

# Finkelstein Newman LLP

## Newsletter

November 2005  
Issue 14

### Inside this issue

Partial Eviction Yields  
Partial Abatement?..... 1

Finkelstein Honored for  
50 Years of Service ..... 1

Daniel J. Curtin, Jr.  
Bids Farewell ..... 2

DF's 50th Year Celebration  
Photographs ..... 3

The Changing Face  
of New York City's  
Rental Market ..... 9

Letter to the Editor..... 9

Finkelstein Newman LLP  
225 Broadway, 8th Fl.  
New York, NY 10007  
212-619-5400

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

### PARTIAL EVICTION YIELDS PARTIAL ABATEMENT?

The long-standing rule of law on actual partial evictions has been that when a landlord retakes possession of any portion of a tenant's space, regardless of how insubstantial, that retaking entitles a tenant to a full rent abatement. That rule has been steadfastly cited for 88 years since the New York State Court of Appeals decided *Fifth Ave. Bldg. Co. v. Kernochan* in 1917. In that opinion, Justice Benjamin Cardozo reasoned that, "If such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong." However, a recent New York case casts doubt on this aged decision's practical application in today's world.

In *Eastside Exhibition Corp. v. 210 East 86th St. Corp.*, a commercial landlord installed floor-to-ceiling steel cross-bracing between two existing steel columns on a tenant's premises (a two-story Manhattan movie theater) in late 2002, giving no

*cont'd pg. 2*

### FINKELSTEIN HONORED FOR 50 YEARS OF SERVICE



Hon. Fern Fisher and Daniel Finkelstein

On September 29, 2005, Daniel Finkelstein was honored at a VIP reception which acknowledged his 50 years of service as an attorney. Over 200 clients, dignitaries, and friends witnessed his receipt of proclamations from the United States Congress, New York State Assembly, the City Council and the Civil Court of the City of New York.

Among the many well wishers and guest speakers were the Hon. Fern A. Fisher, Administrative Judge of the Civil Court of the City of New York, Norman Reimer, President of the New York County Lawyers' Association (NYCLA), and Michael Miller, NYCLA's immediate past president

In written remarks, the Honorable Judith Kaye, Chief Judge of the Court of Appeals of the State of New York extended "congratulations on a superb career." And wished Danny, "Many, many more years of 'practice' until you are perfect." Richard Matasar, Dean and President of New York Law School noted "few lawyers continue to practice with style and grace, fewer still do so and maintain their sense of humor, humility, and respect for others."

Additional photographs of this special event can be viewed on pages 3 through 8.

## PARTIAL EVICTION YIELDS PARTIAL ABATEMENT?

*cont'd from pg. 1*

notice to, and obtaining no consent from, the tenant. The work was done in preparation for construction of two additional stories to the building, with the new cross-bracing occupying permanent space on both floors of the movie theater.

A non-jury trial held before Justice Edward Lehner of the New York County Supreme Court focused on whether this permanent encroachment constituted “such an actual partial eviction” as to deprive the landlord of the right to collect any rent. The trial court found that “while the parties’ lease permits [landlord] to enter [tenant’s] premises at reasonable hours to make alterations in connection with the addition of two stories to the building, it does not authorize [landlord] to permanently deprive [tenant] of the use of any portion of the demised premises.” The trial court recognized that “such a deprivation would constitute a partial actual eviction, which would suspend [tenant’s] liability for all rent.”

Yet, the trial court also found that the landlord’s alterations to the premises, which deprived the tenant of approximately 12 square feet out of some 15,000 square feet of space it leased, did not interfere with an essential

*cont'd pg. 4*

### Editorial Board:

*Executive Editor:* Lucas A. Ferrara, Esq.

