Preferential Rent

Despite Attempts at Clarification, Disputes Abound

Warren A. Estis, a founding partner at Rosenberg & Estis, and Jeffrey Turkel, a partner at the firm, write that under the Rent Stabilization Law and Code, the "legal" rent for an apartment is the rent charged on the base date, plus applicable Rent Guidelines Board increases. Owners, however, are free to charge tenants a "preferential rent," i.e., a rent below the legal rent. However, once an owner charged a lower, preferential rent, all future rents for that apartment would be based on the lower amount.

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DHCR's predecessor, the New York City Conciliation and Appeals Board, took the position that once an owner charged a lower, preferential rent, all future rents for that apartment would be based on the lower amount. In 1987, DHCR ameliorated the rule such that the preferential rent would only apply to the tenant to whom it was initially granted; thereafter, the rent could be based on the non-preferential "legal rent."

In *Missionary Sisters of the Sacred Heart*, 283 A.D.2d 284, 724 N.Y.S.2d 242 (1st Dept. 2002), the Appellate Division, First Department, ruled that a preferential rent could be limited to a specific period within a tenancy if the initial lease so provided. In 2003, the Legislature codified the *Missionary Sisters* ruling by adding §26-511(c)(14) to the RSL. The statute was thereafter implemented by RSC §2521.2, captioned "Preferential Rents."

Notwithstanding judicial, legislative and administrative attempts at clarification, disputes abound concerning preferential rents, as the four cases discussed below establish.

'Pastreich'

In *Matter of Pastreich v. New York State Division of Housing and Community Renewal*, NYLJ, April 14, 2008, at 33, col. 4 (App. Div., 1st Dept.), the tenant signed a lease in 1991 reciting a monthly rent of $5,747.52. The lease included a rider setting forth a "preferential rent" of $3,000 per month. The rider stated that "[a]t the end of the term of this Preferential Lease, Tenant has the option to renew Preferential Lease. The new monthly preferential rent will be $3,000.00 adjusted by the corresponding RSA rent guidelines." The preference clearly applied to the first renewal; beyond that, the rider was unclear.

The initial lease was thereafter renewed five times. Each renewal was based on the lower preferential rent, but recited the higher, legal rent. Finally, in 2004, the owner offered the tenant a renewal lease at the legal rent of $7,652.26, but with no preferential rent option.

The tenant refused to sign the lease, and the owner commenced a holdover proceeding. Civil Court ruled that there were triable issues of fact as to whether the parties intended that the preferential rent would continue for the duration of the

tenancy. DHCR, in response to the tenant's overcharge complaint, ruled that the language of the preferential rent rider could not be considered because it was entered into before the base date, i.e., four years before the tenant filed his overcharge complaint in November of 2004. DHCR, notably, did not hold a hearing in the matter.

The tenant commenced an Article 78 proceeding challenging DHCR's order, and prevailed in Supreme Court (Wilkins, J.). The Appellate Division then reversed. The Court first held that the four-year rule did not prohibit examination of the original 1991 lease and preferential lease rider:

In concluding that any agreement entered into before the November 2000 base date could not be considered, the Deputy Commissioner relied on 9 NYCRR 2521.2(c), prohibiting examination of rental history prior to the 4-year period preceding the filing of the complaint. Here, however, the most recent renewal, like each prior renewal, expressly stated that it was based on the same terms and conditions as the expiring lease, and 'further attached lawful provisions and attached written agreements, if any.' Thus, the 1991 preferential lease rider was incorporated into the most recent lease renewal, and was not barred from consideration by the four year limitation period (citation omitted).

The First Department then remanded the matter to DHCR to determine the parties' intent in the original 1991 lease and rider:

The terms of the preferential lease rider, expressly incorporated into all renewal leases, appear to be open-ended concerning the duration of the preferential rent, and not clearly limited to a maximum of two lease terms, totaling four years, as landlord argues, an interpretation not entirely consistent with the landlord's own actions in offering renewal leases at the preferential rent for 10 years. Accordingly, since the 1991 preferential lease agreement controls, and the parties' intent cannot be unequivocally ascertained from the four corners of the agreement, DHCR acted irrationally in disregarding the terms of that agreement and in not holding an evidentiary hearing on the issue of the parties' intent concerning the duration of the preferential rent (internal citations omitted).

Coffina

In *Matter of Coffina v. New York State Division of Housing and Community Renewal*, 18 Misc.3d 1106(A) (Sup. Ct. N.Y. Co. 2007), the tenant signed an eight-year lease in 1994 reciting a monthly rent of $564.05 for the initial two-year term, to be adjusted thereafter in accordance with applicable Rent Guidelines Board increases for two year renewals. The initial lease did not state that the tenant was paying a preferential rent.

