GDB LAW

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LEGAL UPDATE

Providing current information about legal developments for our clients and friends.

New Tenant Protection Legislation May Also Impact Cooperatives and Condominiums

By: David L. Berkey, Esq.

The New York State Legislature in June enacted tenant protection legislation that significantly changes New York's rent laws and impacts the City's many cooperatives and condominiums. The Housing Stability and Tenant Protection Act of 2019 (S. 6458 and A. 8281) (a) makes the rent regulation system permanent (unless repealed by later act of the Legislature), (b) eliminates luxury and vacancy decontrol provisions of current law, (c) limits "owner use" decontrol to one unit per building where the owner or its immediate family uses such unit as their primary residence and only where the tenant was in residence for less than 15 years; and also limits the amount of major capital improvement increases to two percent in New York City and lengthens the amortization period for such increases, effectively reducing such increases further, among other changes.

Cooperative and Condominium conversions are affected by eliminating "eviction" plans and requiring for "non-eviction" plans that 51 percent of tenants in occupancy agree to purchase their apartments before the conversion can be declared effective. In addition, market rate senior citizens and disabled tenants who do not purchase their apartments may not be evicted unless there is "good cause" and the legislation states that failure to pay an "unconscionable" rent increase does not constitute "good cause." Non-purchasing tenants in conversions to cooperatives or condominiums will now be given, in addition to their 90 day exclusive period to purchase the shares or unit in which they live, during the six month period measured from the end of the 90 day period, an additional exclusive right to purchase the shares or unit on the same terms and conditions as are contained in an executed contract to purchase the shares or unit entered into by a bona fide purchaser.

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Franchise Disclosure Document Gets a New Look

By: David T. Azrin, Esq.

In May 2019, the association of state franchise regulators (known as the North American Securities Administrators Association, or NASAA), issued new rules, effective January 2020, which require franchisors to provide additional written warnings to people considering buying a franchise.

The new rules require franchisors to include two additional cover pages to the Franchise Disclosure Document given to potential buyers, intended to highlight some of the harsher provisions often contained in franchise agreements which franchisees may overlook.

In a section entitled "What You Need To Know About Franchising Generally," all franchisors must now disclose concisely that franchise agreements often contain provisions which some might consider unfair, such as the following:

- the franchisee may have to pay royalties even if the business is losing money,
- the franchise agreement may allow the franchisor to essentially change the terms of the agreement at any time by imposing new operating requirements in the operations manual which may require the franchisee to make additional investments,

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IN THIS ISSUE

Can You Defame Someone in a Notice of Mechanic's Lien?

By: Randy J. Heller, Esq.

A mechanic's lien can be a powerful tool for collecting a contract balance owed for work performed on a construction project. But it is a tool which can be easily abused. To paraphrase the lottery slogan, all you need to encumber someone else's property with a mechanic's lien, is a "computer and a dream."

Unlike other states which impose conditions on filing, or require the lienor to foreclose in a very short period of time, New York sets up no such hurdles, and permits one to renew the lien for years to come with few restrictions. Scholars have opined that the filing of a mechanic's lien is an unconstitutional taking of property. But the New York Court of Appeals rejected that argument in the 1970's on the grounds that the "taking" was de minimis and served a valuable countervailing purpose in the protection of those who performed work, labor or services, or supplied materials, in the improvement of real property.

So what stops someone from just filing a bogus or inflated lien against your house or condo and wreaking havoc on your clear title (not to mention your relationship with your landlord or Board of Managers)? Very little. For reasons too complicated to get into here, suing the lienor for "willful exaggeration of lien" is an inadequate remedy. You could demand that the lienor commence an action to foreclose its lien, so you can challenge the lien itself on its merits, but few people have the stomach to demand that litigation be commenced against them.

Which brings us to the case which is the focus of this article: Centrifugal Associates Group LLC v. Newell Contracting Inc. and Krzystof Bielak. In that case, Mr. Bielak, the President of Newell Contracting (a subcontractor) signed and filed a mechanic's lien seeking an alleged outstanding balance of $320,000 from Centrifugal Associates (the general contractor). Centrifugal was not amused. The lien was filed against the building where the work was performed, prompting the owner to demand that Centrifugal cause the lien to be discharged. With its options for achieving the immediate discharge of the lien limited, Centrifugal started a lawsuit in the Supreme Court, Kings County, against both Newell and Mr. Bielak, alleging defamation. In essence, its claim was that the filing in public records of a written claim contending that $320,000 was due from Centrifugal to Newell, was false and defamatory.

