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RENT STABILIZATION

# Owner Occupancy Under the HSTPA


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Since the dawn of rent regulation, owners have been permitted to recover an occupied apartment for the personal use and occupancy of the owner or a member of the owner's immediate family. Pursuant to the recently enacted Housing Stability and Tenant Protection Act (HSTPA), the Legislature has sharply limited personal use evictions, and the courts are effectuating those changes.

### History

Under rent control, an owner had to demonstrate that he or she required the apartment due to an "immediate and compelling necessity." Thus, in *Cupo v. McGoldrick*, 278 App. Div. 108 (1st Dept. 1951), the owner was able to make such a showing by establishing that "'she is unable to climb stairs and that she has been advised to move to a ground-floor apartment.'"

The Rent Stabilization Law did not require the owner to demonstrate an immediate and compelling necessity. RSL §26-511(c)(9)(b), as it read before the HSTPA was enacted, allowed an owner to refuse to renew a lease where:

> …he or she seeks to recover possession of one or more dwelling units for his or her 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 as his or her primary residence in the city of New York…

### The HSTPA

Once the Republicans lost control of the New York State Senate in 2018, there was nothing to stop the Democratic governor and the Democratic Legislature from implementing reforms they had long sought. The result was the HSTPA, effective June 14, 2019.

Part I of the HSTPA amended RSL §26-511(c)(9)(b) in two important respects.

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First, the Legislature now required the owner to establish an immediate and compelling necessity for the apartment. Second, the statute limited "recovery" for personal use to "only one housing accommodation," eliminating the former provision allowing an owner to recover "one or more apartments."

Critically, section 5 of Part I of the HSTPA provided that the amendment to RSL §26-511(c)(9)(b) "shall take effect immediately and shall apply to any tenant in possession at or after the time it takes effect."

### A Constitutional Challenge Fails

In *Karpen v. Castro*, ___ Misc.3d ___ (Civ. Ct., Kings Co. 2019), a landlord commenced personal use proceedings against multiple tenants in 2018. As noted, the HSTPA limited recovery for personal use to a single apartment.

The tenants moved to dismiss based on failure to state a cause of action. The landlord, citing his reliance on the pre-HSTPA state of the law, alleged that application of the statute to the proceedings was unconstitutional.

Civil Court (McClanahan, J.) rejected the landlord's constitutional claim, holding that the HSTPA did not "deny petitioner all economically beneficial or productive use of the subject premises." Addressing the Legislature's intent, the court wrote:

> Section 2 of Part I of the HSTPA did not enact a new law but expanded laws already in effect. In these circumstances, petitioner did not have a reasonable expectation that the legislature would not change these laws and that such changes could possibly place even more restrictions on the use of his property.

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This court cannot say that the new law is without significant and legitimate purpose. The legislature apparently determined that the policy of restricting the flow of residential units out of the rent stabilization system is valid and necessary. The amendment limiting owners to the recovery of only one apartment and only after establishing immediate and compelling necessity for the personal use is one of the tools employed by the legislature to stem this flow and preserve affordable housing for New Yorkers.

### 'Zagorski' and 'Harris'

It in *Zagorski v. Makarewicz*, 112 NYS3d 892 (Civ. Ct., NY Co. 2019), the landlord commenced an owner occupancy proceeding in March of 2019, prior to the enactment of the HSTPA. The tenant moved to dismiss on the ground that the landlord's predicate notice of non-renewal did not allege an immediate and compelling necessity. This was no surprise, as the RSL required no such showing at the time the owner served the notice.

The court (Wang, J.) dismissed the proceeding based on an inadequate—and apparently incurable—predicate notice:

Petitioner fails to demonstrate that the new requirement in Section 26-511(c)(9)(b) that he allege an immediate and compelling necessity should not be applied to the case at bar.

* * *

Since, as here, a predicate notice cannot be amended, Petitioner's conceded failure to state an 'immediate and compelling necessity' in the instant notice of nonrenewal is not reasonable under the attendant circumstances. As such, the petition fails to state a cause of action pursuant to CPLR 3211(a)(7) (internal citations omitted).

*Zagorski* raises an interesting question: What if the owner's pre-HSTPA predicate notice therein stated that the owner had a grave heart condition and required the tenant's ground-floor apartment because he could no longer climb stairs? That would seem to qualify as an immediate and compelling necessity, even though those words were never used. Why should that notice be deemed insufficient?

Five weeks after *Zagorski* was decided, the Appellate Term, First Department decided *Harris v. Israel*, 65 Misc 3d 155(A) (App Term, 1st Dept. 2019). In *Harris*, the landlord prevailed at trial in 2018, having demonstrated under the law in effect at the time a "good faith basis" to recover the apartment in question. During the pendency of the appeal, the Legislature enacted the HSTPA. The amended statute required the owner to establish an immediate and compelling necessity, and also required the owner to provide an equivalent accommodation to the tenant, who had lawfully occupied the apartment for "fifteen years or more." The owner, obviously, had not satisfied these requirements.

Appellate Term reversed and remanded, stating:

The HSTPA provides that these particular amendments were to 'take effect immediately' and were expressly made applicable to 'any tenant in possession at or after the time it takes effect.' The inference to be drawn from this language is that if at any stage of the appeal process a tenant is lawfully in possession, he is entitled to the beneficial aspects of the statute. Because the legislature has made changes to the law that directly impact this case, and has made those changes applicable to this pending litigation, a remand is appropriate. Accordingly, we remand the matter to Civil Court for such other proceedings as may be necessary to determine landlord's claim in accordance with the HSTPA. (internal citations, brackets, and quotation marks omitted).

*Harris* appears to implicitly reject *Zagorski*. One has to imagine that the predicate notice in *Harris* did not allege an immediate and compelling necessity. Nevertheless, Appellate Term remanded the case, but did not dismiss it.

### 'Sassouni'

In *Sassouni v. Adams*, 65 Misc 3d 1231(A) (Civ. Ct., NY Co. 2019), the tenant in a pending owner occupancy case moved to amend his answer to add an affirmative defense, among others, that the owner had previously recovered possession of a rent stabilized apartment in the building for his daughter and was thus barred by the HSTPA provision limiting recovery to a single unit. The court (Ortiz, J.) granted the tenant's motion to amend, as well as the tenant's motion for summary judgment. It held that the owner had previously "recovered" apartment 4C in the building pursuant to an owner's use proceeding that was never decided, but was settled when the tenant of that apartment relocated within the building pursuant to a lifetime lease.

*Sassouni* raises the question of whether the landlord therein actually "recovered" apartment 4C in an owner's use case. Although a case was commenced, the tenant was never evicted. The tenant could have proceeded to trial, but elected to settle and voluntarily relocate. The statute does not prevent a landlord and/or his or her immediate family members from residing in multiple apartments; it merely limits "recovery" to "only one dwelling unit." The case can be made that "recovery" means the use of judicial proceedings to force a tenant to vacate against his or her will. Plainly, appellate courts will have to determine what constitutes the previous "recovery" of an apartment for personal use.