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DOB OPENS PANDORA'S BOX ON CO-OP/CONDO ENCLOSURES



By Aaron Shmulewitz

The City Department of Buildings (“DOB”) has begun to enforce new policies with regard to balcony and terrace enclosures, solariums and greenhouses (all collectively “Enclosures”) that could send shockwaves through the co-op and condo community, by requiring that many of such structures be removed as part of the next Local Law 11 reporting cycle; non-compliance could subject a co-op/condo to continuing hefty fines and penalties. (While it is conceivable that such an Enclosure could exist in a rental building, it is very unlikely; therefore, this article will focus on the impact on co-ops and condos.)

In Buildings Bulletin 2014-024 issued in December, 2014, the DOB rescinded a 1976 policy that had effectively grandfathered in most Enclosures. The DOB has now indicated that it intends to start enforcing the new policies—and vigorously—as part of Local Law 11 requirements.

Under the New Policies:

- **Screened Enclosures** installed before October 2, 2011 did not require a permit. However, a building owner must now provide evidence that such screened Enclosure was, in fact, installed prior to that date. If proof cannot be provided and the screened Enclosure is more than 40 feet above grade, *an Alt-1 permit must now be obtained for the Enclosure, or it must be removed and the outdoor space restored to its original condition.*
- **Solid Panel Enclosures** (i. e., windows or solid walls) for which a permit or building notice was issued before October 2, 2011 can remain in place only if the Enclosure is not being used as a room with plumbing or HVAC, unless the original permit allowed for that. If such a permit cannot be produced now, or if the solid panel Enclosure is being used as a room without it being allowed by an issued permit, *an Alt-1 permit must now be obtained for the Enclosure, or it must be removed and the outdoor space restored to its original condition.*

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But wait, it gets worse—in several ways.

First, many buildings are “over-built” and have no available floor area ratio (FAR). The DOB could deny a permit application now based on that fact alone, since such an Enclosure generally cannot be “legalized”. As stated above, if a permit cannot be issued, the Enclosure *must* be removed.

Second, if the DOB will not issue a permit now for an Enclosure, the Enclosure must be identified as a SWARMP condition (safe with a repair and maintenance program) in the building’s current Local Law 11 report, and must be approved or removed (and the outdoor space restored to its prior condition) prior to the start of the next Local Law 11 cycle, which begins in February, 2020. Failure to remedy such a SWARMP condition typically subjects a co-op/condo to significant ongoing fines, and effectively prevents the issuance of new DOB permits until cured. That may block apartment owners’ planned alterations, as well as necessary permit-based work planned by the co-op/condo itself. In addition, such a significant violation normally constitutes a technical default under a co-op’s underlying mortgage, which could entitle the lender to accelerate the mortgage, and could block a co-op trying to refinance its mortgage.

Third, *regardless of permit status*, all Enclosures must be inspected for structural stability, and the architect or engineer filing the Local Law 11 report must reference the degree of stability, as part of the Local Law 11 filing. If an Enclosure is found not to be safely secured, the DOB will deem that to be an unsafe condition, and it must be made safe, or removed. Failure to do either would typically subject a co-op/condo to significant ongoing fines, which would have the same blocking effect on new permits, and act as a potential mortgage acceleration trigger, as discussed above.

Fourth, who bears the costs of compliance, especially for what promises to be significant removal and restoration costs? The co-op or condo, as building owner? The apartment owner, as the “guilty” party? What if the Enclosure had been installed many years (and several apartment owners, and maybe a sponsor or two) ago, and the current apartment owner simply “bought” the Enclosure as part of an increased purchase price for the apartment?

Finally, what if the worst happens, and the Enclosure cannot be legalized and must be removed—is it fair and reasonable for the apartment owner to have the apartment’s value suddenly reduced significantly? Would the apartment’s maintenance/common charges be reduced concomitantly? What

if the removal forces the apartment owner to relocate—does the co-op/condo have to grant an abatement? How about if removal requires extensive scaffolding, or a cantilever system from the building roof, or a street crane, running into tens of thousands of dollars more? Which party absorbing such costs would be more equitable?