*Managing Editor:* Helen Frassetti

### Finkelstein Newman LLP

Daniel Finkelstein, *Senior Partner*

Jonathan H. Newman, *Managing Partner*

Robert Finkelstein, *Founding Partner*

Lucas A. Ferrara, *Partner*

Melissa Ephron-Mandel, *Of Counsel*

Robert C. Epstein, *Of Counsel*

### Associates

Barry Gottlieb

Konstantinos G. Baltzis

Rebecca A. Hanlon

### Law Clerks

Dana Agabiti

Shai Dayan

Rosalie Valentino

### SUBSCRIBE !

*If you would like to receive an electronic version of our firm’s newsletters or other publications, please send an e-mail to [Editor@FinkelsteinNewman.com](mailto:Editor@FinkelsteinNewman.com). (Please include the word SUBSCRIBE in the subject line of your e-mail.)*

### Disclaimer:

*This publication is designed to provide accurate information on the subject matters addressed. It is distributed with the understanding that the publication is not intended to render legal or other professional advice. If such expert advice is needed, readers are encouraged to consult with an attorney to secure a formal opinion. Neither the publisher nor its contributors are responsible for any damages resulting from any error, inaccuracy, or omission contained herein.*

© Finkelstein Newman LLP

## DANIEL J. CURTIN, JR. BIDS FAREWELL

Upon graduating law school in 2001, I embarked upon my legal career by joining Finkelstein Newman LLP. Initially hired to assist partners Lucas A. Ferrara and Daniel Finkelstein with the updating and revision of their two-volume West Group treatise,

*Landlord and Tenant Practice in New York*, the partners later offered me a full-time associate position upon my admission to the Bar.

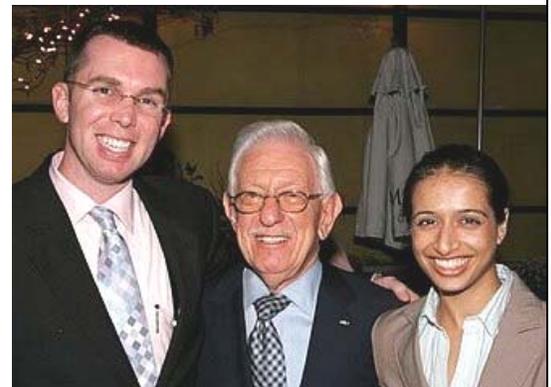
These past four years have been an amazing experience, on a number of levels. Professionally, I have been able to do things that many other young attorneys only dream about doing later in their careers. Aside from various practice-related accomplishments, most recently, I have assisted with the production and editing of this newsletter, a project that began just over a year ago. In that short period of time, we have reached thousands of colleagues and clients via email and hard copy distribution of this periodical. And our readers’ response to this endeavor has been overwhelmingly positive and personally gratifying.

However, it has now come time for me to move on. This month I am relocating to the Lone Star State, with my wife, Alifya. While I am not sure what Austin, Texas holds in store for us, the quality of life is too strong a draw to ignore.

I want to thank my colleagues at Finkelstein Newman LLP for their invaluable guidance over the last four years. I particularly want to thank Danny and Lucas for their unwavering friendship and tutelage. I will miss you both most of all.

Onward!

Daniel J. Curtin, Jr.



Daniel and Alifya Curtin with Daniel Finkelstein



Cindy and Michael Miller



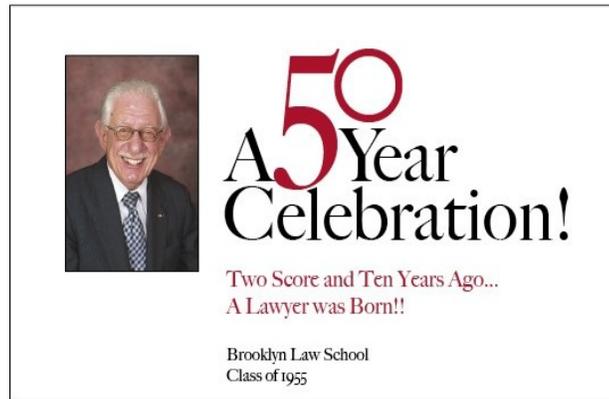
Dan and Mary Ann Hallenborg



Norman Reimer and Susan Walsh



Jonathan Newman and Dan



Hon. Bruce Gould and Dan



Carter Avery, Executive Director of the New York Democratic County Committee, presents Dan with a Proclamation from the New York State Assembly



Sylvia DiPietro with Robert Finkelstein



Jacqui Samuels with Congresswoman Carolyn Maloney's office presents Dan with a Congressional Proclamation



