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## BUILDING OWNERS, CO-OPS AND CONDOS, AND MANAGING AGENTS MUST COMPLY WITH NEW STATE AND CITY ANTI-SEX HARASSMENT LAWS



**By Aaron Shmulewitz**

New State and City anti-sex harassment laws have gone into effect, imposing new administrative and educational requirements on all employers, including owners, Boards and managing agents.

**State**

A new [State Labor Law section 201-g](#) was adopted effective October 9, 2018 that requires all employers to adopt a sexual harassment policy. Such policy must, at a minimum: prohibit sexual harassment; provide examples of prohibited conduct that would constitute unlawful sexual harassment; include information about Federal and State laws on sexual harassment, remedies available to victims of sexual harassment, and

a statement that there may also be additional local laws; include a complaint form; include a procedure for timely and confidential investigation of complaints; inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints; state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against persons engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and state that retaliation against complainants or those who testify or assist in any investigation involving sexual harassment is unlawful. A [model policy](#) has been promulgated, which contains the above minimum requirements and which is intended to

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act as a safe harbor for employers.

An employer is required to distribute copies of its policy to all employees immediately, and at least once annually thereafter, and to each new employee as (s)he is hired.

More demanding, *every* employer must conduct anti-sexual harassment mandatory training for *each* of its employees at least once annually. The initial training must be completed by October 1, 2019, except that all new employees hired on and after January 1, 2019 must receive training within 30 days after hiring.

[State Executive Law section 296-d](#) was also amended to bar employers from permitting sexual harassment of non-employees, including, expressly, contractors, vendors and consultants, and holding the employer liable should it occur.

A comprehensive summary of the new laws, with forms, can be found at <https://www.ny.gov/combatting-sexual-harassment-workplace/employers>.

The State laws are administered by the Department of Labor and the Division of Human Rights.

### **City**

New York City now requires that a “[Stop Sexual Harassment Act Factsheet](#)” be posted at the workplace, as well as distributed to all employees, and to new employees upon hiring.

In addition, [Local Law 96](#) of 2018 requires that, starting April 1, 2019, all employers with 15 or more employees conduct training sessions for all full and part-time employees at least once per annum, except that new employees must be trained within 90 days after hiring. (Parenthetically, and ironically, the City law exempts all government agencies from the training requirement.)

The new City law is discussed more fully at <https://www1.nyc.gov/site/cchr/media/sexual-harassment-campaign.page>.

The City laws are administered by the City Commission on Human Rights.

### **Practical Impact**

While preventing sexual harassment in the workplace is certainly a laudable goal, the new laws create an added layer of administrative requirements with which all property owners, co-op and condo Boards, and managing agents must comply. Agents, especially, will likely bear the brunt of the new laws, as they administer compliance by all of the owners and Boards

whose properties they manage, in addition to compliance for their own employees. It is likely that agents will have to increase staff to handle the record-keeping, and that management fees will increase as a result.

It is noteworthy to reiterate that, under the State law, *every* employer must comply, including with the training program. Thus, a “mom-and-pop” owner of one small residential building that employs a superintendent or janitor must satisfy the same policy adoption, notification, and training obligations as a large corporate owner.

There are also various differences among similar requirements of the new laws, especially with regard to timing. It is likely that an employer will find itself in compliance with one set of laws, but in technical violation of the other. Moreover, employers will need to train newly hired employees before their larger number of existing employees.

It will be interesting to see how the industry management and labor representatives (the Realty Advisory Board, and SEIU Local 32B/J, respectively), respond and interplay with regard to the new laws.

There are no standards or qualifications stated for who may conduct the training programs that are now required by both laws. It is likely that a “cottage industry” of trainers will spring up to fill the void.

Finally, the new posting, distribution and training requirements do not provide for any penalties for non-compliance. Query the outcome if an employer does not.