Taking it one step further, Centrifugal sought personal liability against Mr. Bielak for signing the allegedly defamatory lien. This was based on the legal theory that when one commits a tort (such as defamation), one is personally liable for that tort, even if it was performed in one's capacity as a corporate officer.

Judge Ruchelsman had little legal precedent to rely on in New York. The Judge began by acknowledging that Mr. Bielak could indeed be personally liable for any tort he committed. But the question remained: could the filing of an inaccurate lien (even a deliberately inflated lien) be considered to be defamatory?

> *To paraphrase the lottery slogan, all you need to encumber someone else's property with a mechanic's lien, is a "computer and a dream."*

A 2013 case out of the Supreme Court, Kings County (although a bit of an outlier), had permitted a claim to be made against a lien for a variety of common law causes of action such as fraud, slander of title, malicious prosecution, and malicious abuse of process. But that case had not addressed defamation, and Judge Ruchelsman was unwilling to equate it with slander of title. Nor was he persuaded by decisions in other states, notably Minnesota, which recently permitted a cause of action for defamation against the contents of a mechanic's lien.

Instead, the Judge pivoted to an analysis of whether the contents of a lien are "privileged," thereby precluding a claim of defamation. He stated that a lien can be privileged because it "is authorized by law and related to an action to foreclose." That was significant because New York has recognized that a statement "made in the course of a judicial proceeding" is necessarily privileged "to permit the efficient administration of justice."

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***Randy J. Heller** is a partner at Gallet Dreyer & Berkey, LLP. He represents contractors and owners in a wide array of sophisticated construction related matters as well as litigation. In addition to being named a Super Lawyer for many years running, Mr. Heller is considered one of the top attorneys in construction law in the New York metropolitan area by the* New York Times Magazine, *and one of the Best Lawyers of* New York by New York Magazine. *In addition, Gallet Dreyer & Berkey, LLP has once again been given the highest "Tier 1" rating by* U.S. News & World Report *for its construction law and litigation practice. Mr. Heller can be reached at rjh@gdblaw.com.*

A Properly Managed, Organized, and Prepared Committee Can Be an Invaluable Asset to Boards

By: Michelle P. Quinn, Esq.

The Board of Directors of a mid-sized Manhattan cooperative recently learned the hard way that they cannot do everything, as their monthly meeting dragged on into its 4th hour. Trying to focus on the minutia of every project and issue proved to be too much to discuss in a typical 1-2 hour meeting. Delegation was imperative; committees had to be formed.

Boards of Directors and Boards of Managers have their collective hands full with administration of building operations, capital projects, staff and owner issues, and the like. Many boards look for more flexible ways of managing their workload while adjusting to the board's evolving needs. The creation of committees, especially in larger buildings, can potentially lighten the load. But do they? Or do they create even more work? Committees can be both a substantial benefit to boards and an unexpected burden as well.

The creation of committees is typically authorized by a condominium or cooperative's governing documents. In addition, New York Business Corporation Law §712 specifically empowers cooperative corporations to do so.

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Some advantages of establishing committees include: owner participation in the affairs of the building, especially individuals with specialized knowledge, skills, or background; direct feedback from the community of residents on proposed projects or changes in the building; delegation of tasks, due diligence, investigations, and other legwork on the details of projects; and an increased number of new ideas or strategies.

But committees are not without drawbacks, such as: the requirement of board oversight, which may be burdensome if there are too many committees; lack of direct control over an investigation or project; owner or resident disinterest may impede participation and effectiveness; members may not speak for or represent the interests of the majority of the other residents; inadequate leadership may result in a lack of focus or direction; and committees may exceed the scope of their authority.

Members should be committed and willing to spend the hours needed to accomplish their tasks. They should understand time constraints and deadlines, and should recognize that the committee does not make decisions, but rather advises, recommends, or carries out an assignment.

