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## Taxing The Goose That Lays The Golden Eggs

BY CRAIG L. PRICE



As if closing costs in New York City were not already among the highest in the country, come July 1, 2019, closing on a transaction will become even more expensive.

The 2020 New York State Budget Bill includes increases to the New York State Transfer and Mansion taxes, which affect real property in cities in New York State with populations of one million or more, presently only New York City.

In addition to the \$2.00 per \$500.00 of consideration (or fraction part thereof) of State Transfer Tax currently charged, the new law adds an additional \$1.25 per \$500 of consideration (or portion thereof) on residential property (see Note 1 below) where the consideration is \$3,000,000 or more, and on non-residential property where the consideration is \$2,000,000 or more. This tax is normally paid by the seller and subject to the exemptions and conditions contained in the New York State Tax Law.

Consideration	Transfer Tax Residential	Transfer Tax Non-Residential
Under \$2,000,000	\$2 per \$500 (.4%)	\$2 per \$500 (.4%)
\$2,000,000 to \$2,999,999.99	\$2 per \$500 (.4%)	\$3.25 per \$500 (.65%)
\$3,000,000 or more	\$3.25 per \$500 (.65%)	\$3.25 per \$500 (.65%)

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In addition, the budget bill also adds supplemental, price-based tax to the 1% tax on consideration of residential real property in excess of \$1,000,000 (commonly known as the “Mansion Tax”). The supplemental Mansion tax is on residential-only property (see Note 2 below) located in New York City or any other city in New York State with a population of one million or more (presently none). The supplemental Mansion tax

increases based upon the amount of consideration. This tax is normally paid by the purchaser.

The new tax rates are the fallback to the “pied-a-terre tax” that was under discussion in Albany, which would have imposed recurring incremental real estate taxes on some condominium apartments owned by non-City residents. Having said that, the

new tax rates are sure to have a negative impact on an already uncertain sales environment, especially sales of “super-luxury” apartments.

The new tax rates take effect with regard to closings that occur on and after July 1, 2019. However, such a transaction may still benefit from the old tax rates if the contract was entered into on or before April 1, 2019, and the “date of execution of such contract is confirmed by independent evidence, such as the recording of the contract, payment of a deposit or other facts and circumstances as determined by the Commissioner of Taxation and Finance.” In any event, if you enter into a contract today, but close, record and pay the transfer tax by June 30, 2019, the old tax rates will apply.

If you have a current transaction pending, you should make every effort to try and close prior to July 1, 2019 in order to avoid being subject to the new tax rates.

Consideration	New York Mansion Tax (including Supplemental Mansion tax)
\$1,000,000.00 or less	Not subject to tax
\$1,000,000 to \$1,999,999.99	1%
\$2,000,000 to \$2,999,999.99	1.25%
\$3,000,000 to \$4,999,999.99	1.5%
\$5,000,000 to \$9,999,999.99	2.25%
\$10,000,000 to \$14,999,999.99	3.25%
\$15,000,000 to \$19,999,999.99	3.5%
\$20,000,000 to \$24,999,999.99	3.75%
\$25,000,000 or more	3.9%

**Note 1:** For purposes of the State transfer tax, residential property, including an interest therein, is defined as a 1-, 2- or 3-family house, an individual residential condominium unit, or a cooperative apartment, that is or may be used in whole or in part as a personal residence.

**Note 2:** For purposes of the State “Mansion Tax”, residential property, including an interest therein, is defined as property used in whole or part as a personal residence, and includes a 1-, 2- or 3-family house, an individual residential condominium unit, or a cooperative apartment, that is or may be used in whole or in part as a personal residence.

If you have any questions regarding the above, please contact Transactional Department partner Craig L. Price or any other member of our Transactional Department.

# Roommates: The Rules of the Game

BY SHERWIN BELKIN



Although what is commonly referred to as “The Roommate Law” (Real Property Law § 235-f) has been in existence since 1983, determining

who may have a roommate and how many people can occupy an apartment remains one of New York’s more hyper technical legal exercises. The Roommate Law provides:

- An apartment may be occupied by the tenant(s) named in the lease and by immediate family members of the tenant(s), so long as the tenant(s) occupies the apartment as his or her or their primary residence with said immediate family member(s).
- If the lease has only one named tenant, the apartment may be also occupied by one additional occupant and the

dependent children of said occupant.

