Owner Occupancy

Ruling Approves Multiple Apartment Recoveries

Warren A. Estis, a founding partner at Rosenberg & Estis, and Jeffrey Turkel, a partner at the firm, write that the Court of Appeals recently held that there is no limit on the number of apartments an owner can seek to recover for personal use under the Rent Stabilization Law. They examine the facts of the case and the Court of Appeals' ruling, and also discuss additional arguments that the tenants raised before the Court of Appeals that the Court rejected without comment.

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On June 3, the New York State Court of Appeals unanimously ruled in *Pultz v. Economakis*[1] that there is no limit on the number of apartments an owner can seek to recover for personal use under the Rent Stabilization Law. The Court of Appeals affirmed a 2007 ruling of the Appellate Division, First Department,[2] which in turn reversed a 2006 decision of the Supreme Court, New York County (Soto, J.).

This article will examine the facts of the case and the Court of Appeals' ruling, and will also discuss additional arguments that the tenants raised before the Court of Appeals that the Court rejected without comment.

In the interest of full disclosure, the successful owners in *Pultz v. Economakis* were represented by Jeffrey Turkel of Rosenberg & Estis.

Supreme Court

Catherine and Alistair Economakis own a 15-unit rent-stabilized apartment building located at 47 East 3rd St. in Manhattan. In 2003, they decided they would seek to recover all 15 stabilized units to create a single family home for themselves. They proceeded under RSL §26-511(c)(9)(b), which allows an owner to recover "one or more" stabilized units for his or her personal use. Rent Stabilization Code §2524.4(a) is to the same effect.

In 2004, certain tenants in the building commenced an action in Supreme Court, seeking a declaration that the owners' plan violated the letter and spirit of the RSL. Supreme Court Justice Paul G. Feinman granted the tenants a preliminary injunction barring the owners from proceeding with owner occupancy holdovers in Civil Court, writing as follows:

[A] reading of the RSC which allows a landlord to recover all of the rental premises in a tenement building at one time based on plans to turn the entire building into a private home, would appear to be incompatible with the statute's intent to provide New York City residents with affordable and stable housing. Many, if not all, of the cases relied upon by the defendants refer to smaller brownstone buildings, the restoration of which to an owner-occupied single family home may well have been permitted. However, the statute cannot be read as permitting a tenement apartment building to be rid of an entire rent roll of tenants . . . .[3]

The parties thereafter moved for summary judgment. Supreme Court Justice Faviola A. Soto ruled for the tenants, finding that the owner-occupancy proceedings were more properly classified as proceedings to withdraw units from the rental market under RSC §2524.5(a)(1), which withdrawal requires DHCR approval:

If defendants fully execute their recovery plan, the building will contain no rent stabilized apartment units. The net loss of 15 rent stabilized apartment units clearly exacerbates the "emergency" described in the Rent Stabilization Law - i.e., an "acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing." That loss also clearly falls afoul of the directive of the Rent Stabilization Code "that the policy herein expressly shall be implemented with due regard for the preservation of regulated rental housing."[4]

Justice Soto then permanently enjoined the owners from seeking to recover the subject apartments in Civil Court.

The Appellate Division

The owners thereafter appealed Justice Soto's ruling. On Feb. 15, 2007, the Appellate Division, First Department, unanimously reversed Supreme Court, holding that the phrase "one or more" in RSL §26-511(c)(9)(b) and RSC §2524.4 (a)(3) means just what it says:

Reading these provisions of the Rent Stabilization Law and Code together, it is clear that DHCR approval is not required where an owner seeks possession of "one or more" dwelling units for personal use and occupancy. The plain meaning of the words "one or more" can only be interpreted as a minimum of one apartment and maximum of all. RSC §2524.4(a)(1) is clearly the applicable code provision in this case, and the motion court erred in ruling otherwise [internal citations omitted].[5]

The Appellate Division also rejected the tenants' "withdrawal" and legislative intent arguments:

[A]s should be plain from the statutory language, RSC §2524.5 is not triggered merely by the fact that "any or all" housing accommodations are sought to be recovered. Rather, there must be an attempt to withdraw any or all housing accommodations, *and* that withdrawal must be either for the purpose of conducting the owner's business or because the cost of removing violations filed by government agencies is equal to or exceeds the value of the property. The conjunction "and" cannot be ignored . . . .

