

rowly construed. In interpreting the exception, the Court held that landlords do not have complete discretion to determine the "creditworthiness" of a tenant but rather that "creditworthiness relates to a landlord's legitimate concern that a prospective tenant has a reliable and steady source of income to fund rent payments and satisfy the other financial requirements of a lease." The trial court took a narrow view of the creditworthiness exception and ignored the fact that a tenant will have other monetary obligations other than rent which will affect the tenant's credit status and ability to meet his or her financial obligations.

It must be noted that the trial court found that the landlord's reasons for denying the

application were inconsistent and unsubstantiated. The Court had determined that the tenant's credit problems were merely a pretext used by the landlord to deny the tenant's application.

The Appellate Division affirmed the trial court's decision. While acknowledging that creditworthiness is a valid exception to the statute, the Appellate Division did not address the trial court's narrow view of creditworthiness. Rather, the Appellate Division upheld the trial court's decision based upon its finding that the landlord's reasons for the denial and the landlord's representative were not credible.

Consequently, landlords should be consistent in their treatment of all applicants. In determining the creditworthiness of a tenant, a landlord should contact the prior landlord

or research the tenant's rental history. Any decision relating to a denial of a Section 8 tenant's application based upon creditworthiness should have solid factual support and documentation to backup that decision.

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This newsletter is intended for general information purposes and does not constitute legal advice. You should consult with legal counsel to determine how the law may apply to your specific situation.



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BUSINESS TAX REFORM ACT AMENDED

The New Jersey Business Tax Reform Act (the "Act"), P.L. 2002, c. 40, was enacted on July 2, 2002. The Act, which was made retroactive to be applicable to tax period beginning on and after January 1, 2002, makes dramatic changes to New Jersey's Corporate Business Tax ("CBT"). This article, while not intended to be inclusive of all provisions of the Act, will discuss certain salient provisions of the Act which may have an impact upon your real estate operations and business entities.

Many real estate operators choose to own and operate a property by forming either a limited liability company (LLC), limited liability partnership (LLP) or limited partnership (LP). These types of entities offer the advantages of being taxed as partnerships for Federal income tax purposes while at the same time having the corporate characteristic of insulating its members/partners from personal liability. The Act provides that "pass-through entities" - i.e., entities that are treated as partnerships for purposes of Federal income tax - that have 2 or more members/partners are now assessed an annual filing fee of \$150.00 per member/partner, up to a maximum of \$250,000.00. (This annual fee was also made applicable to professional corporations having 2 or more owners.) This fee is due and payable at the time that the entity files its tax returns, and it is required to be accompanied by an installment payment equal to 50% of the fee that is due for the following year.

In addition, if the pass-through entity includes any non-resident member/partner - i.e., an individual, corporation, partnership, trust or estate that is located outside New Jersey - the entity must make a tax payment on the portion of income allocated to such non-resident at the rate of 9% for a corporate member/partner and 6.37% for all other non-resident member/partner. This payment is credited against any New Jersey taxes that the non-resident member/partner may owe. Any pass-through entity that is

listed on a national exchange or is a qualified investment partnership is exempt from this requirement.

With respect to corporate entities, the Act also attempts to increase the scope of the CBT by modifying the number of corporations that are subject to the CBT. Previously, the CBT only applied to corporations that were "doing business" in New Jersey. The Act now makes the CBT applicable to corporations that derive income from New Jersey sources and have contacts with New Jersey. Further, the Act modifies the tax rate and imposes a new Alternative Minimum Assessment ("AMA") that requires a corporation to pay taxes based upon the greater of the CBT or the AMA. Thus, a corporation must now calculate tax liability based upon the CBT and then calculate the tax liability based on the AMA formula using either gross receipts or gross profits (gross receipts less cost of goods sold). The corporation's tax liability is the greater of these 2 calculations, and the corporation cannot change the method of calculating the AMA for a period of 5 years. The corporation is exempt from the AMA if gross receipts are less than \$2,000,000.00 or gross profits are less than \$1,000,000.00. The Act also reduces the CBT rate from 7.5% to 6.5% for small business corporations that have \$50,000.00 or less of net income and increases the annual minimum CBT for all corporations from \$210.00 to \$500.00.

