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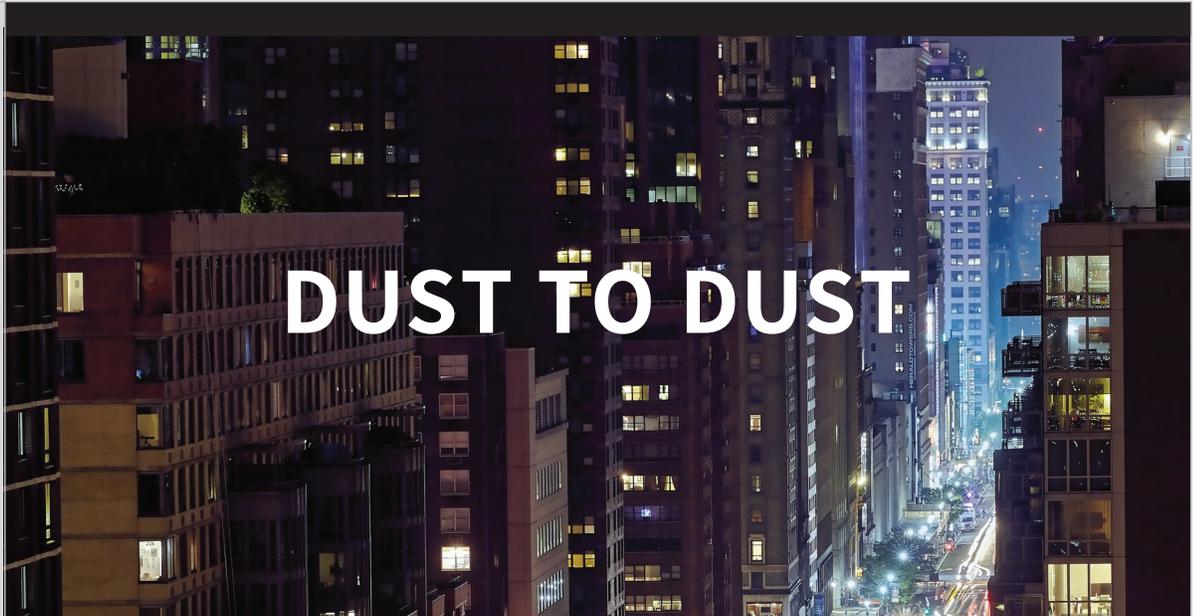
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DUST TO DUST

By Martin Meltzer



New York City's new indoor allergen law, Local Law 55, went into effect on January 18, 2019. Local Law 55 has new requirements with regard to indoor asthma allergen hazards and pest management

in residential dwellings; the law repealed Administrative Code section 27-2018 relating to rodent and insect eradication and extermination. The law contains numerous intricate inspection, treatment and reporting requirements.

The law applies to all rental apartments in multiple dwellings (i.e., buildings that have three or more housing accommodations)—rent regulated apartments as well as market-rate rental apartments. The law expressly exempts co-op and condominium apartments that are occupied by the apartments' owners or their families, but is apparently intended to apply to co-op and

condominium apartments that are occupied by tenants and subtenants, including market-rate rentals of investor-owned apartments (but it is unclear whether the law's requirements are to be effected for any such leased co-op or condominium apartment by the apartment's owner, or by the Board/managing agent).

Local Law 55 now requires owners of multiple dwellings to make annual (or more often if needed) inspections of common areas and apartments for indoor allergen hazards, such as mold, mice, rats, and insect infestations. Owners must also inspect if (a) they have knowledge that there is a condition in an apartment that is likely to cause an indoor allergen hazard, (b) a tenant requests an inspection, or (c) the City has issued a violation requiring correction of an indoor allergen hazard for an apartment or common area. If there is an indoor

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allergen hazard in an apartment, the owner is required to eradicate it using the safe work practices that are provided in the law.

