

# Tenant Buyouts

*For The Next Generation*

ITKOWITZ PLLC

[www.itkowitz.com](http://www.itkowitz.com)

**TENANT BUYOUTS – FOR THE NEXT GENERATION**

By Michelle Maratto Itkowitz, Esq.

ITKOWITZ PLLC

26 Broadway, 21<sup>st</sup> Floor

New York, New York 10007

(646) 822-1805

**www.itkowitz.com**

**mmaratto@itkowitz.com**

Copyright 2016 by Michelle Maratto Itkowitz

No part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted in any form or by any means – electronic, mechanical, photocopying, recording, or otherwise – without the prior permission of the author and publisher. Requests for permission or inquiries about the author should be directed to [mmaratto@itkowitz.com](mailto:mmaratto@itkowitz.com). While every precaution has been taken in the preparation of this book, the author and publisher assume no responsibility for damages resulting from the use of the information herein. Receipt of this book by any person or entity does not create an attorney and client relationship between the recipient and the author or her firm.

By the way: YES! This is legal advertising. And we hope it works!

**Contents**

I. WHY THIS BOOKLET ON TENANT BUYOUTS IS EXTREMELY DIFFERENT FROM THE BOOKLET I WROTE ON TENANT BUYOUTS THREE YEARS AGO..... 5

II. STEP 1: UNDERSTAND THE PLAYING FIELD: THE CURRENT CLIMATE – TENANTS GOT THE MEMO – *IF THEY MOVE, THEN OWNERS MAKE WAY MORE MONEY*..... 6

III. STEP 2: UNDERSTAND THE TENANT – THE ECONOMICS OF A BUYOUT (FROM THE TENANT’S POINT OF VIEW)..... 8

    A. The Typical Economics of a Buyout From the Tenant’s Point of View ..... 8

    B. Then Again...Tenants are Like Snowflakes... ..... 9

IV. STEP 3: LOOK BEFORE YOU LEAP – *STRATEGIC PLANNING*– THIS STARTS BEFORE THE MULTI-FAMILY ACQUISITION – RENT STABILIZATION DUE DILIGENCE..... 10

V. STEP 4: STUFF NOT TO DO – NO HARASSMENT, NO FRIVOLOUS LITIGATION, AND NO SUPERS!..... 12

    A. No Harassment ..... 12

    B. No Frivolous Litigation – This Just Creates Leverage for Tenant ..... 16

    C. No Supers..... 17

VI. STEP 5: YOUR OPENING MOVE -- TELL TENANTS EARLY AND DIRECTLY THAT YOU ARE SEEKING TO DISPLACE THEM ..... 18

VII. STEP 6: LOW-HANGING-FRUIT TENANTS -- LOW BUYOUT AMOUNTS AND NO LAWYERS – THE VULNERABILITY OF THESE SETTLEMENTS AND THE PROPER USE OF THESE TACTICS..... 19

VIII. STEP 7: KEEP OTHER WIN-WIN SOLUTIONS IN MIND ..... 20

IX. STEP 8: IDENTIFYING THE HOLDOUT(S) AND DEALING WITH HIM (OR HER) *FIRST*.  
21

X. STEP 9: DEMOLITION EVICTION – A REAL POSSIBILITY ..... 23

    A. Demolition Eviction – The Statute and Regulations ..... 23

    B. Permission from DHCR ..... 23

**Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

C. Proof Owner Has the Money for the Project ..... 24

D. Building Plans Approved ..... 25

E. Pay Tenant Moving Expenses..... 27

F. Pay Tenant \$5K Stipend ..... 27

G. Relocate Tenant OR Pay an Additional Stipend Based on an Established Formula ..... 27

    1. Pay an Additional Stipend Based on an Established Formula ..... 27

    2. Relocate the Tenant ..... 28

    3. Temporary Relocation ..... 29

H. Who is the “Owner” ..... 29

I. What is “Demolition”? ..... 30

J. DHCR Application Process and No Rent Increases While Application Pending ..... 32

K. You Still Need a Lease, a Termination Notice, and a Housing Court Proceeding ..... 32

L. The Sound Housing Act – Rent Control Tenants and Demolition Eviction ..... 33

M. The Demolition Eviction Hearing..... 34

N. The Demolition Eviction Appellate Process ..... 35

O. Demolition Eviction’s Relationship to Other Litigation Between the Parties ..... 36

P. The Big Objection to Demolition Eviction – And Why I Think It’s a Stupid Objection ..... 36

XI. STEP 10: DEMOLITION EVICTION’S AFFECT ON SETTLEMENT NEGOTIATIONS ..... 38

ABOUT THE AUTHOR..... 39

**I. WHY THIS BOOKLET ON TENANT BUYOUTS IS EXTREMELY DIFFERENT FROM THE BOOKLET I WROTE ON TENANT BUYOUTS THREE YEARS AGO.**

Three years ago, when I wrote a booklet on Tenant Buyouts, it was a very different piece than this one. So different, in fact, that I deleted the earlier book from my website. What changed?

Well, for one thing, I changed. I evolved as a lawyer, a lawyer who represents both landlords and tenants in buyout negotiations. I gained new insights that I think are very much worth sharing.

For another thing, tenants have simply become more educated about both the value to a landlord of their vacatur of a Rent Stabilized apartment and the value to themselves of a lump sum of money after:

- Paying their contingency fee lawyers,
- Paying taxes,
- Paying to move, and
- Paying a new, higher rent.

Finally, the pace of development in New York City has become furious, and that has been transformational for so many aspects of real estate law, including Tenant Buyouts.

**The problem is that the real estate community and most of their lawyers simply have not kept up with the changing climate regarding Tenant Buyouts.** They are still doing things today the same way they did five years ago, and expecting the same or better results (the results were often not that good five years ago). **There seems to be no learning, no adjustment, no growth.** I have the *SAME* conversations with owners and managers repeatedly. Owners want to do things the same old way – dance around the tenant, pressure the tenant, rant about the tenant. ***But none of that works to recover the premises.*** It is as if they keep going to a dry well again and again and expecting that one day it will have water.

**Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

This booklet (I hope) offers a better way for a landlord to approach and achieve a Tenant Buyout. **And, of course, as with ALL my publications, this book is as useful for tenants as it is for landlords.**

**II. STEP 1: UNDERSTAND THE PLAYING FIELD: THE CURRENT CLIMATE – TENANTS GOT THE MEMO – IF THEY MOVE, THEN OWNERS MAKE WAY MORE MONEY.**

You must understand the current playing field for tenant buyouts. Tenants have gotten the memo: If they move, the owners make way more money.