- If the lease has two or more named tenants, the apartment may be occupied by additional occupant(s) and the dependent children of the occupant(s), provided, however, that the total number of tenants plus occupants (exclusive of said occupant(s)’ dependent children) does not exceed the number of tenants named in the lease.
- In no event may any occupant occupy the apartment unless at least one person named in the lease as a tenant shall be in occupancy of the apartment as his or her primary residence.

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- The tenant must inform the owner, in writing, of the name of each family member, occupant and their dependent children, if any, within thirty (30) days following the commencement of occupancy by each such person in the apartment.
- The tenant must inform the owner, in writing, of the name of each family member, occupant and their dependent children, if any, within thirty (30) days following the owner's written request therefor.
- The tenant agrees that, absent express written consent by the owner, no family member, occupant, dependent child thereof or any other person other than the named tenant(s) shall acquire any right to occupancy of the apartment or any other independent tenancy rights or occupancy rights to the apartment.
- Neither the tender nor the acceptance of a rent payment by or on behalf of any person other than the tenant(s) named on the lease shall constitute such express written consent.

(Please note that a rent stabilized tenant that takes a roommate cannot charge the roommate more than his or her per capita share of the rent).

Under the Roommate Law, there are various designations of persons:

- **Tenant(s)** — the persons named on the lease
- **Immediate Family** — persons closely related to the tenant(s)
- **Occupants** — persons not related to the tenant(s) who also occupy (the “roommate”)
- **Dependent Children** — children dependent upon the occupant

By way of example: If the lease names A and B as co-tenants, then, per the lease, A & B can occupy as tenants and can have members of their immediate family live with them. If A marries, his spouse occupies as a member of A's immediate family—and this is permitted even if B stays in occupancy with them. If B leaves, so that A and his spouse are in occupancy, then C, an occupant, could move in with them because:

- A would occupy as a Tenant
- Spouse would occupy as family of A
- C could lawfully reside with A and A's spouse because the number of tenants in occupancy (A), plus C (an occupant) is two and the number of tenants named on the lease (A & B) is two.

The Courts have held that The Roommate Law—when referenced alone—is intended as a pro-tenant protective law; not a landlord basis for eviction. Thus, the Courts have held that unless the lease recites the rules of occupancy, mere reference to The Roommate Law in a lease does not give the landlord the basis to bring an eviction proceeding if too many persons occupy. It is for this reason that BBWG has created an additional lease provisions rider that (in addition to filling in the gaps in many standard leases) lays out the restrictions of The Roommate Law, thus incorporating those restrictions into the lease itself.

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Sherwin Belkin is founding partner of the Firm, and a member of its Administrative and Appeals Departments.

## Court Holds Single Incident of Alleged Arson Serious Enough to Potentially Constitute “Nuisance” Warranting Eviction

BY: SCOTT F. LOFFREDO



reason of gross negligence, substantially

Rent Stabilization Code §2524.3(b) provides that a tenant may be evicted for: (i) committing or permitting a nuisance, (ii) maliciously, or by

damaging the housing accommodation, or (iii) engaging in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other

tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety.

While Courts have generally held that the alleged conduct must be a recurring event and not merely an isolated incident, an exception to this general principle is where

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the Court finds that a one-time incident is of such a serious and egregious nature as to constitute objectionable conduct.

In a recent case handled by our firm, a landlord commenced a nuisance holdover proceeding on the grounds that the tenant of record's live-in brother was captured on video surveillance setting a fire to a flyer located on the wall of the building and walking away—conduct which he was ultimately arrested for. The tenant of record moved to dismiss on grounds that the single incident alone does not amount to a persistent and continuing course of conduct that was intended to harass or harm anyone.

In denying the tenant's motion, the Court stated that a one-time incident, if sufficiently serious and egregious in nature, could constitute objectionable conduct warranting eviction. Additionally, the Court highlighted that in this instance, the landlord attached pictures to its pleading purporting to show the alleged suspect starting the fire and leaving the scene, as well as a police report relating to the arrest for the alleged act. Accordingly, the tenant's motion to dismiss was denied and the case was scheduled for trial.

When determining whether or not to commence a nuisance holdover proceeding

based upon the severity of a tenant's conduct, it is important to assess, as the Court explicitly did in this case, both the qualitative and quantitative aspects under the specific set of facts to determine if the threshold for nuisance has been met.

In the event that you wish to speak to counsel about options available to a property owner undertaking such an analysis, BBWG can assist you.

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Scott F. Loffredo is a partner in the Firm's Litigation Department.

## The Tide Turns In Favor Of Commercial Landlords In Lease Defaults

BY: LEWIS A. LINDENBERG



This article addresses recent case law developments involving a commercial tenant's ability to toll a default provision of its lease.