One thing is certain—the DOB’s new policy is very likely to generate lots of litigation over costly, weighty and emotional issues. Pandora’s Box is now open with, at most, 30 months left until the proverbial stuff starts to hit the fan.

Aaron Shmulewitz (ashmulewitz@bbwg.com) heads the firm’s Co-op/Condo practice.

BREAKING NEWS

TREASURY DEPARTMENT AMENDS RULE TO INCLUDE WIRED FUNDS IN TITLE COMPANY REPORTING REQUIREMENTS FOR ALL-CASH RESIDENTIAL DEALS

By Aaron Shmulewitz

On August 22, 2017, the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCen”) amended its existing Geographic Targeting Order (“GTO”) governing “all-cash” residential purchases of \$3 million or more in Manhattan (\$1.5 million or more elsewhere in New York City, and other amounts in other locations in the country) to close the large loophole that had previously existed for transactions involving wired funds.

Effective September 22, residential deals above those price levels without third-party mortgages will trigger identity reporting requirements by title companies even if funds are moved by wire transfer. The existence of wired funds in the deal had previously exempted such a deal from such reporting requirements, a huge loophole that FinCen is now closing in a continuing effort to combat money laundering, drug trafficking, tax evasion, and other nefarious activities.

Title companies will need to quickly develop, and notify purchasers and their counsel with regard to, procedures on complying with the new GTO.

NYC COUNCIL PASSES NEW TENANT ANTI-HARASSMENT BILLS



By Damien Bernache

In August, the New York City Council passed a number of tenant-protective bills, which, as of this writing, are expected to be signed into law by Mayor Bill de Blasio. Most notable is the expansion of the tenant anti-harassment law to create a rebuttable presumption of intent.



Under the bills, tenants will no longer have to prove that an owner intended to harass them. A rebuttable presumption of intent has been created for a number of situations, including, *inter alia*, where an owner: (i) repeatedly contacts tenants on weekends, holidays, or outside the hours of 9:00 AM-5:00 PM; (ii) fails to continuously maintain essential services; and (iii) fails within 10 days to correct conditions which have resulted in a vacate order.

The rebuttable presumption also applies to the new “buyout” rules which took effect in December 2015. An owner’s failure to advise a tenant in writing, *inter alia*, that the tenant may reject the buyout offer without consequence, or can seek guidance from legal services, or can bar further buy-out communications for 180 days, will constitute harassment unless rebutted by the owner.

Moreover, the threshold for harassment involving essential services or frivolous Court proceedings has now been reduced to a single instance as against a complaining tenant, if the tenant can show that other tenants in the building

have faced multiple interruptions of services or frivolous Court proceedings.

The City Council also passed bills affecting the issuance of DOB permits and inspections. Under the new bills, the DOB will not approve a new building, demolition or major alteration permit where there is in excess of \$25,000 in outstanding fines, penalties, or judgments owed to the City. Moreover, similar applications will be subject to full examination where: (i) the building has recently been fined for work without a permit; or (ii) the owner has been found guilty of harassment, or (iii) the contractor has performed work without a permit within the last 24 months. Work being performed by a contractor who has been found to have performed work without a permit in the past 24 months will be inspected by DOB at least once.

Finally, the bills establish a “Safe Construction Bill of Rights”. All work that does not constitute minor alterations or ordinary repairs where tenants will continue to reside in the building must be accompanied by a Tenant Protection Plan. Such a Plan must include a plain

language description of: (i) the work being undertaken; (ii) the permitted hours of construction; (iii) a timeline for completion of the work; (iv) a description of the amenities or services that will be affected and how the owner will mitigate the disruption; and (v) the contact information for the relevant City agencies where tenants may submit complaints or seek further information. All work that requires a Tenant Protection Plan will be inspected by DOB. A violation for a failure to comply with the section will be subject to a stop work order and/or constitute an immediately hazardous violation, with associated penalties.

Building owners are cautioned that the regulatory environment continues to evolve and are urged to seek experienced counsel, particularly before taking action that may result in additional governmental agency involvement.

Damien Bernache is an associate in BBWG’s Administrative Department. For more information about the topics addressed in this article, Mr. Bernache can be contacted at dbernache@bbwg.com.

