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The Death of the *Yellowstone* Injunction

BY JEFFREY L. GOLDMAN, ESQ.



In a monumental May, 2019 decision, the New York State Court of Appeals in *159 MP Corp. v. Redbridge Bedford, LLC* affirmed the lower court holding that a commercial lease provision which waives the right to commence a declaratory judgment action as to the terms of the lease or any notice sent under the lease is valid and enforceable.

The lease provided: “*Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease....[I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.*” After the tenant was served with a default notice and commenced an action seeking *Yellowstone* injunctive and declaratory relief, the Supreme Court granted the landlord’s motion to dismiss [affirmed by the Appellate Division] holding that there is a strong public policy supporting freedom of contract and, therefore, parties are free to waive a range of rights “observing parties here are ‘sophisticated entities that negotiated at arm’s length’ and entered contracts that defined their obligations ‘with great apparent care and specificity.’”

The Court of Appeals noted that while there may be some public policy limits that the Legislature has identified as being so important that they are non-waivable [by statute, constitution or are illegal] this “does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract”.

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What this means for owners and commercial tenants is that with this language, owners are no longer dragged into Supreme Court for what has become a rubber-stamp granting of a Yellowstone injunction and the resulting protracted and expensive litigation after which the tenant would still have a right to cure. Now, the issues will be resolved relatively quickly in a Civil Court summary proceeding, and should the owner prevail and establish the lease defaults that were not cured within the timeframe set forth in the lease, the tenant will have no right to cure, and no right to have the terminated lease revived, and the owner will recover possession.

However, the Court of Appeals noted that while the Legislature has made certain rights non-waivable in the context of landlord-tenant law (e.g., waiver of personal injury damages (GOL§5-321), warranty of habitability (RPL §235-b)), it has not done so for interim Yellowstone relief. Given the recent anti-landlord changes made by the City Council, proposed anti-landlord changes to the rent regulatory laws, and progressive efforts for commercial rent control, it would not be surprising to see this issue addressed by the Legislature in the near future.

Whether it is drafting a commercial lease or litigating a commercial tenant's default or breach, the attorneys at BBWG are here to help.

Jeffrey L. Goldman, Esq.
Litigation Department Head and
Co-Managing Partner

The Law of Unintended Consequences (The Impact on Co-ops and Condos of the 2019 Rent Laws)

BY AARON SHMULEWITZ



The Housing Stability and Tenant Protection Act of 2019 (the "Act"), which was signed into law by Governor Cuomo on June 14, has triggered

widespread criticism from many owners of rental buildings, and dire predictions of significant negative impact on various aspects of the New York City economy. I will defer to others on those issues.

However, the Act also includes four provisions which could have a huge, but apparently unintended, negative effect on co-op (and, to a lesser extent, condo) management and operations.

First, the Act includes a new Real Property Law section 227-f, which bars a "landlord of a residential premises" from refusing to rent or offer a lease to a potential tenant on the basis that (s)he was involved in a past or pending landlord/tenant litigation. Worse, the law states that a rebuttable presumption of a violation will exist if information was requested from a tenant screening bureau and the requester subsequently refuses to rent or offer a lease to that applicant.

This new law could easily be applied to co-ops in connection with their screening of potential purchasers—past litigation is a common area of inquiry in co-op Board applications, and many Boards decline consent to prospective purchasers who have been litigious elsewhere. The new law would prohibit that practice, and could subject co-ops (and individual Board members?) to civil fines for doing so. Co-op and condo

apartment owners seeking to sublease their apartments could also find themselves subject to the new law if they refuse to rent to a tenant with a litigious background; to the extent that such buildings' managing agents participate in processing such subleasing applications, they could also find themselves indirectly liable for any violations by the apartment owners.

The second area of concern is a new Real Property Law section 238-a, which bars a "landlord, lessor, sublessor or grantor" from demanding any late fee in excess of \$50, or 5% of the monthly rent, whichever is less.

This statute could also be applied to co-ops, and could stop them from charging their standard late fees, which typically far exceed \$50/month. Co-op shareholders who habitually pay their maintenance late could take advantage of the new law, and use the

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co-op—and the new law—to “finance” their cash flow needs elsewhere. Once again, co-op and condo apartment owners who sublease their apartments would also be blocked by the new law from charging truly disincentivizing late fees.

Third, the new Real Property Law section 238-a also bars a “landlord, lessor, sublessor or grantor” from demanding any fee or payment in excess of \$20 for processing a tenancy application—and must waive even that paltry fee unless a copy of the background check report is supplied to the applicant.

