RENT REGULATION

Departments Divide Over Loft Law Ruling

By **Warren A. Estis**

And **Jeffrey Turkel**

In its recent decision in *Acevedo v. The Piano Building, LLC*, —AD 3d—, 891 N.Y.S.2d 41 (1st Dep't 2009), the Appellate Division, First Department, ruled that even where a loft unit does not fall under the Loft Law, the unit will still be subject to rent stabilization under the Emergency Tenant Protection Act ("ETPA") if it can be legalized and otherwise falls under the statute. In so holding, the First Department declined to follow contrary Appellate Division, Second Department, authority. The source of the disagreement between the Departments is the proper interpretation of the Court of Appeals' 2004 decision in *Wolinsky v. Kee Yip Realty Corp.*, 2 NY 3d 487, 779 N.Y.S.2d 812 (2004).

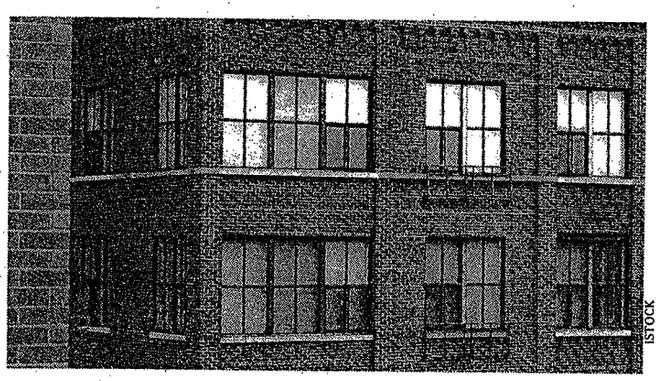
The Loft Law

The Loft Law (MDL Article 7-C) allows for the conversion of Interim Multiple Dwellings, which are defined as buildings once used for commercial, manufacturing or warehouse purposes which lack a residential certificate of occupancy. The Loft Law is generally limited to buildings that, on Dec. 1, 1981, had been occupied for residential purposes by three or more families living independently of each other since April 1, 1980, MDL §281(1). Once the legalization process is completed, loft tenants will become rent stabilized, provided the building contains six or more units.

'Wolinsky'

In *Wolinsky*, various loft tenants about to be evicted asserted ETPA status despite the fact that residential occupancy of their loft units was illegal under the zoning resolution, which allowed residential use only for artists. The Court of Appeals held that the units did not fall under either the Loft Law or the ETPA:

> It is clear that the tenants' residential occupancies of the commercially-leased units are not within the purview of the Loft Law. The units were first used for residential purposes in 1997, almost two decades after expiration of the Loft Law eligibility window period. Tenants nevertheless urge that their illegal conversions are entitled to protection under the ETPA, relying on the broad language and scope of that Act.
> Reading the ETPA and the Loft Law together, we agree with the courts below that the tenants' illegal conversions do not fall under the ambit of the ETPA. As reflected in the Legislative history and intent of the Loft Law, the fixed eligibility period was designed to address the public safety and municipal zoning emergency caused by the expansion of illegal conversions at that time. The statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives. If the prior-enacted ETPA already protected illegal residential conversion of manufacturing space, significant portions of the Loft Law would have been unnecessary. Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the "loft pioneers" (internal citations omitted).[1]



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The question arose as to whether illegal conversions can fall within the ambit of the Emergency Tenant Protection Act.

The Second Department

The question thereafter arose as to whether illegal conversions can ever fall within the ambit of the ETPA. In *Gloveman Realty Corp. v. Jefferys*, 18 AD 3d 812, 795 N.Y.S.2d 462 (2d Dept. 2005), the Second Department, citing *Wolinsky*, implied that illegally-converted lofts that were not eligible for protection under the Loft Law were also not entitled to the protection of the ETPA. In *315 Berry St. Corp. v. Hanson Fine Arts*, 39 AD3d 656, 835 N.Y.S.2d 261 (2d Dept. 2007), the Second Department seemingly created an exception to *Gloveman*, holding that illegally converted units could become subject to the ETPA where "it is undisputed that the [owner] knew of and acquiesced in the unlawful conversion, at the expense of the occupants, of the unit from commercial to residential use, that the applicable zoning generally permits residential use, and that the [owner] sought legal authorization to convert the premises to use during the pendency of [the] proceeding" (material in brackets supplied).[2]