COMMERCIAL SUBTENANT HAS NO RIGHT TO BECOME DIRECT TENANT OF OWNER AFTER PRIME TENANT'S DEFAULT AND VOLUNTARY TERMINATION OF LEASE



By Jeffrey Levine

A commercial subtenant will generally be protected by the prevailing rule that a subtenant becomes the direct tenant of the owner (a/k/a the overlandlord) following the prime tenant's voluntary surrender of the leased premises where the prime tenant has not defaulted under the prime lease. This rule protects a commercial subtenant against the loss of its sublease, and eviction, when its landlord (i. e. the prime tenant) enters into an agreement with the owner to voluntarily terminate the prime lease and relinquish its tenancy rights to the owner.

However, a sublease will *not* be preserved, and the subtenant will *not* become the direct tenant of the owner, where the prime lease is terminated as a result of a default thereunder by the prime tenant, since the sublease is dependent upon, and subordinate to, the prime lease. Thus, the termination of the prime lease resulting from a default by the prime tenant normally results in any subleases thereunder being extinguished.

An appellate Court recently issued a decision applying these principles. A commercial tenant had sublet its premises to various subtenants and then defaulted under its lease by failing to pay the owner rent arrears exceeding \$2 million.



The owner then commenced a summary nonpayment proceeding against the prime tenant and its various subtenants. In that nonpayment proceeding, the prime tenant and the owner signed a stipulation of settlement that provided for the prime tenant's voluntary surrender of possession and the termination of the prime lease.

The various subtenants asserted that their subleases remained intact and that they could remain in possession of their respective premises as direct tenants of the owner, despite the termination of the prime lease, because the termination of the prime lease occurred as a result of the prime tenant's voluntary surrender to the owner. The Civil Court ruled in favor of the subtenants, holding that the subleases remained intact, but that decision was reversed by the Appellate Term.

In reversing, the Appellate Term held that the surrender by the prime tenant did

not constitute a "voluntary" surrender, because the termination of the prime lease had resulted from the prime tenant's breach of the prime lease. The Appellate Term emphasized that the termination of a prime lease resulting from a breach by the prime tenant extinguishes the sublease, even where the termination of the prime lease occurs through the prime tenant's consent. The Appellate Term also pointed out that a provision in the prime lease, which had stated that the subleases and the sublease rents would be deemed assigned to the owner upon the prime tenant's default in the payment of rent, did not grant the subtenants the right to become direct tenants of the owner, because the subtenants were neither parties to, nor intended beneficiaries of, the prime lease. The Appellate Term also noted that the absence of a Non-Disturbance Agreement between the subtenants and the owner precluded a finding that the subleases could survive the termination of the prime lease.

Commercial landlords should consult with an experienced attorney whenever facing a situation involving the potential voluntary termination of a lease, especially when subtenants are in place pursuant to existing subleases.

Jeffrey Levine (jlevine@bbwg.com) is a partner in BBWG's Litigation Department specializing in commercial lease disputes and commercial real estate matters.

THE KEYS TO UPGRADING YOUR BUILDING'S ENTRANCE: CONVERTING FROM TRADITIONAL TO ELECTRONIC ENTRY



By Diana R. Strasburg

With the ongoing costs of maintaining a traditional lock and key system at residential apartment buildings,

many owners have converted their building's standard front door metal lock and key system to an electronic keyless entry system.

Electronic keyless entry systems can improve security at a building since:

- These systems do not allow duplication of the electronic keys, thus preventing entry into the buildings by unauthorized persons;
- The loss of an electronic key does not require changing the lock as it would with a standard metal key, since the lost electronic key can simply be deactivated and a new one issued to the tenant; and
- These systems decrease the risk of breaking into, or "picking," a lock.

However, an owner of a building that includes tenants who are subject to rent control and/or rent stabilization, that wishes to convert from a traditional metal lock and key to electronic keyless entry must first file an administrative application with the New York State Division of Housing and Community Renewal

("DHCR") requesting permission to do so. Failure to request permission prior to installing a new entry system may result in an order from DHCR reducing the rents of all regulated tenants, for failure to maintain a required service.