In late 2001, the owner offered, and the tenant signed, a two-year renewal lease which recited the "legal" regulated rent as $1,117.69, and further stated that the tenant would be charged a "lower rent" of $656.37 per month. Two years later, the tenant signed a renewal lease based on the higher, legal rent, but the lease did not mention the "lower rent" at all.

In 2004, the tenant filed an overcharge complaint with DHCR, asserting his entitlement to the "preferential rent." DHCR's rent administrator and deputy commissioner both found no overcharge. The tenant then brought an Article 78 proceeding.

Supreme Court (Bransten, J.) sustained DHCR's ruling. Supreme Court found, as had DHCR, that the owner had registered the apartment from 2000 through 2004 as having both a higher, legal regulated rent and a lower, preferential rent (the base date being March 2000, four years before the tenant's March 2004 overcharge complaint). Supreme Court ruled that by registering the higher rent each year, that rent became "previously established" under Rent Stabilization Code §2521.2(a) for purposes of determining the tenant's overcharge complaint:

Significantly, all of the relevant apartment registrations indicated that Mr. Coffina was paying a preferential rent. Thus, the higher legal rent listed in the apartment registration was 'previously established' and could be used in a renewal lease. In fact, Mr. Coffina's unchallenged 2002 renewal lease unmistakably set forth that he was paying a rent that was lower than the legal rent. In the end, Mr. Coffina's opposition to the genesis of his 'preferential rent' comes way too late. He had notice that the Owner treated his rent as a 'preferential rent' for at least four years and cannot challenge that treatment or the amount listed now.

'370 Manhattan Avenue'

In *370 Manhattan Ave., Co. Inc. v. Seitz*, (App. T. 1st Dept.) the tenant, as in *Coffina*, took occupancy of a stabilized apartment pursuant to a lease that did not specify that his $600 monthly rent was preferential. Notwithstanding, the owner timely filed apartment registration statements with DHCR from 1999 through 2003, listing both the legal regulated rent and the preferential rent. The tenant thereafter executed renewal leases which recited both the legal and preferential rents.

The landlord thereafter terminated the preferential rent in a subsequent renewal, and a non-payment proceeding ensued. Appellate Term, reversing Civil Court (Schreiber, J.), cited *Coffina* in ruling for the landlord:

> On these facts, where a series of renewal lease forms and apartment registration statements reflected the 'preferential' status of tenant's rent, tenant may not be heard to argue that the rent he paid without objection was not a preferential rent (citation omitted). Under Rent Stabilization Law §26-511(c)(14), landlord was entitled to offer a renewal lease that charged the 'previously established' legal regulated rent. The legal regulated rent was 'previously established' since it was listed on the renewal leases as well as landlord's annual registration statements (citation omitted). 'Where the amount of rent set forth in the annual registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter' (citation omitted). Thus, tenant may not now challenge landlord's treatment of rent as preferential, having 'had notice that landlord treated his rent as a preferential rent' for at least four years' (*Matter of Coffina v. New York State Div. of Hous. and Community Renewal*, 2007 N.Y. Slip. Op 52429 [U], *5).

'Von Rosenvinge'

In *Von Rosenvinge v. Wellington Fee, LLC*, NYLJ, April 21, 2008, at 19, col. 1 (Sup. Ct. N.Y. Co.), the tenant's initial 2002 lease contained a rider stating that the tenant would pay the lower preferential rent, and that renewals would be based upon the preferential rent amount. Several renewals later, the owner offered a renewal stating that the tenant would continue to pay the preferential rent, but that future renewals would be based on the higher, legal rent. The tenant then brought a declaratory judgment, asserting that the contemplated reversion to the legal rent was unlawful.

Supreme Court (Stallman, J.) agreed:

> *In this case, the parties' intentions control in regard to the original lease that provided that the tenant would pay a preferential rent for as long as he remained a tenant. The parties' intentions do not control in regard to the renewal lease that removes the preferential rent. This renewal lease takes away a benefit from the tenant. Benefits given to a rent stabilized tenant cannot be withdrawn by a subsequent lease except under certain circumstances that do not apply here. Once the landlord has agreed that a tenant will pay preferential rent as long as he is a tenant, the landlord may not afterwards start charging the legal regulated rent (citation omitted).*

Owners who propose to change a preferential rent should, at the very least, register both the legal and the preferential rent each year. Tenants should carefully check these registrations and timely object well before the higher rent becomes "previously established."

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