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EFFECT OF NEW LEGISLATION REGARDING RESIDENTIAL LEASES ON COOPERATIVES AND CONDOMINIUMS

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Introduction

As you may have heard or read, last month, comprehensive and far-reaching amendments to the laws affecting residential leases were enacted in New York State. The impetus for such legislation was that the statutes governing rent stabilization and rent control protections were due to expire and the New York State Legislature was of the mind to permanently extend and substantially expand these protections. However, the new laws have cast a wide swath, extending their reach to non-regulated residential leases, which includes the leasing of condominium units and the subleasing of cooperative apartments in New York City. In addition, whether by design or as an unintended consequence, several of the new laws appear to apply to cooperative proprietary leases and the relationship between cooperative corporations and their tenant-shareholders. Indeed, while certain provisions of existing statutes governing residential tenancies expressly exempt cooperative proprietary leases from their coverage, the newly enacted provisions conspicuously do not.

We anticipate that these new laws will be the subject of future litigation and judicial interpretation. A lawsuit in federal court challenging the constitutionality of the new laws has already been commenced. Lobbying efforts also are underway to convince legislators to amend the new provisions to exclude cooperatives from their coverage. However, we want to make you aware of various new requirements that, at least on their face and for the time being, appear to apply to cooperative and condominiums.

Limitations on Application Fees

The new law limits the fee that can be collected at the beginning of a tenancy of any dwelling unit, for the processing, review or acceptance of a leasing application, to the actual costs of a credit and background check or **twenty dollars**, whichever is less. In the case of rentals of cooperative apartments and condominium units, managing agents typically charge a fee for processing a lease application that far exceeds this twenty-dollar limitation, and condominium and cooperative apartment owners often require their prospective tenants or subtenants to pay this fee. In order to comply with the new limitations, we recommend that managing agent leasing applications be revised to shift all lease application expenses to the unit owner or shareholder, as the case may be, except for the actual credit and background checks (which may not exceed twenty dollars). If an apartment owner now wants to pass along the managing agent's fees to the tenant or subtenant, to the extent that it exceeds twenty dollars, it will have to be built into the rent payable under the lease.

Limitations on Late Fees

The new law provides that, for any dwelling unit, no fee may be demanded or charged for the late payment of rent unless such rent payment has not been made within **five** days of its due date and the late fee may not exceed **fifty dollars** or **five percent** of the monthly rent, whichever is less. Many cooperatives have late fee policies authorized by their proprietary leases which provide for the imposition of late fees in amounts higher than the

amounts now permitted under the new law. To the extent that those policies provide for the payment of late fees in amounts that exceed the statutory limits, they will no longer be enforceable. The new law does not apply to late fees that are payable by a condominium unit owner to a condominium association for the late payment of common charges, as may be authorized by a condominium's governing documents, because condominium common charges are not rent.

Purchase Applications

The new law prohibits a landlord of a residential premises from refusing to rent an apartment based upon a prospective tenant's involvement in a pending or prior landlord-tenant proceeding. The law creates a "rebuttable presumption" that a landlord is in violation of this section of the new law if it is established that the landlord or its agent "requested information from a tenant screening bureau relating to a potential tenant or otherwise inspected court records relating to a potential tenant and the…[landlord] subsequently refuses to rent or offer a lease to the potential tenant." This provision is designed to prohibit the practice of landlords "blacklisting" of tenants who were involved in disputes with prior landlords. However, the provision as drafted could very well be interpreted to apply to the review by coop boards of purchase applications; and if so, it would significantly alter the cooperative landscape by restricting the board's otherwise unfettered right (except for existing prohibited discriminatory reasons) to approve or disapprove prospective purchasers.

The scope of this new prohibition and its applicability to cooperatives will have to await judicial interpretation or further legislative clarification. In addition, it is arguable that there is no private remedy for a violation of this provision of the new law because it gives only the New York State Attorney General the power to bring a proceeding when the Attorney General believes there has been a violation of the provision "for a judgment enjoining the continuation of such violation and for a civil penalty of not less than five hundred dollars, but not more than one thousand dollars for each violation."