In addition, prior to occupancy by a new tenant, the owner of a multiple dwelling is required to eradicate all visible mold and pest infestations in the apartment, as well as any underlying defects, like leaks, using the safe work practices provided in the law. If the owner provides carpeting or furniture, (s)he must thoroughly clean and vacuum it prior to such new occupancy commencing.

An owner is required to include a notice with all vacancy and renewal leases setting forth the owner's obligations. The notice must be signed by the owner or his or her representative, and state that (s)he has complied with the statute's requirements. An owner must also provide new tenants and renewing tenants with the

Fact Sheet containing information about indoor allergen hazards.

Local Law 55 can be downloaded [here](#).

The Fact Sheet can be downloaded [here](#).

How the law will work, and how City agencies will enforce the law, have not yet been crystallized; owners and their attorneys have yet to determine how to address the new requirements from a practical perspective.

If you have any questions, please contact Martin Meltzer, a litigation partner who heads the Firm's non-payment group, at mmeltzer@bbwg.com.

JAY B. SOLOMON: NEW PARTNER IN BBWG'S LITIGATION DEPARTMENT



The firm started 2019 with a significant addition to our already-prestigious Litigation Department. **Jay B. Solomon** brings to BBWG 30+ years' experience in handling complex real estate, corporate and commercial landlord-tenant litigation and appellate work in New York's state and federal courts. While concentrating his practice in New York City, Westchester and Long Island, Jay also expands the firm's reach into New Jersey.

Jay joins BBWG from the boutique commercial real estate firm Klein & Solomon, LLP, which he co-founded and where he was in charge of its commercial and business litigation practice for more than 20 years. Recognized by his peers with the highest rating published by Martindale-Hubbell, "Jay has an impeccable reputation as a leading member of the real estate bar," says Jeff Goldman, co-managing partner and head of BBWG's Litigation Department. "He is highly respected as a problem-solver who quickly and clearly identifies issues and how best to resolve them."

When asked about his most memorable experiences, Jay talks about his successful trips to Albany to argue cases before the State's highest court. "Nothing feels quite as rewarding as being greeted by the Chief Judge and the six associate judges of the Court of Appeals," Jay says, "and being awarded with two unanimous decisions in important areas of real estate and business law."

Jay has testified as an expert witness at trial in New York's Supreme Court. He is a member of the Judiciary Committee of the New York County Lawyers' Association as well as a member of the New York City Bar Association. He is a certified instructor and teaches a continuing education seminar on Commercial Landlord-Tenant Litigation in New York for Lorman Education Corp. Jay also volunteers as an arbitrator in NYC's Small Claims Court.

"It was an easy decision for the firm to extend an offer to Jay," says Dan Altman, co-managing partner of the firm. "He has an excellent track record and is already working with several of the firm's partners on acquisitions, dispute resolution and commercial real estate litigation, including summary proceedings, foreclosures, contract disputes, broker cases and guarantees on commercial leases."

Jay's areas of expertise also extend to co-op and condo litigation, representing creditors in bankruptcy litigation, environmental spill cases, defending administrative investigations, labor and employment litigation, RICO cases, and guardianship matters.

The firm looks forward to a long and successful partnership with Jay as we continue to grow and provide our clients with the best real estate legal representation in New York City.

Jay can be reached at jsolomon@bbwg.com

INDIVIDUAL APARTMENT IMPROVEMENTS: ALWAYS BE PREPARED TO DEFEND

By Samuel R. Marchese



Since 2011, DHCR's policy for evaluating Individual Apartment Improvements ("IAI's") has evolved, making it more onerous for building owners to substantiate IAI increases.

Under current law (Rent Stabilization Code §2522.4(a)(1)), the legal regulated rent in a vacant rent-regulated individual apartment may be increased based on increased services, new equipment, or IAI's. The allowable percentage that an owner is permitted to collect for an IAI is based upon the number of apartments in a building. As of September 24, 2011, IAI increases in buildings containing more than 35 apartments became required to be calculated as 1/60th of the total cost of the qualifying IAI; for buildings containing 35 or fewer apartments, the calculation remained 1/40th. If an apartment is vacant at the time of the installation of the IAI's, an owner can include the increase without the written consent of a tenant.

