Rent Stabilization

Courts Guided by Program's Purpose

BY WARREN A. ESTIS AND JEFFREY TURKEL

Over the last several weeks, the Court of Appeals and the First and Second Departments of the Appellate Division have issued decisions touching on primary residence, the four-year overcharge rule and luxury deregulation. All three cases concern policy issues that go to the very essence of what rent regulation should—or should not—accomplish. In the interest of full disclosure, Rosenberg & Estis represented the owner in *Noto*.

'Glenbriar'

We last discussed *Glenbriar Co. v. Lipsman*, 11 A.D.3d 352, 783 N.Y S.2d 546 (1st Dept. 2004), in our article of Nov. 3, 2004. *Glenbriar* concerned two elderly "snowbird" tenants who lived half the year in their rent stabilized apartment in Riverdale, and the other half in their Florida condominium.

In 1995, apparently motivated by health concerns, the Lipsmans purchased a condominium apartment in West Palm Beach, Florida. For tax reasons, Mr. Lipsman adopted Florida as his primary residence, but Mrs. Lipsman did not. The landlord bought a proceeding in Civil Court to evict the Lipsmans on grounds of non-primary residence. After trial, Civil Court (Spears, J.) ruled against the tenants, holding that they did not primarily reside in their New York apartment.

RENT REGULATION

Warren A. Estis

Jeffrey Turkel

The Appellate Term reversed.[1] The majority (Justices Lucindo Suarez and Phyllis Gangel- Jacobs) found in favor of the Lipsmans, holding:

> ...this case presents a not uncommon 'snowbird' situation where a tenant purchases a Florida property for use as a winter and/or vacation residence. In evaluating the history of this tenancy...landlord has not established by preponderant evidence that tenants have forfeited their principal New York residence of long-standing [citations omitted].

Justice William P. McCooe, in dissent, was troubled by the fact that Mr. Lipsman had become a Florida resident for tax purposes:

> While no one factor is controlling in a primary residence case, the cumulative evidence particularly the decision of the tenants to declare themselves Florida residents on their Florida income tax returns by seeking the benefit of the Florida tax laws and failing to pay New York State income tax are factors of greater importance since they are undisputed and unexplained.

A divided Appellate Division affirmed. The majority (Justices Angela M. Mazzarelli, Richard T. Andrias and Betty Weinberg Ellerin) concluded that Mrs. Lipsman had established an ongoing "substantial physical nexus" with the New York City apartment "for actual living purposes."[2] The dissent (Justices David Friedman and Luis A. Gonzalez) were troubled by the fact that the Lipsmans, in the dissent's view, used their New York City apartment as a clubhouse for family reunions:

> Of course, we all sympathize with the Lipsmans' desire to maintain, at below-market cost, a connection with the home where they raised their children. The Rent Stabilization Code, however, was not intended to facilitate the pursuit of such a goal. Certainly, rent regulation was not instituted for the purpose of subsidizing adults, such as the Lipsmans' grown children, who, as the majority puts it, wish to 'come back to their childhood home to visit.' Again, by no means do I deprecate the desire of the Lipsmans and their children to maintain a connection with the Lipsmans' Bronx apartment; I merely observe that the rent regulation laws were intended to further other, more socially pressing concerns, namely the shortage of affordable housing in New York City.[3]

On Oct. 20, 2005, the Court of Appeals unanimously affirmed, albeit on jurisdictional grounds.[4] The Court observed that where "there are affirmed findings of facts supported by the record," the Court of Appeals "cannot review those facts and substitute its own findings." The Court of Appeals concluded:

> On this record, we are bound by the finding below, which requires an affirmance of the Appellate Division's order.

Of more interest is the concurring opinion of Judge Albert M. Rosenblatt, in which Judge Robert S. Smith joined:

> I appreciate the stated desire of the Lipsmans to keep their rent-stabilized apartment so that, among other benefits, their children may maintain ties with the home in which they were raised. On the other hand, I also sympathize with those who cannot afford a similar apartment in which to raise their own families, a plight exacerbated by tenants availing themselves of stabilized or controlled rents for New York apartments while simultaneously maintaining a primary residence in another state.
>
> An apartment should not be decontrolled merely because its tenants are retired and want to spend some of the colder months in a warmer climate. I write separately, however, to highlight the unseemly prospect of spouses living together yet claiming two separate primary residences...in order to take advantage of the mutually exclusive benefits of two jurisdictions.
>
> ***
>
> There are many bona fide arrangements in which one spouse can honestly take advantage of one state's laws and the other spouse the other state's. Spouses need not share a primary residence, and legitimate arrangements of that kind should be recognized. The open possibility, however, of manipulation and gaming of the system—as suggested by this record—is dismaying.

In *Glenbriar*, even the majority observed that there were "troubling facts" surrounding Mr. Lipsman's declaration of Florida as his primary residence. Thus, although the tenants ultimately prevailed in *Glenbriar*, the Court's majority and concurring opinions expressed deep concern as to the possibility of manipulation of the system.

'Ador'

We addressed *Ador Realty LLC v. New York State Division of Housing and Community Renewal*[5] in our column of May 7, 2003. *Ador* concerns Section 26-511(c)(5) of the Rent Stabilization Law, which was added to the statute by the Rent Regulation Reform Act of 1997 (L. 1997, ch. 116). That section provides that an owner, upon entering a vacancy lease after June 15, 1997, can collect a "longevity increase" if the owner has not collected a vacancy increase during the proceeding eight years. In such instances, the owner would be entitled to a rent increase equal to .6 percent, to be multiplied by:

> (a) the number of years since the imposition of the last permanent vacancy increase, or (b) if a rent was not increased by a permanent vacancy allowance since the housing accommodation became subject to this chapter, the number of years that such housing accommodation has been subject to this chapter.

