Domestic Partners

Refusal to Add Gay Life Partner to Lease Upheld
Warren A. Estis, a founding partner at Rosenberg Estis, and Jeffrey Turkel, a partner at the firm, review *Zagrosik v. New York State Division of Housing and Community Renewal*, in which the court held that domestic partners are not entitled to be added to a rent-stabilized lease, although they are entitled to succession rights after the named tenant vacates.

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Rent-stabilized tenants occasionally get married, and often seek to add their spouse to the existing lease or to any renewal thereof. Section 2522.5(g)(1) of the Rent Stabilization Code allows tenants to do so, stating:

> Notwithstanding the foregoing, the tenant shall have the right to have his or her spouse, whether husband or wife, added to the lease or any renewal thereof as an additional tenant where said spouse resides in the housing accommodation as his or her primary residence.

But what if the "spouse" is a domestic partner? In *Zagrosik v. New York State Division of Housing and Community Renewal*,[1] New York County Supreme Court Justice Nicholas J. Figueroa, affirming DHCR, held that domestic partners are *not* entitled to be added to a rent-stabilized lease, although they are entitled to succession rights after the named tenant vacates.

'Braschi'

The status of gay life partners and other non-traditional family members was memorably addressed by the New York State Court of Appeals in the 1989 case of *Braschi v. Stahl Assocs. Co*.[2] In *Braschi*, Miguel Braschi lived with Leslie Blanchard, the tenant of record, in a rent-controlled apartment at 405 East 54th Street. Blanchard died in 1986, and Braschi sought succession rights under Section 2204.6 of the Rent and Eviction Regulations, which granted non-eviction protection to occupants who are the "surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant . . . ." Braschi, who had been Blanchard's gay life partner, argued that he was indeed a family member under the regulation.

The Court of Appeals agreed. Writing for the majority, Judge Vito J. Titone wrote:

> . . . we conclude that the term family, as used in 9 NYCRR 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence.[3]

'Goldstein'

The same issue arose under rent stabilization in the 1990 case of *East 10th Street Assocs. v. Goldstein*.[4] In *Goldstein*, Robert Wells, the gay life partner of Stuart Goldstein, sought succession rights after Goldstein died in 1987. The First Department held that although the definition of "family member" under Rent Stabilization Code ?2520.6(o) did not include "gay life partners," such persons were nevertheless entitled to succession rights under appropriate circumstances:

> . . . we find that the decision in *Braschi* . . . provides a controlling precedent herein since there is no significant distinction between the two regulatory schemes which would mandate a different definition of 'family'. Thus, in determining that 'a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence', the Court of Appeals specifically placed this statement '[i]n the context of eviction', *not* 'in the context of eviction from a rent controlled apartment.' It would be anomalous to hold that a life partner could be a valid family member for the purpose of protection from eviction from a rent-controlled apartment, but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned" (internal citations omitted, italics in original).[5]

In April of 1990, DHCR promulgated regulations under both rent control and rent stabilization, which, in relevant part, defined "family member," for purposes of succession rights, to include non-traditional family members, such as gay life partners. See, 9 NYCRR 2204.6(d)(3)(i); 9 NYCRR 2520.6(o)(2). The Court of Appeals upheld these regulations in *Rent Stabilization Association of New York City, Inc. v. Higgins.*[6]

'Zagrosik'

Zagrosik, unlike *Braschi* and *Goldstein*, was not a succession case. Instead, Dan Zagrosik, the rent-stabilized tenant in a Lower East Side building, asked that his gay life partner (Gregg Hanson) be added to a renewal lease that was to commence on July 1, 2003. Zagrosik and Hanson, in fact, possessed a Certificate of Domestic Partnership from the City of New York. In support of his demand, the tenant relied on Rent Stabilization Code ?2522.5(g)(1), which, as noted, requires a landlord to add a "spouse, whether a husband or wife," to the lease as a tenant. The landlord declined to do so, and the tenant filed a complaint with DHCR.

DHCR found against the tenant, and thereafter denied the tenant's Petition for Administrative Review on March 15, 2005. Deputy Commissioner Paul A. Roldan wrote:

> "In accordance [with ? 2522.5(g)(1)], the Commissioner finds that in the underlying proceeding the Rent Administrator correctly applied this Agency's position that the domestic partner of a named tenant, even if formalized by the issuance of Certificate of Domestic Partnership, does not fall within the definition of the term 'spouse, either husband or wife.'
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> The Commissioner notes, notwithstanding the instant determination, that the tenant's domestic partner may, at the appropriate time, establish his succession rights, if any, to the subject apartment under RSC Section 2523.5(b)(1)."

In the subsequent Article 78 proceeding, the tenant argued that a claim of *succession* was no substitute for the right to be named in a renewal lease *now*, before the tenant of record dies or moves away. The tenant raised, inter alia, due process and discrimination in housing claims, and cited *Braschi* and *Goldstein* as mandating that ?2522.5(g)(1) be read as including domestic partners within the definitions of "spouse."

Supreme Court disagreed. The Court first cited *Hernandez v. Robles*,[7] wherein, as characterized by Justice Figueroa, the First Department ruled in December of 2005 that "New York City could not be compelled to issue a marriage license to same-sex couples, as New York's disparate treatment of heterosexual and same-sex couples did not violate the due process or equal protection provisions of the New York Constitution . . . ." Supreme Court wrote:

> Respondent may rationally and lawfully treat petitioner and his partner differently than a married couple seeking joint tenancy rights. Respondent's regulation does not constitute an unlawful discrimination against a same-sex couple any more than denying that couple a marriage license. The regulation does not interfere with the petitioner's right to reside with his partner in the apartment they have been sharing.

Supreme Court next observed that under Section 3-244(e) of the New York City Administrative Code, domestic partners were merely granted "[e]ligibility to qualify as a family member entitled to succeed to the tenancy or occupancy rights of a tenant . . . ." Thus, according to Supreme Court, DHCR gave the tenant's domestic partner all he was entitled to by recognizing his potential right to succeed to the apartment.

Supreme Court concluded that DHCR's interpretation of ?2522.5(g)(1) did not constitute discrimination in housing:

> Executive Law ? 296(5)(a) does not mandate the relief petitioner seeks. The statute prohibits a landlord from denying housing to a person because of his or her sexual orientation. Respondents' decision, as noted, does not deprive petitioner and his partner of housing. The New York City Human Rights Law . . . similarly prohibits discrimination in the sale or rental of a housing accommodation. Again, petitioner is not discriminated against; rather his partner is being given the succession right he is entitled to as a domestic partner under NYC Admin. Code ? 3-244(e).

Supreme Court's determination is not likely to be the last word on the subject. *Hernandez v. Robles* was argued before the Court of Appeals on May 31, 2006. The New York Law Journal reported on June 1, 2006 that oral argument was "spirited," and that "[t]he judges did little to tip their hands as to how they would vote, greeting both sides with wide ranging, skeptical questions." A decision is expected shortly.

It is likely that the Court of Appeals' decision in *Hernandez* will affect any appeal from Justice Figueroa's ruling in *Zagrosik*. Until then, gay life partners, as opposed to heterosexual spouses, have no right to be added to a rent stabilized lease.

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Endnotes:

1. 2006 WL 1666241 (N.Y. Sup.).

2. 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989).

3. 74 N.Y.2d at 211.

4. 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990).

5. 154 A.D.2d at 145.

6. 83 N.Y.2d 156, 608 N.Y.S. 930 (1993).

7. 26 A.D.3d 98, 805 N.Y.S.2d 354 (1st Dep't 2005).
