RENT REGULATION

Courts Differ on Timing Issues In Owner-Occupancy Cases

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In *Pultz v. Economakis*, 10 N.Y.3d 542, 860 N.Y.S.2d 765 (2008), landlords Alistair and Catherine Economakis sought to evict all of the rent-stabilized tenants in their 15-unit building so that they could convert the building into a single-family home for themselves and their children. The Court of Appeals held that the landlords' plan was lawful in that the governing statute, RSL §26-511(c)(9)(b), provided without limitation that an owner can recover "one or more dwelling units" for his or her personal occupancy.[1]

Since that time, other owners have attempted to recover multiple apartments in owner occupancy proceedings in order to turn a building into a single family home. Two recent cases, *Bianco v. Sciaulino*, 26 Misc.3d 780, 897 N.Y.S.2d 596 (NYC Civ. Ct. 2009) and *Rudd v. Sharff*, 27 Misc.3d 860, 896 N.Y.S.2d 858 (NYC Civ. Ct. 2010), establish that courts disagree as to the legality—and the logistics—of an owner's attempt to recover a significant number of rent-stabilized apartments on owner occupancy grounds.

The Basics

RSL §26-511(c)(9)(b) and RSC §2524.4(a) provide that an owner may refuse to renew a tenant's lease where the owner seeks to recover the apartment for his or her own personal use. To this end, the owner must serve the tenant with a notice of non-renewal between 150 and 90 days before the expiration date of the tenant's stabilized lease. This notice must set forth "the statutory ground upon which the tenant's removal or eviction is sought, the facts necessary to establish the existence of such ground, and the date when the tenant is to surrender possession." *Giancola v. Middleton*, 73 A.D.3d 1056, 900 N.Y.S.2d 752, 753 (2d Dept. 2010).

An interesting question arises where an owner seeks to recover on owner occupancy grounds numerous rent stabilized apartments to create a single family home: What if, for example, the expiration dates of the various stabilized leases are months or years apart, and the project cannot go forward until all of the apartments are vacant? Does this timing issue, which may result in a recovered apartment lying fallow for several years, mandate dismissal of the proceeding?

'Bianco'

This issue arose before Judge Joseph E. Capella in *Bianco*. There, the landlord commenced an owner-occupancy proceeding against a rent stabilized tenant "as part of a broader effort to convert the nine apartments in the subject building into a single family home for his family."[2] The tenant, Andrew C. Sciaulino, moved on various grounds to dismiss the petition. The tenant pointed out that while his lease expired on May 31, 2009, one of the six remaining tenants in the building had a lease that would not expire until July 31, 2010. The tenant thus argued, inter alia, that "this proceeding is not ripe because it is mere speculation as to whether the petitioner will be able to recover possession of the other units in the building."[3]

Judge Capella found no impediment and denied the motion to dismiss, writing:

> By claiming that the procedure is premature, and given the various lease expiration dates throughout the building, the respondent is essentially placing the petitioner in the near impossible situation of having to commence upwards of up to six holdover proceedings simultaneously, or alternatively not disclose his good faith intent...to occupy all of the apartments in the subject building. While the amount of time that elapses before the petitioner can obtain possession of all of the units in the building will depend upon a variety of factors, including the expiration dates of each of the applicable leases and/or the length of any ensuing litigation, this does not mean that the instant proceeding is not ripe, especially if the petitioner has articulated a good faith intent...within the time constraints set forth in the Rent Stabilization Code regarding *Golub* notices. Ultimately, the petitioner's objective of obtaining complete possession of all of the apartments in the building is not beyond his control, and may occur through litigation and/or other means, such as the buyouts of other tenants or the voluntary vacatur, abandonment and/or surrender by other tenants.[4]

The Court added:

> Although a variety of factors may come into play, it is not beyond possibility that the petitioner might obtain possession of the other apartments in this building, even during the pendency of this proceeding. It may be that by the time this proceeding is ready for trial, any other apartments which the petitioner has not yet gained possession of, may be involved in similar litigation so as to allow the consolidation in the form of a joint trial.[5]

'Rudd'

Judge Gerald Lebovits confronted a similar issue in *Rudd*. There, the owner commenced two owner occupancy proceedings against rent stabilized tenants whose leases expired on July 31, 2009. The owner stated in his notices of non-renewal that he intended to convert the entire building into a single family home. Notably, the leases for two other apartments in the building will not expire until April 30, 2011.