New York Times, December 24, 2015:



NY Post, October 6, 2015:



**Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

Crains, October 5, 2015:

Real Estate NEWS | REAL ESTATE  
October 5, 2015 | Updated 10/07/2015

## Developer pays two tenants \$25 million to vacate their apartments

Brick, April 7, 2014:

RENT

What's a buyout really worth? Use this calculator to figure it out

City Realty, June 21, 2011:

CITYREALTY

BUY

RENT

SELL

NEW DEVELOPMENTS

MARKET INSIGHT

NEIGHBORHOODS



CityRealty > CityRealty Insider > Paid (To) Leave: Lucky Tenants Hold Out For A Buyout

## Paid (To) Leave: Lucky Tenants Hold Out For A Buyout

JUNE 21, 2011

SFist, July 31, 2014:

 sfist.com

<http://sfist.com/2014/07/31/how-much-should-you-be-getting-if-y.pl>

## How Much Should You Get Paid If Your Landlord Wants To Buy You Out Of Your Rent-Controlled Apartment?

by Jay Barmann in News on Jul 31, 2014 3:05 pm

**III. STEP 2: UNDERSTAND THE TENANT – THE ECONOMICS OF A BUYOUT (FROM THE TENANT’S POINT OF VIEW)**

**A. The Typical Economics of a Buyout From the Tenant’s Point of View**

Securing a buyout is a balancing act – how much is enough money to get the tenant to go, but not so much that paying it obviates the reason for getting the tenant out in the first place? Consider two different tenancies.

Tenant #1:

Apartment Status: Free Market, 22 months left on the lease.  
Rent: \$3,500.00 per month  
Bedrooms: One  
Length of Tenancy: 2 years  
Tenant Age: 31  
Other Occupants: None  
Tenant’s Profession: Tech. Made a company. Doing well the last two years. Future uncertain.  
Credit Score: Decent  
Ties to Neighborhood: Likes the neighborhood and the cool bars and restaurants, but does not see himself raising a family there. May move back to where family is in Philadelphia, depends on his job. Sees himself owning a home one day.

Tenant #2:

Apartment Status: Rent Stabilized  
Rent: \$1,975.00 per month  
Bedrooms: Two  
Length of Tenancy: 15 years  
Tenant Age: 59  
Other Occupants: Tenant’s daughter and granddaughter  
Tenant’s Profession: Works for the City  
Credit Score: Low.  
Ties to Neighborhood: Goes to church in neighborhood, many friends there, grew up in the area, has rented all her life.



### **Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

Now let us assume that it does not make sense to offer the tenant a dime more than \$40,000.00 to get out of the way.

Obviously, Tenant #1 is more likely to take the buyout than Tenant #2. Tenant #1 is not protected by Rent Stabilization like Tenant #2, pays more rent than Tenant #2, and is less attached to the neighborhood than Tenant #2. Tenant #1 is younger and more nimble than Tenant #2. Additionally, Tenant #1 has a much better chance than Tenant #2 of being able to take the \$40k and get a mortgage for a nice co-op or condo because he has a better credit score and has made more money over the last 24 months. Fundamentally, Tenant #1 sees himself as a temporary renter and a homeowner someday. Tenant #2 already has the perfect living situation – a two-bedroom, affordable, Rent-Stabilized apartment that she can pass on to her daughter.

Tenant #2 is probably not taking a \$40,000.00 buyout.

#### **B. Then Again...Tenants are Like Snowflakes...**

Tenants are like snowflakes, no two are identical. Tenants are people, with lives, obviously. You may believe, based on what little you know about a certain tenant, that the tenant has little incentive to move. But you never know who just got a job offer in San Francisco, or who's girlfriend wants to move to Thailand, or whose knees can't take the stairs on the 5<sup>th</sup> floor walk-up anymore, or who just won the lottery for a new construction Rent Stabilized apartment in Brooklyn (I represented a tenant like this recently). There are many reasons to move. And a landlord's buyout offer might come at the perfect time. You cannot know until you ask. The key is to ask NICELY – we will get to that below.

**IV. STEP 3: LOOK BEFORE YOU LEAP – STRATEGIC PLANNING– THIS STARTS BEFORE THE MULTI-FAMILY ACQUISITION – RENT STABILIZATION DUE DILIGENCE.**

**The process of de-tenanting a development site or a major reconstruction project should begin BEFORE the building is purchased!**

The old saying goes that the three most important things about real estate are: location, location, and location. Keeping that rule in mind, one should add our rule about the three other most important things about multi-family real estate, and those things are: the tenancies, the tenancies, and the tenancies. Hello! ***A building's value is a function of the tenancies.***

My clients often retain us after they buy buildings without knowing very much about the tenancies. They then bring their landlord and tenant legal problems to us. So often we say to a client, *"Client, why didn't you ask us about this situation BEFORE you went to contract, or, at least, while you were in contract? We could have mitigated the damage (or at least predicted it) had we known about this sooner."*

Thus, we suggest that owners, managers and developers consult us during the property acquisition phase for Rent Stabilization Due Diligence<sup>1</sup>. Indeed, we can look at a building and see it in a way that an engineer, architect or transactional lawyer cannot. We see what is at the heart of the building – the tenancies.

The Rent Stabilization Due Diligence Process does the following things:

- (1) We look for anything about the building or the tenancies that would stymie legal action, should it be necessary.
- (2) We look for overcharges.
- (3) We look for vulnerabilities in Rent Stabilized tenancies.
- (4) We look for vulnerabilities in allegedly Free Market tenancies, which very well might manifest as Rent Stabilized (there is a big trend for re-regulation with J-51 and *Altman*.)

---

<sup>1</sup> See our booklet on Rent Stabilization Due Diligence for Multi-Family Acquisitions <http://www.itkowitz.com/due-diligence>.

- (5) We enter into an interactive process with the owner, whereby a strategic plan for achieving the building's goals is formulated – be that to maximize the rent roll or de-tenant or something in between.

We refer to the process as “Due Diligence”, but we can perform the analysis before a contract is entered into, during a due diligence period, or after a property is purchased. We have performed this service for purchasers, sellers, and lenders.

*EXAMPLE OF WHY RENT STABILIZATION DUE DILIGENCE IS SO AWESOME*

*Two guys in Brooklyn bought an eight family building with only three Rent Stabilized apartments occupied. One of the occupied Rent Stabilized apartments was clearly not being used by the tenant as her primary residence. In fact, the tenant lived elsewhere and she was using the apartment solely as an office for her party-planning business.*

*The new owners were excited to start a case against this tenant. But they could not! The tenant's Rent Stabilized lease had long ago expired. You can ONLY do a non-primary residence case by first sending what is known as a “Golub Notice”, a special notice of non-renewal that can only be tendered between 150 and 90 days of the lease expiration. If there is NO LEASE, the lease can't end. NO ENDING DATE means no Golub Period. NO GOLUB PERIOD means NO NON-PRIMARY RESIDENCE CASE. The only thing these new owners could do was to send this tenant, who was so clearly not living there, a new Rent Stabilized lease and wait two years to do a non-primary residence case!*

*IF THEY HAD COME TO US BEFORE (or even during) the contract, we could have advised that the lease should be immediately renewed, and therefore, shaved months off the project.*

**V. STEP 4: STUFF NOT TO DO – NO HARASSMENT, NO FRIVOLOUS LITIGATION, AND NO SUPERS!**

**A. No Harassment**

The New York City Housing Maintenance Code was amended last summer (2015) (the new stuff is in § 6) to seek to prevent owners from harassing tenants regarding buyouts. The new law went into effect in December 2015. I think all owners and managers should read it, so below my summary of what the law says I include the whole statute.

You cannot seek to secure a buyout by using:

- force
- threats of force
- interruptions or discontinuances of essential services
- commencing repeated baseless or frivolous court proceedings
- removing tenant's possessions
- tampering with the entrance or the lock
- threatening, intimidating, or using obscene language
- too frequent communication, at such unusual hours or in such a manner as can reasonably be expected to abuse or harass
- communication at the place of tenant's employment, without prior written consent
- false information

Tenant can notify landlord in writing that he or she does not wish to be contacted by landlord for 180 days. Landlord must honor this.

