally do not have sufficient assets to protect against the tenant's default in meeting its rental obligations.

By way of illustration, assume the landlord was able to obtain the more complete Good Guy Guaranty, and assume that the tenant owes three months rent when it tenders the keys prior to the expiration of the lease. Although the tenant does not include payment of the three months, the landlord has recourse against the Guarantor. The Guarantor remains liable until it satisfies not only the three months, but any additional rent which accrues until the entire amount of then outstanding rent is paid.

To make the issue more interesting, consider when tenants owing rent demand that the landlord apply the security deposit to satisfy the outstanding rent obligations and satisfy the guarantor's obligations. The law provides that the tenant's rent security is not to be a replacement for the guarantor's obligations under the Good Guy Guaranty. Using our prior example, if the rent security held by the landlord was equivalent to three months rent, the landlord can decline to use the rent security to meet the Good Guy Guaranty, and require new money from the Guarantor with the qualification that the rent security will be applied to *future* lease obligations, *i.e., rent as it accrues pursuant to the lease, brokerage fees for re-renting the premises.*

In a recent case involving all of the issues mentioned in this article, the tenant vacated the premises and demanded that the rent security be applied towards the tenant's outstanding rent and that the guarantor be released from the obligations of the Good Guy Guaranty. Prior to the tenant vacating the premises, landlord had commenced a summary non-payment proceeding for rent. The Court awarded the landlord summary judgment for the outstanding rent indicating that the security is to be applied towards the tenant's future lease obligations inasmuch as the landlord was under no obligation to mitigate its rent pursuant to New York Law and that the Guarantor remained liable pursuant to the Good Guy Guaranty. The Court stated that *"The respondent's [the tenant's] claim of surrender, does not end its financial obligation to the petitioner [the landlord] until it has paid the arrears in full. A set off based on security deposit cannot apply pursuant to the terms of the lease and the Guaranty."*

In conclusion, the tenant and the Guarantor pursuant to the lease and the Good Guy Guaranty, respectively, must act in a way consistent with the written documents, i.e., be a good guy by complying and paying what it agreed to pay, otherwise the "Bad Guy/Tenant" and Guarantor will find itself liable to its landlord.

Lewis A. Lindenberg, Esq. (llindenberg@bbwg.com) is a partner in BBWG's Litigation Department concentrating on commercial litigation matters. Christina Simanca-Proctor, Esq. (csimanca-protor@bbwg.com), a litigation associate, assisted Mr. Lindenberg in the commercial non-payment proceeding discussed in this article.

COOPERATIVE CORPORATIONS

continued from page 1

York City. Board members need to ensure that they are insulated to the maximum extent possible from individual liability. Board members should seek to discharge their duties to the co-op without the fear of incurring personal liability.

Another potential by-law provision that may need modification is a provision which allows the board to set the amount and method of collecting maintenance from the shareholders. For example, it is possible that such a provision may provide that the board must mail notice to all shareholders every time the board modifies the maintenance. Boards need to ensure that they and their managing agents are complying with such a provision, or they should modify the by-laws to concur with their current operational procedures.

It is also possible that certain by-laws may restrict the ability of a board to borrow or, less likely, to spend, on behalf of the co-op without obtaining the consent of the shareholders. If stated levels were contemplated at the time of conversion, it is likely that any such levels are now outdated, and obtaining shareholder consent is both impractical and unnecessary. If such provisions exist in a co-op's by-laws, amending them would be important, in order to enable the board to comply with current borrowing and spending levels without the need to obtain shareholder consent.

The foregoing are just some of the issues that co-op boards should have their counsel review regularly in order to ensure that they are operating in compliance with their governing documents and that no modifications are needed.

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BENCHMARKING UPDATE: CITY INTENDS TO DELAY ASSESSMENT OF PENALTIES

By Kara I. Rakowski

In BBWG's March 2011 Newsletter: "Administrative Law Update", readers were informed of New York City's new Local Law 84, which requires owners of large buildings to begin benchmarking the energy and water usage of such buildings no later than May 1, 2011.

On March 21, 2011, the City issued a notice stating that for at least three months after the May 1, 2011 deadline, no penalty will be assessed due to failure to comply with the benchmarking requirements of Local Law 84. In addition, starting May 24, a hotline will be established to answer any benchmarking or portfolio manager questions. The hotline will be accessible Monday through Friday, 10:00 a.m. to 4:00 p.m. by dialing 311.

