Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

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JULY 2017 | VOLUME 39

INSIDE THIS ISSUE

COURT UPHOLDS LUXURY DEREGULATION IN "421-G" BUILDINGS, IN VICTORY FOR BBWG CLIENT

By William Baney

Are owners entitled to deregulate apartments based on luxury decontrol in buildings receiving New York Real Property Tax Law ("RPTL") § 421-g benefits? We may now be closer to the answer to that question, and that answer is a positive development for owners.

RPTL § 421-g was enacted in 1995, as the cornerstone of Mayor Giuliani's plan to revitalize Lower Manhattan which was largely vacant and unable to attract commercial tenants. This was due in part to the technology boom of the 1990's, which had rendered the antiquated buildings downtown undesirable for commercial use. To stimulate a re-purposing of these buildings, RPTL § 421-g provided owners a tax abatement for converting commercial buildings to residential use, and apartments created as a result of the conversion were subject to rent stabilization laws.

BBWG represented an owner of a building receiving RPTL § 421-g tax benefits who commenced a declaratory judgment action against the tenants, seeking a declaration that luxury deregulation is applicable in buildings receiving such tax benefits. BBWG argued that, therefore, a tenant's apartment was properly deregulated out of rent stabilization since the initial rent exceeded the threshold for luxury deregulation (at the time, $2,000 per month).

BULLETIN

Rent Guidelines Board issues new order granting rent increases effective October 1, 2017-September 30, 2018: 2% increase for two-year leases and 1.25% increase for one-year leases

On May 2, 2017, Justice Shlomo Hagler of New York County Supreme Court granted summary judgment to the owner, finding that luxury deregulation was applicable in RPTL § 421-g

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buildings, and that apartments in RPTL § 421-g buildings could be deregulated once the rent met the threshold amount for luxury deregulation.

Justice Hagler, in analyzing two prior Housing Court decisions which had come to differing conclusions, found that the plain meaning of the statute was ambiguous, and resorted to examining the underlying legislative intent and purpose of the statute.

In support of its motion, the owner had submitted the legislative history, including letters from Mayor Giuliani and former Senate Majority Leader Joseph Bruno which were written before the State Senate voted on the RPTL § 421-g legislation. These letters stated that the Legislature intended that apartments created in RPTL § 421-g buildings would be fully subject to rent stabilization, including luxury deregulation. Mayor Giuliani's letter was read into the record during the debate before the State Senate voted to approve the bill which would eventually become RPTL § 421-g.

Justice Hagler further relied upon DHCR's interpretation and advisory opinions regarding RPTL § 421-g, in which DHCR stated "high-rent deregulation is available from the inception of the first residential tenancy" with respect to RPTL § 421-g apartments, so long as the first rent exceeded the threshold for luxury deregulation.

Justice Hagler ruled that "it appears that the main purpose of the Plan was to stimulate economic development, and not to primarily establish rent regulation for luxury housing, in Lower Manhattan. This is in stark contrast to RPTL §§ 489 [now J-51] and 421-a tax abatements which appear to have been historically provided to encourage and foster rent regulation, and, therefore, specifically excluded from luxury deregulation."

While a lower Court decision, Justice Hagler's decision should ease the concerns of owners throughout Lower Manhattan who followed DHCR and HPD interpretations and deregulated apartments in RPTL § 421-g buildings.

Note—On July 3, a different judge, ruling in a different but substantially similiar case involving a 421-g building, ruled in favor of the tenant. The owner in that case (which BBWG also represents) plans to appeal. Appellate reconciliation of the disparate rulings is needed.

Joseph Burden, senior partner, and William Baney, associate, represented the owner in this action.

BBWG IN THE NEWS

Founding partners **Sherwin Belkin** and **Joseph Burden** were quoted in several publications with regard to the Firm's successful handling of a litigation that upheld luxury deregulation in a "§421-g" building (see also related article in this newsletter): in The Real Deal on May 9; in citybizlist.com on May 9; in propublica.org on May 10; in The Wall Street Journal on May 11; and in the June edition of the CHIP New York Housing Journal.