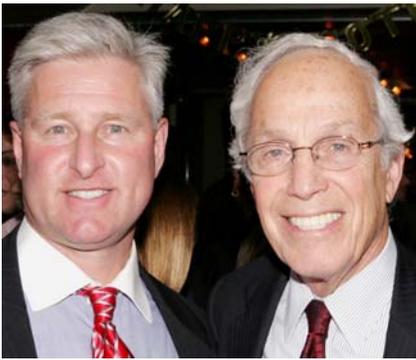
Roy Bernard and Dan



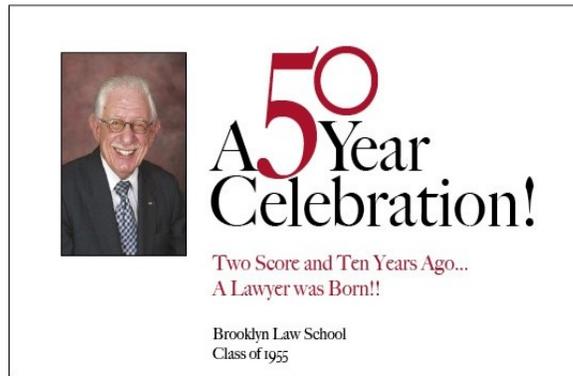
Hon. Trudy L. Mason and Lucas Ferrara



Dan with Hon. Arlene Bluth



Jon with Hon. Seymour Boyers



Robert and Dan



Rita Warner with Margo and Allen London



Helene Blank with Dan and Jan Levien



Michael Miller, Norman Reimer, Jonathan Newman and Dan



John Zaccaro with Jon

**50**  
A Year  
Celebration!

Two Score and Ten Years Ago...  
A Lawyer was Born!!

Brooklyn Law School  
Class of 1955



Norman Reimer honors Dan



Jonathan Newman, Dan, Robert Finkelstein and Lucas Ferrara



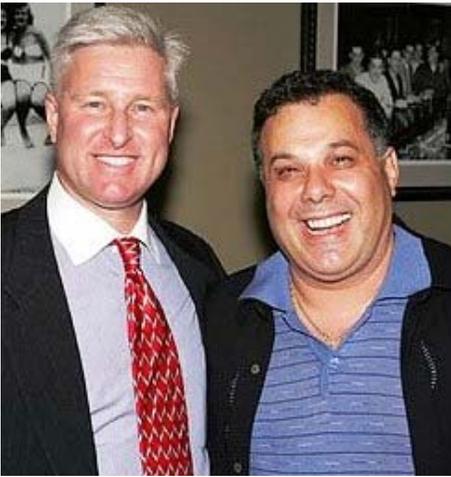
Mark Stein, SVP, Meringoff, with Dan



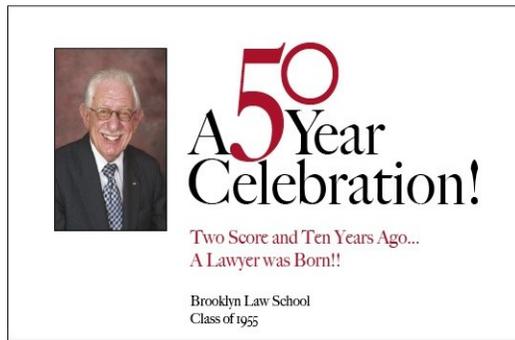
Fred Grapstein, CFO, Hotel Pennsylvania with Jon



Dan with Hon. Jim McManus



Jon with Tony Pecora



Mark Seitelman with Lucas



Hon. Dirk McCall presents Dan with Proclamation from City Council



Lucas with Hon. Frank Wilkinson



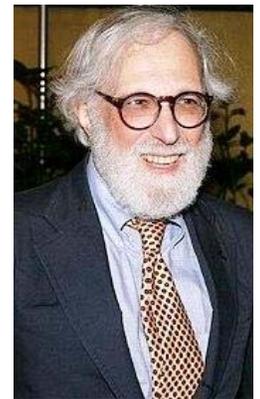
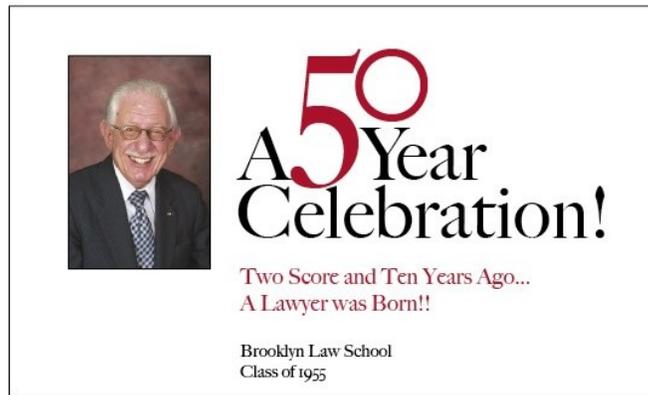
Rodd McCleod with Dan