To the extent Judges Feinman and Soto may have relied on the policy underlying the Rent Stabilization Law to preserve the supply of regulated housing in New York City . . . this too was error. Although both courts correctly summarized this legislative policy, they overlooked that the same legislative body also enacted a provision expressly permitting an owner to recover dwelling units for personal use and occupancy, and did so without imposing any limitation on the number of units that may be recovered (italics in original).[6]

Court of Appeals

The Court of Appeals thereafter granted the tenants leave to appeal, but nevertheless unanimously affirmed the First Department's ruling in all respects. After declaring the "withdrawal" provision of the RSC to be plainly inapplicable, the Court (in an opinion by Judge Theodore T. Jones) rejected the tenants' statutory and legislative intent arguments:

Read together, the plain language of the Rent Stabilization Law and the Rent Stabilization Code permit an owner to refuse to renew leases to rent-stabilized tenants and to recover possession of "*one or more*" stabilized dwelling units for his or her personal use and occupancy as his or her primary residence, or as the primary residence of a member of the owner's immediate family, without first obtaining DHCR approval.

Plaintiffs' legislative intent argument presumes an ambiguity in the Rent Stabilization Code owner occupancy provisions with respect to defendants' actions. Of course the Legislature intended to make more rental housing available, but it also intended to allow owners to live in their own buildings if they choose to do so. The unambiguous language of 9 NYCRR 2524.4(a) was chosen by the Legislature to reconcile these conflicting policies, and we give effect to the plain meaning of that language (internal citations omitted, italics in original).

Perhaps what is most interesting about the Court of Appeals' decision are the arguments the Court rejected sub silentio.

The tenants had previously argued in the Appellate Division that the phrase "one or more" did not mean "all." In their brief to the Court of Appeals, the tenants raised a new argument: an owner could recover all rent-stabilized apartments in a building for personal use, but had to maintain the original configuration - and the rental history - of the apartments in case the owner vacated and the units became restabilized. The tenants' attorneys wrote:

The statute specifies that the recovery of possession of the dwelling units is for the "use and occupancy" by one of the owners or members of his or her immediate family. The plain meaning of this language is that the dwelling units, as constituted at the time of recovery, will remain in place. This statutory language nowhere permits an owner to recover units for personal use and then reconfigure them in a manner that withdraws them from the rental market.

The tenants then went on to argue that the owners herein could not prevail because they planned to obliterate the

apartments to create a single family home. The tenants asserted that the most the owners could do was to recover all of the apartments and connect them by creating internal doorways:

There is a simple and common sense distinction between what a landlord is permitted to do with more than one apartment recovered in owner use proceedings, and what is prohibited. A landlord may make alterations, such as installing a door between apartments, or temporarily removing individual kitchen fixtures, that do not render meaningless the rent history of the apartment. A landlord may not withdraw the apartment from the rental market by altering it so extensively that the rent history becomes meaningless and the apartment necessarily becomes deregulated.

Much of oral argument before the Court of Appeals was devoted to the tenants' argument that the owners could only recover the subject apartments if they maintained their outer dimensions. The Court was highly skeptical of this claim, and did not address it in its opinion. Notably, many Courts have previously held, explicitly or implicitly, that an owner may freely combine, alter or even obliterate apartments recovered for owner occupancy in the course of creating a single family home. See, e.g., *Proctor v. Barnes*, NYLJ, Jun. 3, 2002, at 22, col. 3 (App. T. 1st Dep't); *Smilow v. Ulrich*, 11 Misc.3d 279, 806 N.Y.S.2d 392 (Civ. Ct. N.Y. Co. 2005).

The prevalence of "combination" cases is not surprising given the nature of owner occupancy. Owners usually seek to recover "one or more" stabilized units for personal use where the owner (1) has a larger expanding family, *Steinmetz v. Cedeno,* NYLJ, Jan. 3, 1996, at 27, col. 4 (Civil Ct. Kings. Co.); (2) has an ill parent or relative, *Powers v. Babic*, 148 Misc.2d 952, 569 N.Y.S.2d 324 (App. T. 1st Dep't 1990); or (3) wants to enjoy a more expansive lifestyle than a single apartment would allow, *Tauber v. Ruscica,* NYLJ, Oct. 14, 1987, at 14, col. 3 (Civ. Ct. N.Y. Co.). Given that many owners in personal use cases already live in their buildings, and that rent-stabilized apartments are often quite small, it follows that in many instances the owner will seek to combine and reconfigure the units or units recovered to create integrated, contiguous space.

The Court of Appeals ended its opinion by noting that it was not authorizing any tenant's eviction, but was instead allowing the owners to precede in Civil Court to establish their good faith intention to use the subject apartments as their primary residence. The trial is expected to begin this summer.

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Endnotes:

1. NYLJ, June 4, 2008, at 29, col. 3.

2. 40 A.D.3d 24, 830 N.Y.S.2d 101 (1st Dep't 2007).

3. 8 Misc.3d 1022 (A), 803 N.Y.S.2d 20 (Sup. Ct. 2005).

4. NYLJ, March 21, 2006, at 19, col. 3 (Sup. Ct. N.Y. Co.).

5. 40 A.D.3d at 29.

6. Id. at 30, 31.