IAI rent increases may be challenged by a tenant up to four years after the installation as a matter of right, and in some cases, much farther back if the tenant alleges and is able to show substantial indicia of fraud. The review period may also be expanded to determine if an apartment is subject to rent stabilization.

When a challenge is presented, DHCR utilizes a "heightened scrutiny" standard of review to evaluate IAI documentation. This standard of review was formally acknowledged when DHCR issued Operational Bulletin 2016-1, which was later revised on November 9, 2017. The Operational Bulletin suggests that owners must submit proof in all of the following four categories:

- 1) Cancelled check(s) contemporaneous with the completion of the work claimed;
- 2) Invoice receipt marked paid in full contemporaneous with the completion of the work claimed;
- 3) A signed contract; and
- 4) An affidavit from the contractor indicating that the installation was completed and paid in full.

In addition, the Operational Bulletin provides that DHCR can request any additional documentation to substantiate the legitimacy of the IAI costs.

If the IAI's cannot be substantiated by any of the foregoing types of documentation, DHCR has taken the position that an owner is not entitled to any IAI increase in rent.

There are significant consequences if DHCR disallows IAI's, including:

- 1) A reduction in a tenant's rent;
- 2) Overcharge liability; and
- 3) A determination that alters the rent regulatory status of an apartment.

It is highly possible and greatly anticipated that due to the upcoming renewal of the Rent Stabilization Law and regulations in June 2019, IAI's will be eliminated or significantly changed. We highly recommend that owners take this into consideration when planning any future IAI projects.

It is strongly recommended that legal counsel be consulted prior to commencing or performing any IAI's in an apartment. In addition, a potential building purchaser should always engage competent counsel to perform due diligence to review the improvement records, as well as lease files.

Samuel R. Marchese (smarchese@bbwg.com), is an associate in BBWG's Administrative Law Department. For more information regarding rent reduction orders and the rent restoration process, please contact Mr. Marchese.

BBWG EXPANDS ITS CONSTRUCTION AND LEASING PRACTICE GROUPS

BBWG is excited to announce that it has expanded the scope of its Transactional Department with the addition of **Robert S. Marshall, Jr.** as a partner.



Mr. Marshall focuses his practice on construction and leasing matters and represents tenants, landlords, owners, developers, project managers, construction managers, contractors, suppliers, engineers, architects, designers, consultants and brokers.

Mr. Marshall has represented clients in connection with the construction and leasing of millions of square-feet of commercial, residential and mixed-use property across the country, including private and government offices, trading floors, bank branches, boutique and big-box retail stores, showrooms, restaurants, bars, nightclubs, music studios, art galleries, coffeehouses, supermarkets, drugstores, malls, shopping centers, retail and mixed-use buildings, entertainment complexes, billboards, digital signage, telecommunications sites, educational facilities, fitness clubs, spas, medical centers, research laboratories, airport terminals, parking garages, berthing facilities, gas stations, factories, warehouses, student, senior and affordable housing, office and residential towers, hotels, cooperatives, condominiums, townhouses and custom designed homes.

Mr. Marshall guides clients in the drafting and negotiation of all types of construction contracts and lease agreements and counsels and evaluates complex issues at all stages of construction projects and leasing transactions. Mr. Marshall recently represented a public technology company, as tenant, in the negotiation of an office lease with a public REIT, as landlord, for approximately 107,000 square feet of space for its national headquarters in a 48-story, Class A, trophy office tower in Midtown.

Mr. Marshall also recently represented a foreign government, as owner, in the negotiation of a general contractor agreement with a global construction company, as contractor, for the ground-up construction of a new 32-story, state-of-the-art, glass tower containing approximately 220,000 square feet of mixed office and residential space and below-grade auditorium and parking space in Midtown.

The depth and breadth of Mr. Marshall's expertise broadens even further BBWG's ability to handle the most sophisticated and complex transactions for clients.

Mr. Marshall can be reached at rmarshall@bbwg.com.