For any questions regarding Local Law 84 compliance, or the City's March 21, 2011 notice, please contact Kara I. Rakowski, Esq. (krakowski@bbwg.com) of BBWG's Administrative Law Department.

LITIGATION UPDATE

ACCESS INTO CONDOMINIUM UNITS

By Brian Clark Haberly

A problem that condominium boards face at times is a need to obtain access to a unit (for repairs, inspection, or other necessary work) and the unit owner is unwilling to grant access. In this situation, the condominium board might be surprised to learn that it has more rights (and options) than it might expect.

Unlike a rental apartment or a co-op, where access is governed by the lease agreement between the parties, access into a condominium unit is governed by the by-laws of the condominium. Generally speaking, the by-laws of a condominium give much broader rights for access into an individual unit.

This issue was discussed in a decision by Justice Louis B. York of the New York Supreme Court in *Board of Managers v. Manhattan L.B. Living Trust,* which found that the "business judgment" rule applies to access disputes between unit owners and condominium boards and serves to shield the decision of a condominium from judicial review.

In the *Board of Mangers* case, a unit owner and a condominium board were having a protracted disagreement about access to the unit owner's apartment, and repairs to be performed within the apartment. Both sides agreed that there was a mold condition in the apartment, but the unit owner and the condominium board had very different ideas about what specific work should be performed and the scope of the repairs. The unit owner wanted the court to evaluate the proposals made by both sides and determine which of the two proposals was more reasonable.

Justice York refused to pick and chose between the competing plans proposed by the unit owner and the condominium board. Justice York stated that the business judgment rule prevented the court from second-guessing the remediation plan that the condominium board wanted to implement. Justice York found that the work the condominium board wanted to do in the unit was within the scope of its authority and was therefore not reviewable by the court. Justice York held that the court would not compare the two different plans, and instead directed the unit owner to provide access into his apartment in order for the condominium board's contractors to do the repairs that the condominium board wanted to perform.

Recently our firm handled two cases where a condominium board had discovered bedbugs in multiple units in the building, but the unit owners were unwilling to provide access into their individual units for extermination to be performed. The unit owners and the condominium disagreed about the scope of the extermination which needed to be performed.

BBWG then brought actions against condominium unit owners in Supreme Court for preliminary injunctions and access into their individual units. By bringing these actions, the condominium board was able to gain access and perform necessary work in order to protect the interests of the condominium as a whole.

When dealing with a dispute about access into a condominium unit for repairs or work impacting building systems or common areas, the board should keep in mind that it often has greater rights than it may be aware it has in order to compel the recalcitrant unit owner to provide access for inspection and repairs to the unit.

Brian Clark Haberly (bhaberly@bbwg.com) is a partner in the Firm's Litigation Department.

LITIGATION UPDATE

COURT OF APPEALS REINSTATES THE LOW RENT/LONGEVITY ADJUSTMENT

By Magda L. Cruz

In 2008, the NYC Rent Guidelines Board, the administrative body that each year promulgates guidelines for rent increases to stabilized leases, passed a special adjustment that applied to apartments renting below $1,000.00 per month, and occupied by the same tenant for six years or more. Leases for apartments falling in that category were subject to a minimum dollar renewal increase (generally, $45 per month for a one-year renewal; $85 per month for a two year renewal). In 2009, the RGB passed this adjustment again (this time, generally, $30 per month for a one-year renewal; $60 per month for a two-year renewal). The Legal Aid Society commenced litigation to invalidate these adjustments. *Matter of*

continued on page 7

PREPARE NOW FOR THE UPCOMING 2012/2013 MBR CYCLE

By Thomas J. Bannon

It is not too soon for owners of buildings that contain rent control units to begin preparing for the upcoming 2012 - 2013 Maximum Base Rent (MBR) Cycle.

During the Spring of 2011, owners who are currently in the MBR program should be checking the DHCR website (http://nysdhcr.gov/Rent) in anticipation of the availability of the 2012 / 2013 MBR forms. The applications that need to be filed include the Violation Certification and the Operation and Maintenance and Essential Service Certifications.

It is the Violation Certification that is critical to the owner's success in having its maximum base rent application granted and an Order of Eligibility issued by DHCR. In the owner's Violation Certification, it 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 they meet the DHCR criteria for violation removal for those violations on record as of January 1, 2011.