Mr. Belkin was also quoted in Business Insider on April 26 on methods landlords use to increase rents on rent-stabilized tenants; in citybizlist.com on May 2 commenting on proposed new AirBnB legislation; in The Wall Street Journal on May 26 on AirBnB-related practicalities; in The Real Deal on May 26 on the efficacy of non-disclosure agreements; and on June 13 in US News and The Real Deal with regard to a decision in the Portofino case that upheld the establishment of the Tenant Protection Unit.

Mr. Belkin and Administrative Department partners **Martin Heistein** and **Kara Rakowski** will be panelists on the New York Multifamily Summit on September 19, discussing "Update of Regulations and Multifamily Laws".

Daniel Altman, head of the Firm's Transactional Department, was quoted in citybizlist.com on June 13 with regard to the potential elimination of §1031 exchanges.

Litigation partner **Matthew Brett** authored an article that appeared in The New York Law Journal on May 31 entitled "In Rent Regulation Arena, 'Altman' Appears To Be In Flux".

Mr. Brett also lectured at a continuing legal education class hosted by Worldwide Land Transfer on the issue of "High Rent Luxury Deregulation", on June 29.

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DRAFTING LEASE PACKAGES FOR NEW BUILDINGS

By Sherwin Belkin

During the nearly three decades that BBWG has been in existence, we have worked with scores of developers in putting together leases and riders that are tailored for the special needs of new buildings.

While the standard printed lease form is a fine base document, it is only a starting point. Full compliance with New York's seemingly endless regulations and full maximization of owner protection doesn't stop with the printed boilerplate form. We work closely with the developer to understand the unique aspects of a new development and memorialize these terms in a lease and its modifying riders with an eye towards these dual goals.

As an example, in the heated competition for tenants, an owner's ability to offer a wide variety of amenities has become a major marketing tool. Health clubs, lounges, rock-climbing walls, screening rooms, swimming pools, basketball courts, yoga studios, storage, bike room, concierge services and more are now routinely offered as owners try to distinguish their properties. Not only must the amenities be reflected in the lease documents, with proper safety requirements, membership rules, and protocols put in place, but decisions must be made from the start as to whether the owner will self-operate all or some of the amenities, or if they will be operated by independent third parties. The decision is crucial--since most new rental construction has flowed from the RPTL §421-a program, with its resultant rent stabilization coverage, the initial decision as to self-operation or operation by independent third party contractor will carve into stone whether or not an amenity becomes a rent stabilized "required service" (with limitations on fees and mandates on continuation); or if the amenity is not "required", such that the owner retains greater flexibility over the amenity in the future.

Because BBWG not only has real estate and transactional experience, but is also well versed in New York's regulatory morass, we can help address the following (and much more) when preparing your initial lease package:

- Are you using the proper 421-a rider, which enables you to collect additional 2.2% surcharges as the abatement burns off and deregulate units once the abatement ends?
- Does your lease allow you to enforce violations of the Roommate Law (RPL §235-f) due to an excess number of occupants? (The standard lease does not.)
- Are you improperly using a preferential rent rider on the initial renting?
- Does your lease provide for a temporary rent concession? Many owners find that this is very helpful in marketing.
- Does your lease address the gap in time between application for a tax abatement and the technical onset of rent stabilization?
- Are amenities carefully spelled out as to method of operation, membership, safety and liability?
- Are tenants placed on notice as to their potential liability for illegal short term rentals? (This notice may end the practice before it begins.)

- Have you included all requisite municipal riders? (Bed bugs, window guards, fire safety, DHCR Tenant's Rights Rider, etc.)
- Will the building permit pets? Are the types of pets, size, breed and rules for the harboring and transport of pets carefully spelled out?

These are only a handful of the issues that BBWG routinely confronts and addresses when preparing a new building lease package. Addressing these and many more issues before the first tenant signs a lease can avoid a host of future problems.