A TENANT'S RIGHT TO CURE WHEN CAUGHT USING AIRBNB-TYPE SERVICES

By **Joshua Zukofsky**



While there has been much written about New York City tenants' use of Airbnb-type services, there are still many questions left unresolved. One such question is whether a tenant that advertises and permits short-term stays would be provided a right to cure when the landlord seeks to evict him/her on these grounds. (A

short-term stay is defined under City and State law as any period of less than 30 consecutive days.)

Recently, in *498 West End Avenue LLC v. Reynolds, et. al.*, 2018 NY Slip Op 51943(U) (App. Term 1st Dept. 2018), the Appellate Term, First Department upheld the Civil Court decision by Judge Jack Stoller, and denied the landlord's motion for summary judgment in a summary holdover proceeding commenced due to a tenant's advertisement and sublet of a residential apartment by using Airbnb.

In the underlying decision, *498 West End Avenue LLC v. Reynolds, et. al.*, 2018 NY Slip Op 31708(U) (Civ. Ct. N.Y. Co. 2018), the Civil Court denied summary judgment in favor of the landlord even though it was uncontested that the rent stabilized tenant had sublet the apartment on Airbnb to more than 18 people, and that at least 13 of them had sublet for a period of less than 30 days during a 19-month period. The Court granted partial summary judgment in favor of the landlord, yet held for trial the issue of whether the tenant was entitled to an opportunity to cure. The main issue was determining whether the tenant profited from the use of Airbnb-type services. If there was profiteering, then there could be no cure.

Prior to this decision, Court decisions had mostly held that it was an incurable act for a rent regulated tenant to advertise on Airbnb-type services and rent out their apartment for profit. In *220 West 93rd St., LLC v. Stavrolakes*, 823 N.Y.S.2d 44 (1st Dept. 2006), the Court held that it would be an incurable act for a rent controlled tenant to profiteer and commercialize an apartment by allowing short-term transient rentals. Similarly, in *Goldstein v. Lipetz*, 53 N.Y.S.3d 296 (1st Dept. 2017) the

Appellate Division held that there is no right to cure the use of Airbnb-type services when a tenant substantially profiteers from the illegal sublets, as the "integrity of the rent stabilization scheme is obviously undermined" when tenants are able to sublease for amounts that exceed the legal value of the apartment. In *230 East 48th Street LLC v. Campisi*, 59 Misc.3d 148(A) (App. Term 1st Dept. 2018), the Court found that a tenant that rented out her apartment "more than one dozen times" was not entitled to a cure as her conduct demonstrated profiteering and "showed complete disregard for the legitimate security concerns of landlord and other tenants...who were subject to dozens of transient strangers".

The main distinction between *Reynolds* and the line of prior cases that did not allow a cure is whether the Court found that the rent stabilized tenant profited or not. In *13775 Realty, LLC v. Foglino*, 36 N.Y.S.3d 48 (App. Term 1st Dep't. 2016), the Appellate Term denied a landlord's motion for summary judgment as the Court found that the landlord could not establish (a) the number of times that the tenant had sublet the premises and (b) the amount of the overcharge.

Thus, the main difficulty is determining whether "profiteering" occurred. A rent stabilized tenant is entitled to seek 10% above the legal rent from a sub-tenant if an apartment is furnished. Any amount collected above this amount would constitute profiteering.

In *Goldstein*, the Court calculated the "profit" based upon a per-diem rate in finding that the tenant's commercialization of the apartment was unlawful as the nightly charge was greater than the nightly amount under the lease. However, in *Reynolds* the Court calculated the profits based upon the income generated by the tenant compared to the sum of the tenant's daily rent for the same number of days that the sublet occurred. The calculation in *Reynolds* is more favorable to a tenant. Going forward, it will be important to monitor how "profit" is calculated by the appellate Courts in these types of proceedings.

