RENT REGULATION

Appellate Court Deals a Blow To Owners of Loft Units

By **Warren A. Estis**

And **Jeffrey Turkel**

In two recent cases involving rent and rent overcharge claims, the Appellate Division, First Department dealt a sharp blow to owners of residential loft units. In *Jo-Fra Props. Inc. v. Bobbe*, NYLJ, Dec. 23, 2010, at 25, col. 1, the First Department held that the loft owner was barred under Multiple Dwelling Law (MDL) §302(1)(b) from collecting rent from residential tenants in an Interim Multiple Dwelling (IMD) building that had not yet been legalized. In *Nur Ashki Jerrahi Community v. New York City Loft Board*, NYLJ, Dec. 2, 2010, at 29, col. 6, the court held that the four-year statute of limitations on rent overcharges under CPLR 213-a did not apply to an IMD covered by the Loft Law.

'Jo-Fra'

Jo-Fra concerned five loft buildings located on West 28th Street in Manhattan. Residential tenants began moving into loft units in the buildings during the 1970s, and well into the 1990s. Although the Loft Law (MDL §§280-287) was enacted in 1982, the owner in *Jo-Fra* took no steps to legalize the building until 2004, when various tenants filed an application for coverage with the Loft Board.

Following litigation, the owner agreed to register the buildings as an IMD and to begin the legalization process. While that process dragged on, the tenants filed rent overcharge complaints with the Loft Board relating to the years 2004 through 2008. Months later, the owner commenced an action for ejectment, wherein the owner also sought use and occupancy from the tenants.

Supreme Court (Edmead, J.) dismissed the owner's use and occupancy claims, and the First Department unanimously affirmed on appeal.

The First Department began its analysis by discussing the interrelationship between the Loft Law and an owner's ability to collect rent in a building that had not yet been fully legalized:

> With the enactment of the Loft Law in 1982, owners of interim multiple dwellings were given a timetable in which to 'take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building.' If they complied with that legalization timetable they were entitled to collect rent even if they had not yet obtained a certificate of occupancy; otherwise, the lack of a proper certificate of occupancy would preclude a right to collect rent for these properties. (internal citations omitted).

The court then observed that the premises had still not been legalized, such that the owner was barred from collecting rent pursuant to MDL §302(1)(b). That section, generally, holds that an owner cannot collect rent where a building does not have a certificate of occupancy. The First Department summed up its determination as follows:

> While the Loft Law, for the first years of its enactment and renewal, sought to facilitate owners' voluntary conversions of loft buildings to residences, the Legislature's decision in 2001 not to further extend the deadlines for alteration applications and permits reflected a determination that the owners' interests no longer warranted that protection. If Jo-Fra had acknowledged the buildings' status and satisfied its owner obligations under the Loft Law, instead of spending years raising procedural defenses, it could have been in compliance long ago. While it had the right to pursue its defenses, it had no one to blame but itself for the position it is now in.

'Nur Ashki'

CPLR 213-a, captioned "Actions to be commenced within four years; residential rent overcharge," states in full:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

In *Nur Ashki*, the question arose as to whether CPLR 213-a applied in the underlying Loft Law proceeding. The First Department ruled that it did not.

Nur Ashki concerned a loft building located at 5-7 White Street in Manhattan. The former owner registered the building as an IMD in 1983, listing apartment 5B as a covered unit with a rent of $770.00 per month. Patricia Thornby moved into 5B in 1990 pursuant to a lease whereby she purported to waive Loft Law coverage. She thereafter executed three renewal leases, each with a similar waiver provision.

In 2006, Ms. Thornby filed two complaints with the Loft Board, one asserting Loft Law coverage and the other asserting rent overcharge. The Loft Board ruled that the tenant was indeed covered by

The First Department began its analysis by discussing the inter-relationship between the Loft Law and an owner's ability to collect rent in a building that had not yet been fully legalized.

the statute, and issued an order finding that the tenant had been overcharged $62,880.80 for the four year period preceding 2006 complaint. The Loft Board did not address the landlord's defense that the four-year statute of limitations under CPLR 213-a barred any finding of rent overcharge whatsoever.

The owner thereafter commenced an Article 78 proceeding. Supreme Court (Lehner, J.) held that the tenant was covered by the Loft Law, but annulled the Loft Board's refund directive, finding that CPLR 213-a indeed applied to tenant's overcharge complaint. Both sides appealed.

The First Department easily disposed of the owner's claim that the tenant was not covered by the Loft Law. The court held that

> The difference between the four-year statute of limitations in CPLR 213-a and in 29 RCNY 106.1(c) is substantial. While both statutes limit recovery of an overcharge to the four year period prior to the filing of the complaint, CPLR 213-a goes further by saying that in addition, rental events occurring more than four years prior to the complaint cannot be examined to determine what the lawful rent should be in the first place. Thus, the Appellate Division ruled that in determining the legal rent for the loft unit in question, the Loft Board could examine the entire rental history. The Appellate Division summarized its holding as follows:
>
> A loft is removed from coverage under the Loft Law and eligible for rent stabilization when a certificate of occupancy is issued legalizing the premises for residential use. Upon a determination of legalization, the Loft Board issues a final order setting the initial legalized rent for registration with the DHCR. Therefore, as the municipal respondent Loft Board asserts and as petitioner Owner does not dispute, a determination of the initial rent for an IMD is conducted before the rent is registered for rent stabilization, and an IMD rent is often not examined until an owner places the tenant on notice of what the owner claims is the legal rent.
>
> It is axiomatic, then, that the rent first registered with the DHCR, establishing the legal registered rent for future increases and starting the running of RSL's four-year statute of limitations, should be calculated by an examination of the entire rent history given the long period of time that the entire process takes. (Internal citations omitted).

the Loft Law "is a governmental residential regulatory scheme that is not subject to waiver by the tenant." In support of this proposition, the court cited an earlier decision in the *Jo-Fra* case. See *Matter of Jo-Fra Props. Inc.*, 27 A.D.3d 298, 813 N.Y.S.2d 63 (1st Dept. 2006).

The court ruled for the tenant on her rent overcharge claims, citing its earlier decision in *Sori-Goalya Realty v. New York City Loft Bd.*, 284 A.D.2d 137, 726 N.Y.S.2d 93 (1st Dept. 2001). In that case, the court ruled that CPLR 213-a did not apply to Loft Board matters and was limited to civil, judicial proceedings. The Appellate Division also relied on its decision in *Hicks v. New York State Division of Housing and Community Renewal*, 75 A.D.2d 127, 901 N.Y.S.2d 186 (1st Dept. 2010).

In *Hicks*, the court held that CPLR 213-a did not apply to rent controlled apartments, noting that the CPLR provision was not intended to supplant existing statutes of limitations in rent regulatory schemes. The Appellate Division also noted that when enacting the four-year statute of limitations in 1984, the Legislature amended the rent stabilization statute, but not the rent control statute.

The Appellate Division ruled that the applicable statute of limitations was set forth in 29 RCNY 106.1(c), which states that:

> An application for rent overcharges shall be filed within four years of such overcharge. Overcharges shall not be awarded for the period prior to the date of filing of a coverage or registration application, nor for more than four years before the date on which the application for overcharge was filed.

WARREN A. ESTIS *is a founding partner at Rosenberg & Estis, P.C. and* JEFFREY TURKEL *is a partner at the firm.*