Lucas, Helene, Jan, Gus Baltzis, Dan, Hon. Adam Silvera and Sylvia



Marilyn Flood



Hon. Alan Flacks



Margaret Davidson, Dan, Kate Jeglinska and Maria DeJesus



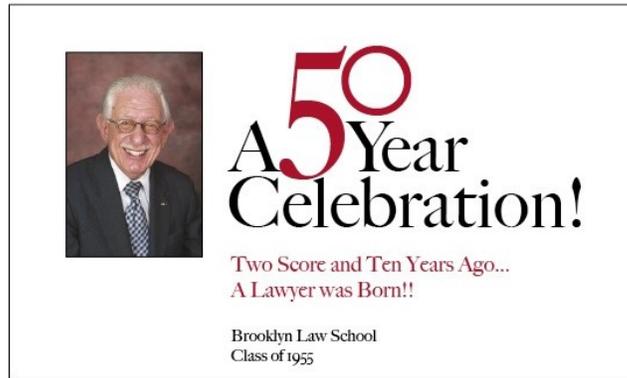
Jon with Hon. Charles and Kathi Ramos



Prof. Doris Bluth with Hon. Charles and Debbie Buchwald



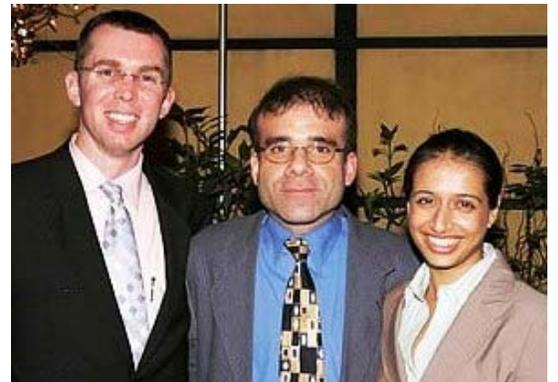
Hon. Jacqueline Silbermann



Hon. Judy York



Steven Hoffman and Linda Hurwitz with The Millers



Daniel with Lucas and Alifya

## THE CHANGING FACE OF NEW YORK CITY'S RENTAL MARKET

Some 65% of New Yorkers rent, rather than own their homes, with the bulk of these units being regulated. Of the 2,084,769 total rental units, about 1.04 million are rent stabilized and only 59,324 are rent controlled. Most rent-controlled units are in prewar buildings where the tenants have continuously resided since 1971. Rent-stabilized apartments typically exist in buildings of six or more units built between 1947 and 1974. The current rent-regulatory laws allow for units to enter and exit the system, so the status of these apartments is subject to flux and impacts the City's available housing stock.

The City's housing market is principally impacted by new construction, conversions of non-residential buildings into residential use, and through a variety of tax-incentive programs. In this last category, the number of housing units that received "Section 421-a" exemptions increased by 78.2% in 2004. Under this program, owners are exempt from real-estate taxes due to increased property values resulting from improvements. To be eligible, projects must be new construction on vacant lots, predominantly vacant, or improved with a non-conforming use three or more years before the new construction begins. Rental apartments built with "Section 421-a" tax exemptions are subject to the provisions of the Rent Stabilization Laws during the exemption period, which usually lasts for 10 to 25 years depending on a variety of factors, including geographic location and government commitment to the preservation of units for low- and moderate-income families.

"Tax incentive" housing is also encouraged via the Section 421-a "Affordable Housing Program." Developers can choose to locate the affordable housing units on-site by setting aside 20% of the units in the building for low-income tenants or building off-site. In return, these developers receive up to a 25-year tax exemption. New housing starts under the Affordable Housing Program rose significantly this past year, increasing 812.5% from 2003 levels.