Security Deposit and Advance Payments of Rent/Impact on Requiring Maintenance Escrows

Amending New York State's statutory provisions that deal with security deposits, the new law provides that "in residential premises…[n]o deposit or advance shall exceed the amount of one month's rent…" As drafted, the new provisions could be interpreted to prohibit the practice by some cooperatives of conditioning the approval of certain prospective purchasers on the purchaser's agreement to deposit, in escrow, an amount in excess of one month's maintenance (e.g., one year's maintenance) in order to secure the prospective payment of maintenance. The new law also prohibits a cooperative shareholder who is subleasing his or her apartment or a condominium unit owner who is leasing his or her unit from negotiating business terms of a free-market lease that would require the payment of more than one month's security or more than one month's rent in advance.

Changes to Summary Non-Payment Proceedings

Significant changes to the law affecting landlord-tenant summary proceedings will have the effect of curtailing a legal remedy available to cooperative corporations in cases where tenant-shareholders are delinquent in paying maintenance, assessments and/or other charges. Because there is a landlord-tenant relationship between a cooperative corporation and a tenant-shareholder by virtue of the proprietary lease, cooperative corporations have been allowed to bring statutory summary nonpayment proceedings in Housing Court to recover maintenance and other charges that would be considered maintenance (such as assessments) or that are otherwise defined in the proprietary lease as "additional maintenance" or "additional rent." These proceedings are summary in nature (at least in theory) and can result in the cooperative corporation recovering a judgment awarding possession of an apartment when the rent adjudged to be due is not paid.

While cooperative corporations may still bring nonpayment summary proceedings, the new law narrowly defines "rent" in the context of such proceedings to "mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement," and further provides that "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding… notwithstanding any language to the contrary in any lease or rental agreement." For cooperative corporations, this means certain charges that tenant-shareholders are regularly required to pay, such as electricity or other utility charges, will not be recoverable in a summary nonpayment proceeding, even if the proprietary lease expressly characterizes such charges as "additional maintenance." It also casts into doubt whether unpaid special assessments may be sought in such a proceeding. In the case of special assessments for shortfalls in operating income or a capital improvement, we think that a strong argument can be made that the language customarily set forth in the proprietary lease can support a claim that such special assessment meets the definition of "monthly or weekly amount charged in consideration for the use and occupation of a dwelling . . ." Nevertheless, this argument may be challenged in Court by a tenant-shareholder who is sued in Housing Court for such arrears. Thus, we will confer with the board and/or its managing agent before including any assessments in a rent demand or Housing Court petition so that the board can make the determination as to how it wishes to proceed in this regard.

The bottom line is that in situations in which a cooperative corporation wishes to enforce a tenant-shareholder's obligation to pay anything other than the base monthly maintenance, such as assessments, utility charges, late charges, interest and other charges, the cooperative corporation may have to consider commencing a traditional plenary lawsuit in Supreme Court, a much lengthier and more cumbersome legal process.

Lease Renewal and Rent Increase Notice Requirements

Although perhaps not directly affecting the operation of cooperatives and condominiums,

Boards and their managing agents should be aware of certain new notice requirements that will apply to subleases between cooperative shareholders and their subtenants, and leases between condominium unit owners and their tenants. Until now, if a lease was entered into for a fixed term (such as a one-year term), the parties were presumed to understand that upon the expiration of such term, the tenant was obligated to vacate the premises unless a new lease or an extension was negotiated with the landlord. Under the new law, if a landlord intends to not renew a lease, or intends to raise the rent by **five percent** or more upon the expiration of such lease, then the landlord is obligated to give the tenant written notice, prior to the expiration of the lease, of the landlord's intention to not renew or to raise the rent by more than five percent. Such notice must be served thirty, sixty or ninety days prior to the lease expiration date, depending upon the duration of the lease term and the time that the tenant has been in possession. A failure to give the required notice will result in an extension of the tenancy under its existing terms until the notice is given and the notice period has expired.

Conclusion

The new laws include many other provisions that have not been addressed above. The purpose of this newsletter is to highlight the most pertinent provisions that may affect cooperatives and condominiums and that may require boards and managing agents to consider revising their current policies. Our firm is available to assist you in that regard or to answer any questions you may have regarding these new laws.