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OUR PRACTICE AREAS INCLUDE:

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- *Employment Law*
- *Franchising, Distribution and Licensing*
- *Intellectual Property*
- *International Business Law*
- *Litigation*
- *Mergers and Acquisitions*
- *Real Estate Law*
- *Tax Law*
- *Trusts and Estates*

Franchise Disclosure

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- the franchisor may require the franchisee to buy certain products or supplies from the franchisor or its designated suppliers at above-market prices,
- the franchisor might not be obligated to renew the agreement or the franchisor may be allowed to change the terms in the renewal agreement, and
- the franchise agreement may prohibit the franchisee from staying in the same line of business after the franchise ends.

These disclosures are required even for franchisors whose agreements do not contain these types of provisions.

In another section, entitled "How to Use this Franchise Disclosure Document," franchisors must now direct a prospective franchisee to the specific sections of the lengthy disclosure document for answers to some of the most frequently asked questions, such as:

- How much can I earn?
- How much will I need to invest?
- Is the franchise system stable, growing, or shrinking?

> *The sale of franchises is already heavily regulated in the United States. Existing federal and state rules already require franchisors to provide prospective franchise buyers with a lengthy detailed franchise disclosure document.*

- Does the franchisor have a troubled legal history?, and
- What is it like to be a franchisee in this system?

The new requirements and sample cover pages are available on the NASAA website, at http://www.nasaa.org/industry-resources/corporation-finance/franchise-resources/.

The sale of franchises is already heavily regulated in the United States. Existing federal and state rules already require franchisors to provide prospective franchise buyers with a lengthy and detailed franchise disclosure document that contains information about, among other things, the franchisor's background and experience, the franchisor's litigation history, the required fees, the money the franchisee will need to open the business, the franchisor's duties to provide assistance including a detailed description of the training program, the restrictions on purchasing products or supplies, a list of every existing franchisee including their contact information, the franchisor's audited financial statements, and a copy of every agreement the franchisee will be required to sign. The purpose of these regulations is to protect franchisees from what some may consider abusive sales practices.

The new rules issued by NASAA this year impose additional required upfront disclosures to help ensure that people buying franchises are fully aware of the significant obligations and restrictions which they will be undertaking in becoming a franchisee.

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David T. Azrin *a partner at Gallet Dreyer & Berkey, LLP, represents a range of business clients and individuals on employment, trademark, and franchise law matters. Mr. Azrin is the organizer of the International Franchise Association's franchise business network program in the New York City area. He has been named by Super Lawyers magazine as one of the top attorneys in franchise and distribution law in the New York metropolitan area, and by the editorial board of Franchise Times magazine as one of the top franchise attorneys ("Legal Eagle") in the United States. Mr. Azrin can be reached at dta@gdblaw.com.*

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FIRM NEWS AND HONORS

David T. Azrin

In May, partner David T. Azrin sponsored an International Franchise Association NYC Franchise Business Network event on lead generation for franchisors and franchisees.

In May, Mr. Azrin was selected as a 2019 Top Rated Lawyer in Labor & Employment Law by ALM Media.

David N. Milner

In June, partner David N. Milner was re-elected for an 8th term as Trustee of the Village of Lake Success, New York.

David I. Faust

In June, partner David I. Faust gave a presentation titled "Probate, Tax and Related Issues Transferring US Assets of Non-US Decedents" at the 21th annual STEP-Israel Conference in Tel Aviv and a presentation titled "Know Your Customer and Anti-Money Laundering" at the Tel Aviv Bar Association.

David L. Berkey

In July, partner David L. Berkey was the Golf Chairman at the New York State Bar Association's Real Property Law Section Summer Meeting at the Equinox Resort in Manchester, Vermont.

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New Tenant Protection Legislation

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Many other tenant benefits are included in the legislation. For example, "tenant blacklists" will now be banned, rent security deposits will be limited to one months' rent, and landlords will have to notify tenants if their rent will be increased by more than five percent or if they do not intend to renew a tenant's lease.

The days of "three day" rent demands will be gone. Now, a written notice must be sent to the tenant by certified mail at least five days after the rent due date advising the tenant that the rent is late. If a summary proceeding is to be brought to collect the rent, a written fourteen day notice requiring the payment of rent must be sent to the tenant demanding payment or possession of the premises. Answers in summary proceedings may contain any legal or equitable defense or counterclaim, and the court may render an affirmative judgment on the counterclaim. Requests for adjournment of such proceedings by tenants are more freely granted and payment of use and occupancy during the proceeding is more restricted. A tenant's failure or inability to pay use and occupancy ordered by the court shall not be the basis to dismiss any of the tenant's defenses or counterclaims.