There are numerous other provisions of the Act which may or may not affect you. This article is intended to highlight a few key provisions of the Act and has purposely not discussed numerous other provisions that may affect your business operations. You are strongly urged to contact your tax professional to discuss the Act in greater detail and examine how the Act may affect your real estate operations.

LAW AGAINST DISCRIMINATION IS AMENDED TO INCLUDE SOURCE OF LAWFUL INCOME FOR RENTAL PAYMENTS

The Law Against Discrimination ("LAD") prohibits discrimination in housing or employment because of race, religious principles, color, national origin, ancestry, marital status, sexual orientation, familial status or sex. The law was recently amended to prohibit discrimination in leasing property based upon the source of lawful income used for rental payments. (It was also amended to include discrimination based upon the age of children.) The LAD is separate and distinct from the source of income discrimination law that has existed and has been discussed relative to Section 8 contracts. That law, N.J.S.A. 2A:42-100, makes it unlawful for a landlord to refuse to rent an apartment because of the source of any lawful income. Under that statute, a landlord could refuse to rent an apartment to a tenant based on the "creditworthiness" of

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the prospective tenant. In addition, that statute provides a statutory penalty in the maximum amount of \$200 for the first offense and not more than \$500 for each subsequent offense. It does not authorize a rejected applicant or tenant to file a private legal action for damages.

The LAD on the other hand, does not expressly contain the creditworthiness exception that is in the source of income statute. The LAD also permits penalties in far greater amounts than the penalties provided in the source of income statute. Under the LAD, the applicant or tenant who alleges discrimination based upon source of lawful income or age of children has a private right of action for which damages can be awarded. In addition, the prevailing party in any such action can be awarded counsel fees.

COURT EXAMINES THE MEANING OF CREDITWORTHINESS

In a recent published opinion, the Appellate Division had the opportunity to examine a trial court's decision that discussed the exception to the discrimination statute known as N.J.S.A. 2A:42-100.

N.J.S.A. 2A:42-100 makes it unlawful for a landlord to refuse to rent any apartment to another person based upon source of income. The statute however, provides an exception: a landlord can refuse to rent to a tenant based upon the creditworthiness of the tenant. There is no reported opinion that defines or establishes the standards to determine "creditworthiness".

In this case, a prospective tenant sued under N.J.S.A. 2A:42-100 to compel a landlord to rent an apartment to the tenant and to execute a Section 8 contract. The landlord refused to rent the apartment to the tenant, claiming that the tenant fell within the exception to the statute since she did not have good credit.

This case turned on the facts of this particular case. The landlord's decision to refuse to rent the apartment was based on the tenant's TRW report which reflected two open out of state accounts for medical services which were over five years old. One charge was for \$335 and the other was for \$99. Neither was paid. The landlord had established standards for determining the sufficiency of income for rental purposes. The tenant did not meet those standards as the tenant was unemployed. Also, the landlord never contacted the tenant's prior landlord to evaluate the tenant's rental history, even though the tenant supplied him with the contact information.

The trial court reviewed the legislative history and purpose of the statute and concluded that the statute must be liberally construed in favor of the tenant and the creditworthiness exception must be nar-

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NEW JERSEY COURT EXTENDS APPLICATION OF RECENT U.S. SUPREME COURT CASE

FRK&B recently reported on the United States Supreme Court case, Department of Housing and Urban Development v. Rucker et al, 535 U.S. 973 (2002) which affirmed a Public Housing Authorities' right to evict a tenant when a member of the tenant's household has engaged in drug-related activity and that tenant had no knowledge of that criminal activity. Prior to Rucker, New Jersey law required a landlord to prove that the tenant knew or should have known about the drug activity in order to evict the tenant.

While most of the New Jersey Courts have been applying the principles of the Rucker decision to all types of housing, the New Jersey Appellate Division in Oakwood Plaza Apartments v. Smith, 352 N.J. Super. 467 (App. Div. 2002) concluded that Rucker is applicable to Section 8 tenants and that federal law supersedes New Jersey state law. Now there are two reported decisions which hold that Public Housing Authorities and Section 8 landlords are no longer required to prove that the tenant knew or should have known

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about the drug activity at the premises in an eviction action. This is a victory for landlords who accept Section 8.