Before contacting a person to discuss a buyout (and then again every 180 days thereafter if discussions are still continuing), Landlord must disclose in writing:

- (1) the purpose of such contact,
- (2) that such person may reject any such offer and may continue to occupy such dwelling unit,
- (3) that such person may seek the guidance of an attorney regarding any such offer and may, for information on accessing legal services, refer to The ABCs of Housing guide on the department's website,
- (4) that such contact is made by or on behalf of such owner, and
- (5) that such person may, in writing, refuse any such contact and such refusal would bar such contact for 180 days, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer.

Finally, there is a catch-all definition of harassment at § 27-2004 (48)(g):

...other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.

Here is the actual law! NYC Admin Code – Title 27, Chapter 2, the Housing Maintenance Code:

§ 27-2004 (48). Except where otherwise provided, the term "harassment" shall mean any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following:

a. using force against, or making express or implied threats that force will be used against, any person lawfully entitled to occupancy of such dwelling unit;

b. repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit;

c. failing to comply with the provisions of subdivision c of section 27-2140 of this chapter [post building's serial number];

d. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;

e. removing the possessions of any person lawfully entitled to occupancy of such dwelling unit;

f. removing the door at the entrance to an occupied dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying a key to the new lock to the persons lawfully entitled to occupancy of such dwelling unit;

f-1. contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer;

f-2. contacting any person lawfully entitled to occupancy of such dwelling unit to offer money or other valuable consideration to induce such person

to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, unless such owner discloses to such person in writing (i) at the time of the initial contact, and (ii) in the event that contacts continue more than 180 days after the prior written disclosure, at the time of the first contact occurring more than 180 days after the prior written disclosure:

- (1) the purpose of such contact,
- (2) that such person may reject any such offer and may continue to occupy such dwelling unit,
- (3) that such person may seek the guidance of an attorney regarding any such offer and may, for information on accessing legal services, refer to The ABCs of Housing guide on the department's website,
- (4) that such contact is made by or on behalf of such owner, and
- (5) that such person may, in writing, refuse any such contact and such refusal would bar such contact for 180 days, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer;

f-3. offering money or other valuable consideration to a person lawfully entitled to occupancy of such dwelling unit to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy while engaging in any of the following types of conduct:

- (1) threatening, intimidating or using obscene language;
- (2) initiating communication with such frequency, at such unusual hours or in such a manner as can reasonably be expected to abuse or harass such person;
- (3) initiating communication at the place of employment of such person without the prior written consent of such person; or
- (4) knowingly falsifying or misrepresenting any information provided to such person; or

g. other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are

intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.

**B. No Frivolous Litigation – This Just Creates Leverage for Tenant**

You either have grounds to sue a Rent Stabilized tenant for eviction. Or you do not. Some common grounds for the eviction of a Rent Stabilized tenant are:

- Non-primary residence (but for this to work, the apartment cannot be the tenant's primary residence);
- Nuisance (but for this to work, the tenant has to be committing a significant and provable nuisance, which means more than one isolated incidence of bad behavior);
- Chronic nonpayment of rent (but for this to work, there have to be several cases actually brought for nonpayment in court where there are not abatements for violation of the warranty of habitability);
- Nonpayment of rent (but payment at any point before the warrant of eviction issues is a defense to nonpayment);
- Owner's use of the apartment (but for this to work, Owner or his immediate family need to be able to prove that they will actually live there, and this is only a temporary exemption from Rent Stabilization anyway).

Most of the time, most tenants will be in compliance with their lease and statutory obligations and there will be no grounds for eviction. I will NEVER understand why landlords and their lawyers think it is a clever idea to bring a baseless case against a tenant when attempting to secure a buyout.

There are some traps in nature, like a spider web, where when the creature caught in the trap struggles, it becomes more tightly caught. When a Rent Stabilized tenant is blocking a project, owner is caught in a trap. Unfortunately, many owners feel that they *MUST do something*. But, in fact, the captors (the tenants and their contingency fee lawyers) are COUNTING on the stymied owner struggling. A tenant looking for a buyout usually wants to cost owner time, energy, and money.



There is absolutely no point to the “frivolous holdover”. A well-represented tenant in on a groundless holdover isn't going to cower in fear. She is going to counter sue you for an overcharge and legal fees. She may do a separate discrimination or harassment case, and she's going to start calling HPD and doing HP proceedings against you. You want her out of an empty building and suddenly you are paying to fix the paint in the hallways of a building you want to knock down because HPD has ordered you to. Now you are struggling like a trapped fly and NONE of it shakes the tenants loose, it just expends your energy. This will: (a) show weakness, and (b) expend time and money on nothing. Owner will not be wearing the tenant down; owner will be wearing himself and his partners down.

Strength is not always about aggression or immediate action. Sometimes strength is about planning and patience. Wait until the spider is asleep, and then deftly free one arm and use that to free the other. Demolition eviction, discussed at length below, is a good tool for cutting the spider web of a Holdout Tenant.

**C. No Supers**

OMG please do not send the existing super to speak to the tenants about a buyout first. Why does anyone think this is a good idea? You have no idea: (a) what the super is really saying, and (b) whose side the super is really on. Supers have a way of playing the landlords and the tenants against each other. This is a major project for you and you are sending the super (who until 5 minutes ago did not even work for you) in to negotiate on your behalf? Why?

**VI. STEP 5: YOUR OPENING MOVE -- TELL TENANTS EARLY AND DIRECTLY THAT YOU ARE SEEKING TO DISPLACE THEM**

Another thing that I will never understand is why new owners think they should tiptoe around the tenants upon meeting them after the acquisition of a building, which owner wishes to de-tenant. I see this again and again. *“When we introduce ourselves to the new tenants don’t say anything about the project!”* Why? It isn’t exactly a secret. Most tenants have been living in an increasingly empty building as seller failed to re-rent whenever a tenant left. Again, see above, tenants have gotten the memo – they know you want them out.

The method that I advise my owner-clients to employ is this. Start, of course, with a written notice as per the anti-harassment laws above. Then introduce yourself in person to your tenants – shake their hands, be courteous to them, look the tenants in the eye and do not be evasive, and say something like this:

The essence of life is change, especially in this vibrant city. This building was built in 1910. It is 2016. This building is obsolete. Our plans are to demolish the building and build even more housing units. We understand and honor that this is and has been your home. As we move forward in our process, we want to make your transition as painless as we are possibly able to. We are open to discussing a buyout, at your convenience.

Own your agenda and be honest with the tenants – that is the ultimate sign of your respect for them as human beings and your personal strength and confidence in your project.

**VII. STEP 6: LOW-HANGING-FRUIT TENANTS -- LOW BUYOUT AMOUNTS AND NO LAWYERS – THE VULNERABILITY OF THESE SETTLEMENTS AND THE PROPER USE OF THESE TACTICS.**

As discussed above, some tenants will be ready to go for reasonable amounts as soon as you offer a buyout (especially if you do so directly as I suggest above.)