This article was written by Sherwin Belkin, a BBWG founder and Administrative Department partner. Mr. Belkin can be reached at sbelkin@bbwg.com.

CONSIDERATIONS WHEN PURCHASING A COMMERCIAL PROPERTY OUTSIDE NEW YORK

By Daniel T. Altman and Stephen M. Tretola

While BBWG's Transactional Department continues to be very heavily involved in the financing, acquisition and disposition of commercial real estate in the New York metropolitan area, we also regularly and successfully represent a variety of clients in buying, selling and financing shopping centers, multifamily, mixed-use and retail properties throughout the United States. In representing clients in these types of transactions, it is critical to forge strong relationships with competent local counsel to provide guidance on contract issues that are tailored to the specific jurisdiction where a transaction is taking place.

BBWG recently represented a real estate investment trust (REIT) in purchasing a shopping center in New Mexico, and is currently representing that REIT in the purchase of a similar property in North Carolina. Purchasers of these types of assets (or any commercial property) outside of New York should carefully consider the following concepts and issues when negotiating a contract:

- Title and Survey – An extensive review should be performed before executing a contract (or during the permitted due diligence period) to determine any encumbrances that could potentially affect current or future use of the property. Covenants and restrictions and easement agreements recorded against the property in government land records and land entitlements should be understood thoroughly so that certain conditions can be made precedent to closing in the text of the contract;
- Zoning – A zoning report should be reviewed to determine if the property is in compliance with all local ordinances, laws and codes (and whether the contract needs to address certain deficiencies);
- Tax Issues – A purchaser should understand how local real estate taxes (and supplemental taxes) accrue and are paid by the property owner;
- Closing Costs/Prorations – Responsibility for various closing costs such as title premiums, survey costs, real estate transfer taxes, escrow fees and recording fees should be analyzed since they vary from state to state. In addition, closing adjustments and prorations of rents, utilities and taxes should be examined with local counsel;
- Exhibits to Contract – Local counsel should be consulted to review the various exhibits to the contract to ensure that the deed and assignments properly convey the real and personal property and take into consideration any local law idiosyncrasies.

While many of these issues are similar in nature to a New York transaction, it is prudent to work closely with local counsel to uncover any unfamiliar issues and to review and analyze the contract based upon local customs. BBWG is ready to assist clients on the purchase or sale of any property located outside of New York.

Daniel Altman (daltman@bbwg.com) and Stephen Tretola (stretola@bbwg.com) are partners in the firm's Transactional Department

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BBWG IN THE NEWS

David Skaller, a partner in the Firm's Litigation Department was the featured speaker on a June 27 panel on "Evictions: AirBnB, Illegal Sublets, Non-Primaries—Landlords' Rights, Tools and Technologies". Mr. Skaller and litigation associate **Julian Rodriguez** also participated in a May 18 mock trial program for all Housing Court judges and court attorneys, on evidentiary issues.

Martin Meltzer, a partner in BBWG's Litigation Department, has been appointed a Trustee of Housing and Services, Inc., a supportive housing organization whose mission is to end chronic homelessness, prevent displacement of at-risk persons, and improve housing conditions for those marginalized, through development and management of permanent supportive housing, collaboration with other community groups, and preservation initiatives to safeguard affordable housing stock.

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).

BROKER NOT LIABLE TO REJECTED CO-OP BUYERS FOR SUGGESTING FULL DISCLOSURE AND PRESENTATION OF FACTS TO BOARD

Verzatt v. Halstead Property, LLC Appellate Division, 1st Department

COMMENT—The Court noted that the broker had tried to facilitate, not prevent, Board approval.