*Aaron Shmulewitz ([ashmulewitz@bbwg.com](mailto:ashmulewitz@bbwg.com)) heads the firm's Co-op/Condo practice.*

## CONGRATULATIONS

The firm was cited as having New York City's 12th largest real estate law practice in the [October edition of The Real Deal](#).

A survey in that same issue noted that the firm had represented purchasers in transactions valued at more than \$350 million last year, excluding co-ops.

# TENANT GETS RENT ABATEMENT FOR SCAFFOLDING ON TERRACE



**By Joseph P. Burden**

A recent decision by the Appellate Term, First Department ruled that a tenant whose terrace was used as a staging area for scaffolding for the building's Local Law 11 exterior repair work was entitled to a rent abatement for breach of the warranty of habitability, as well as attorneys' fees.

The case, *Israel Realty v. Shkolnikov*, decided in June, 2018, involved a co-op building performing mandatory Local Law 11 repairs on the building façade. In order to do the work, the co-op had to install scaffolding on the terrace of the ground floor apartment occupied by a rental subtenant, and use that terrace as a staging area for the work. As a result, the terrace was unavailable for four months. The rental tenant stopped paying rent to the apartment's owner, who then commenced a non-payment proceeding against the tenant. The tenant claimed that she was entitled to an abatement of 100% of her rent for the four-month period because she was precluded from using the terrace.

The Housing Court granted a 100% abatement for the four-month period. The Appellate Term affirmed, but reduced the abatement to 60%. The Court held that, notwithstanding the fact that this was mandatory work and the culprit was the co-op, not the apartment owner, the tenant was still entitled to the abatement—i.e., even though the conditions resulted from events beyond the owner's control.

The Court further held that, as the prevailing party, the tenant was also entitled to an award of attorneys' fees in the amount of \$30,000.

It should be noted that the lower Court decision had indicated that the apartment was small and minimally furnished, whereas the terrace was fully furnished and used for meals, smoking, etc., and the use of the terrace as a staging area prevented the tenant from opening her window or raising her shades for four months.

It is unclear whether the apartment owner claimed over

against the co-op for the loss of rent and the attorneys' fees, and/or sought any sort of maintenance abatement due to the work. (Normally, if a subtenant asserts an abatement, the apartment owner should cross-claim over against the co-op for contribution or reimbursement for the lost rent and the attorneys' fees.)

The holding in this case is a warning to buildings that have to do Local Law 11 work that they should get the cooperation of affected apartment owners and tenants, in order to avoid a potentially substantial abatement.

Significantly, this Appellate Term case's holding is at variance with a 2017 holding by the Appellate Division, 1st Department in *Musey v. 425 E. 86 Apts. Corp.* The Musey decision held that "a terrace that is safe and suitable for plaintiff's own exclusive, outdoor use is an amenity, not an essential function that the co-op must provide", indicating that loss of use of a terrace should not trigger a maintenance abatement. Since Appellate Term decisions are appealable to the Appellate Division, the Israel Realty decision is subject to being overturned on appeal at the Appellate Division, should it proceed that far. At a minimum, judicial clarity of the disparate holdings is needed.

*Joseph P. Burden is a founding partner of the Firm, and co-head of its Litigation Department.*

# MCI UPDATE



By **Paul Kazanecki**

Owners contemplating filing an application for an MCI (major capital improvement) rent increase for work being performed should get a head start by checking the following, which will impact the initial filing of the application:

- Have all DHCR annual registrations been filed to date? A search of DHCR's records will determine if an annual registration is missing.
- Does the building have any open Class "1" NYC Department of Buildings/Environmental Control Board hazardous violations? If yes, efforts should be made to dismiss all DOB/ECB hazardous violations. DOB/ECB hazardous violations will result in the rejection of the MCI application and may impact your MCI filing if facing the two-year statute of limitations (the DHCR requires that all MCI applications be filed within two years of physical completion). If rejected, the owner will only have a 60-day grace period to remove the hazardous violations.