Most co-op application fees run into the hundreds of dollars, if not more. While such fees are most often paid to the co-op’s managing agent (and not to the co-op itself), query whether an argument could be made that the managing agent is merely performing a ministerial task on behalf of the co-op Board, and should thus also be barred from charging more than \$20. A condo, being an amalgamation of real estate owners and not a “landlord, lessor, sublessor or grantor”, would ostensibly not be subject to this new restriction, at least as currently drafted. However, once again, co-op and condo apartment owners who charge their tenants processing or application fees for subleases could be caught in this net as well; and, again, to the extent that such buildings’ managing agents process such applications, the managing agents could also find themselves subject to the new prohibition, and indirectly liable for any violations.

Finally, the Act also amends General Obligations Law section 7-108, dealing with tenant security deposits, to now provide that “no deposit or advance shall exceed

the amount of one month’s rent under such contract”. While the apparent intent of the amendment, and its context, were probably not meant to apply to co-ops and condos, the language *is* still broad enough to include them in its reach. Many co-op Boards condition consent to a purchaser with iffy financials on his/her depositing a large sum in escrow, typically equal to one or two years’ maintenance for the apartment, to secure the purchaser’s payment obligations to the co-op. In addition, many co-op and condo apartment owners who lease out their apartments at market rates typically require a security deposit equal to two or more months’ rent.

The new statute would technically bar both of these activities. Ominously, the amended statute now provides that willful violation of this law could subject the violator to punitive damages equal to twice the amount of the deposit or advance taken. Thus, a co-op Board that requires a purchaser to make an escrow deposit of, say, \$50,000 could theoretically be liable for punitive damages of \$100,000. Will fear of violating the amended statute lead to more Board turndowns and, consequently, less flip tax revenue to co-ops and lower transfer tax revenue to the City and State? Can co-op Boards get around the new law by requiring straight pre-payment of one or two years’ maintenance in lieu of an escrow deposit? Or will the bar on an “advance” in excess of one month’s rent close off that possibility as well?

In addition to the above, the Act also imposes various new procedural hurdles for a landlord seeking to commence litigation against a tenant in Housing Court. These will impact co-ops as well, but not as significantly and regularly as those discussed above.

It would appear that the legislature’s zealous desire to effect certain changes with regard to the rental industry could very well have extremely significant spillover effects on co-op and condo management and operations. Further refinement by the legislature and the Courts is needed, desperately and fast.

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

SoHo/NoHo Zoning Reformation Initiative Launched

BY: ROBERT A. JACOBS



After years of escalating zoning non-compliance in SoHo and NoHo, the City of New York, through its Department of City Planning (“DCP”) and Manhattan

Borough President Gale Brewer along with Council member Margaret Chin, is finally focusing on fixing a zoning problem that just will not go away.

SoHo is the area of Manhattan south of Houston Street that stretches southward to Canal Street and lies between the Hudson River and Lafayette Street. NoHo is the area of Manhattan north of Houston Street that is generally understood to be bounded by Astor Place and Houston Street (on the north and south) and Broadway and The Bowery (on the west and east).

Under present zoning, residential use in SoHo/NoHo is largely restricted to joint living-work quarters for artists (“JLWQA Units”). This requires one occupant of the unit to be certified as an “artist” by the City’s Department of Cultural Affairs. In addition, retail use is not permitted in many of the areas in SoHo/NoHo where, in reality, such uses are thriving, albeit illegally from a zoning perspective. As originally conceived, the SoHo/NoHo areas were zoned to protect the artist community that pioneered the conversion of obsolete manufacturing spaces to an artists’ haven in the 1970’s.

However, due to mounting economic pressure from non-artist buyers seeking to live in a part of Manhattan with unique cast iron buildings and spacious lofts like no other place in the City, artists were induced to sell their spacious lofts. As a result, the amount of residential non-compliance in SoHo/NoHo has been increasing over the years and is now reaching critical mass. The proliferation of this zoning non-compliance can be attributed, in part, to a laxity in enforcement by the Department of Buildings (“DOB”), tacitly looking the other way for reasons which some speculate to be due to the difficulty and hardship of enforcement coupled with the undisputed economic vitality brought to the area by the changing demography.

As a result, non-artists have been moving into JLWQA Units at an increasingly rapid pace by offering substantial profits to former artists for the privilege of living in this unique part of the City. Many of the buildings in this area are owned as co-ops, with their Boards of Directors facing increasing pressure from shareholders to accept non-artists. To induce Boards to accept such non-conforming use, many purchasers have agreed to indemnify their co-ops against any zoning non-compliance by offering to execute so-called “SoHo Letters”. However, when push comes to shove, the Courts have not looked favorably on the viability of such arrangements.