In addition, according to DHCR administrative precedent, building owners are required to provide all regulated tenants and lawful occupants with free electronic keys. As such, there is no specific limit on the number of electronic keys which may be issued for an apartment. Occupants of an apartment include children who must be issued an electronic key upon request of the parent/guardian.

Additionally, regulated tenants may receive up to four free additional electronic keys for guests and/or employees (in addition to those already supplied for residents of the apartment). Guests include family members and friends who can be expected to (a) visit a tenant's apartment on a regular basis (such as dog walkers), or (b) visit as needed to care for a tenant, or (c) visit the apartment if the tenant is away. Employees, including contractors or professional care givers, may have an expiration date placed on their electronic key.

DHCR precedents permit owners to charge a maximum of \$25.00 to replace a lost or stolen electronic key.

DHCR precedents also impose specific requirements prior to distributing the electronic keys:

- The owner may request that tenants verify that the information on file is current, and annually thereafter;
- Individuals obtaining an electronic key must provide proof of identity, but the owner may not record any data (i.e. drivers license number) ; and
- Individuals can be required to sit for a photo to be electronically associated with a key. However, minors are not required to have their photo taken.

A significant added benefit to an owner of having an electronic keyless entry system is that such a system records each time an electronic key is used to open a front door, enabling an owner to use such information as evidence in connection with potential non-primary residence cases when there is accompanying security video recordings.

Since DHCR requires owners to provide specific details of such a proposed entry mechanism modification, BBWG is ready to assist clients in preparing these applications for filing with DHCR.

Diana R. Strasburg (dstrasburg@bbwg.com), is an associate in BBW&G's Administrative Law Department. For more information regarding filing service modification applications, please contact Ms. Strasburg.

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 NOT LIABLE FOR THEFT OF SHAREHOLDER'S JEWELRY FROM APARTMENT

Palmer v. Murray Hill Mews Owners Corp. Appellate Division, 1st Department

COMMENT—The Court deemed the shareholder's claims to be "speculation and conjecture", noting that there was no evidence that its employees had access to the apartment keys, or that keys had been taken, or that there had been prior similar incidents, and that there was thus no reason why the co-op should have been on notice of foreseeability.

CO-OP SHAREHOLDER RESPONSIBLE FOR REPAIRS TO PLUMBING INSTALLED BY HER OR PREDECESSOR

Goldenberg v. 425 Park-South Tower Corporation Appellate Division, 1st Department

COMMENT—The Court based its decision on the language in the proprietary lease.

CONDO UNIT OWNER NOT LIABLE FOR BOARD'S LEGAL FEES

Weiss v. Bretton Woods Condominium II Appellate Division, 2nd Department

COMMENT—The bylaws provided for reimbursement of the Board's legal fees only if judgment was entered for the Board.

CONDO UNIT OWNER CANNOT SUE BOARD OVER DEFECTS IN APARTMENT FLOOR SLAB, BECAUSE SHE HAD PREVIOUSLY SUED BOARD AND SPONSOR FOR IDENTICAL CLAIMS IN PRIOR LITIGATION

Lorne v. 50 Madison Avenue Condominium Supreme Court, New York County

COMMENT—The Court held that the prior decision was res judicata, since the plaintiff had had the opportunity to assert various theories in the prior suit.

CO-OP SUBLETTING FEE UPHELD

200 East 90th Street Owners Corp. v. Weber Appellate Term, 1st Department

COMMENT—Both the proprietary lease and bylaws authorized the Board to impose a fee, with no new shareholder consent required.

CONDO CAN SUE SPONSOR'S ENGINEER FOR BREACH OF CONTRACT, BUT NOT FOR MALPRACTICE

Board of Managers of 100 Congress Condominium v. SDS Congress, LLC Appellate Division, 2nd Department

COMMENT—The Board was deemed to be an intended third-party beneficiary of the contract between the sponsor and the engineer. This holding differs from the mostly-prevailing view in prior decisions.

CONDO CAN SUE SPONSOR FOR FAILURE TO CORRECT DEFECTS, WHICH FORCED CARS TO DETOUR IN BUILDING GARAGE

Board of Managers of The Reade Chambers Condominium v. 71 RC Property, LLC Appellate Division, 1st Department

COMMENT—The Court held that claims could be asserted for breach of contract and implied easement of necessity.