- Does the building have any reported NYC Department of Housing Preservation and Development Class "C" hazardous violations? If yes, the initial MCI application must be accompanied by an original affidavit by a professional engineer or registered architect attesting to the fact that the Class "C" violations have been physically removed and/or rectified.
- If the Class "C" violation is lead-based paint in nature, the professional consultant or owner must attest that the process of removing or expunging the lead-based paint violation has begun. It should be noted that the DHCR will not establish an effective date until the Class "C" lead-based paint violation has been removed or expunged, which will result in the loss of retroactivity.

Taking the time to check on registrations and hazardous violations early in the MCI process will save significant time and money subsequently.

*This article was written by Paul Kazanecki of BBWG's Administrative Department. For questions regarding this article please contact Mr. Kazanecki at [pkazanecki@bbwg.com](mailto:pkazanecki@bbwg.com).*

## BBWG IN THE NEWS

Litigation Department co-head **Jeffrey L. Goldman's** representation of Trump Park Avenue in an action to recover unpaid rent of \$115,000 per month from a former tenant was reported in an article in [Bloomberg.com](https://www.bloomberg.com) on [September 27](#).

**Aaron Shmulewitz**, head of the Firm's co-op/condo practice, answered an inquiry in the Q&A feature of the Sunday New York Times real estate section on [October 7](#) on co-ops and condos going smoke-free. **Mr. Shmulewitz** also answered an inquiry in the [October edition of The Cooperator](#) on a co-op shareholder's right to receive financial information.

Administrative Law Department co-head **Kara Rakowski** authored an article entitled "ADA Compliance Is Not Only For Your Building" in the [September 1 edition of The Mann Report](#), discussing the importance of real estate entities having ADA-compliant websites. **Ms. Rakowski** was also the guest speaker at REBNY's Residential Brokerage Division Upper Manhattan Committee meeting on September 27, where she discussed issues arising in the purchase and sale of townhouses, including the administrative due diligence process, Rent Stabilization/Rent Control, SRO's/Certificates of No Harassment, and illegal transient use.

Transactional Department partners **Craig L. Price** and **Stephen Tretola** represented the purchaser of an Upper East Side 20-unit apartment building, which was featured in an [August 21 New York Times](#) feature on recent commercial real estate transactions.

**Mr. Price** also separately represented the purchaser of a Harlem 24-unit apartment building for \$11.5 million, which was featured in [The Real Deal on September 5](#).

## BBWG IN THE NEWS

**Matthew Brett**, a partner in the Firm's Litigation Department, was quoted in [The Real Deal on October 2](#) in an article discussing the impact of the Court of Appeals' 2018 reversal of the decision in the [Altman](#) case.

Transactional Department partners **Daniel T. Altman** and **Lawrence T. Shepps** led Dalan Management's \$83 million complex acquisition and financing of an entire block of eight buildings along Eighth Avenue, including residential apartments and retail stores, across from Google's office building, in a joint venture with a Miami based investor. Dalan Management will manage the properties on behalf of ownership.

In addition, **Messrs. Altman's** and **Shepps'** representation of the seller of two midtown office buildings in a \$46 million transaction was included in the "NYC Real Estate Week in Review" feature in [law360.com on August 27](#).

Administrative Law Department partner **Alexa Englander** was a presenter at the Tri Borough Multi Family Building Owner Strategies Seminar hosted by Marcus & Millichap on October 18, speaking on the topic of "DHCR Registrations, Leasing & General Landlord/Tenant issues".

## 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](mailto:ashmulewitz@bbwg.com)).

### SINGLE INCIDENT OF LEAVING STOVE ON IS NOT A NUISANCE SUFFICIENT TO WARRANT EVICTION

*Mexico Leasing LLC v. Dabo (Civil Court, Queens County, L&T Part)*

COMMENT | While involving a rent-stabilized tenant, this case is instructive for co-op and condo Boards as well. The Court noted that a nuisance requires a pattern of problematic behavior; this single incident in a 22-year tenancy, which did not cause a fire, did not rise to that level.