Based upon these decisions and statutes, it is likely that in most situations when a rent stabilized tenant uses the apartment for utilizing Airbnb-type activity, the actions of the tenant will be deemed incurable. The *Reynolds* decision provides for a limited

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exception to this rule, which was noted by the Civil Court. The Civil Court held that this decision was limited and that tenants who profiteer are still not entitled to a cure for their unlawful conduct.

As the use of an apartment for short-term “hoteling” creates a dangerous situation for the legal occupants of a building, all owners must protect themselves from this conduct. Landlords should ensure that all building staff are vigilant about who is entering their buildings and that they treat seriously any

complaints by neighbors regarding unlawful sublets. Landlords should also ensure that all leases with new tenants include very specific riders outlawing the use of Airbnb-type services that promote unlawful sublets and short-term stays. Landlords that use security cameras are also in a better position to establish unlawful conduct by tenants

Joshua Zukofsky (jzukofsky@bbwg.com) is an associate in the firm’s Litigation Department.

BBWG IN THE NEWS

Founding partner **Sherwin Belkin** penned a January 23 Op-Ed in the [Daily News](#) decrying proposed legislative changes and their devastating impact on the City housing industry. **Mr. Belkin** was also quoted in a January 30 article in [The Real Deal](#) criticizing a new proposed bill that would impose universal rent control on free-market apartments.

Martin Heistein, co-head of the Firm’s Administrative Law Department, was quoted in [The Real Deal](#) on January 22 on advice given to landlords to apply for MCI rent increases immediately in light of pending legislation that could limit their future availability.

Aaron Shmulewitz, head of the Firm’s co-op/condo practice, was quoted in a February 4 article in [Real Estate Weekly](#) on a proposed change in City regulations that would make the City’s co-op/condo real estate tax abatement available to some apartments owned by certain LLC’s. **Mr. Shmulewitz** was also quoted in [Realtor.com](#) on February 14, discussing issues involving the rental of blocs of apartments to colleges for quasi-dormitory purposes.

Kara Rakowski, co-head of the Firm’s Administrative Law Department, authored an article in the February edition of [Mann Report Management](#) entitled “NYC Pilot Program and Speculation Watch Lists: Two Lists That Owners Don’t Want to See Their Buildings On”, discussing new requirements imposed on owners by HPD. **Ms. Rakowski** was also quoted decrying the new law in a February 5 article in [The Commercial Observer](#). **Ms. Rakowski** was also a guest speaker at a February 6 seminar sponsored by CHIP on the new requirements.

Transactional partner **Craig L. Price** will be the moderator of, and **Kara Rakowski** will be a panelist on, a March 12 panel entitled “NYC Multifamily in 2019” to be hosted by Cushman & Wakefield at its 1290 Avenue of the Americas headquarters.

Partners **Allison Lissner**, **Noelle Picone** and **Kara Rakowski** were speakers at the 8th Annual Real Estate Women’s Forum held at The New York Academy of Sciences on February 28, on the topic of “Residential and Commercial Real Estate Acquisitions & Due Diligence”. This annual high-level conference spotlights industry leaders as well as up-and-coming female executives in commercial real estate.

TRANSACTIONS OF NOTE

Transactional Department partners **Craig L. Price** and **Stephen M. Tretola**, and associate **Nicole Neidich**, handled the purchase of a shopping center property in Shelton, Connecticut that closed at the end of December as part of a 1031 exchange, including financing by an insurance company.

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 CANNOT SUE WIDOW OF DECEASED UNIT OWNER TO COMPEL ACCESS FOR POST-FIRE REPAIRS, SINCE SHE HAD NOT BEEN APPOINTED EXECUTOR

Board of Managers of The Westbury Terrace Condominium v. Ringen Supreme Court, Nassau County

COMMENT | The prescribed course of action would have been for the condo to seek the appointment of a personal representative for the estate so that an action for the relief sought could be brought against such representative. The Board apparently felt that the emergency nature militated against doing so here, but wound up incurring an even longer delay.

