ETPA Status Denied to Illegal Units

In the recent case of *Wolinsky v. Kee Yip Realty Corp.*,[1] the New York State Court of Appeals declined to extend rent stabilization status to illegal loft units that did not otherwise qualify under the Loft Law. The Court's unanimous decision, which affirmed a unanimous ruling of the Appellate Division, First Department,[2] was no surprise; what is more surprising is that the tenants believed they could succeed in the first place.

The Facts

The landlord in *Wolinsky* owned a seven-story commercial building at 135 Grand Street in Manhattan. The building is situated in a M1-5B zoning district, which permits the property to be used for light manufacturing and joint living-work space for artists. Section 41-11 of the New York City Zoning Resolution, in an effort to encourage industrial growth, allows new residential development for joint living-working quarters only.

In 1997, the landlord entered into commercial leases with various tenants for raw loft space in the building. The tenants then renovated their spaces for residential use. It is unclear whether the landlord knew of, or permitted, such use; the Appellate Division's decision repeats the tenants' allegation that they used their units "as residences with the landlord's permission."[3] The tenants are not certified as artists, and the building's certificate of occupancy does not allow the building to be used residentially.

As the putatively commercial leases began to expire, the tenants sought a declaration in Supreme Court that their lofts had become subject to the Rent Stabilization Law and Code by virtue of the Emergency Tenant Protection Act (ETPA) (L. 1974, ch. 576, §4). The act allowed municipalities throughout New York State, including New York City, to extend rent stabilization coverage to all but a narrow class of apartments enumerated in §5(a) of the statute. Because it did not expressly prohibit municipalities from extending stabilization protection to patently illegal loft units, the tenants argued that they were covered.

RENT REGULATIONS

WARREN A. ESTIS

JEFFREY TURKEL

The Loft Law

The tenants' gambit was necessitated by the fact that they could possibly qualify for protection under the New York City Loft Law, enacted pursuant to L. 1982, ch. 349. By its own terms, the Loft Law (Multiple Dwelling Law §§280 et seq.) would apply only to a loft building which "on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another." MDL §281(1)(iii). The loft units in question were constructed in 1997, a good 16 years after the Loft Law's so-called "window period" had closed.

Other provisions of the Loft Law, although silent as to ETPA coverage, spelled doom for the tenants' goal of obtaining legal — much less stabilized — status for their units. MDL §280, which set forth the Legislature's findings in support of the legislation, stated that "the intervention of state and local governments is necessary to effectuate legalization, consistent with the local zoning resolution, of the *present* illegal living arrangements in ... 'de facto multiple dwellings ...' " (emphasis supplied). As Justice David Saxe (now of the Appellate Division, First Department) observed in the 1986 Supreme Court case of *Korn v. Batista*:[4]

> [T]he entire thrust of the Loft Law was to protect those tenants who had been living in precarious living arrangements before the Loft Law went into effect. *It was not designed to encourage people to create new ones.* (emphasis supplied).[5]

The Litigation Begins

Supreme Court (Tolub, J.) granted the landlord's motion for summary judgment and dismissed the complaint. A unanimous Appellate Division, First Department affirmed, stating:

> Plaintiffs do not claim to be artists and do not claim protection under the Loft Law. Instead, they claim protection under the ETPA, an 'inclusive rather than exclusive' statute that covers 'all housing accommodations which it does not expressly except, including previously unregulated accommodations' [citation omitted], such as, plaintiffs argue, lofts first used as residences with the landlord's permission after the Loft Law window period ended on December 31, 1981. Clearly, however, ETPA coverage does not extend to tenancies that are illegal and incapable of becoming illegal (see *Tan Holding Corp. v. Wallace*, 187 Misc.2d 687, 688-89, 724 N.Y.S.2d 260). As the IAS court explained, to accept plaintiffs' argument as to the coverage of the ETPA would be, in effect, to award a variance to the building without administrative authorization. Such relief cannot be granted without legislation like the Loft Law, and we decline to do so based on mere speculation that a variance, if applied for, would be granted."[6]

The Court of Appeals granted leave and affirmed the Appellate Division, although on more expansive grounds. The Court first observed, in a footnote, that the landlord had failed to preserve any argument that "the units were, in any event, exempt from ETPA coverage under one of the statutory exceptions. ...." The unstated exception was undoubtedly ETPA §5(a)(5), which exempts from ETPA coverage "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy-four."

More surprising than the outcome was the fact that the tenants believed that they could succeed in the first place.

The Court of Appeals began its analysis by focusing on the legislative history of the Loft Law:

> The Loft Law ... permits conversions of "Interim Multiple Dwellings," which are defined as buildings or portions of buildings that were occupied at any time for manufacturing, commercial or warehouse purposes and lack a residential certificate of occupancy [citation omitted]. Critically, the statutory definition established a window period for eligibility encompassing only those units that, on December 1, 1981, were occupied for residential purposes since April 1, 1980 by three or more families living independently of one another. By adopting an eligibility period that was closed at the time of the enactment, the Legislature demonstrated its intent to provide the benefits of the Loft Law only to existing residential tenancies, *not to encourage new conversions of loft space* (emphasis supplied).

The Court continued:

> It is clear that tenants' residential occupancies of the commercially-leased units are not within the purview of the Loft Law. The units were first used for residential purposes in 1997, almost two decades after expiration of

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

the Loft Law eligibility window. Tenants nevertheless urge that their illegal conversions are entitled to protection under the ETPA, relying on the broad language and scope of that Act.

Reading the ETPA and the Loft Law together, we agree with the courts below that the tenants' illegal conversions do not fall under the ambit of the ETPA. As reflected in the legislative history and intent of the Loft Law, the fixed eligibility period was designed to address the public safety and municipal zoning emergency caused by the expansion of illegal conversions at that time [citations omitted]. The statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives. If the prior-enacted ETPA already protected illegal residential conversions of manufacturing space, significant portions of the Loft Law would have been unnecessary (see, e.g. Multiple Dwelling Law §286[3]). Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the "loft pioneers. ..."

The Court concluded:

Notably, the City has not acted to amend the zoning resolutions to include purely residential use of M1-5B zoned space or to re-zone tenants' neighborhood. Similarly, the Legislature has not adopted a new eligibility period that would confer Loft Law protections on later conversions. Such steps could make residential loft units like tenants' legal or capable of being legalized, if such a change were deemed necessary or desirable. We therefore conclude that the ETPA cannot be extended to those illegally converted lofts.

As noted at the outset of this article, the Court's ultimate conclusion can only be described as inevitable. A ruling in favor of the tenants would have (1) encouraged illegal conversions; (2) made a mockery of the New York City Zoning Resolution; and (3) extended the ETPA coverage to patently illegal units. It is difficult to argue with the Court of Appeals' unanimous affirmance.

1. N.Y.L.J. June 9, 2004, Court of Appeals Cal. No. 78.
2. 302 A.D.2d 327, 756 N.Y.S.2d 515 (1st Dep't 2003).
3. 302 A.D.2d at 327.
4. 131 Misc.2d 196, 499 N.Y.S.2d 325 (Sup. Ct. N.Y. Co. 1986).
5. 131 Misc.2d at 200.
6. 302 A.D.2d at 327-28.