Private initiative groups such as the Fix SoHo/NoHo Coalition have also been pressuring the City to reform the zoning in SoHo/NoHo to address what has become a zoning nightmare by relaxing the prohibition against non-artists and retail use with an eye toward continuing protection for artists.

The DCP, in its SoHo/NoHo Community Planning Process, has proposed certain changes to the existing zoning regulations. This proposal includes expanding the living-work requirements to non-artistic working uses and, thus, eliminating the artist-in-

residence requirement. The proposal also includes providing non-artist residents of JLWQA Units an amnesty period against enforcement by the DOB based on no artist in residence until the Unit is sold to a qualifying buyer.

As for commercial uses, the proposal includes plans to allow a wider range of neighborhood-compatible uses on ground floors, such as retail, food stores, community facilities, arts and cultural uses, while maintaining the 10,000 square foot cap on retail uses. The proposal recommends expanding such uses beyond the ground floor with greater capacity in certain portions of SoHo/NoHo. Regulations governing scale, type and hours of operation of eating and drinking establishments would be relaxed while maintaining current regulations on bars and entertainment establishments.

While many of these proposals are viewed by some as potentially damaging to the artistic community, and viewed by others as being simply inadequate to address the zoning debacle, it is certainly encouraging that the City is finally taking steps to address the anachronistic and ineffective zoning that is stifling the legitimate growth of this area.

This article was written by Robert Jacobs, a partner in the Administrative Department at BBWG. For information on zoning issues affecting SoHo/NoHo and related topics, please contact Mr. Jacobs at rjacobs@bbwg.com.

Notices of Termination Should Provide Details of Tenant's Failure to Cure

BY CHRISTINA SIMANCA-PROCTOR



Notices to cure are an effective remedy to correct certain objectionable or illegal conduct in residential buildings.

Often, notices to cure stop a tenant's offenses and the landlord and tenant move forward without the need for litigation.

However, when a notice to cure does not put an end to the alleged conduct, a landlord's remedy is to terminate a tenancy with the service of a notice of termination. A valid notice of termination must include an allegation that the tenant's conduct continued after the expiration of the notice to cure and the dates of the alleged additional occurrences.

Recently, the Civil Court, Queens County in *Sudimac v. Beck*, 2019 NY Slip Op 50442 (March 15, 2019) held that a notice of termination must not just allege that the violation continued after the cure date, but also include how the landlord discovered that the violation continued.

In *Sudimac*, the landlord alleged in its notice to cure that the tenant installed new flooring, and thereby changed the floor height of the apartment, without the prior written consent or permission of the landlord. The landlord then served the tenant with a notice of termination dated one day after the tenant's deadline to cure the unapproved new floor. After the expiration of the notice of termination, the landlord commenced a holdover proceeding.

The tenant in *Sudimac* moved to dismiss the holdover proceeding, alleging that the notice of termination merely mirrored the allegations in the notice to cure and did not allege any new instances of lease violations by the tenant. The Court in *Sudimac* granted tenant's motion, holding that the landlord had failed to allege how the landlord had determined, just one day after the cure date, that the illegal floor remained. The Court stated that the failure to "set forth the relevant facts upon which the landlord relies for eviction is defective and gives the appearance of bad faith in its preparation."

In another recent holdover case, *2704 University Ave. Realty Corp. v. Thompson*, 2019 NY Slip Op 50652 (May 2, 2019), the Civil Court, Bronx County dismissed the landlord's holdover proceeding that was predicated on a notice to cure requiring the tenant to cure an alleged illegal sublet. The notice to cure in *Thompson* expired on August 31, 2018 and the landlord served the tenant with a notice of termination dated September 3, 2018 (Labor Day). The notice of termination alleged that the illegal sublet had not been cured but failed to allege any additional facts relevant to after the expiration of the cure period.

The Court in *Thompson* noted that the period between the expiration of the notice to cure and the date of the notice of termination was a holiday weekend. The landlord's notice of termination indicated "a lack of good faith in that little or no investigation at all took place to ascertain whether [the tenant] had cured the alleged sublet." The landlord, therefore, failed to apprise the tenant with sufficient particularity of the facts which it believed established its prima facie case.

Based on the decisions in *Sudimac* and *Thompson*, it is vital that a landlord take reasonable steps to ascertain whether the conditions alleged in a notice to cure have continued after the expiration of the cure deadline. Notices of termination should state, with particularity, how the alleged conduct has not been cured, or why the landlord believes it has not been cured, and the date(s) the landlord conducted such investigation.

