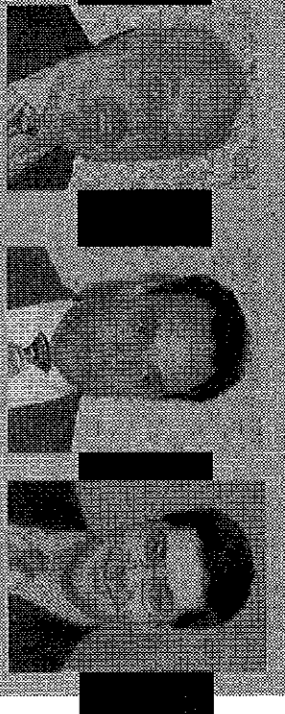


Part 2 of 2

Reviewing the Ramifications of "Succession Rights" to Owners

COUNSEL'S
CORNER

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Editor's Note: The below article is the second segment of a report that appeared in the April, 2007 issue of IMPACT.

WHITE PLAINS—In litigation over the issue of succession rights, a landlord's contentions would be three-fold regarding the burden of proof a proposed "non-traditional" successor must prove in order to be permitted to retain succession rights and therefore remain in the apartment.

First, the landlord would argue that the proposed successor would have the burden of proving his emotional interdependence with the tenant of record and that the proposed successor is unable to establish this.

Second, the landlord would argue that the proposed successor would have the burden of proving his financial interdependence with the tenant of record and that he is unable to do so.

Third, the landlord would argue that the tenant of record must show that he had both the emotional and financial interdependence while occupying the apartment along with the tenant of record continuously for a period of at least two years immediately preceding the date when the tenant of record vacated the apartment as their primary residence.

The proposed successor may not be a sublessee or assignee of any type as part of this two-year period in order to succeed on a claim of succession rights.

More Details

Regarding the first and second arguments, the courts have held that this burden is on the tenant asserting the defense of succession rights to satisfy his "affirmative obligation of establishing succession rights to the subject Manhattan rent stabilized apartment as a non-traditional family member of the" vacating or deceased tenant. *Caru, LLC v. Ramos*, Slip Copy, 14 Misc.3d 138(A), 2007 WL 527864 (Table) (N.Y. Sup. App. Term), 2007 N.Y. Slip Op. 50280(U).

In *Caru*, the court awarded possession of the apartment to the Landlord, finding that the proposed successor did not satisfy her burden of establishing financial interdependence with the tenant of record. That this burden rests with the respondent (proposed successor) has also been affirmed in *UM Realty, LLC v. Myers*, Not Reported in N.Y.S.2d, 2002 WL 32082265 (N.Y. Sup. App.

Term), 2002 N.Y. Slip Op. 50704(U).

In *UM Realty*, the court stated:

[t]he burden was upon occupant to establish his entitlement to succession rights (Emergency Tenant Protection Regulations [9 NYCRR] § 2503.5[e]; 55 Spring St. Assoc. v. Hill, NYLJ, May 8, 2002 [App Term, 1st Dept]), and occupant failed to meet this burden (Emergency Tenant Protection Regulations [9 NYCRR] § 2500.21[n][2]; 54 Featherco Inc. v. Correa, 251 A.D.2d 23, 673 N.Y.S.2d 658; GSL Enters. v. Lopez, 239 A.D.2d 122, 656 N.Y.S.2d 637; Seminole Realty Co. v. Greenbaum, 209 A.D.2d 345, 619 N.Y.S.2d 5).

Regarding the third argument, the burden is also on the tenant to prove the continuous two-year period of occupancy along with the tenant of record immediately prior to the date that the tenant of record vacates the premises.

The Importance of Records

Landlords should always maintain their records and request that their tenants of record provide them with information regarding any other persons occupying any particular units along with the tenant of record. This will enable the landlord to keep track of what persons are occupying what units in addition to tenants of record so that the landlord will be aware of situations and units where potential succession rights issues may arise.

In addition, this will enable a landlord to pursue any illegal sublet, illegal assignment, failure to renew, non-primary residence or other necessary and relevant holdover actions against both the tenant of record and any illegal occupants that the landlord becomes aware of.

A proposed successor can establish his or her burden with regard to the two continuous years necessary for succession rights in a variety of ways, including those similar to how a tenant would establish primary residence if that issue were to arise. Therefore, assuming that a landlord does not wish to acknowledge the rights of a non-traditional family member or indeed any family member to succeed to the tenancy, the landlord may attempt to challenge this "right" as stated above.

Landlords should be aware that should the landlord allow the proposed successor to succeed to the tenancy the landlord is not permitted to increase the rent until the land-

lord offers the proposed successor a renewal lease and at that time the landlord is only allowed to increase the rent by the amounts set forth by the Rent Guidelines Board.

Should the landlord wish to challenge the proposed successor's rights to succeed to the tenancy, the landlord should commence a holdover proceeding against the proposed successor without accepting rent from the purported successor. This would be on the grounds that he / she is an illegal occupant of the apartment and, essentially, an illegal sub-lessee of the apartment (the landlord's contention being that he had rights as an occupant only so long as the tenant of record was residing in the apartment).

As an aside, it is worth noting that this is another reason—the ability to bring actions and challenge a tenant or occupancy in these types of proceedings—that it is important for landlords to maintain good records.

Proper Timing

Also, if the timing is appropriate, the landlord may maintain a holdover for failure to renew and/or non-primary residence.

The theory here is that if the tenant of record does not renew but instead the proposed successor attempts to renew then no renewal has been made and unless the proposed successor is able to establish succession rights, than no renewal can be made and the landlord is entitled to reclaim possession of the apartment.

The theory of non-primary residence is that the tenant of record is not maintaining the apartment as his or her primary residence any longer and therefore the landlord is entitled to reclaim possession of the apartment.

This, again, shifts the burden on to the proposed successor to establish succession rights.

It is likely in the landlord's best interests to bring a holdover proceeding against both the tenant and the "illegal occupant" in these situations to protect the landlord's interests. As one can see this is one of the few situations where the burden of proof (for this affirmative defense) lies squarely with the tenant and/or the proposed occupant.

In conclusion, keep good records, do not accept rent from a person you know has no right to reside in the apartment and commence legal action as soon as possible. The failure to do so may result in a continuation of an Emergency Tenant Protection Act (ETPA) tenancy without a vacancy increase and the ability to improve the apartment by a Major Capital Improvement (MCI).

Note: Due to an error several revised portions of the last article were incorrectly set forth. The last sentence of the first paragraph prior to "Definitions" should have read: "At the outset it should be noted that under ETPA, until a change in statute, succession rights originally applied as a result of case law and the doctrine was not at first separately codified as it was under rent stabilization.

The effects were and are largely the same, except when it came to the narrow issue of a "non-traditional family member's" entitlement to succession rights.

Similarly, the last paragraph of the second section, prior to "Giving Proof," should have read: "While this was only directly provided for in the relevant statutory authority covering rent stabilized buildings within New York City, case law at first and then statutory authority also applied to the jurisdictions covered by ETPA."

The last paragraph of the third section, prior to "An Important Distinction" should have read "There is no longer any dispute over whether succession rights should apply to the ETPA communities and the rationale." The authors apologize for any confusion.

Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J. Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

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