CONDO UNIT OWNER ENTITLED TO COMPENSATION FOR LOSS OF USE OF TERRACE AS STAGING AREA FOR LOCAL LAW 11 WORK, UNDER BREACH OF WARRANTY OF HABITABILITY

Lincoln v. Residences at Worldwide Plaza Civil Court, New York County, Small Claims Part

COMMENT | This Small Claims case appears to have extended the warranty of habitability to condominium unit ownership, for the first time. Let's hope the condo is appealing this decision.

SUIT BY CO-OP SHAREHOLDER AND ITS PRINCIPAL AGAINST CO-OP AND BOARD MEMBERS DISMISSED

Dogwood Residential, LLC v. Stable 49 Supreme Court, New York County

COMMENT | This 70-page decision is grounded on a detailed factual analysis, and arises from a similar suit in 2015 as well as a stip of settlement in a holdover proceeding.

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT TO INJURED EMPLOYEE, CO-OP, ITS CONTRACTOR AND SUBCONTRACTOR

Perez v. 50 Sutton Place South Owners, Inc. Supreme Court, New York County

COMMENT | The decision reflected a complex relationship among the parties (including a possibly-undisclosed sub-subcontractor), and murky facts regarding control over the work, and precisely how the accident occurred.

CONDO APARTMENT TENANT CAN SUE BOARD AND CURRENT AND PRIOR MANAGING AGENTS FOR PERSONAL INJURY DUE TO EXPOURE TO TOXIC SEWER GAS IN APARTMENT, BUT CLAIMS DISMISSED AGAINST SPONSOR AND UNIT OWNER

Smith v. Adagio Condominium Supreme Court, New York County

COMMENT | This decision features a detailed factual analysis regarding causation and responsibility for a disconnected waste pipe behind a wall.

CONDO BOARD AND SPONSOR SPLIT VERDICT IN SUIT TO DETERMINE WHETHER RESERVE FUND WAS PROPERLY FUNDED UNDER NYC LAW

Board of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner LLC Supreme Court, New York County

COMMENT | The Court examined each facet of the NYC reserve fund law, and whether the sponsor's credit claims were eligible.

CO-OP SUCCEEDS IN PULLMAN EVICTION PROCEEDING AGAINST SHAREHOLDER FOR REPEATED UNAUTHORIZED SUBLETTING

340 East 93rd Street Corp. v. Kasachkoff Civil Court, New York County, Landlord & Tenant Part

COMMENT | The Court examined the factors necessary to support a Pullman eviction, and upheld the co-op on all. A powerful weapon in co-ops' arsenals against shareholders who refuse to play by the rules.

SHAREHOLDER CAN SUE CO-OP FOR REJECTING MULTIPLE PURCHASERS, BUT SUIT DISMISSED AGAINST INDIVIDUAL BOARD MEMBERS

Graham v. 420 East 72nd Tenants Corp. Appellate Division, 1st Department

COMMENT | Questions of fact as to bad faith and retaliatory motives precluded summary judgment dismissal.

QUESTIONS OF FACT REGARDING TRANSFER OF OWNERSHIP BETWEEN LENDERS ON FORECLOSURE OF CO-OP APARTMENT LOAN BAR SUMMARY JUDGMENT, AND REQUIRE TRIAL FOR EVICTION OF FORECLOSED SHAREHOLDER

FNMA v. Tenenbaum District Court, Nassau County, Landlord & Tenant

CO-OP LATE CHARGES RULED EXCESSIVE AND UNENFORCEABLE

Vernon Manor Cooperative Apartments, Section II, Inc. v. Brisport City Court, Mount Vernon

COMMENT | The cumulative late charges had risen to 30% of one month's maintenance.

LANDLORD LIABLE FOR AIRBNB VIOLATION PENALTIES ARISING FROM TENANT ACTIVITY, DESPITE LANDLORD HAVING NO KNOWLEDGE, INVOLVEMENT OR INTENT

JNPJ Tenth Ave., LLC v. Department of Buildings Supreme Court, New York County

COMMENT | This case involves a rental building, but is instructively important to co-op and condo Boards. Court decisions have consistently held landlords strictly liable for such illegal use by tenants, even without any knowledge.



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