The obvious problem with the statute is that an owner's entitlement to collect a longevity increase may depend upon events going back 20 years or more. The RSL, however, otherwise limits examination of a rental history to *four* years for purposes of determining whether a rent overcharge has been collected. The potential for abusing the longevity increase rule is obvious.

In *Ador*, DHCR's Commissioner held that the four year statute of limitations on rent overcharges did *not* prohibit DHCR from examining past rent registrations to determine whether the landlord was taking the proper longevity increase. In a subsequent Article 78 proceeding, Supreme Court Justice Ira B. Harkavy disagreed, holding that the four year rule prohibited DHCR from determining whether the

Warren A. Estis *is a founding member at Rosenberg & Estis.* **Jeffrey Turkel** *is a partner at the firm.*

owner had, as claimed, gone 20 years without collecting a vacancy increase.

In a decision issued on Oct. 3, 2005, the Second Department reversed.[6] Noting the tension between the four year rule and the potential for longevity increase abuse, Justice Robert A. Spolzino wrote for a unanimous court:

> Nothing in the legislative history suggests that either the statutory limitation on the DHCR's consideration of its records or the statutory prohibition against requiring the owner to maintain records was intended to apply to the DHCR's determinations with respect to longevity increases. To the contrary, the provisions were addressed to different issues within the overall rent regulation scheme. While, ordinarily, we would nevertheless apply the restrictions as written, their application here is not neutral with respect to the purposes of the longevity increase, but destructive of those very purposes, operating as an impediment to their fair administration. As a result, the way to resolve this dilemma that is least inconsistent with the legislative intent is to read the four-year rule as not applying to longevity increase determinations.

In *Noto v. Bedford Apartments Co.*, ___A.D. 3d __, 801 N.Y.2d 21 (1st Dept. 2005), a tenant rented Apartment 15C at 168 West 86th Street in 1976. The stabilized apartment consisted of ten rooms. In 1991, the tenant's wife (Katherine Noto) rented 15B, an adjacent ten room rent stabilized apartment. The husband and wife, with the landlord's permission, then combined the apartments at a cost of approximately one million dollars.

In 1998, the owner sought to luxury deregulate Apartment "15B", which rented for more that $2,000. By that time, Noto lived in 15B and her estranged husband lived in 15C. The owner argued that the apartments had been combined, and that DHCR should import the husband's income into Apartment 15B for purposes of determining whether the $175,000 income threshold had been met.

DHCR's District Rent Administrator ("DRA"), after an inspection, determined that 15B and 15C were a single integrated unit. The inspector specifically noted that the apartments had only one external exit, and only one kitchen. The DRA then deregulated 15B, and his determination was thereafter sustained on administrative review and in an Article 78 proceeding.

The owner commenced various proceedings in Housing Court to recover 15B and 15C. Noto took the position that only 15B had been deregulated, as DHCR's deregulation order only mentioned that apartment. Judge Ernest Cavallo disagreed, noting that "[a]lthough the DHCR order does not explicitly refer to Apt. 15C, this is only because Apt. 15C no longer exists." Notably, Judge Cavallo dismissed the owner's proceeding without prejudice because the owner had failed to offer the tenant a market rate renewal lease in accordance with Rent Stabilization Law Section 26-504.3(e). Ms. Noto, however, had argued that the proceeding should have been dismissed *with* prejudice.

After the owner made its market rate offer, Noto brought a declaratory judgment action in Supreme Court, seeking (1) a ruling that only 15B had been deregulated, and (2) a preliminary injunction enjoining the owner from compelling Noto to sign a market rate lease. Supreme Court (Bransten, J.) held that although Noto had not established in her papers her right to a preliminary injunction, a hearing should be held to determine if a preliminary injunction should be granted. The court, in the meantime, tolled Noto's time to sign the market rate renewal offer. Justice Bransten did not address the underlying merits.

The Appellate Division held that Supreme Court erred in tolling Noto's time to sign the market rate lease, observing that where "a court has found that a movant has not made the requisite showing for injunction relief based on the papers, the motion must be denied."[7]

The First Department then unanimously ruled that both apartments had been deregulated. The First Department held that because both apartments had been combined into a single unit, DHCR had necessarily deregulated both 15B and 15C. The court also found that Judge Cavallo's order, wherein he refused to dismiss the owner's proceeding with prejudice and affirmatively held that DHCR had deregulated both apartments, aggrieved the tenant, such that his ruling was entitled to collateral estoppel effect.

Most importantly, the court took pains to observe that tenants living in combined 20-room apartments were not the intended beneficiaries of the Rent Stabilization Law:

> Moreover, we observe that the Rent Regulation Reform Act of 1993 was an 'attempt to restore some rationality' to a system which 'provides the bulk of its benefit to high income tenants' (Mem. of Sen. Kemp Hannon, 1993 N.Y. Legis. Ann. at 175). The Act recognizes that '[t]here is no reason why public and private resources should be expended to subsidize rents for these households' (id.). To that end, these rent laws specifically provide for deregulation of high rent accommodations upon vacancy or when occupied by high-income tenants [citations omitted]. Clearly, these laws were not intended to protect a high-income tenant who insists on rent stabilization for an extremely spacious multi-room apartment in the desirable Upper West Side.[8]

Glenbriar, Ador and *Noto* all establish that appellate courts are deeply concerned with perceived attempts, by owners or tenants, to manipulate the system.

1. 2002 WL 1363398
2. 11 A.D.3d at 353
3. Id. at 358
4. 2005 WL 2663960
5. N.Y.L.J., March 19, 2003, at 20, col. 3.
6. 2005 WL 2438384
7. 801 N.Y.S.2d at 25.
8. Id. at 24.