Owner Occupancy

Grappling With the Adequacy of Predicate Notice
Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, discuss a recent Civil Court decision which reviewed various principles concerning the requisite content of the predicate notice needed to commence an owner occupancy proceeding and some of the legal precedent the decision cited.

Warren A. Estis and William J. Robbins

04-04-2007

One of the grounds specified in Section 2524.4 of the Rent Stabilization Code ("RSC") for refusing to renew a lease, without an order of the Division of Housing and Community Renewal, is that the owner seeks to recover the housing accommodation "for such owner's 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."[1] The statute requires that, before commencing such an owner occupancy proceeding, a landlord must serve a notice of non-renewal on the tenant at least 90 and not more than 150 days prior to the expiration of the lease term.[2]

A recent decision by New York County Civil Court Judge Peter M. Wendt in *Kokot v. Green*[3] reviewed various principles concerning the requisite content of the predicate notice needed to commence an owner occupancy proceeding. This article discusses the reasoning of the decision in *Kokot* and some of the legal precedent it cited.

Section 2524.2(b) of the RSC provides that:

> *Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.*[4]

In *Kokot*, Judge Wendt, after quoting the statute, enunciated a few basic principles governing the adequacy of a predicate notice to an owner occupancy proceeding, as follows:

¿ The facts underlying the landlord's claim of seeking a dwelling unit for personal use "must be set forth with specificity in the notice of non-renewal", sufficient to permit the tenant to frame a defense;

¿ Merely reiterating the statutory language of RSC §2524.4(a)(1) in the notice is by itself insufficient;

¿ The notice is adequate to allow the proceeding to continue "as long as the notice sets forth a number of allegations tending to support the grounds for eviction that are fact specific to the particular proceeding, indicating actual reasons why recovery of possession is necessary"; and

¿ The notice need not lay bare a landlord's trial proof nor evidentiary details "which may be explored during the discovery phase of the proceeding."

Some of the cases cited by Judge Wendt in support of these principles are *Numano v. Vicario,*[5] *McGoldrick v. DeCruz,*[6] *Teichman v. Ciapi*[7] and *Teacher's College v. Kadhi-Smith,*[8] all of which involve predicate notices to owner occupancy proceedings. He also cited *Hughes v. Lenox Hill Hospital,*[9] a case involving a predicate notice of non-renewal based on non-primary residence, for the proposition that "the appropriate test to determine the sufficiency of a predicate notice in a summary proceeding ' . . . is one of reasonableness in view of the attendant circumstances.'"

In *Numano*, the landlord's notice "merely tracked the statutory language for non-renewal upon the ground of owner occupancy [RSC §2524.4(a)(1)], without setting forth allegations fact specific to this particular proceeding." Citing *Berkeley Associates Co. v. Camlakides,*[10] "the Appellate Term, First Department held the notice to be insufficient" [i]n the absence of any factual recitation of the reasons landlord seeks to recover possession."

In *McGoldrick*, the notice of non-renewal informed the tenant, among other things, that the landlord "maintains a good faith and honest intention and desire which is actual and genuine to regain possession" of the rent-stabilized apartment "for the use and occupancy of the Owner/Landlord as the primary residence of an immediate family member, to wit: her daughter." The notice also stated that the subject building "is the only property owned by the Owner/Landlord with space for residential use."

The Appellate Term, First Department upheld the notice in *McGoldrick*. It rejected the tenant's argument that the notice purportedly was deficient for not expressly designating the daughter's name and not explaining with specificity why the tenant's apartment was targeted and suitable for owner occupancy and why other apartments were unsuitable. The court stated that information concerning the identify of the landlord's daughter "can readily be acquired by tenant through a bill of particulars" and that the other allegations the tenant asserted should have been included in the notice "concern evidentiary matters more appropriately explored during the discovery phase of the proceeding." The court further stated that "[a] predicate notice in a holdover summary proceeding need not lay bare a landlord's trial proof."