We at BBWG are ready to assist and advise landlords faced with potential holdover situations on how to best address them, to enhance the chances of success.

Christina Simanca-Proctor is a partner in the Firm's Litigation Department.

BBWG In The News

Founding partner **Sherwin Belkin** was included in **The Top 50 Attorneys of 2019** magazine.

Mr. Belkin also was the featured speaker in an industry investor conference call on “NYC Rent Regulation Proposals and Potential Impact On Multifamily Lending” hosted by the Webdush Financial Institutions Research Team on June 5.

Mr. Belkin also responded to an inquiry about the extent of lease guaranties in the “Ask Real Estate” feature of *The New York Times* Sunday Real Estate section on May 25: [Read article here](#). **Mr. Belkin** was also quoted in a June 19 article in *Real Estate Weekly* on the prospects of legal challenges to the new State rent laws: [Read article here](#), and in *The Commercial Observer* on June 25 critiquing the impact of the new laws: [Read article here](#).

Mr. Belkin, Administrative Law Department co-heads **Kara Rakowski** and **Martin Heistein** and Litigation Department head **Jeffrey L. Goldman** presented analyses of the new State rent laws to more than 300 attendees at a July 10th event sponsored by REBNY, and to more than 400 attendees at a July 11th event sponsored by the RSA.

Martin Heistein, co-head of the Firm’s Administrative Law Department, was quoted in a June 27 article in *The Real Deal* on prospective legal challenges by the real estate ownership community to the new State rent laws: [Read Article here](#).

Transactional Department partners **Craig L. Price** and **Stephen Tretola**, together with associate **Michael Shampan**, represented the purchaser of a \$26 million mixed-use development in Clinton Hill, comprising 50 apartments and first-floor commercial space. **Kara Rakowski**, co-head of the Firm’s Administrative Department, and associate **Damien Bernache**, handled the 421-a administrative due diligence for the transaction.

Mr. Price also represented the tenant-in-common sellers in a \$19 million sale of a mixed-use property in Greenwich Village, consisting of 30 apartments and a commercial space. **Mr. Price** was also quoted in a May 7 article in *The Real Deal* on the effect that impending increases in transfer taxes are having on residential contracts and closings: [Read article here](#), and in *Brickunderground.com* on June 5 on buying pre-construction condominium apartments: [Read article here](#), as well as in *Brickunderground.com* on June 19 on co-op shareholders agreeing to sell their entire building to a developer: [Read article here](#), and in *The Real Deal* on June 24 about residential deals trying to close before transfer tax increases kick in on July 1: [Read article here](#).

The Firm’s representation of the purchaser of a group of condominium units in downtown Brooklyn for \$26 million was cited as one of the 10 largest deals in the City during the week of June 3, in *law360.com* on June 11: [Read Article here](#).



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 BOARD CANNOT PIERCE CORPORATE VEIL AND SUE SPONSOR'S PRINCIPALS

Board of Managers of The Modern 23 Condominium v. 350-52 West 23, LLC Appellate Division, 1st Department

COMMENT | The Court examined the traditional factors necessary to justify piercing the corporate veil, and found them lacking here.

CO-OP ENTITLED TO STATUTORY PRE-JUDGMENT INTEREST ON SHAREHOLDER'S UNPAID MAINTENANCE

Hotel Carlyle Owners Corporation v. Schwartz Appellate Division, 1st Department

CO-OP APARTMENT BUYER CANNOT SUE SPONSOR FOR 30% OVERSTATEMENT OF APARTMENT SIZE

Von Ancken v. 7 East 14 LLC Appellate Division, 1st Department

COMMENT | The Court held that the buyer had an opportunity to inspect and measure the apartment before signing the contract. Caveat emptor.

CO-OP PROPRIETARY LEASE AMENDMENTS REQUIRING SIMULTANEOUS OCCUPANCY FOR MADONNA'S CHILDREN AND EMPLOYEES TO LIVE IN APARTMENT ARE VALID AND ENFORCEABLE

Ciccione v. One West 64th Street, Inc. Appellate Division, 1st Department

COMMENT | Other than the celebrity status of the plaintiff here, this is a not-uncommon issue in co-ops. The Court also held that some of her claims were barred by a four-month statute of limitations applicable to suing boards.