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, the owner should be prepared to submit its work logs or an affidavit outlining the work that the employee performed, and most importantly, the dates when the repairs were completed. Owners must demonstrate that the work was performed prior to January 1, 2011, 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 areas where the violations previously existed to certify that they have since been cured. The key element in the granting of an Order of Eligibility is for owners to competently prove 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 to correct the violation was performed, 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, commence a course of action to have the violations removed, and document all work so that you will be in compliance with the violation criteria at the time of filing for 2012-2013 MBR increases.

Thomas J. Bannon (tbannon@bbwg.com) is a legal assistant in BBWG's Administrative Law Department.

Co-op | Condo Corner

By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or (ashmulewitz@bbwg.com).

CONDO BUYER'S CLAIM FOR REFUND OF DEPOSIT DUE TO UNCOMPLETED NATURE OF UNIT SURVIVES DISMISSAL, DUE TO QUESTIONS OF FACT

Asensio v. Casa 74th Development LLC, Appellate Division, 1st Dept.

CONDO BUYER'S CLAIM FOR FRAUD BASED ON SHORT MEASUREMENTS OF ACTUAL APARTMENT IS DISMISSED, DUE TO DISCLAIMER IN CONTRACT

The Plaza PH2001 LLC v. Plaza Residential Owners LP, Appellate Division, 1st Dept.

COMMENT | *In contrast to the decision above, the Court here stressed an express contractual provision in which the buyer indicated that it was not relying on any representations outside the contract; since the contract did not state the apartment's measurements, the Court found no fraud. The dismissal of the fraud claim was tempered by the fact that the Court allowed the buyer's breach of contract claim to continue.*

CO-OP GYM USER CAN SUE CO-OP FOR INJURIES; CO-OP'S FORM OF RELEASE CANNOT BAR CO-OP LIABILITY FOR ITS OWN NEGLIGENCE

Roer v. 150 West End Avenue Owners Corp., Supreme Court, New York County

COMMENT | *This case is of signi□cant concern, since it calls into question the e□ectiveness of similar releases used by co-ops and condos throughout the City.*

RENTAL LANDLORD CANNOT COMPEL TENANT TO GRANT ACCESS TO REPAIR SAGGING FLOORS IN APARTMENT, DUE TO UNCERTAINTY OVER CAUSE OF SAGGING, AND OVER PREFERRED MANNER OF REPAIR

33 Christopher Corp. v. Friedman, Supreme Court, New York County

COMMENT | *This decision is curious; logic would have dictated that any doubt would be resolved in favor of safety □rst.*

CONDO ENTITLED TO SUMMARY JUDGMENT IN LIEN FORECLOSURE, DESPITE UNIT OWNER CLAIM THAT HE OWED LESSER AMOUNT

Board of Managers of The Village Mall at Hillcrest Condominium v. Dadon, Supreme Court, Queens County

LANDLORD'S FAILURE TO ACT IN RESPONSE TO SMOKE ODOR COMPLAINTS CONSTITUTES CONSTRUCTIVE EVICTION, ENABLES TENANT TO END LEASE, AND WARRANTS 40% RENT ABATEMENT FOR PERIOD PRIOR TO TERMINATION

Upper East Lease Associates v. Cannon, District Court, Nassau County

COMMENT | *Continuing and extending the recent trend, the Court held that, even though the landlord had taken steps to investigate and try to remediate the problem, the landlord was obligated to take further steps, and its failure to do so breached its warranty of habitability to the tenant. While this case involved a rental building, it is instructive—-and bad news—-for co-ops and condos.*

CO-OP'S STANDARD PROPRIETARY LEASE AND ALTERATIONS AGREEMENT NOT UNCONSCIONABLE, NOT SIGNED UNDER DURESS, AND NOT CONTRACTS OF ADHESION, AND ARE THUS ENFORCEABLE AGAINST SHAREHOLDER, ESPECIALLY WITH REGARD TO ALTERATIONS RESTRICTIONS

510 East 84th Street Corp. v. Genitrini, Supreme Court, New York County

COMMENT | *The Court noted that if this shareholder's arguments prevailed with regard to these standard co-op documents, then every co-op's governing documents would similarly be unenforceable. The Court noted that the shareholder chose to live in a co-op but sought to negate the co-op's very nature.*

CONDO BUYER'S FAILURE TO CANCEL CONTRACT FOR FAILURE OF FINANCING CONTINGENCY WAIVED HER RIGHT TO DO SO; HER FAILURE TO CLOSE THEREAFTER CONSTITUTED BREACH, ENTITLING SELLER TO RETAIN DEPOSIT