As will be shown, under many circumstances a commercial tenant's entitlement to an injunction tolling the time within which to cure a lease default is no longer automatic.

Before the seminal 1968 Court of Appeals decision in *First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, a commercial tenant was required to cure a lease default within the time prescribed in a notice of default. Standard commercial

leases generally provide tenants with as few as five days to cure lease defaults, generally an insufficient time to cure most defaults and to preserve a commercial tenant's lease.

The Yellowstone decision greatly enhanced commercial tenants' ability to preserve their leaseholds, by providing that, after receipt of a default notice from its landlord, a commercial tenant needed to immediately commence a Supreme Court action and move for an injunction, demonstrating that it (1) holds a commercial lease; (2) received a notice of default from its landlord with the threat of termination of the lease; (3) is timely moving for injunctive relief prior to the expiration of the period contained within the notice to cure; and (4) is prepared and able to demonstrate the ability to cure the alleged default by any means short of vacating the premises—essentially, to take whatever steps are required to cure the alleged default in order to preserve the tenant's leasehold.

The ability to obtain a Yellowstone injunction came with certain other requirements for tenants. The Courts required tenants to pay ongoing monthly use and occupancy (rent) (see *Calvert v. Le Tam Realty Corp.*, and *313 West 57th Rest.*

*Corp. v. 313 West 57th Associates*), as well as requiring that a reasonable bond be posted by the tenant (see *61 W. 62nd Owners Corp. v. Harkness Apt. Owners Corp.*) (Note—I handled all three of these cases earlier in my career and was on the prevailing side.) These protections for a landlord only maintained the status quo but did not necessarily address a landlord's substantive concerns—that in many instances Yellowstone injunctions were unwarranted and should not have been granted to tenants in the first instance.

Those reservations now appear to have borne fruit, in a shift toward not freely granting Yellowstone relief. Courts are more closely examining the nature of the commercial lease default and deciding whether the claimed default is subject to a cure even if additional time is afforded the tenant.

In a decision issued on March 5, 2019, *Bliss World v. 10 West 57th Street Realty, WL1028983*, the Appellate Division reversed the lower Court, and held that a tenant's alleged failure to maintain proper insurance and assigning the lease without first obtaining the landlord's consent were not curable events warranting the granting of

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a Yellowstone injunction. The Court held that: (i) even if the tenant now obtained insurance, it could not retroactively provide coverage for the uninsured period, and (ii) the tenant could not show how it would undo the assignment of lease.

Two other significant Court decisions that denied a Yellowstone injunction involving lack of required insurance are *Prince Fashions, Inc., v. 60G 542 Broadway Owners, LLC* (2017) and *Rui Qin Chen Juan v. 213 W. 28 LLC* (2013).

A landlord in these situations only needs to prove that the alleged defaults referenced in the notice of default occurred and if successful in proving that the alleged default occurred, e.g., that the tenant did not maintain insurance, that the tenant would be evicted from the premises.

The take-away from these recent Court decisions suggests that the pendulum is moving back in landlords' direction, enabling landlords to enforce lease terms, particularly making sure that proper

insurance is being maintained and other lease provisions are being strictly observed by their tenants. BBWG stands ready to assist landlords pursue the appropriate legal means against defaulting tenants.

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Lewis A. Lindenberg is a partner in the Firm's Litigation Department, concentrating his practice in commercial lease disputes.

## Income-based Discrimination

BY MARTIN MELTZER  
AND DAMIEN BERNACHE



BBWG's newsletter articles regularly discuss City agencies that enforce tenants' rights with regard to owners who do not keep their buildings in good condition. Another agency that owners should be aware of is the New York City Commission on Human Rights (NYCCHR). The NYCCHR enforces all areas of housing discrimination.

A client recently asked whether it is required to participate in the "Section 8" voucher program with regard to a market (non-rent-stabilized) unit and accept the Section 8 voucher where the building does not currently participate in the Section 8 voucher program and the person who applied for the apartment does not have good credit.

Although an owner might think that it is acceptable to deny a rent subsidized

applicant housing because of his poor creditworthiness, the NYCCHR thinks otherwise.