If you buy out a Rent Stabilized tenant who has no lawyer for a low sum, however, and within a reasonable period of time thereafter the tenant gets a lawyer and comes back to say they made a mistake, then the court is likely to let the tenant out of the agreement and restore the Rent Stabilized tenancy. *Tabak v. Vargas*, 43 Misc3d 143(A) (AT 1st dept. 2015) (While a stipulation is essentially a contract and should not be lightly set aside, the court possesses the discretionary authority to relieve parties from the consequences of a stipulation “if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it” ... In this case, tenant, now represented by counsel, has demonstrated that she has a potentially meritorious rent overcharge claim, which should not be deemed forfeited by her uncounseled decision to consent to judgment. Under the circumstances, we sustain the court's discretionary determination to vacate the stipulation ... In doing so, we express no view as to the ultimate outcome on the merits of the rent overcharge claim.)

This is an old conundrum for anyone vacating a building. If the tenant has a lawyer the deal is solid. But if the tenant has a lawyer the tenant will want more money. I cannot solve that for you. I can only tell you your options.

I often prepare a short agreement for unrepresented tenants. Such agreement will protect owner LESS than my normal thick buyout package. But that doesn't matter because NO agreement can protect owner fully from an unrepresented tenant. And the lighter agreement will be less likely to scare the tenant off. We call this the “low hanging fruit agreement”.

## **VIII. STEP 7: KEEP OTHER WIN-WIN SOLUTIONS IN MIND**

There are other ways to induce a tenant to move that have nothing to do with harassment, litigation, or buyouts.

I have seen owners take a \$40,000.00 buyout sum, and buy a condo in the area -- a condo that is nicer than the tenant's current Rent Stabilized Apartment. In that case, owner would give the tenant a Lease-for-Life for the condo unit. When the tenant dies, owner has an appreciated asset.

Another solution is to move the tenant to another Rent Stabilized apartment that the landlord owns or can otherwise locate.

We represented a landlord in a case where a tenant stood in the way of a development project in Manhattan. Tenant wanted money to get out, for sure. But the parties couldn't close in on a number. The tenant was in his late thirties. We sent an associate attorney to one routine appearance, and the associate was in his mid-thirties. The tenant and our associate, two guys in the same age range, had a long afternoon wait on a bench in the court's hallway. They hit it off and chatted. (The tenant, himself a lawyer, was *pro se* so our associate could speak to him without counsel). Via that conversation, we discovered that one of the tenant's biggest issues was getting his three little kids into a good school district so he would not have to pay for private school. The landlord ended up paying for a broker to relocate the tenant on a certain block in Park Slope.

You need to figure out what moves people. You can only do that if you keep civil communications going between owner and tenant.

**IX. STEP 8: IDENTIFYING THE HOLDOUT(S) AND DEALING WITH HIM (OR HER), FIRST.**

You will not hear anybody else say what I will be saying in this section. But here's the truth about "the Holdout" (in my humble opinion).

First (and this part is not controversial), the Holdout can be defined as the tenant who will not get out of the way of owner's project. He (or she) remains in the way until a late date, when the project imminently needs to begin and the owner is losing money. The Holdout uses this position, this leverage, to demand a larger buyout than owner wants or, in many cases, is able to pay.

Here is my big insight about the Holdout – the Holdout is not asking for a million dollars because he is the last man standing. No. The Holdout is the last man standing *because he wants a million dollars!* In other words, the Holdout does not end up in your way by accident. She was planning to be there on Day One.

You also need to consider that it is not so easy to be a Holdout; it is not a path for everyone. My extensive experience over twenty years in this profession is that MOST tenants do not like litigation and do NOT want to take on their landlords. I have so often seen tenants with significant rights walk away from enforcing those rights because to do so means litigation, which is – expensive, time-consuming, and stressful, and might mar their chances of renting an apartment in the future. Most people have real lives – jobs and families and interests. Being a Holdout takes energy. It takes a particular personal strength. Think of every horror movie you have ever seen – what is creepier than an EMPTY building? Think of your own kitchen at 2:00 a.m. when you go downstairs because you can't sleep and it's empty and quiet – *creepy right?!?! Well imagine being the last man or woman living in an otherwise empty building, a building where you know you are implicitly unwanted. That's not everyone's cup of tea. A Holdout is a special person.*

Furthermore, I am asserting that the Holdout is usually identifiable at the beginning of a de-tenanting process. I informally surveyed ten owners and managers that I respect, and half agreed that they knew on Day One who the problem tenant would be.

There is no science here (unless I conduct a bigger survey), but the Holdout usually telegraphs his "Holdout-ness" as soon as you meet him. If he has a lawyer, that's a give-away. If he doesn't have a lawyer yet and you are speaking directly to him, he tells you how well he knows

### **Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

his rights, how hard it will be to move, and asks for more money than owner budgeted for him. He has a victim mentality. He files complaints with HPD and DHCR.

The key is to identify the Holdout and deal with him or her EARLY. I will never understand why owner's say, *"He's going to be a problem, let's leave him for last?"* Really?! What good will that do?

I had a group of young developers in my office 6 months ago. They had just acquired a multi-family building in Brooklyn. About 25% of the apartments were occupied. Upon meeting their new tenants one announced that he wanted \$50k. I asked the young developers, *"Is that what you had budgeted?"* The answer was, *"Yes."* I said, *"Well give it to him."* No, they didn't want to give it to him, they wanted to wait. This made no sense to me. About a week ago they were back in my office. Now this dude is the last guy left and he wants \$1M and he just gave owner's one of those 180 Day Letters – in other words, *"I want \$1M and we can re-discuss it in 6 months, enjoy the carrying costs of your building with no rent roll."* They would gladly give this guy \$50k today! But they can't even approach him for 6 months and now he wants \$1M!

Deal with the Holdout, as with all your thorny problems in your life and business, EARLY.

Will paying the presumptive Holdout a big number jack up the other buyouts in the building? Maybe, maybe not. You can attempt to keep the deal confidential, and remember everything we explored above about not everyone wanting to camp out in an empty building while fighting a war with their landlord. I know only this much – letting the Holdout be the last man standing is never a wise move.

Now, let's talk about how to get the Holdout, and everyone else, out – Demolition Eviction.

**X. STEP 9: DEMOLITION EVICTION – A REAL POSSIBILITY**

**A. Demolition Eviction – The Statute and Regulations**

A landlord who intends to demolish a Rent Stabilized building may recover such units, subject to certain exceptions and limitations. Rent Stabilization Code (“RSC”) 2524.5 states:

(a) The owner shall not be required to offer a renewal lease to a tenant ...and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:

(2) Demolition.

The governing rules and regulations are:

- 9 NYCRR 2524.5, Rent Stabilization Code § 2524.5 (Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR)
- New York State Division of Housing and Community Renewal Fact Sheet #11
- New York State Division of Housing and Community Renewal Operational Bulletin 2009-1

In order to achieve an eviction on the grounds of demolition, you must comply with the following requirements.

**B. Permission from DHCR**

Demolition eviction requires the owner to first get the permission of the New York State Division of Housing and Community Renewal (“DHCR”). 9 NYCRR 2524.5(a).

**C. Proof Owner Has the Money for the Project**

The owner must submit proof to the DHCR of the owners financial ability to complete the project. 9 NYCRR 2524.5(a)(2)(i). Evidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances. DHCR Operational Bulletin 2009-1; *See also Peckham v. Calogero*, 12 NY3d 424 (2009), below.