The Second Department clarified its stance in *Caldwell v. American Package Co. Inc.*, 57 AD 3d 15, 866 N.Y.S.2d 275 (2d Dept. 2008). In *Caldwell*, the tenants were ineligible for protection under the Loft Law, but asserted ETPA status. Addressing head-on the issue of the proper interpretation of *Wolinsky*, the Second Department wrote:

> Despite the seeming lack of ambiguity in [*Wolinsky's*] holding, however, courts have since struggled to determine whether *Wolinsky's* rejection of ETPA protection for these conversions is absolute. The dispute centers on two statements in the *Wolinsky* opinion, the first of which refers to the Appellate Division as having "rejected tenants" request for ETPA protection, holding that the Act "does not extend to tenancies that are illegal and incapable of becoming legal," and the second at the conclusion of the opinion, mentioning that legislative changes could have made the subject premises "legal or capable of being legalized" (internal citations omitted, material in brackets supplied).[3]

After recounting the *Gloveman* and *315 Berry Street* decisions, the Second Department concluded:

> Viewing these holdings through the prism of *Wolinsky*, the conclusion is inescapable that the exception recognized in *315 Berry St.* is an extremely limited one, applying only in the particular circumstances described there. The *Wolinsky* court reached its conclusion that "illegal conversions do not fall under the ambit of the ETPA" by recognizing that the Loft Law would have been unnecessary if protection for the residents of such premises was already available under ETPA. The Court of Appeals concluded on that basis, that "the statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives." That the opinion went on to bolster this conclusion by citing the subsequent inaction of both the City and the State to extend such protections does not undermine its major premise that ETPA does not protect illegal loft occupants.[4]

'Acevedo'

In *Acevedo*, the former owner purchased a tenant's

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

rights under the Loft Law pursuant to MDL §286(12) in December of 1995, and thereafter rented the unit residentially on a free market basis. When the new tenant claimed ETPA status, the current owner took the position that by purchasing the prior tenant's rights under the Loft Law, the apartment had become "deregulated" and was not picked up by the ETPA.

The First Department quickly disposed of that argument, holding that a purchase of rights merely allows the owner to buy the tenant out, not to deregulate the apartment. The court then addressed the owner's argument that pursuant to *Wolinsky*, once a unit fell outside of the Loft Law, it could not be subject to the ETPA.

The First Department rejected that argument, criticizing contrary Second Department authority:

> We decline to join the Second Department in reading Wolinsky as providing a blanket prohibition barring ETPA coverage of all loft units not subject to the Loft Law, even where the Zoning Resolution permits residential use as of right. In our view, *Wolinsky* stands for nothing more than the proposition that illegal loft units are not entitled to rent stabilization treatment when the unit is incapable of being legalized. Indeed, the Court of Appeals acknowledged in *Wolinsky* the possibility that ETPA could provide protection to such tenants capable of becoming legalized. It explicitly noted that the City of New York in that case had "not acted to amend the Zoning Resolution to include purely residential use...or to rezone tenants' neighborhood. ...Such steps could make residential loft units like tenants' legal or capable of becoming legalized" (internal citations omitted).[5]

The First Department concluded:

> Where zoning expressly allows residential use as of right, and apartments can be legalized by the owner filing a certificate of occupancy, there is no rationale under *Wolinsky* to foreclose ETPA coverage. To do so would be to deny the effect to that part of *Wolinsky* that relied upon the impossibility of conforming with the Zoning Resolution as its basis for denying ETPA coverage. We thus adhere to our prior determination that where, as here, the pre-1974 building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA "notwithstanding the sale of loft law rights by a prior tenant."[6]

The First Department granted the owner's motion for leave to appeal to the Court of Appeals on Feb. 9, 2010. Matthew Breed, the attorney who represented the landlord in *Acevedo*, reports that the appeal is being perfected. A Court of Appeals ruling is expected later this year.

1. 2 NY 3d at 493.
2. 39 AD 3d at 657.
3. 57 AD 3d at 21.
4. Id. at 22-23.
5. 891 N.Y.S.2d at 44-45.
6. Id. at 45.