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RENT REGULATION

Curability of Profiteering In Rent-Regulated Apartments


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It is no secret that some rent-regulated tenants, whether through Airbnb or some other platform, are profiteering from or otherwise commercializing their apartments. The focus of this article is to survey existing case law as to when such conduct is curable, and when the offending tenant can be evicted. The answer depends on whether the apartment is rent stabilized or rent controlled, and whether the victim of the profiteering is a subtenant, a roommate, or a transient occupant.

Rent-Controlled Cases

Section 2205.1(a) of the Rent and Eviction Regulations, which implement the rent control law, provides that it shall be unlawful "for any person to demand or receive any rent for any housing accommodations in excess of the applicable maximum rent established therefore." Under rent control, this rule has been applied not only where a landlord overcharges a tenant, but where a prime tenant overcharges a subtenant or a transient guest. Although under rent stabilization a prime tenant cannot charge a roommate a rent that exceeds "such occupants' proportionate share of the legal regulated rent," RSC §2525.7(b), there is no analogous provision under rent control.

The leading case under rent control with respect to commercialization and/or profiteering is *220 West 93rd Street v. Stavrolakes*, 33 AD3d 491 (1st Dept. 2006), lv to app denied 8 NY3d 813 (2007). There, the First Department ruled:

> Sufficient evidence, in the form of testimony and numerous exhibits, was presented for the court to find that the occupancy of this three-bedroom apartment…by numerous persons between 2001 and 2005—especially short-term transient students at illegal rents—was in the nature of subletting rather than taking in roommates, *and constituted profiteering and commercialization of the premises, an incurable violation of the Rent Control Law* (italics supplied).

In general, a rent-stabilized tenant who overcharges a subtenant or a transient occupant (as opposed to a roommate) is subject to eviction.

In *Peck v. Lodge*, 2003 WL 26094731 (Sup Ct New York County), the court granted the landlord summary judgment, finding that the tenant's use of the apartment as a B&B constituted a violation of a substantial obligation of her tenancy. The court rejected the tenant's claim that her guests were actually roommates, in that these guests were "numerous, short-term, and restricted in their use of the apartment's space." The court also held that the record indicated that these guests were "charged sums which in the aggregate exceeded the legal monthly rent," resulting in the commercialization of the apartment and profiteering. The court concluded that "profiteering, in the context of rent control and rent stabilization, has been declared to be an 'incurable ground for eviction.'"

In the 1986 case of *Hurst v. Miske*, 133 Misc 2d 362 (Civ Ct 1986), the rent-controlled prime tenant commenced a holdover proceeding against her subtenant. The court held that the prime tenant had overcharged the subtenant by an average of 247 percent, and that such conduct subverted the remedial purpose of the rent control law. The court found that the prime tenant had "forfeited her rights to this apartment," but it should be noted that the landlord was not a party to the proceeding.

Disproportionate Rent

In *WSC 72nd Street Owners v. Bondy*, 9 Misc 3d 126(A) (App Term 1st Dept. 2005), the Appellate Term held that "while profiteering under a sublease is illegal, there exists no provision in the rent control regulations…which prohibits charging a roommate a disproportionate share of the legal rent." Thus, "no possessory cause of action is available to the landlord." See

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also, *Porto v. Watts*, 11 Misc 3d 1069(A) (Civ. Ct. 2006) ("no possessory proceeding lies against a rent-controlled tenant who overcharges a roommate").

In *270 Riverside Dr. v. Braun*, 4 Misc 3d 77 (App Term 1st Dept. 2004), the rent-controlled tenant collected rent from her two roommates in the aggregate sum of $1,270, slightly more than the legal regulated rent of $1,192. The court held that there was no possessory cause of action where a rent-controlled tenant overcharges her roommates, and further added that because the overcharge was so slight, "tenant's conduct did not rise to the level of an incurable violation warranting forfeiture of the tenancy."

In *Ishida v. Markowicz*, 18 AD3d 502 (2d Dept. 2005), the Second Department denied summary judgment in a profiteering case involving a rent-controlled tenant, holding that there was "a triable issue of fact as to whether the relationship between the plaintiff and defendant was that of roommates or of tenant and subtenant."