In *Porter v. DHCR*, NYLJ, 5/5/08, p. 27, col. 4 (App. Div. 1 Dept.), a DHCR decision to grant landlord's demolition application was upset by the fact that landlord's attempts to demonstrate its financial ability to complete the proposed demolition project were inconsistent with the fact that DHCR found that landlord had greatly underestimated the required tenant relocation expenses.

In *1804 Washington Avenue Corporation*, DHCR Adm. Rev. Docket No. WJ420025RO (7/9/09) LVT Number: #22195, Landlord asked the DHCR for permission to evict a Rent Stabilized tenant in order to demolish a Single Room Occupancy (SRO) hotel building in an Historic District, with one remaining tenant. The District Rent Administrator ("DRA") ruled against landlord, finding that landlord failed both to submit certain DOB approval documentation and to prove it was financially able to complete the proposed demolition and construction project. Landlord appealed and lost. Landlord claimed that the demolition would cost \$100,000.00 and the construction would cost \$500,000.00. The bank loan statements landlord submitted to the DRA were issued more than two years before landlord filed its application. Landlord didn't show that the loan money may be used, or was even still available, for the construction project. Landlord also failed to prove that it had approved plans from DOB for the proposed work.

In *Calamaras*, DHCR Adm. Rev. Docket Nos. VC420007RT, VC420008RT (12/6/07) LVT Number: #20223, the landlord sought permission not to renew tenant's Rent Stabilized lease based on landlord's intention to demolish the building. The DHCR ruled for the tenants when landlord hadn't proved its good-faith intent to proceed on the project. Landlord's building plans hadn't been approved by DOB, that there appeared to be no final commitment to any particular building size or configuration, and that landlord hadn't previously completed any construction projects and didn't meet the requirements regarding financial ability to complete the proposed project.



In *Ando*, DHCR Adm. Rev. Docket No. UH420017RT 8/23/06 LVT Number: 19118, the landlord sought permission not to renew tenant's Rent Stabilized lease based on landlord's intention to demolish the building. The DRA ruled for landlord. Tenant appealed and lost. Tenant claimed that landlord hadn't proved its financial ability to complete the demolition. In a separate proceeding, the DHCR had determined that landlord had submitted sufficient proof of its financial status. Landlord could proceed with eviction action against tenant.

See also *Peckham v. Calogero*, 12 NY3d 424 (2009), below.

#### **D. Building Plans Approved**

The plans for the project must have been already approved by the appropriate city agency (Department of Buildings, Landmarks, Department of Environmental Protection, whatever is required). 9 NYCRR 2524.5(a)(2)(i).

The definition of “demolition” has been challenged, and the law is governed by the *Peckham v. Calogero*, 12 NY3d 424 (2009), so we examine the case in detail below. *Peckham* also contains an important holding regarding the definition of “financial ability” to complete the project.

*Peckham* started in 2004 and took until 2009 to resolve because it went all the way up the New York State’s highest court, the Court of Appeals. Landlord won. The building was a 40 foot deep, three-story, eight (8) unit Rent Stabilized Building in Manhattan. The owner wanted to build a 70 foot deep building with twelve (12) units in its place.

According to owner's plan, “[t]he Demolition will entail the removal of (a) the roof, (b) entire interior of the Building, (c) all partitions, (d) floor joints, (e) subfloors, and (f) building systems. In addition, much of the facade, and the entire rear wall of the Building will be removed.”

Tenant opposed owner's application, arguing that (1) owner advised the New York City Department of Buildings (DOB) that the job involved “a reconstruction or an alteration” and (2) the evidence of financial ability could not be relied upon because the only thing it established was that the funds in question were held in the name of an entity other than owner. Moreover, tenant challenged what was meant by “demolition.”

The Court of Appeals ultimately held that it was not important that there is no precise or expansive definition of “demolition” in the Rent Stabilization Law and Code. Numerous terms and concepts lack such a definition. Further, over the years, DHCR has not required the proponent of a demolition application to show that it intends to “raze the structure to the ground” (the dictionary definition of “demolition”) in order to be successful. An intent to gut the interior of the building, while leaving the walls intact, has been held to be sufficient. Courts reviewing this interpretation of the term “demolition” have held likewise. Therefore, the court held in *Peckham* that owner's demolition plan comported with DHCR's long-held interpretation of “demolition.”

Regarding the “financial ability” that must be shown before a demolition application is granted, DHCR has stated that “[e]vidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances” (DHCR Operational Bulletin 2002-1). In *Peckham*, Owner submitted (1) a printout from JPMorgan Chase Bank verifying that a bank account had been opened and funded in the amount of \$4,800,000.00 and (2) a letter indicating that these funds were to be applied toward Owner's demolition/construction project. Although the letter was addressed to a different Limited Liability company (“LLC”) than the ownership LLC, there was ample basis for DHCR to infer that the borrower LLC and ownership LLC were affiliates.

Another illustrative DHCR case concerning the efficacy of the architectural plans with respect to a Demolition Eviction application is *1205-1215 First Avenue Associates, LLC*, DHCR Adm. Rev. Docket Nos. YI4100086RO et al. (1/27/14) LVT Number: #25497. In *1205 First Avenue*, Landlord asked the DHCR for permission to refuse renewal of Rent Stabilized tenants' leases based on its intent to demolish the building. The DRA ruled against landlord, finding that it didn't have the required architectural plans or proof of financial ability to complete the project, and that landlord didn't proceed in a timely manner. Landlord appealed and lost. The DHCR's Operational Bulletin 2009-1 states that, *on 30 days' written notice, the DRA can dismiss a demolition application based on landlord's failure to proceed in a timely fashion*. During the DHCR hearing process, landlord's architect died. Landlord's new architect then refused to adopt the prior architect's plans. Landlord claimed that it was unfair to find that landlord wasn't proceeding in a timely fashion on that basis. *But landlord's plans would have required revision in any event*. The new architect stated that 2008 Building Code changes now required the inclusion of ductwork in the plans. Also, exit stair width requirements had been increased. Consequently, this required a redesign of exit stairs and a revision to the plans. ADA requirements, mandated by

**Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

the federal Fair Housing Act, also had replaced the requirements of Local Law 58, now requiring that various areas of the apartments be larger than previously provided for. The DRA's hearing officer was therefore correct to dismiss the application for failure to prosecute. Landlord could refile a new application based on current conditions.

**E. Pay Tenant Moving Expenses**

The owner must pay the tenant's reasonable moving expenses. 9 NYCRR 2524.5(a)(2)(ii)(a).

**F. Pay Tenant \$5K Stipend**

The owner must pay the tenant a "stipend" of \$5,000.00, provided the tenant leaves by the vacate date in the DHCR's order. 9 NYCRR 2524.5(a)(2)(ii)(a) and (b)(1).

**G. Relocate Tenant OR Pay an Additional Stipend Based on an Established Formula**

The owner must relocate the tenant or pay the tenant a large additional stipend based on a formula established by the DHCR. 9 NYCRR 2524.5(a)(2)(ii)(b)(1).