RENT-STABILIZED TENANT NOT EVICTED BASED ON SINGLE ASSAULT ON BUILDING SUPERINTENDENT

Pelham 1130 LLC v. Cause Civil Court, Bronx County, Landlord & Tenant Part

COMMENT—While not involving a co-op or condo, this holding is still instructive, on a question that arises frequently. The Court held that a pattern of repeated behavior is necessary to support an eviction, and distinguished this case from a prior holding that had supported eviction based on a single *shooting* incident.

BUILDING OWNER LIABLE FOR AIRBNB-TYPE ACTIVITY BY TENANTS; RECEIVER APPOINTED, OWNER FOUND IN CONTEMPT OF PRIOR ORDER; PRINCIPALS OF OWNER ENTITY CAN BE SUED PERSONALLY BY NYC

City of New York v. NYC Midtown LLC Supreme Court, New York County

COMMENT—This 57-page decision paints the ultimate nightmare scenario for a building owner (including co-ops and condos)—responsibility for the actions of residents without any real ability to prevent them. The Court held that the

owner here had failed to prevent the transient leasing, thus permitting criminal activity to occur, and had made no effort to comply with a prior preliminary injunction order.

CONDO BUYER'S ATTORNEY COMMITTED MALPRACTICE BY NOT ADVISING BUYER THAT SPONSOR'S REQUIREMENT THAT CONTRACT DEPOSIT BE PAID TO SPONSOR AS LOAN INSTEAD OF TO ESCROW AGENT VIOLATED LAW AND AG REGULATIONS

Riviera Property Holdings, LLC v. Ferber Chan et al. Supreme Court, New York County

COMMENT—This involved what had started as a well-known troubled condo project; the law firm was held liable for the loss of the nearly \$1 million deposit, which proved unrecoverable in light of its unconventional routing.

CO-OP HOLDER OF UNSOLD SHARES MAY BE ENTITLED TO SURRENDER PARKING SPACES TO THE CO-OP AGAINST THE CO-OP'S WISHES

North Shore Towers Apartments Incorporated v. Three Towers Associates Appellate Division, 2nd Department

COMMENT—In reversing a lower court decision, the appellate Court held that language ambiguities in the proprietary lease and offering plan made it unclear whether the Holder of Unsold Shares could surrender the leases for the parking spaces without surrendering the leases for the appurtenant apartments simultaneously.

BBWG IN THE NEWS



Founding partner **Sherwin Belkin** was quoted: in the July edition of [The Real Deal](#) on landlords' concerns about heightened scrutiny following a recent Court decision that was unfavorable to an owner; in the July/August editions of [RSA Reporter](#) and [New York Housing Journal](#) on a recent Court decision upholding the establishment of the DHCR's Tenant Protection Unit, and the industry's plans to appeal therefrom; discussing recent divergent Court decisions involving the availability of 421-g real estate tax benefits, in [The Real Deal](#) on [July 5](#) and [July 19](#); on new City Council bills intended to benefit tenants, in [citybizlist.com](#) on [August 10](#) and in [Real Estate Weekly](#) on [August 16](#); and in [The Commercial Observer](#) on [August 17](#) on how City agencies and Courts penalize owners for tenants' AirBnB-type activities.



Joseph Burden, co-head of the Firm's Litigation Department, was quoted on the recent divergent Court decisions involving 421-g benefits, in [Downtown Express](#) on [July 21](#) and in the [Daily News](#) on [July 24](#). **Mr. Burden** also lectured at the annual New York State judges' seminars on June 23 and July 26 on the topic of "Conflicting Appellate Precedent in Housing Court Cases".



Jeffrey Goldman, co-head of the Firm's Litigation Department, was quoted on the topic of City agencies fining owners who report AirBnB-type violations in their buildings on [July 11](#), in [Crain's New York](#) and in [bisnow.com](#), as well as in the [August edition](#) of [The Real Deal](#).



Administrative Department partners **Kara Rakowski** and **Alexa Englander** authored an article in the [August 16](#) edition of [The New York Law Journal](#) on the potential impact of provisions of the zoning resolution on development in anti-harassment districts.





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