Tarlovsky v. Falk, Supreme Court, New York County

COMMENT | *The Court noted that the seller's eventual setting of a time of the essence date was valid and enforceable, and subsequent adjournments of the closing date by the seller did not waive the seller's right to enforce it.*

"COLLYERS BROTHERS" HOARDING SITUATION IN CO-OP WARRANTED REFEREE'S INVESTIGATION AND REPORT, WHICH WAS CONFIRMED BY COURT DESPITE MOTION TO REJECT IT

Meadow v. 205 East 77th Street Tenants Corp., Supreme Court, New York County

CO-OP SHAREHOLDER'S PREFERENTIAL SUBLETTING RIGHTS VOID UNDER BCL 501(C) EVEN IF INITIALLY GRANTED BY SPONSOR TO INDUCE HER TO BUY

Bregman v. 111 Tenants Corp., Supreme Court, New York County

COMMENT | *The Court also reiterated recent case law that a co-op can change its subletting policy even after many years' reliance thereon by shareholders.*

CO-OP COMMERCIAL LEASE WITH SERIES OF TENANT RENEWAL OPTIONS DOES NOT VIOLATE RULE AGAINST PERPETUITIES, REMAINS VALID DESPITE CO-OP'S EFFORT TO DECLARE IT VOID

Bleecker St. Tenants Corp. v. Bleeker Jones LLC, New York State Court of Appeals

COMMENT | *While the co-op's desire to invalidate a below-market lease imposed upon it by the conversion sponsor was certainly understandable, had its creative argument prevailed, numerous commercial leases throughout the City would have been at risk of cancellation.*

COURT OF APPEALS REINSTATES

continued from page 4

Casado v. Markus. The Supreme Court and the Appellate Division, First Department ruled that the RGB did not have the legal authority to enact these adjustments, and in 2010, they were struck down. But, on March 24, 2011, New York's highest appellate court, the Court of Appeals, reversed the lower courts and reinstated the low rent/longevity adjustments. The Court of Appeals, in *Matter of Casado v. Markus,* found that the RGB had the power to establish different rent increases for apartments whose rents fail to cover building costs, and which result in newer tenants effectively having to subsidize the apartments of long-term tenants paying disproportionately lower rents.

In light of this ruling, impacting approximately 300,000 apartments City-wide, owners of buildings with stabilized tenancies that are six years old or older, renting below $1,000.00 per month, may be entitled to raise the current legal regulated rents of such apartments.

Magda L. Cruz (mcruz@bbwg.com) is a partner in the Firm's Appeals Department and an owner representative on the NYC Rent Guidelines Board.

CASES AND TRANSACTIONS OF NOTE

Partner MARTIN MELTZER, head of BBWG's non-payment group, won a legal fee award in a commercial non-payment eviction proceeding in which the Court awarded the owner nearly $82,000, representing reimbursement of approximately 93% of the owner's legal fees sought. The case was litigated in Civil and Supreme Courts.

MR. MELTZER and JORDI FERNANDEZ, an associate in the non-payment group, also won a legal fee award on behalf of a co-op against two shareholders. After prevailing in the underlying dispute, the Court awarded the co-op more than $50,000 in legal fees reimbursement and interest; the legal fees awarded represented approximately 98% of the amount sought.

Litigation partners LEWIS LINDENBERG and JEFFREY LEVINE successfully represented a commercial landlord in a dispute involving commercial subtenants which had come into possession after the landlord had settled a non-payment case with the prime tenant. MR. LINDENBERG and MR. LEVINE were able to obtain a judgment of possession against the subtenants without having to commence a new legal proceeding against the subtenants because the court granted the landlord leave to add the subtenants as parties to the non-payment petition, and then awarded the landlord summary judgment as against the subtenants. The court stayed execution of the warrant of eviction as against the subtenants only so long as the prime tenant complied with its rental payment obligations under the existing stipulation of settlement.

CRAIG INGBER and ALLAN GOSDIN, a partner and an associate, respectively, in BBWG's Transactional Department, recently completed the negotiation and execution of a lease of retail space in Tribeca to a yoga studio for a five-year term with a five-year extension option. The transaction involved unique issues regarding the tenant's application for a special use permit with the NYC Board of Standards and Appeals to allow such studio use.

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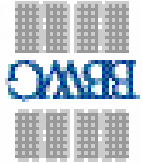

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