Oakwood Plaza Apartments is a privately owned, rent subsidized housing complex, subject to federal regulations. Since it participates in the Section 8 program, it was required to have a provision in the lease relating to termination due to drug related activity. It also had a separate lease addendum pertaining to illegal drugs and evictions. It should be noted that the Courts in Rucker and Oakwood recognized that their rulings do not mandate eviction, but permit it after the landlord weighs certain factors enumerated in the federal regulations.

Although most of the New Jersey Courts have been applying the principles of the Rucker holding to all types of housing, private landlords should amend their leases to include the same lease provision and lease addendum which were involved in these cases. Please contact FRK&B if you would like us to prepare this lease addendum for you.

JERSEY CITY RENT LEVELING ORDINANCE AMENDED TO INCLUDE LATE FEES AND OTHER CHARGES

The Jersey City Rent Leveling Ordinance was amended in February 2002 to permit a landlord to charge late fees up to \$35.00, returned check fees up to \$35.00 and other "similar charges" up to \$35.00. It is believed that this amendment was precipitated by the New Jersey Supreme Court decision Community Realty Management

Inc. for Wrightstown Arms Apartments v. Harris, 155 N.J. 212 (1998) and the recent amendments to the Court Rules. Consequently, landlords can now "evict" a Jersey City tenant for non-payment of these charges, provided there is a written lease that includes them as additional rent.

NEW CONSTRUCTION IS EXEMPT FROM RENT CONTROL

Under New Jersey law, newly constructed multi-family housing is exempt from rent control. According to the statute, owners of buildings with four or more rental units constructed after June 25, 1987, can claim an exemption from rent control. To claim the exemption, the owner must simply file a written statement of the claim with the municipal construction official at least 30 days prior to the issuance of a certificate of occupancy for the newly constructed multiple dwelling.

The filing requirement seems straightforward, and it is. If the owner fails to timely file the proper documents, the owner may

not be entitled to the exemption.

A problem also arises where an owner of new construction, within the meaning of the statute, does not claim the exemption and then sells the building. A municipal rent review board will most likely preclude the subsequent owner from claiming the exemption, even where the original owner would have been entitled to it. Therefore, before purchasing a multi-unit building constructed after 1987, owners should find out whether the prior owner claimed the exemption. If the owner did not, the new owner may be subject to rent control.



Pictured above are some members of the FRK&B team who attended the New Jersey Apartment Association Convention held in Atlantic City in May 2002. Pictured from left to right is: Norman Feinstein, Danna Schnoll, Gary Gordon, Lawrence Raiss, Ophelia Batalion, Richard Kelin, Adrienne LePore, Robyn Latman, Rosalie Scheckel and Tracey Goldstein.

FRK&B Highlights

FRK&B is proud to announce that it has expanded its landlord tenant practice to include eviction actions in Ocean County. FRK&B represents landlords on a regular basis in Essex, Hudson, Passaic, Union, Bergen, Middlesex, Somerset, Morris and Monmouth Counties.

Tracey Goldstein was recently appointed by the Honorable Eugene Codey to the Special Civil Part Essex County Bench Bar Committee. The Committee currently assists in drafting changes to the Court Rules and procedures in the Special Civil Part. Rosalie Scheckel currently serves on the Committee and has been a member for over 10 years.

The New Jersey/Pennsylvania Real Estate Journal featured Richard Kelin in its Corporate Business Profile section.

Robyn Latman was recently appointed to the New Jersey State Bar Association Special Civil Part Committee and the Statewide Coordinating Committee for Implementation of Special Civil Part Best Practices. Both committees are responsible for overseeing changes to the Court Rules and their uniform application throughout the state.

FRK&B, along with the NJAA is planning to present another free seminar for FRK&B's landlord tenant clients and NJAA members. The seminar will be held at the Mountain Ridge Country Club on February 27, 2003 at 8:30 am. Contact Pat Desmond at FRK&B to register.