CO-OP SHAREHOLDER LIABLE TO NEIGHBOR FOR UNILATERAL UNAUTHORIZED DESTRUCTION OF LONG-STANDING WOODEN DECK

Hoffman v. Babad Supreme Court, New York County

COMMENT | The Court held that the defendant (a well-known "personality" in NYC real estate circles for many years) was liable for \$100,000 in actual damages, plus \$100,000 in punitive damages. BBWG represented the victorious plaintiff.

APPLICANT TO ACQUIRE HDFC APARTMENT MUST PRODUCE TAX RETURNS TO PROVE INCOME ELIGIBILITY

Garcia v. 2728 Broadway Housing Development Fund Corp. Appellate Division, 1st Department

COMMENT | The HDFC's certificate of incorporation and bylaws imposed that requirement.

CO-OP SELLER ENTITLED TO KEEP DEPOSIT ON BUYER'S BREACH OF CONTRACT

Monaghan v. Cole Appellate Division, 1st Department

COMMENT | The parties' agreement had carved out the issue that the buyer claimed, erroneously, entitled him to cancel the contract.

CO-OP SHAREHOLDER NOT A HOLDER OF UNSOLD SHARES BECAUSE NOT SO DESIGNATED BY SPONSOR

Kirrane v. Dunolly Gardens Owners Corp. Appellate Division, 2nd Department

COMMENT | This proprietary lease was unusual in that it did not contain the typical language about Unsold Shares retaining their character regardless of transfer. In the absence of that language, the Court held that a transfer had ended their Unsold status, because of the failure to satisfy the one perpetuating condition—sponsor designation.

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CO-OP LIABLE TO NEIGHBORING PROPERTY OWNER FOR DIMINUTION IN VALUE CAUSED BY APARTMENT AIR CONDITIONERS PROTRUDING OVER PROPERTY LINE

Madison 96th Associates, LLC v. 17 East 96th Owners Corp.
Appellate Division, 1st Department

COMMENT | But the co-op was found not liable for the encroachment of the co-op building's underpinning into the neighboring parcel. Watch those windows.

CONDO UNIT OWNER CANNOT SUE BOARD OR NEIGHBOR FOR NEIGHBOR'S CONSTRUCTION OF TERRACE GREENHOUSE TO REPLACE OLD ONE

ESX Services LLC v. The Board of Managers of The Essex House Condominium Supreme Court, New York County

COMMENT | The new greenhouse was apparently the same size, and on the same footprint, as the original greenhouse. The dispute was over whether the new one's height exceeded the old one's height by one foot, thus blocking the plaintiff's views of Central Park. The condo Board's decisions were held protected by the business judgment rule.

CONDO BOARD CAN SUE SPONSOR FOR BREACHING PRIOR STIPULATION TO REPAIR DEFECTIVE CONDITIONS

Members of The DeKalb Avenue Condominium Association v. Klein
Appellate Division, 2nd Department

COMMENT | But claims for fraud and breach of statutory housing merchant warranty were dismissed on technical grounds.

CONDO UNIT TENANT CAN SUE UNIT OWNER OVER NON-RETURNED SECURITY DEPOSIT

Furuya v. Parry Supreme Court, New York County

CO-OP APARTMENT SELLER CANNOT SUE BOARD FOR IMPOSING CONDITIONS ON PURCHASE BY FRANCE, WHICH FRANCE REFUSED, THUS CANCELLING THE DEAL

Farkas v. River House Realty Co., Inc. Appellate Division, 1st Department

COMMENT | The Court held that there was no proof of anti-French bias by the Board, just reasonable conditions on a foreign government.

EMPLOYEE OF SHAREHOLDER'S CONTRACTOR CANNOT SUE SHAREHOLDER OR CO-OP FOR INJURIES SUFFERED DURING APARTMENT RENOVATION WORK

Munoz v. Stedman Supreme Court, Westchester County

COMMENT | The Court relied on the single-family exception to the strict liability Labor Law statute, holding that the shareholder and the co-op did not exert any control over the work.

CO-OP SHAREHOLDER BARRED BY COLLATERAL ESTOPPEL FROM SUING BOARD

Jamal v. Caroline Garden Tenants Corporation Appellate Division, 2nd Department

COMMENT | The issues were already litigated and decided in two prior actions.

CO-OP SHAREHOLDER CANNOT SUE CO-OP FOR CLAIMS THAT ACCRUED MORE THAN 10 YEARS AGO

Siegel v. The Dakota, Inc. Appellate Division, 1st Department

COMMENT | The Court indicated that the facts were discoverable back then, and the shareholder's failure to do so should not enable him to avoid the statute of limitations now. [🔗](#)



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