**1. Pay an Additional Stipend Based on an Established Formula**

The owner can, in essence, buy the tenant out, but such "buyout" is really a 72 month stipend based on an established formula set up by DHCR that is calculated based on the number rooms in the apartment (no less than three) and the tenants current rent. 9 NYCRR 2524.5(a)(2)(ii)(b)(3). The "Demolition Stipend Chart" is included with Operational Bulletin 2009-1.

Examples (9 NYCRR 2524.5(a)(2)(ii)(b)(1)):

An owner would have to pay a tenant in a six-room apartment, whose rent is \$1,000.00 per month, \$1,958.00 per month for 72 months, or \$140,976.00.

An owner would have to pay a tenant in a three-room apartment, whose rent is \$1,500.00 per month, \$78.00 per month for 72 months, or \$5,616.00.

This option is NOT available, however, if the stipend would result in the tenant losing a subsidy or other governmental benefit which is income dependent. In that case, ***the tenant may elect*** to waive the stipend and have the owner at his or her own expense, relocate the tenant to a suitable housing accommodation at the same or lower legal regulated rent in a closely proximate area. 9 NYCRR 2524.5(a)(2)(ii)(c). Therefore, it is important to note that this option (perhaps the most desirable) is not always available.

## **2. Relocate the Tenant**

The owner has the option to (or if the above-discussed stipend would result in the tenant losing a subsidy or other governmental benefit which is income dependent then owner must) move the tenant out of the way permanently. In that case, the alternative housing must satisfy at least three criteria 9 NYCRR 2524.5(a)(2)(ii)(b)(1).

The alternate housing accommodation must be “suitable”. 9 NYCRR 2524.5(a)(2)(iii). Let us now examine what “suitable” means under the law.

In the event a comparable housing accommodation is offered by the owner, a tenant may file an objection with the DHCR challenging the suitability of a housing accommodation offered by the owner for relocation within 10 days after the owner identifies the housing accommodation and makes it available for the tenant to inspect and consider the suitability thereof. Within 30 days thereafter, the DHCR shall inspect the housing accommodation, on notice to both parties, in order to determine whether the offered housing accommodation is suitable. Such determination will be made by the DHCR as promptly as practicable thereafter. In the event that the DHCR determines that the housing accommodation is not suitable, the tenant shall be offered another housing accommodation, and shall have 10 days after it is made available by the owner for the tenant’s inspection to consider its suitability. 9 NYCRR 2524.5(a)(2)(iii).

In the event that the DHCR determines that the housing accommodation is suitable, the tenant shall have 15 days thereafter within which to accept the housing accommodation. A tenant who refuses to accept relocation to any housing accommodation determined by the DHCR to be suitable shall lose the right to relocation by the owner, and to receive payment of moving expenses or any stipend. 9 NYCRR 2524.5(a)(2)(iii).

Suitable housing accommodations shall mean housing accommodations which are similar in size and features to the respective housing accommodations now occupied by the tenants. 9 NYCRR 2524.5(a)(2)(iii).

Such housing accommodations shall be freshly painted before the tenant takes occupancy, and shall be provided with substantially the same required services and equipment the tenants received in their prior housing accommodations. 9 NYCRR 2524.5(a)(2)(iii).

The building containing such housing accommodations shall be free from violations of law recorded by the city agency having jurisdiction, which constitute fire hazards or conditions dangerous or detrimental to life or health, or which affect the maintenance of required services. 9 NYCRR 2524.5(a)(2)(iii).

The DHCR will consider housing accommodations proposed for relocation that are not presently subject to rent regulation, provided the owner submits a contractual agreement that places the tenant in a substantially similar housing accommodation at no additional rent for a period of six years, unless the tenant requests a shorter lease period in writing. 9 NYCRR 2524.5(a)(2)(iii).

The alternate housing accommodation must be “at the same or lower legal regulated rent”. 9 NYCRR 2524.5(a)(2)(iii).

The alternate housing accommodation must be “in a closely proximate area”. 9 NYCRR 2524.5(a)(2)(iii).

### **3. Temporary Relocation**

If the owner intends to put the tenant back in the newly constructed building on the site, then the owner has to house the tenant in suitable interim housing provided at no cost to the tenant. 9 NYCRR 2524.5(a)(2)(ii)(b)(1).

#### **H. Who is the “Owner”**

When it comes to development, ownership usually has a whole bunch of entities floating around and there are all kinds of transfers happening. While that is being handled by your transactional attorney, your counsel on the Demolition Eviction Application has to be kept

apprised. It is possible to be bounced from the DHCR because the application was not filed by “the owner”. The term, “owner”, is specifically defined in RSC Section 2520.6(i). RSC Section 2520.6(i) defines “Owner” as:

A fee owner, lessor, sublessor, assignee, net lessee, or a proprietary lessee of a housing accommodation in a structure or premises owned by a cooperative corporation or association, or an owner of a condominium unit of the sponsor of such cooperative corporation or association or condominium development, or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation,...Any separate entity that is owned, in whole or in part, by an entity that is considered an owner pursuant to this subdivision, and which provides only utility services shall itself not be considered an owner pursuant to this subdivision. Except as is otherwise provided in sections 2522.3 and 2526.1(f) of this Title, a court-appointed receiver shall be considered an owner pursuant to this subdivision.

### **I. What is “Demolition”?**

The definition of “demolition” has been challenged, and the law is governed by the *Peckham* case (*Peckham v. Calogero*, 12 NY3d 424 (2009)), so we examine the case in detail below. *Peckham* also contains an important holding regarding the definition of “financial ability” to complete the project.

*Peckham v. Calogero*, 12 NY3d 424 (2009).

*Peckham* started in 2004 and took until 2009 to resolve because it went all the way up the New York State’s highest court. Landlord won. The building was a 40 foot deep, three story, 8 unit Rent Stabilized Building in Manhattan. The owner wanted to build a 70 foot deep building with 12 units in its place.

According to owner's plan, “[t]he Demolition will entail the removal of (a) the roof, (b) entire interior of the Building, (c) all partitions, (d) floor joints, (e) subfloors, and (f) building systems. In addition, much of the facade, and the entire rear wall of the Building will be removed.”

Tenant opposed owner's application, arguing that (1) owner advised the New York City Department of Buildings (DOB) that the job involved “a reconstruction or an alteration” and (2) the evidence of financial ability could not be relied upon because the only thing it established was that the funds in question were held in the name of an entity other than owner. Moreover, tenant challenged what was meant by “demolition.”

The state’s highest court ultimately held that it was not important that there is no precise or expansive definition of “demolition” in the Rent Stabilization Law and Code. Numerous terms and concepts lack such a definition. Further, over the years, DHCR has not required the proponent of a demolition application to show that it intends to “raze the structure to the ground” (the dictionary definition of “demolition”) in order to be successful. An intent to gut the interior of the building, while leaving the walls intact, has been held as sufficient. Courts reviewing this interpretation of the term “demolition” have held likewise. Therefore, the court held in *Peckham* that owner's demolition plan comported with DHCR's long-held interpretation of “demolition.”

Regarding the “financial ability” that must be shown before a demolition application is granted, DHCR has stated that “[e]vidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances” (DHCR Operational Bulletin 2002-1). In *Peckham*, Owner submitted (1) a printout from JPMorgan Chase Bank verifying that a bank account had been opened and funded in the amount of \$4,800,000 and (2) a letter indicating that these funds were to be applied toward Owner's demolition/construction project. Although the letter was addressed to a different Limited Liability company (“LLC”) than the ownership LLC, there was ample basis for DHCR to infer that the borrower LLC and ownership LLC were affiliates.