The New York City Human Rights Law (NYCHRL) prohibits discrimination based upon source of income (among many other grounds). Generally, an owner cannot refuse to accept "program" applicants nor subject such applicants to additional conditions for rental, as long as the apartment's rent and size qualify for the program's voucher payment standards (VPS). In practice, this is an area of emphasis for the NYCCHR. The NYCCHR has interpreted the NYCHRL to, among other things, prohibit the denial of program applicants that have a subsidy that is indexed to income (such as a Section 8 voucher) based upon insufficient income or other credit criteria. The NYCCHR's view is that an applicant will only pay a portion of his/her income towards the overall rent (generally 30%, as determined by the participating agency), and that, therefore, the applicant's income will always be sufficient by definition to meet the tenant portion.

In the example above, if the owner were to deny this applicant based solely upon his income, this could result in a complaint being filed at the NYCCHR by the rejected applicant. Since the apartment's rent is within the VPS, and an applicant cannot be denied solely because of insufficient

income, denial of this application would subject the owner and the managing agent to a viable discrimination complaint based on source of income. Potential penalties range from \$10,000 to \$250,000, plus payment of actual damages suffered by the applicant, not to mention the thousands of dollars in legal fees the owner would have to pay to defend against such a complaint, along with a potential order that the owner reimburse the complainant's legal fees.

Owners should be particularly aware that the NYCCHR has a history of sending out "testers" who approach brokers and managing agents, and ask if they accept programs. If the "tester" has any inkling that the owner is denying such an applicant improperly, the NYCCHR will likely start its own action. Owners' leasing agents and managers should be well-versed in housing discrimination matters and how to avoid the potential pitfall of finding themselves at the mercy of the NYCCHR.

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# BBWG In The News

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Founding partner **Sherwin Belkin** penned a letter to the editor that was published in Crain's New York Business on February 25, criticizing pending State legislation that would eliminate MCI rent increases: **Read article [here](#)**. **Mr. Belkin** was also featured in an article entitled "Stage Is Set For Rent Regulation Debate", in Crain's on March 18: **Read article [here](#)**.

**Martin Heistein**, co-head of the Firm's Administrative Law Department, was the keynote speaker at a seminar held on March 13 for City building owners, sponsored by Marcus and Millichap. **Mr. Heistein** spoke about the upcoming changes to the rent regulatory laws in Albany, as well as changes currently being proposed by the City Council.

**Kara I. Rakowski**, co-head of the Firm's Administrative Law Department, was a guest on the "Realty Speak" podcast which aired on April 2, during which she discussed potential changes to rent regulation and their effects on housing and local business: **Listen [here](#)**.

The mortgage refinancing of a major office building in Forest Hills on which partner **Stephen M. Tretola** and associate **Nicole Neidich** represented the owner/borrower was included as a nominee for the "most ingenious deal" of the year in the "Between The Bricks" feature in The New York Post on March 20: **Read article [here](#)**.

Litigation partner **Lisa Gallaudet** discussed a pending case being handled by BBWG involving a celebrity's attempt to take advantage of Loft Law provisions so as to not pay rent, in House Beautiful on March 5: **Read article [here](#)**. **Ms. Gallaudet** was also quoted in a March 23 article in The New York Times discussing a lawsuit against a BBWG client by loft tenants seeking to bar use of an electronic keyless entry system into the building: (**Read article [here](#)**), and in an April 4 c/net.com article on the same case: **Read article [here](#)**.

Transactional Department associate **Nicole Neidich** was a panelist on a "Recent Alumni Career Perspectives" program hosted by the Mattone Family Institute for Real Estate Law at St. John's University School of Law on April 2.



# 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).

## CO-OP SHAREHOLDER DEFEATS SUMMARY JUDGMENT MOTION IN HOLDOVER EVICTION PROCEEDING FOR HARBORING UNREGISTERED OVERSIZE DOG

*Hillman Housing Corporation v. Rosario* Appellate Term, 1st Department

**COMMENT** | The Court found questions of fact regarding the dog's size, when its occupancy commenced, and the interplay between the co-op's governing documents and the City Pet Law.

## CONDO UNIT OWNER CAN SUE UPSTAIRS NEIGHBOR FOR WATER LEAK DAMAGE ARISING FROM ALLEGED NEGLIGENCE

*Sultan v. Connery* Supreme Court, New York County

**COMMENT** | The Court held that the burden of proof was never satisfied by the upstairs neighbor on its motion for summary judgment.

## CONDO ENTITLED TO UNPAID COMMON CHARGES PLUS INTEREST, LATE FEES AND LEGAL FEES TO BE SET AT REFEREE HEARING

*Board of Managers of The Regatta Condominium v. Dewan* Supreme Court, New York County

**COMMENT** | The Unit Owner's various defenses were dismissed summarily. BBWG represented the condo in this all-around victory.