### CO-OP'S USE OF TERRACE AS STAGING AREA FOR EXTERIOR REPAIRS WORK BREACHED WARRANTY OF HABITABILITY, ENTITLING RENTAL TENANT TO 60% RENT ABATEMENT; TENANT ALSO AWARDED LEGAL FEES

*Israel Realty LLC v. Shkolnikov (Appellate Term, 1st*

*Department)*

COMMENT | As discussed in a separate article in this newsletter, this holding is at variance with a 2017 decision by the Appellate Division that indicated that no abatement was due for loss of use of a terrace, since it was only an amenity. This is a frequent, vexing issue for co-ops, and judicial reconciliation is needed.

### COURT CONFIRMS REFEREE REPORT HOLDING CONDO UNIT OWNER OWED \$7,000 IN LATE FEES AND \$57,000 IN LEGAL FEES ON COMMON CHARGE ARREARS THAT INITIATED THE DISPUTE

*Board of Managers of Palm Trees Condominium v. Lewis (Supreme Court, New York County)*

COMMENT | This unusually pro-Board holding was based on scrupulous adherence to the Condominium's bylaws,

and points up the importance of accurate record-keeping by a Board and managing agent.

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### **OUSTED HDFC CO-OP DIRECTORS CANNOT OVERTURN ELECTION**

*Green v. Cristancho (Supreme Court, New York County)*

COMMENT | The Court analyzed and validated the procedural aspects of the election meeting. The Court also noted that the HDFC ran up \$1 million in real estate tax delinquencies and triggered an in rem tax foreclosure proceeding under the ousted Board, implicitly eliminating even further any desire by the Court to reinstate them.

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### **CONDO CAN CHARGE COMMERCIAL UNIT OWNERS COMMON CHARGES BASED ON COMMON INTEREST PERCENTAGES INSTEAD OF ON PRIOR USAGE-BASED CALCULATION**

*MacArthur Properties I, LLC v. Galbraith (Supreme Court, New York County)*

COMMENT | The language of the Declaration and Bylaws was held to prevail, and the Condominium's past practice was held not binding on prospective determinations. The Court also held that questions of fact precluded a determination as to the appropriate method of calculation for the prior six-year statute of limitations period.

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### **RENT-STABILIZED TENANT'S RENTING OF APARTMENT ON AIRBNB IS AN INCURABLE LEASE DEFAULT, WARRANTING EVICTION WITHOUT AN OPPORTUNITY TO CURE**

*The 230 East 48th Street LLC v. Campisi (Appellate Term, 1st Department)*

COMMENT | Consistent with prior Court decisions in similar cases, the Court held that the tenant's conduct removed her from the protections normally accorded to rent-stabilized tenants. Query whether a Court would also take such a strict position with a co-op shareholder found to have engaged in this conduct.

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### **CO-OP BOARD CANNOT RESCIND CONSENT FOR PURCHASE OF ADJOINING APARTMENT AFTER PURCHASER SATISFIED BOARD'S STATED CONDITIONS**

*Lusk v. 170 W. 81st Owners Corp. (Supreme Court, New York County)*

COMMENT | The business judgment rule does not protect Board decisions outside the scope of the Board's authority, as the ill-advised bait-and-switch type decision here was indicated to be.

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### **CO-OP BOARD'S FAILURE TO RESPOND TO SHAREHOLDER'S REQUEST TO SIGN DOB APPLICATION FORMS TO CONSTRUCT ROOF DECK WAS TANTAMOUNT TO REFUSAL, MAKING ARTICLE 78 PROCEEDING AGAINST BOARD APPLICABLE**

*Sullivan v. 226-8 East 2nd Owners Corp. (Appellate Division, 1st Department)*

COMMENT | The decision gave no reason for the Board's long and repeated failure to respond. Imperious Boards are their own worst enemies.



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