CO-OP SPONSOR NOT LIABLE FOR NOISE COMPLAINTS MADE BY ITS SUBTENANT, BECAUSE SPONSOR HAD NO CONTROL OVER BEHAVIOR IN APARTMENT

Clarke v. 6485 & 6495 Broadway Apartment, Inc. Appellate Division, 1st Department

COMMENT—The reasoning of this decision seems questionable; co-op shareholders are frequently held liable for the actions of their subtenants, both under their proprietary leases and common law.

CO-OP CANNOT EVICT SHAREHOLDER FOR UNAUTHORIZED WALL INSTALLED 20 YEARS EARLIER BY PREDECESSOR SHAREHOLDER; VICTORIOUS SHAREHOLDER IS AWARDED LEGAL FEES

Coliseum Tenants Corp. v. Benmark Civil Court, New York County, Landlord & Tenant Part

COMMENT—The Court ruled that the Board knew or should have known of the wall, and its failure to take action for many years constituted laches and waiver. Boards must act promptly when learning of default situations, or else may suffer the consequences.

CO-OP EVICTION OF DELINQUENT SHAREHOLDER BARRED ON TECHNICALITY IN DEFINING HIS STATUS

Chatham Square Owners Corp. v. Roth District Court, Nassau County, Landlord & Tenant Part

COMMENT—In the non-judicial foreclosure sale that gave rise to this, the shareholder was listed as a "licensee", but should have been listed as a "tenant". The error was deemed fatal.

CO-OP PENTHOUSE OWNER ENTITLED TO USE OF ENTIRE TERRACE, AND RECOUPMENT OF ALL LEGAL FEES FROM CO-OP

Rose v. 115 Tenants Corp. Appellate Division, 1st Department

COMMENT—Disputes over valuable outdoor space are not-uncommon, and are hotly contested. The Court based its holding on an analysis of the language in the proprietary lease and offering plan.

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CO-OP CAN BE SUED BY RESIDENT WHO HAD BEEN SEXUALLY ASSAULTED IN LAUNDRY ROOM

Gonzalez v. Riverbay Corporation Appellate Division, 1st Department

COMMENT—The co-op's motion to dismiss was denied based on the existence of questions of fact as to the foreseeability of the incident, based on the co-op's apparent failure to take appropriate steps to enhance security after several prior similar incidents. The lessons to be learned are clear.

RENT-STABILIZED TENANT EVICTED FOR AIRBNB ACTIVITY; NO RIGHT TO CURE EXISTS

Trust f/b/o Shari Lynn Goldstein v. Lipetz Appellate Division, 1st Department

COMMENT—While not involving a co-op or condo, still instructive (and hopefully stretchable). The tenant's 40-year tenancy was terminated based on 93 different AirBnB guests during an 18-month period--and despite her playing the "ill senior citizen" card.

CONDO DEFECTS SUIT DISMISSED AS AGAINST SPONSOR'S PRINCIPALS

Board of Managers of The 125 North 10th Condominium v. 125North 10, LLC Appellate Division, 2nd Department

COMMENT—The Court held that the principals' mere certification in the offering plan was insufficient to permit veil piercing or other basis for principals' liability.

SPONSOR'S ARCHITECTS NOT LIABLE TO SPONSOR ON THIRD-PARTY INDEMNITY CLAIMS IN CONDO DEFECTS SUIT

Board of Managers of The 125 North 10th Condominium v. 125North 10, LLC Appellate Division, 2nd Department

COMMENT—In a companion suit, the Court held that the sponsor entity's responsibility for its own potential breaches to the Condominium bars third-party indemnification, which is based on purely passive/vicarious liability.

CONDO NOT OBLIGATED TO REIMBURSE UNIT OWNER FOR HIS LEGAL FEES IN CONDO'S UNSUCCESSFUL LITIGATION AGAINST HIM

The Board of Managers of The J Condominium v. Tornabene Civil Court, Kings County, Landlord & Tenant Part

COMMENT—The Court held that the "reciprocal legal fees" provision of Real Property Law §234 applies only to landlord/tenant relationships. A condo and its Unit Owners are governed by the bylaws which, in this case, provided only for one-way reimbursement.

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