**J. DHCR Application Process and No Rent Increases While Application Pending**

The owner is required to file Form RA-54, "*Owner's Application for Order Granting Approval to Refuse Renewal of Lease and/or to Proceed for Eviction*" with the DHCR. DHCR Fact Sheet #11.

Once an application has been filed, an owner may refuse to renew tenants' leases until a determination of the owner's application has been made. Tenants may remain in occupancy during such period, and the owner may not increase the rents. Should the application be denied or withdrawn, the owner must again offer prospective renewal leases to the tenants, as directed in the DHCR's order of denial or withdrawal. DHCR Operational Bulletin 2009-1.

**K. You Still Need a Lease, a Termination Notice, and a Housing Court Proceeding**

Many of my clients come to me with buildings where their predecessor-in interest has allowed the Rent Stabilized leases to lapse. This is, for so many reasons, a terrible thing for an owner to do. In Rent Stabilization the lease protects the owner much more than the tenant. The tenant has all her rights, lease or no lease. The landlord, however, loses all kind of rights, even to sue for nonpayment of rent, if a properly renewed Rent Stabilized lease is not in place.

Demolition eviction is predicated on refusal to renew an existing lease. The allowable time for the notice of non-renewal is within 90 to 150 days of the expiration of an existing lease. Absent a lease being in effect, the 90 to 150 day period cannot be arrived at. *Santorini Equities, Inc. v. Picarra*, 72 A.D.3d 73 (1<sup>st</sup> Dept. 2010). Therefore, until you have a firm plan of action for your Rent Stabilized building, make sure you renew the leases in a timely fashion and keep the building properly registered with DHCR.

In New York City, pursuant to RSC Section 2524.2(c)(3), after filing a demolition application, an owner must serve each tenant with a Termination Notice at least 90 and not more than 150 days (the "Golub Period") prior to the expiration of the tenant's lease term. Provided each tenant whose "window period" occurs prior to the issuance of the order is served with a timely Termination Notice, the order granting the application may be issued. DHCR Operational Bulletin 2009-1.



### **Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

The Termination Notice may be served either personally or by regular or certified mail. A contemporaneous affidavit providing dispositive facts by the person making the service or mailing a receipt indicating proof of certified mailing shall constitute sufficient proof of service. When service is by registered or certified mail, the stamped post office receipt shall constitute sufficient proof of service. Once such proof of service has been submitted to the DHCR, the burden of proving non-receipt shall be on the tenant.

The Termination Notice shall state that:

- 1. the owner will not renew the tenant's lease because the owner has filed an application for permission to recover possession of all housing accommodations in the building for the purpose of demolishing them, for which plans and financing have been obtained, as stated in the application;*
- 2. while the application is pending, the tenant may remain in occupancy;*
- 3. the tenant shall not be required to vacate until the DHCR issues a final order approving the application and setting forth the time for vacating, stipends and other relocation conditions; and*
- 4. the tenant must be offered a prospective renewal lease if the application is withdrawn or denied.*

The DHCR cannot order the eviction of any tenant. In other words, landlord gets a vacate order from the DHCR and the tenant does not go, then landlord must take the tenant to Housing Court for a summary holdover proceeding. Warrants of eviction must be obtained from courts of competent jurisdiction. DHCR Operational Bulletin 2009-1.

#### **L. The Sound Housing Act – Rent Control Tenants and Demolition Eviction**

To demolish a building and replace it with new housing when the housing contains Rent Controlled units the landlord must comply with the requirements of Administrative Code § 26-408(b)(4):

- (1) the new building must contain at least 20% more housing than the demolished buildings;

- (2) adequate arrangements must have been made to relocate tenants;
- (3) necessary demolition and construction permits must have been obtained.
- (4) landlord is required to prove that there is no “reasonable possibility” that it can earn an 8 ½% net annual return on the assessed value of the property without such demolition and development. (This is the Sound Housing Act (Administrative Code § 26-408[b][5] ))

The Sound Housing Act has been held to be constitutional. *Kalikow 78/79 Co. v. State*, 174 A.D.2d 7 (AD1st 1992).

### **M. The Demolition Eviction Hearing**

The DHCR may conduct a hearing on the Demolition Eviction application. DHCR Fact Sheet #11. But a hearing is NOT required.

*Various Tenants of 220 Central Park South*, DHCR Adm. Rev. Docket Nos. XG420040RT-XG420066RT (12/28/09) LVT Number: #22472 and *220 CPS "Save Our Homes" Association v. DHCR*, NYLJ, 4/2/09, p. 40, col. 3 (App. Div. 1 Dept.), is a very interesting case. *220 Central Park* stands for the proposition that no hearing is required and that DHCR cannot order an Environmental Impact Statement as part of a Demolition Eviction application. *220 Central Park* also provides guidance on what it means for the landlord to have sufficient building plans and funds to complete the project.

In *220 Central Park*, the DHCR granted landlord’s application for permission to refuse to renew Rent Stabilized leases in order to demolish the building. Tenants appealed, claiming that the DHCR didn’t perform an environmental impact study (EIS). The court ruled for tenants, but the appeals court reversed, finding no requirement that the DHCR to conduct an EIS under the Rent Stabilization Code. The case was then sent back to the DHCR to allow tenants to comment on whether landlord had the financial ability to complete the project. The DHCR ruled for landlord. Landlord’s plan to raze the existing building to the ground and build a new, 41-story building with 75 apartments over the existing underground parking garage qualified as a demolition. DOB approved landlord’s plans. Landlord demonstrated the financial ability to complete the project. The projected cost of the demolition project was \$307,772,205, and landlord’s financial capacity was substantially greater. Landlord’s corporate balance sheet reflected over \$4.2 billion in financial capacity, consisting of \$2.068 billion available cash, \$308 million restricted cash, and \$1.873 billion of unused bank revolving credit. Landlord’s cost estimate,

### **Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

prepared by a major worldwide construction management firm, also was credible. Notably, *Tenants also claimed that a hearing was required by law. But no hearing was required.* Neither the Rent Stabilization Law nor Code require a hearing in a demolition proceeding. And landlord showed that it had the good-faith intent to carry out the project by submitting approved DOB plans and proof of its financial ability to complete the project.

