RENT REGULATION

Owner Occupancy Notice Must State Facts, Panel Says


By **Warren A. Estis** | And **Jeffrey Turkel**

In *Hirsch v. Stewart*, NYLJ, April 29, 2009, at 26 col. 1, the Appellate Division, First Department, unanimously ruled that where an owner seeks to evict a rent stabilized tenant based on owner occupancy, Rent Stabilization Code ("RSC") §2524.2(b) requires that the predicate notice of non-renewal to the tenant must "state the facts underlying [the owner's] decision" to recover the apartment.

The decision, authored by Justice Angela M. Mazzarelli, and joined by Justices David E. Saxe, David Friedman, Rolando T. Acosta and Leland G. DeGrasse, was a blow to rent-stabilized owners in the already hotly contested world of owner occupancy evictions under rent stabilization.

Facts

Morton Hirsch owns the building located at 459 W. 43rd St. in Manhattan. In July of 2005, he served a notice of non-renewal on Elaine Stewart, the tenant of apartment 1-A, which stated:

> PLEASE TAKE NOTICE, that your lease...will expire on October 31, 2005, and that your tenancy is hereby terminated as of October 31, 2005. Furthermore, the landlord will not renew your lease based upon the fact that the Landlord seeks possession of [the apartment] for the Landlord's own use. The Landlord seeks to recover possession of [the apartment] for the personal use and occupancy of himself as his primary residence in the City of New York (material in brackets in original Appellate Division decision).

The owner served the notice of non-renewal pursuant to RSC §2524.4(a)(1), which allows an owner to refuse to renew a rent stabilized tenant's lease where the owner "seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family...."

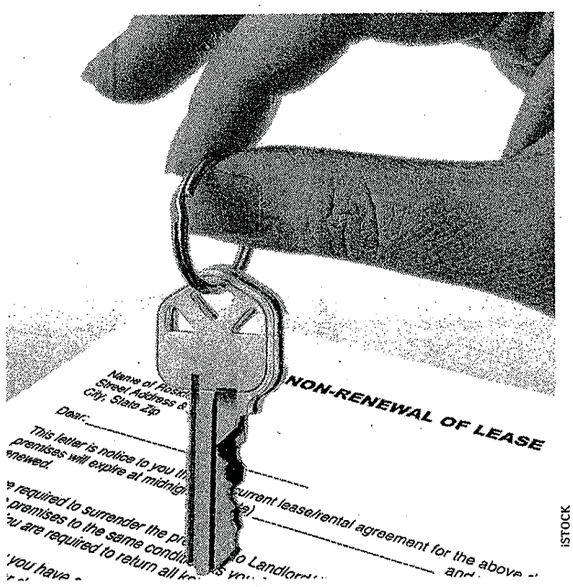
The content of the notice of non-renewal, which must be served between 150 and 90 days before the tenant's lease expires, is governed by RSC §2524.2(b), which states:

> Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, *the facts necessary to establish the existence of such ground*, and the date when the tenant is required to surrender possession (emphasis supplied).

The owner in *Hirsch* commenced a holdover proceeding when the tenant refused to vacate at the end of her lease term. The tenant moved Housing Court (Milin, J.) to dismiss the petition, arguing that the notice of non-renewal violated RSC §2524.2(b) by not specifying "the facts necessary" to establish a valid claim for owner occupancy.

Judge Milin dismissed the petition. The Appellate Term, First Department, affirmed Judge Milin, writing:

> The underlying notice of non-renewal, containing conclusory allegations concerning the landlord's intention to primarily reside in the subject apartment upon tenant's surrender, was insufficient to serve as a predicate for the within owner occupancy proceeding. Landlord's notice failed to comply with the specificity requirements of Rent Stabilization Code (9 NYCRR) §2524.2(b), since it merely "tracked the statutory language for non-renewal upon the ground of owner occupancy...without setting forth allegations of fact specific to this proceeding" (internal citations omitted).[1]



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The Appellate Division

The Appellate Division, First Department, unanimously affirmed Appellate Term. The court first addressed the owner's argument that while a notice of non-renewal may have to state specific facts in a non-primary residence case (see *Berkeley Assoc. Co. v. Camlakides*, 173 A.D.2d 193, 569 N.Y.S.2d 629 [1st Dep't 1990]), where the case is premised on objective facts regarding where the tenant lives, an owner occupancy proceeding was largely premised on "'a state of mind not necessarily susceptible to a statement of facts.'" The court rejected that argument, finding that (1) "[t]his argument ignores the plain language of section 2524.2(b), which does not differentiate among the various types of grounds for terminating a lease," and (2) the owner could have, and should have, set forth in the notice of non-renewal the relevant facts he presented on appeal, i.e., that he sought the apartment in question due to "the proximity of the apartment to his office and his desire to live closer to where he worked."