Rent is now defined in the statute to mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling. No fees, charges or penalties other than rent may be sought in a summary proceeding.

> *The new law also makes it a crime to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer, or who has a lease for the dwelling unit.*

In cases where a landlord obtains a default judgment against a tenant in a landlord-tenant proceeding, the landlord is prohibited from recovering attorneys' fees.

In summary proceedings, payment to the landlord of the full amount of rent due prior to the date of the hearing renders the entire proceeding moot. The landlord must accept the payment when tendered.

Courts will now have the authority to permit a tenant to remain in occupancy for up to one year if the tenant cannot find, after making reasonable efforts, a similarly suitable dwelling in the same neighborhood. Fortunately, this provision will not apply to objectionable conduct holdover cases where the landlord established that the tenant's conduct was objectionable.

Landlords are prohibited from charging any late fees to a tenant unless the rent is not paid within five days of the date due. A late fee may not exceed fifty dollars or five percent of the monthly rent, whichever is less.

Landlords may not charge fees for the processing, review or acceptance of a rental application, before or at the beginning of a tenancy, except background checks and credit checks, and then such fee cannot exceed the lesser of the actual cost of such search or twenty dollars.

Such limitations on late fees and processing fees will also apply to cooperatives and condominiums and will likely apply to fees charged in connection with the review of purchase or leasing applications. Sublet fees not related to background or credit checks may not be permitted.

The new law also makes it a crime to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer, or who has a lease for the dwelling unit, except as permitted by law pursuant to a warrant of eviction or other order of court. The use of or threats to use force or harassment to accomplish an eviction is a class A misdemeanor, that can subject the violator to imprisonment for up to a year and civil penalties from $1,000 to $10,000 for each violation.

There will be much commentary on the new law as cases testing or applying its provisions wend their way through the court system. We will keep you advised of major developments.

ABOUT THE AUTHOR

David L. Berkey *is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's Cooperative and Condominium Practice. A seasoned litigator, Mr. Berkey is a trusted advisor to numerous cooperative and condominium boards, banks, insurance companies and individuals. Mr. Berkey can be reached at dlb@gdblaw.com.*

Properly Managed Committee

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In deciding whether or not to establish committees, it is important to:

- create clear mission statements which define the parameters, the specific purpose and goals, and the scope of each committee;
- decide if members will be permitted to vote or simply advise;
- set limits on the number of members;
- decide if members must be in good standing to participate; and
- decide if the committee is limited to residents versus owners.

Each of these factors should be clearly expressed to potential committee members from the start.

Committees can be perpetual or project-specific. Common types of ongoing committees are social, gardening, building/structural, safety, financial, capital improvements, and communication. Project-based committees can assist with a specific proposal in performing due diligence, getting feedback, and gathering votes. Some boards do not form any standing committees; rather wait until a need is identified, and then form a provisional committee to carry out the necessary charge.

Committees can be a practical way to structure and manage the board's work. Sometimes a smaller group can be more focused and efficient in dealing with issues than the full board. A committee is created to provide counseling and advice for the board or to handle a task on the board's agenda. Any recommendation made by a committee needs to be approved by the board. But remember, the board is not obligated to adopt or implement committee suggestions. Committees are more effective when their charter and scope of work is clearly defined by the board.

A streamlined committee structure makes board work easier. The formation of an effective committee comprised of building residents and owners, when there are both ongoing concerns as well as project specific matters, can be invaluable if properly generated, guided, and governed.

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Michelle P. Quinn *is a partner at Gallet Dreyer & Berkey, LLP. She represents businesses and individuals in commercial and residential landlord-tenant litigation, including summary proceedings. Ms. Quinn has substantial experience with Mitchell-Lama Cooperatives, Redevelopment Companies, and tenancies protected by New York State Rent Regulations. Ms. Quinn can be reached at mpq@gdblaw.com.*

Defamation

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Ultimately, the Judge dismissed the defamation claim, and Mr. Bielak dodged the bullet. It is unclear whether the same claim, labeled as a "slander of title," would have survived, or why that too shouldn't be protected by a defense of privilege.

So, for the time being, people who have mechanic's liens filed against their property have only a few options available to them to push back against the lienor, or make the lien go away. Pending a reversal on appeal, it would appear that a claim for defamation is no longer on the table.

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