The tenants moved to dismiss. They argued that the owner was not proceeding in good faith because if he recovered the two subject apartments, those apartments would have to remain vacant for several years until the owner could recover the remaining apartments and create a single family home, assuming that such efforts were even successful. Judge Lebovits framed the issue as follows:

> When an owner's timely non-renewal notice states the owner's intention to

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decline a renewal lease to a rent-stabilized tenant because the owner intends to use the entire building as a primary residence, but the owner indicates no desire to convert any apartment for personal use and occupancy until the entire building is recovered and the notice makes clear that the recovery might not take place for several years, is that notice reasonable in view of all the attendant circumstances?[6]

Judge Lebovits decided this issue in favor of the tenants, writing:

> A primary goal of rent stabilization is to preserve the availability of affordable housing for lower-income families. Permitting owners to evict tenants while they wait until an owner recovers the remaining units in a 13-unit building would mean that rent-stabilized tenants unlikely to find comparable housing in New York City will lose their homes, while apartments that would otherwise be available sit unused—warehoused for potentially many years. The inconsistency of that situation with rent stabilization's overarching policy is manifest.
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> Three tenants—respondents Sharff, Knight, and Kenny—could be evicted from two rent-stabilized apartments only to have their two apartments sit unused and off the market for 21 months at the earliest. This court finds that 21 months under the circumstances is unreasonable. Petitioners' notices do not, therefore, state a proper claim of owner occupancy under RSC §2524.4(a).[7]

Judge Lebovits acknowledged the contrary result in *Bianco*, but ruled that "[t]o the extent that language in *Bianco* suggests that the *Bianco* court believed that notices like the one here are sufficient to evict under RSC §2524.4, this court respectfully disagrees."[8]

In seeking to distinguish *Rudd* from *Pultz v. Economakis*, Judge Lebovits wrote that "the Court of Appeals in *Pultz* focused only on whether the language of RSC §2524.4(a) permits, as a matter of law, an owner to recover an entire building. It did not deal with the sufficiency of a *Golub* notice or whether the facts alleged in the notice described the use as a primary residence."[9]

While the Court of Appeals in *Pultz* did not touch on the issue raised in *Rudd* and *Bianco*—the effect of staggered expiration dates on an owner's efforts to combine multiple apartments into a single family home—the Appellate Division in *Pultz* did. The tenants in *Pultz* relied on RSC §2524.4(a)(5), which provides that an owner's failure to use an apartment for the intended purpose after the tenant vacates, or who does not continue in occupancy for three years, "may result in a forfeiture of the right to any increases in the legal regulated rent in the building in which such housing accommodations contain..."

The tenants in *Pultz* argued that given the various expiration dates, allowing the landlords to proceed would render the penalty meaningless. The Appellate Division rejected this argument, stating:

> Plaintiffs' speculation that the delay in recovering all of the units in the building or in renovating the building will render such penalty nugatory is not a sufficient basis to deprive defendants of their statutory rights. Again, any argument concerning the inadequacy of the statutory penalty is one for the Legislature.[10]

Indeed, in *Economakis v. Zambrano*,[11] a civil court case involving one of the tenants in the Economakis building, the tenant also argued that the staggered lease expiration dates warranted dismissal of the petition therein. Judge Peter Wendt rejected this argument, writing:

> Respondent argues that petitioners' proceedings thwart the purpose of the RSC in that by the time petitioners recover all of the units, more than three years will have passed since the first unit has been recovered. This argument is merely speculative. While it may be raised as a defense at trial, it cannot be the basis for summary dismissal of this proceeding.

An appeal has been perfected to the Appellate Term in *Rudd*; a Notice of Appeal has been filed in *Bianco*.

1. Author Jeffrey Turkel of Rosenberg & Estis successfully represented the landlords in *Pultz v. Economakis*.
2. 26 Misc.3d at 781.
3. Id.
4. Id. at 782 (internal citations omitted).
5. Id.
6. 27 Misc.3d at 862.
7. Id. at 864-65.
8. Id. at 866.
9. Id. at 865.
10. 40 A.D.3d 24, 33, 830 N.Y.S.2d 101 (1st Dept. 2007).
11. NYC Civ. Ct. L&T Index No. 67540/05.