## SPONSOR REP ON CONDO BOARD CAN BE SUED FOR BREACH OF FIDUCIARY DUTY

*Bowery 263 Condominium Inc. v. D.N.P. 336 Covenant Avenue LLC* Appellate Division, 1st Department

**COMMENT** | The sponsor rep was the sole Board member for a period, and was held to owe a fiduciary duty to all Unit Owners, including [especially] with regard to addressing their claims re sponsor construction defects.

## CONDO LATE CHARGES AND INTEREST ARE NOT CRIMINAL USURY, SINCE THEY ARE NOT INTEREST ON A LOAN

*Board of Managers of Ruppert Yorkville Towers Condominium v. Hayden* Appellate Division, 1st Department

**COMMENT** | The Court also held that the Unit Owner could have avoided late charges and interest by simply paying her common charges. A big win for condos.

## CO-OP SHAREHOLDER NOT A HOLDER OF UNSOLD SHARES, AND THUS NOT ENTITLED TO EXEMPTION FROM CO-OP FEES

*Pastena v. 61 West 62 Owners Corp.* Appellate Division, 1st Department

**COMMENT** | Such status is frequently the subject of disputes.

## REFEREE'S REPORT ON COURT-ORDERED CO-OP ELECTION CONFIRMED

*Wynkoop v. 622A President Street Owners Corp.* Appellate Division, 2nd Department

**COMMENT** | This was a trilogy of cases, involving a 4-shareholder co-op in Brooklyn enmeshed in bitterly hard-fought litigation that probably consumed way more in aggregate legal fees than warranted for what was at stake.

## CO-OP NOT LIABLE TO SHAREHOLDER FOR BREACH OF HOUSE RULES BY ANOTHER SHAREHOLDER

*Ran v. Weiner* Appellate Division, 1st Department

**COMMENT** | While the holding was consistent with common provisions in a typical co-op's governing documents, query to what extent the holding should be constricted by the warranty of habitability and circumstances constituting constructive eviction.

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**CONDO SPONSOR’S ARCHITECTURAL CONSULTANT AND SECURITY SYSTEM INSTALLER NOT LIABLE TO SPONSOR IN CONDO BOARD’S DEFECTS SUIT AGAINST SPONSOR**

*Board of Managers of Olive Park Condominium v. Maspeth Properties, LLC* Appellate Division, 2nd Department

**COMMENT** | The Court examined the standards for common law indemnity and found the facts wanting.

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**PROPERTY OWNER OBLIGATED TO GRANT ACCESS LICENSE FOR REPAIRS AND PROTECTION BY NEIGHBOR, BUT IS ENTITLED TO BE PAID LICENSE FEES**

*New York Public Library v. Condominium Board of The Fifth Avenue Tower* Appellate Division, 1st Department

**COMMENT** | This is a common issue, and a common (and common sense) resolution.

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**CITY ENJOINS USE OF APARTMENTS FOR AIRBNB-TYPE ACTIVITY**

*City of New York v. Baldeo* Supreme Court, New York County

**COMMENT** | The activity was found to be a public nuisance. The owner was hammered despite claims of ignorance of his tenant’s actions.

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**CONDO CAN FILE TAX CERT APPEALS ON BEHALF OF ALL UNIT OWNERS BASED ON A STANDING AUTHORIZATION; ANNUAL AUTHORIZATIONS NOT REQUIRED**

*Eastbrooke Condominium v. Ainsworth* Court of Appeals

**COMMENT** | This would appear to be self-evident.

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**TENANT CAN SUE LANDLORD UNDER FHA AND STATE HUMAN RIGHTS LAWS FOR HOUSING DISCRIMINATION BASED ON LANDLORD’S FAILURE TO ADDRESS RACIAL HARASSMENT BY ANOTHER TENANT**

*Francis v. Kings Park Manor, Inc.* U.S. 2nd Circuit Court of Appeals

**COMMENT** | The Court emphasized the remedial goals of the laws, and found that the landlord had allowed a “hostile housing environment” to exist, similar in concept to employment laws.

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**CONDO BUYER WHOSE OFFER WAS MATCHED BY BOARD’S EXERCISE OF ITS RIGHT OF FIRST REFUSAL CANNOT SUE SELLER, BOARD OR BUYER**

*Segev v. 262 N. 9 LLC* Supreme Court, New York County

**COMMENT** | The Court held that the Board’s exercise of its ROFR in accordance with the bylaws did not constitute breach of contract or tortious interference. The Court also held that a buyer has no standing to challenge the Board’s actions under its bylaws. [📄](#)

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