Aside from these additions to the housing stock, the New York City Rent Guidelines Board has reported some significant losses of rent-regulated units. By way of example, the City has lost apartments formerly subject to the Mitchell-Lama law. Created in 1955 as a way of providing affordable rental and cooperative housing to moderate- and middle-income families, developers of low- and moderate-income housing received tax breaks and low-cost mortgages. After 20 years, landlords could leave or "buy out" of the Mitchell-Lama program. Since 1985, the City has lost more than 28,000 Mitchell-Lama units representing a 21% decrease since 1985, with the pace of "buyouts" accelerating rapidly. Within the first four months of 2005 alone, almost 3,600 units lost their Mitchell-Lama status.

With respect to stabilized units, High Rent/Vacancy Decontrol was the largest contributing source to a decrease. The Rent Regulation Reform Act of 1997 ("RRRA") authorizes the deregulation of apartments that are vacated after June 20, 1997, and which have a legal monthly rent of \$2,000 or more. Last year, 8,856 units were deregulated under the High Rent/Vacancy Decontrol provisions in the RRRA. From 1994-2004, a total of 41,430 units were deregulated due to High Rent/Vacancy Decontrol, 88% of which were located in Manhattan. And while private landlords should not be compelled to subsidize regulated housing, public policy concerns mandate that we, as a society, all bear the responsibility and burden of preserving affordable housing throughout our great State. To that end, creative solutions, such as offering substantial tax abatements or setoffs, are clearly warranted in order to incentivize private property owners to end the spiraling trend of removing regulated units from the rental market.

If you have questions or comments about rent regulation or the housing market, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at [LFerrara@FinkelsteinNewman.com](mailto:LFerrara@FinkelsteinNewman.com).

### LETTER TO THE EDITOR

I was involved in much of the condemnation work surrounding Metrotech and Times Square. Your article on Kelo ["Eminent Domain: Public Taking, Private Good?"] and its implications in the Finkelstein Newman Newsletter [October 2005, Issue 13] provided a very clear and direct explanation and analysis of the law. Nice job.

E.B., Esq. (name withheld)



## PARTIAL EVICTION YIELDS PARTIAL ABATEMENT?

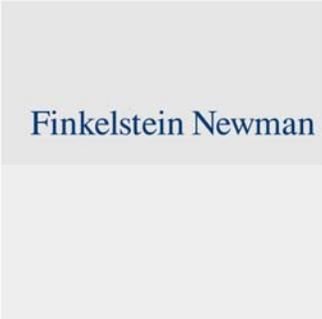
*cont'd from pg. 2*

area of operation for the tenant's business and encompassed such a small percentage of the tenant's total area that it was *de minimis*. Thus, the trial court held that "the taking of a non-essential minute area of space" was an exception to Justice Cardozo's partial actual eviction rule which allowed for total rent abatement. For these reasons, the landlord was permitted to keep the steel cross-bracing in place and the tenant was denied a rent abatement.

On appeal, the Appellate Division, First Department, did not accept the trial court's application of a *de minimis* exception, but instead chose what it deemed the most equitable result—a partial rent abatement. Arguably, this holding is in direct conflict with the Cardozo rule, since a proportionate rent abatement is the precise kind of arrangement rejected by the *Fifth Ave. Bldg. Co. v. Kernochan* opinion. The Appellate Division focused on the same factual aspects of the case as the trial court—the small amount of rented space encroached upon by the landlord and its minimal impact on the tenant's business—yet with a very different result. Rather than allow a windfall for the tenant (a full rent abatement) or permit a partial taking by the landlord with no financial consequence (no rent abatement), the Appellate Division reasoned that the tenant should receive some form of relief for the partial taking and remanded the case to the Supreme Court for a determination of actual damages.

The *Eastside* decision is likely good news for landlords within the First Department in that it seemingly ushers in a new rule governing actual partial evictions. If this decision is followed, landlords may be permitted to complete permanent repairs and improvements that deprive tenants of small amounts of their rented space with only minimal rental adjustments as opposed to full rent abatements. The key inquiry in subsequent cases will likely be where the line is to be drawn between "minimal," or *de minimis*, encroachments and "substantial," actual partial evictions—a distinction of considerable significance to landlords and tenants alike.

If you have questions or comments about partial evictions or this case, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at [RFinkelstein@FinkelsteinNewman.com](mailto:RFinkelstein@FinkelsteinNewman.com).



Finkelstein Newman LLP

225 Broadway, 8th Fl.  
New York, NY 10007  
212-619-5400

**We're on the Web!**

**Visit us at:**

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