In *Teichman*, the notice stated in relevant part that "my husband and I plan to move to 259 West 90th and make the garden apartment our retirement home." The Civil Court concluded that the notice was defective because a retirement house is not necessarily a primary residence, and it could not be ascertained from the notice whether the landlord intended to occupy the premises as a primary residence. The Appellate Term, First Department disagreed, reversed and reinstated the petition. It stated:

> *The absence of the words 'primary residence' - a legal term of art - is not fatal to the efficacy of a preliminary notice in an owner occupancy proceeding, particularly where the characterization of the intended use of the premises for retirement purposes is not inconsistent with its use as a primary residence.*[11]

In *Teachers College*, the Civil Court (Marc Finkelstein, J.) found that the facts contained in the predicate notice were "quantitatively and qualitatively" sufficient. The notice set forth "a number of allegations tending to support the ground for eviction that are fact specific for this particular proceeding [and] indicates actual reasons why [petitioner] wishes to recover possession of respondent's apartment."

As summarized by the court in *Teachers College*, the notice there contained the facts that the petitioner is an institution operated exclusively for educational purposes on a not-for-profit basis, took title to the subject building on a specified date, and

> *intends to use the subject apartment for housing a faculty/staff member employed by it, has insufficient housing accommodations for all of its faculty and staff members, and this shortage of housing accommodations has impeded its ability to recruit faculty and staff members, many of whom are required to reside near its campus.*[12]

The court rejected the tenant's contention that the predicate notice is required to mention the specific faculty/staff person needing the tenant's apartment, or that the owner's need for the tenant's apartment must have arisen during the most recent lease term.

Based on this case precedent, the court in *Kokot* found the notice of non-renewal at issue in that case to be "facially sufficient" and denied the tenant's motion to dismiss based on the claim that the notice did not state facts sufficient to support the alleged ground for eviction. It characterized that predicate notice as follows:

> *Here, the notice was very fact specific. It clearly provided respondent with notice of the reasons why petitioner wants to occupy the subject unit, and of the grounds on which petitioner intends to rely in proving its case . . . .*
>
> *It designates who plans to reside in the subject premises, why he wishes to reside there as his primary residence, and sufficient salient facts and reasons supporting these claims.*[13]

The facts which the court commented were found in the notice included that petitioner is the owner of the building where the premises is located; that he intends in good faith to occupy the apartment for use and occupancy as his primary residence in New York City; that he intends to combine the subject apartment (3E) with apartment 4E which has already been recovered by the owner, as well as apartment 5E which he intends to seek, and possibly other contiguous apartments as they become available, but not more than four apartments in total to be combined into a single residential unit. Other facts stated in the notice were that the owner has retained an architect to develop plans to combine the apartments, and that he presently rents and resides in a non-rent regulated apartment but wants to relocate into a combined apartment to have more space for himself and his minor children.

The court rejected the tenant's contention that the notice had to "state details such as the names and ages of petitioner's children or that architectural plans of the alleged combination of apartments [had to] be attached." The court characterized these as "evidentiary details which may be obtained in discovery" and, elsewhere in its decision, as "part of the case which petitioner must prove at trial."

The court also rejected the tenant's contention that "each of the six statements in the notice, if taken individually" purportedly did not state sufficient facts to support the predicate notice. Judge Wendt noted that although that some of the individual paragraphs in the notice "might simply track the statute, other paragraphs "provide facts which are specific to this proceeding" and "state the facts regarding why petitioner wants the premises for his own use." In determining the sufficiency of the notice, the court commented, it "must evaluate all of the statements in the notice together."