*Berkowitz, Milbourn, Farwell*, DHCR Adm. Rev. Docket Nos. UH410047RT – UH410049RT (10/16/08) LVT Number: #20980, is an example of a DHCR case where a hearing was granted on the issue of the landlord's good faith intention to demolish the building. Landlord asked the DHCR for permission to refuse lease renewals for three Rent Stabilized tenants. Landlord wished to demolish the building. In addition to the three Rent Stabilized apartments, there were two vacant units and three apartments that previously became exempt from rent regulation based on luxury decontrol. To support its application, Landlord submitted various documentation to the DRA including a deed, current tenant list, termination notices, a bank letter listing landlord's account balance in excess of \$289,000.00, and a permit from the NYC Landmarks Preservation Commission (LPC). Tenants objected. They claimed that the application was incomplete and fraudulent. They said that landlord had no permit from the city for demolition, showed no proof of financial ability to pay for the demolition, and submitted no architectural plans or engineering reports. They also said that landlord didn't mention that the proposed demolition would be done in connection with demolition of the building next door, which contained rent-controlled tenants. Landlord then submitted architectural plans that it said were approved by the LPC and that it would submit DOB approval as soon as it became available. Later, landlord submitted architectural plans that were approved by DOB, and a letter from its bank stating that bank permission wasn't needed because the plans didn't affect the banks' mortgage on the property. Landlord also submitted additional banking documents showing over \$400,000.00 on account. The DRA ruled for landlord. Tenants then appealed, claiming that the DRA didn't consider their arguments and should have held a hearing. The DHCR ruled for tenants and reopened the case. Tenants correctly pointed out that the DRA's decision didn't contain any discussion of the issues raised or whether landlord provided its good-faith intent to demolish the building. A hearing was needed to determine landlord's good-faith intent and address other questions.

### **N. The Demolition Eviction Appellate Process**

Any party aggrieved by the DHCR's determination may file a Petition for Administrative Review (PAR) in accordance with RSC Part 2529. The filing of a PAR shall stay such order until the final determination of the PAR by the DHCR Commissioner. Upon a

showing that there are equitable grounds, the DHCR Commissioner may entertain requests for expedited processing of the PAR. After the PAR, an appeal can be taken to the Supreme Court of the State of New York via an Article 78 proceeding. *Peckham v. Calogero*, 12 NY3d 424 (2009).

**O. Demolition Eviction’s Relationship to Other Litigation Between the Parties**

In *36th and Second Tenants Assn. v. DHCR*, NYLJ, p. 26, col. 3 (10/20/97) (App. Div. 1 Dept.), landlord applied to the DHCR for permission to demolish the building. Tenants in the meantime had filed a court appeal of the DHCR ruling in a harassment case. Tenants asked the court to delay the processing of the demolition application until their appeal was ruled on. The court ruled against tenants, refusing to delay the processing of the demolition application. Tenants appealed. The appeals court ruled against tenants. Tenants hadn’t proved that irreparable injury would result if the processing of the demolition application wasn't delayed. And even if the harassment determination was reinstated as a result of tenants' other appeal, the DHCR may still proceed with the review of the demolition application.

**P. The Big Objection to Demolition Eviction – And Why I Think It’s a Stupid Objection**

The big objection that you will hear over and over – posited by owners’ counsel and tenants’ as well is simply this – *Demolition Eviction takes too long*. This is a ridiculous objection and I reject it.

If you avoid getting started on Demolition Eviction (because you think it will take a long time), then of course it will take even longer. You cannot finish what you do not start.

Owners tell me that their “other lawyers” tell them that Demolition Eviction should be kept as a last resort. Wrong. **Demolition Eviction is what you should LEAD WITH.**

**Tenant Buyouts for the Next Generation**

Copyright 2016 by Michelle Maratto Itkowitz, Itkowitz PLLC; www.itkowitz.com; TerraCGR 2016 Only Brooklyn Real Estate Summit; June 1, 2016

Demolition Eviction:

- (a) is the method set up by the legislature for de-tenanting a building (harassment and frivolous holdovers and even buyouts are not);
- (b) is a humane way to de-tenant, because the tenants have plenty of notice;
- (c) is CHEAP in terms of legal fees – it costs so much less to litigate at DHCR than it does in court; and
- (d) it works if owner is not lying.

And – *News Flash* – frivolous, purposeless, unethical holdovers take a long time too, and they have no chance of securing a vacancy, yet owners' lawyers are recommending such tomfoolery.

## **XI. STEP 10: DEMOLITION EVICTION'S AFFECT ON SETTLEMENT NEGOTIATIONS**

This is the finale. Every situation is different, and – quite obviously – this is not legal advice, and just because you are reading my booklet in your bathroom does not mean we have a lawyer and client relationship – but if there is a theme to this piece, it is simply as follows.

### **When it comes to tenant buyouts -- Speak softly and carry a big stick.<sup>2</sup>**

There are three keys to de-tenanting a building.

One – PLAN. Rent Stabilization Due Diligence<sup>3</sup> and Legal Project Management<sup>4</sup> are keys to the success of any de-tenanting project.

Two – Conduct yourself like a grown man (or a grown woman!). Understand the playing field and your tenants' points of view. Treat tenants with the dignity and respect that you would want someone to treat your family with in a similar situation. Do not engage in harassment or frivolous holdover cases. Be direct with tenants about your agenda.

Three – DEMOLITION EVICTION! There CAN be a relationship between an owner's attempt to secure a buyout on favorable terms and the degree to which that owner is willing to push forward on a Demolition Eviction application. Demolition Eviction may take a long time to secure (all litigation takes a long time) and it may cost money (all litigation costs money); but it can be better than making the last Holdout tenant a virtual partner in your building by paying him huge numbers, or worse, walking away from the project. When faced with a properly prosecuted Demolition Eviction application, a tenant's number has a great chance of going down....one way or another.

Thus, I tell you – speak softly, respectfully, and honestly to your tenants, while wielding the only stick that will really recover your building for you – Demolition Eviction.

---

<sup>2</sup> <https://www.loc.gov/exhibits/treasures/trm139.html>.

<sup>3</sup> See our booklet on Rent Stabilization Due Diligence for Multi-Family Acquisitions <http://www.itkowitz.com/due-dilligence>.

<sup>4</sup> See our web page on Legal Project Management <http://itkowitzlegalprojectmanagement.itkowitz.com/>.

## ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner of Itkowitz PLLC. She practices real estate litigation. Michelle has over twenty years of experience, and is best known for her work in the area of commercial and complex-residential landlord and tenant law in the City of New York. Michelle's core competencies include: Rent Stabilization and Rent Control, the Loft Law, Yellowstone injunctions, tenant buyouts, clearing buildings so that construction projects can go forward, and Rent Stabilization Due Diligence. She also is very experienced in general commercial litigation.

Michelle publishes and speaks frequently on legal issues in real estate. The groups that Michelle has written for and/or presented to include: Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; The Association of the Bar of the City of New York; The New York State Bar Association, Real Property Section, Commercial Leasing Committee; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; and BisNow

Michelle regularly creates and shares original and useful content on real estate and law, including booklets, videos, articles, and podcasts. She is frequently quoted in the press on a variety of real estate and legal issues. As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle recently developed a seven-part, eight-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 16,000 lawyers have purchased Michelle and Jay Itkowitz's earlier CLE classes from Lawline.com, and the programs have met with the highest reviews. Jay and Michelle are currently co-authoring a chapter on lease remedy clauses for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman in the loan closing department.

Itkowitz PLLC is proud to be a New York State certified Women-Owned Business Enterprise ("WBE").

There are many ways to keep up with Michelle. When Michelle tweets, which is not an obnoxious amount, she does so in an easy to understand manner about useful stuff regarding real estate, business, the legal industry, and organic herb gardening. Feel free to contact Michelle; she would be happy to speak to you.



Michelle Maratto Itkowitz, Esq.  
Itkowitz PLLC  
itkowitz.com  
mmaratto@itkowitz.com  
26 Broadway, 21<sup>st</sup> Floor  
New York, New York 10004  
Twitter: @m\_maratto