The Appellate Division next rejected the owner's claim that because RSC §2524.4(a)(1)—as opposed to its predecessor, §54 of the prior Rent Stabilization Code—does not require the owner to prove "good faith," the predicate notice need not document the owner's good faith intention to recover the apartment. The court observed that in the recent determination in *Pultz v. Econmakis*, 10 N.Y.3d 542, 860 N.Y.S.2d 765 (2008), the Court of Appeals emphasized the need to establish good faith:

> [W]e underscore that [the owners] may not recover the stabilized units unless and until they establish in Civil Court (at holdover proceedings against plaintiffs) their *good faith intention* to recover possession of the subject apartments for the husband owner's personal use as the primary residence (emphasis added) (10 N.Y.3d at 548).

The Appellate Division also found without merit the owner's claim that the tenant could determine all of the relevant facts regarding the landlord's

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intentions on discovery or at trial. The court first observed that if a recitation of facts is required in a non-primary residence case, where the tenant knows full well where he or she primarily resides—then such a recitation is doubly important in an owner occupancy case, where only the owner knows his or her true intent. The court then wrote:

> ...the landlord's argument also fails because discovery is not available as of right in a summary proceeding. Were a tenant served with a barebones notice like the one in this case to be denied leave to conduct discovery, he or she would be completely at sea in an ensuing holdover proceeding. The tenant would simply be unable to defend.

The Court's observation in this respect is perplexing, as discovery is routinely granted tenants in owner occupancy proceedings. See e.g., *Zunce v. Rodriguez*, 22 Misc.3d 265, 871 N.Y.S.2d 828 (N.Y.C. Civ. Ct. 2008); *Malafis v. Rosario*, 18 Misc.3d 1106(A), 856 N.Y.S.2d 24 (N.Y.C. Civ. Ct. 2007); *Kokut v. Green*, 14 Misc.3d 1224(A), 836 N.Y.S.2d 493 (N.Y.C. Civ. Ct. 2007); *McGoldrick v. DeCruz*, 195 Misc.2d 414, 758 N.Y.S.2d 756 (App. T. 2003).

In further support of its position, the Appellate Division, citing *Isdahl v. Pogliani*,[2] observed that "the landlord's position has been repeatedly rejected by the Appellate Term, First Department." There, Appellate Term wrote:

> The specificity requirements of Rent Stabilization Code (9 NYCRR) §2524.2(b) were not satisfied by allegations that the named landlords "took title" to the subject West 22nd Street building premises on a given date in 1993 or that the landlords' named daughter intends to occupy the subject apartment as her primary residence. These barebones allegations, which neither provide the reason(s) why the landlords seek possession of the apartment for their daughter's use or bear upon their good faith intention to do so, were inadequate to salvage a renewal notice otherwise devoid of facts (citations omitted).

Citing *Gincola v. Middleton*,[3] the Appellate Division noted that the Appellate Term, Second Department had adopted the First Department's position. In *Gincola*, however, Justice Joseph G. Golia vigorously dissented. Justice Golia wrote that except where the factual circumstance of a case is extraordinary, as in *Pultz* (where the owner sought to recover all 15 units in his building based on owner's use), a notice of non-renewal in an owner occupancy case need only set forth "that the owner intends to occupy the apartment as his primary residence."

With the Appellate Division having definitively ruled, it is now the law in the First Department that notices of non-renewal in owner occupancy cases must "state the facts underlying [the owner's] decision." Practitioners are advised to set forth specific allegations as to (1) how and why an owner came to the decision that he or she needs to recover the apartment; (2) who will use the recovered apartment and (3) how the apartment will be used.

1. 15 Misc.3d 140(A), 2007 WL 1518608 (App. T. 1st Dep't).
2. 22 Misc.3d 14, 871 N.Y.S.2d 804 (App. T. 1st Dep't 2008).
3. 21 Misc.3d 34, 871 N.Y.S.2d 576 (App. T. 2d & 11th Jud. Dists. 2008).