Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Issue: # 3 **LANDLORD TENANT ALERT** 12/1/11

Dear Clients, Colleagues, and Friends:

As you may know, Calabro & Associates, P.C. merged with Moritt Hock & Hamroff LLP effective June 1, 2011. Gregory Calabro joined the firm as a Partner along with Jacqueline Kahman as an Associate.

Since the merge, our NYC office expansion is well underway. We have added an additional 2,000 square feet to our existing office space in order to better accomodate our growing practice. The new space includes the addition of 4 offices, a second large board room, 3 work stations, a file room, as well as a newly expanded reception area. The construction is nearly complete.

The L&T practice continues to be based in the New York Office.

In this issue, you will learn about the recently enacted Rent Act of 2011; an Appellate Court decision which ruled that the landmark Court of Appeals involving Stuy-Town and Peter Cooper Village should apply retroactively; an exception to the statute of limitations in calculating rent overcharges; and a recent case concerning a commercial tenant's obligation to replenish its security rent deposit.

Commercial Landlord Not Entitled To Replenishment Of Security Deposit From Tenant Or Guarantors That Was Credited To Unpaid Rent

In 413 West 14 Associates v. Santorelli, Harris and Dogmatic, Inc., 101303/10, Supreme Court Justice Gische held that neither the tenant, Domatic, Inc., nor the guarantors, Michael Santorelli and Laurel Harris, were required to replenish the security deposit that the landlord had credited to unpaid rent before the tenant vacated the premises.

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In this case, the tenant notified the landlord pursuant to a written ninety (90) day notice that it intended to vacate the premises. The landlord thereafter notified the tenant prior to tenant's vacatur that the landlord was crediting the security deposit to the rent arrears and that the security deposit had to be replenished. When the tenant did not replenish the security deposit, landlord served tenant with a notice to cure. When the tenant still did not replenish the security deposit, landlord served tenant with a notice of termination. Tenant thereafter vacated the premises. Landlord then commenced the instant action seeking among other things, unpaid rent and replenishment of the security deposit by the tenant and guarantors.

Although the provisions of the lease required that the tenant replenish the security deposit within ten (10) days of notice from the landlord, the guaranty held that the guarantors were only liable until the tenant vacated the premises and that the security deposit would be credited to any monies due by tenant. The court held that the security deposit was not "additional rent" but rather "liquidated damages" held in escrow that is used to ensure that the tenant complies with the terms of the lease, and as such, it was axiomatic that neither the tenant, nor the guarantors, would be required to replenish the security deposit upon vacating the premises.

Practice Tip: Never apply security deposit to rent arrears; when rent remains unpaid have your attorneys prepare and serve a rent demand as a predicate notice to a summary non-payment eviction proceeding.

Rent Act of 2011

On June 24, 2011, the New York State Legislature passed, and the Governor signed, the Rent Act of 2011.

The following are the major changes that were put into effect with the passage of this bill that will remain in effect until June 15, 2015:

1. Deregulation high-rent/vacancy threshold increased from $2,000 to $2,500 per month.
2. Deregulation high-rent/high-income threshold increased from to $2,000 to $2,500 per month and from $175,000 to $200,000 in income in the prior two years.
3. Vacancy increases may now only be taken one time in any calendar year.
4. Individual apartment improvements rent increases in buildings of thirty-six (36) or more apartments was reduced from 1/40th to 1/60th of the cost incurred by the owner.

Appellate Division Holds That Roberts v. Tishman Speyer Prop. L.P. Applies Retroactively

The Appellate Division First Department in Gersten v. 56 7th Avenue LLC, et al. ruled that that the Court of Appeal's decision in Roberts v. Tishman Speyer Prop. L.P. should apply retroactively. As you will remember, in the Roberts case, the Court of Appeals held that thousands of unregulated market apartments in Stuyvesant Town and Peter Cooper Village were illegally removed from rent stabilization while the owners received tax benefits under the J-51 tax program. In affirming the Appellate Division's decision, the Court of Appeals in the Roberts case held that owners who receive J-51 benefits forfeit their luxury decontrol rights even if their buildings were already subject to the Rent Stabilization Law.

Although the Gersten decision is a huge victory for tenants-at-large throughout New York, the tenants in Gersten actually lost their appeal because the Appellate Division gave preclusive effect to an eleven (11) year old luxury decontrol order by the DHCR. The Appellate Division held that while tenants were not barred by the statute of limitations from challenging the DHCR order, the tenants were precluded from challenging the DHCR order under administrative finality principles because the tenants had an ample opportunity to challenge the owner's application for luxury decontrol as being precluded by the receipt of J-51 benefits.

Rent Reduction Orders and The Four-Year Statute of Limitations For Rent Overcharges

The statute of limitations on a rent overcharge case is four years. The court usually does not look back beyond the rent registration more than four years prior.

Nevertheless, the Court of Appeals has held that when calculating any rent overcharge, the DHCR shall consider Rent Reduction Orders issued *prior* to the four-year statute of limitations period that were in effect during the limitations period. See Matter of Cintron v. Calogero, 15 N.Y.3d 347 (2010).

In a recent Court of Appeals case, Scott v. Rockaway Pratt, LLC, 2011 WL 2183292, 2011 N.Y. Slip Op. 04723, the Court reinstated a Supreme Court holding in New York County which held that a calculation of a rent overcharge should make reference to a 1982 rent reduction order which remained in effect during the four-year statute of limitations period.

Practice Tip: Go to the DHCR and obtain a printout of all DHCR orders to determine whether you are collecting an amount in excess of the legal regulated rent.

Sincerely,

Gregory Calabro, Esq.
Moritt Hock & Hamroff LLP