Rent-Stabilization Cases

Cases Where Violation Held Noncurable. In general, a rent-stabilized tenant who overcharges a subtenant or a transient occupant (as opposed to a roommate) is subject to eviction. Thus, in *42nd and Tenth Assoc. v. Ikezi*, 46 Misc 3d 1219(A) (Civ Ct 2015), the Civil Court considered the case of the rent-stabilized tenant who was renting to transients using Airbnb. The court held that "using a residential apartment as a hotel room and profiteering off it is ground for eviction and is incurable, as it undermines the purpose of the Rent Stabilization Code."

In *West 148 v. Yonke*, 11 Misc 3d 40 (App Term 1st Dept. 2006), the tenant "rented a portion of the stabilized apartment to a series of guests or 'roommates,' and charged each of the roommates nearly double the monthly stabilized rent. "The tenant advertised her apartment as "Chez Sylvie Bed and Breakfast." The Appellate Term, affirming the trial court, held that 'the tenant's commercial exploitation of her stabilized apartment required eviction pursuant to the Rent Stabilization Code."

In *Breson v. Halo*, 3 Misc 3d 1103(A) (Civ Ct 2004), the court awarded a final judgment of possession against a rent-stabilized tenant who engaged in "commercial exploitation" by charging her subtenant and/or roommate more than 100 percent of the legal rent. The court held that the tenant's conduct constituted "rent profiteering which is an incurable ground for eviction."

Other rent-stabilization cases where the tenant was evicted for profiteering are *Atlantic Ave. v. Pendry*, 308 AD2d 543 (2d Dept. 2003) ("the conduct of a profiteering rent-stabilized tenant 'is not to be condoned by permitting the tenant to remain after the fraud has been found out'"); *51 W. 86th St. Assoc. v. Fontana*, 28 Misc 3d 140(A) (App Term 1st Dept. 2010) (judgment of possession awarded where rent-stabilized tenant profiteered with respect to subtenant); *643 Realty v. Thadal*, 15 Misc 3d 131(A) (App Term 2d Dept. 2007) (judgment of possession awarded against rent-stabilized tenant who substantially overcharged her subtenant; "tenant's profiteering was not insubstantial"); *30-40 Assoc. Corp. v. Cuervo*, 16 Misc 3d 127(A) (App Term 1st Dept. 2007) ("tenant should not be permitted to cure the lease violation, inasmuch as tenant collected nearly three times the stabilized rent and failed to refund the overcharge"); *Continental Towers Limited Partnership v. Freuman*, 128 Misc 2d 680 (App Term 1st Dept. 1985) (rent-stabilized tenant who overcharged subtenant commercialized the apartment and was not permitted to cure).

Cases Where Violation Held Curable. There are instances where "profiteering" under rent stabilization has been held to be curable. In *Cambridge Dev. v. Staysna*, 68 AD3d 614 (1st Dept. 2009), the rent-stabilized tenant substantially overcharged his subtenant, but the subtenancy "was to be of short duration and upon learning of the illegality of the rent being charged, tenant promptly cured any violation of Rent Stabilization Code §2525.6(b) by immediately agreeing with the subtenant to offset his future rent and utility payments." Similarly, in *Ariel Assoc. v. Brown*, 271 AD2d 369 (1st Dept. 2000), "respondents promptly refunded all sums to the subtenants and notified petitioner of the cure prior to the commencement of the holdover proceedings."

In *672 Ninth Ave. v. Burbach*, 14 Misc 3d 1236(A) (Civ Ct 2007), the rent-stabilized tenant overcharged her subtenant by 24 percent for a period of one year, but "cured the violation by promptly refunding the excess payment and terminating Silleg's subtenancy." The court held that the 24 percent overcharge did not constitute profiteering or commercial exploitation, and that the warrant of eviction should be permanently stayed because the tenant "secured the subtenant's departure and refunded so much of the rent as was paid in excess of the legal maximum." See also *Central Park West Realty v. Stocker*, 1 Misc 3d 137(A) (App Term 1st Dept. 2004) (tenant permitted to cure where sublease had terminated prior to landlord's service of a notice to cure, and tenant refunded the overcharge to the subtenant shortly after commencement of the holdover).

Disproportionate Rent

RSC §2525.7(b) states that the rental amount that a tenant may charge a roommate "shall not exceed such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation." In *First Hudson Capital v. Seaborn*, 54 AD3d 251 (1st Dept. 2008), a majority of the First Department held that this provision does not give a landlord a cause of action for eviction against a rent-stabilized tenant who profiteers with respect to a roommate, as opposed to a subtenant.