In *Kokot*, the tenant also moved to dismiss on the ground that the petitioner allegedly had not demonstrated that he commenced the proceeding in "good faith" as a matter of law. Judge Wendt noted that "[a]lthough there is no mention of 'good faith' in the statute, Courts have read into the statute a 'good faith intention' as a requisite element for the refusal to renew." Citing *Matter of Rosenbluth v. Finkelstein*[14] and *Sobel v. Mauri,*[15] he continued:

> *'Good faith' is defined as 'merely an intention and desire to gain possession of premises for one's own use' . . . The sole requirement is that the intent be actual and genuine, and not a guise merely to remove the tenant, and then shortly thereafter place the unit back on the rental market in order to obtain a higher rent [citations omitted].*[16]

In *Kokot*, the court concluded that the tenant had "not establish[ed] that petitioner is not in good faith in seeking possession for petitioner's use so as to warrant dismissal of the petition on motion." The court rejected the tenant's assertion that the landlord purportedly was not in good faith because he wanted too many units. It noted that RSC §2524.4 (a)(3) provides that "one or more" units may be recovered for an owner's personal use, and the only limitation in that statutory section is that recovery may only be sought by one individual owner of an ownership entity.

The court commented that the petitioner's notice stated facts "which comprise clear, plausible reasons why petitioner wants to occupy the subject units and a clear plan for their use." Characterizing the issue of petitioner's good faith as "a factual one which is better resolved at trial," and noting that the petitioner would be required to prove its case at trial, the court held that the tenant had not established a basis for dismissing the petition on motion based on lack of "good faith".

The following are additional points to consider in reviewing the reasoning of the cases cited above:

Some of the cases refer to the tenant getting in discovery details beyond the facts in the predicate notice. In a summary proceeding, unlike a Supreme Court action, there is no discovery as of right. In order to obtain discovery, the tenant has to make a motion.

No motion is required to obtain a bill of particulars, since a bill of particulars has been held to be ancillary to the pleadings rather than to disclosure. The general rule, however, is that a demand for a bill of particulars may not be used to compel the disclosure of evidence. Therefore, a tenant in a summary proceeding who believes it critical to obtain evidentiary detail beyond what is in the predicate notice presumably would move for discovery rather than just demand a bill of particulars.

As for the content of the notice of non-renewal based on owner occupancy, the cases enunciate guiding principles. The challenge for the lawyer drafting such a notice on behalf of the landlord, or attacking the notice on behalf of the tenant, is to apply those guiding principles to the actual circumstances involved.

Warren A. Estis *is a founding partner at Rosenberg & Estis.* **William J. Robbins** *is a partner at the firm.*

Endnotes:

1. Rent Stabilization Code §2524.4(a)(1), 9 NYCRR 2524.4(a)(1).

2. Rent Stabilization Code §2524.2(c)(3), 9 NYCRR 2524.2(c)(3).

3. NYLJ, March 2, 2007, p. 22, col. 1 (Civ. Ct. N.Y. Co.).

4. Rent Stabilization Code §2524.2(b), 9 NYCRR 2524.2(b).

5. 165 Misc.2d 457, 632 N.Y.S.2d 926 (App. Term 1st Dep't 1995).

6. 195 Misc.2d 414, 758 N.Y.S.2d 756 (App. Term 1st Dep't 2003).

7. 160 Misc.2d 182, 612 N.Y.S.2d 293 (App. Term 1st Dep't 1994).

8. NYLJ, March 8, 2006, p. 18, col. 3, 34 HCR 187B (Civ. Ct. N.Y. Co.).

9. 226 A.D.2d 4, 651 N.Y.S.2d 418 (1st Dep't 1996), lv. denied 90 N.Y.2d 829, 660 N.Y.S.2d 552 (1997).

10. 173 A.D.2d 193, 569 N.Y.S.2d 629 (1st Dep't 1991), aff'd 78 N.Y.2d 1098, 578 N.Y.S.2d 872 (1991).

11. 160 Misc.2d at 183.

12. 34 HCR at 188.

13. NYLJ, March 2, 2007, p. 22, col. 1, at col. 2.

14. 300 N.Y. 402 (1950).

15. NYLJ, Dec. 12, 1984, p. 10, col. 4, 12 HCR 283C (App. Term 1st Dep't).

16. NYLJ, March 2, 2007, p. 22, col. 1, at p. 23, col. 1.
