Rent Stabilization

Appellate Division Splits on 'Snowbird' Case

IN THE RECENT case of *Glenbriar v. Lipsman*,[1] a sharply divided Appellate Division, First Department, panel ruled that two elderly "snowbird" tenants — who lived half the year in their rent stabilized Riverdale apartment and the other half in their Florida condominium — did not qualify as non-primary residents. The Appellate Division's opinion, in turn, affirmed a sharply divided Appellate Term panel.

The case, which seems destined to go to the Court of Appeals, could potentially impact thousands of rent-regulated tenants who split their time between Florida and New York. The various majority and dissenting opinions in *Glenbriar* establish that the justices of the Appellate Term and the Appellate Division have sharply differing views as to almost every aspect of this case, especially issues of public policy.

A Brief History of Primary Residence

The very basis for rent regulation is the Legislature's finding that there is an "intractable housing emergency" in the City and State of New York. *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 389, 618 N.Y.S.2d 857 (1994). By 1971, however, the Legislature determined that certain tenants were exacerbating the housing shortage by using their apartments as pied-à-terres. The result was the enactment of L. 1971 ch. 373 (Chapter 373), which removed from the jurisdiction of rent control and rent stabilization "any housing accommodation which is not occupied by the tenant in possession as its primary residence." Governor Rockefeller stated in his Memorandum in Support of Chapter 373:

> Thousands of controlled apartments in New York City and elsewhere are rented by people who do not live in them. They use the apartment as a convenience, staying in them occasionally when they come to the City. Some even use them for storage. Continued controls on these apartments, indirectly subsidizing them through reduced real estate taxes, and keeping them off the market, is one of the worst inequities of rent control.[2]

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Over the years, the First Department made clear that tenants who do not primarily live in their apartments should not obtain the benefits of rent regulation. In *Cier Industries Co. v. Hessen*,[3] for example, the Appellate Division, First Department, singled out non-primary resident tenants as exacerbating the housing shortage and undermining the very purpose of rent regulation, saying that

> ... one of the basic and most significant components of the Rent Stabilization Law is its application only to premises used as the primary residence of the tenant. A tenant of a stabilized apartment who maintains a primary residence elsewhere, and also seeks to retain the stabilized apartment for convenience or for considerations of personal gain, is not one who is a victim of the housing crisis but may rather be said to be a contributing and exacerbating factor in the continuation of the critical shortage of affordable apartments (citations omitted).[4]

A case that could have an impact on thousands of rent-regulated tenants who split their time between Florida and New York.

More recently, in *Rima 106, L.P. v. Alvarez*,[5] the First Department refused to enforce a clause in a rent stabilized lease that barred the landlord from evicting the tenant on grounds of non-primary residence. The court held that such a clause "was contrary to public policy, and must be declared a nullity."[6]

In the *Glenbriar* case, discussed below, the various Justices of the Appellate Division and the Appellate Term could not agree as to whether the Lipsmans deserved the benefits of rent regulation, or undermined the rent regulatory system altogether.

'Glenbriar'

Lee and Lillian Lipsman moved into their Riverdale apartment in 1959. In 1995, apparently motivated by health concerns, they purchased a condominium in West Palm Beach, Fla. The Appellate Term informs us that the Lipsmans spend their winter months in Florida and return to New York every spring. For tax reasons, Mr. Lipsman adopted Florida as his primary residence, but Ms. Lipsman did not.

The landlord sought to evict the tenants on non-primary-residence grounds. A trial was held before Civil Court Judge Brenda S. Spears. Judge Spears, evaluating the testimony of the various witnesses, determined that the tenants did not primarily reside in their Riverdale apartment.

The tenants appealed and prevailed before the Appellate Term, First Department, albeit by a two-to-one margin. Justices Lucindo Suarez and Phyllis Gangel Jacob wrote the majority opinion, and Justice William P. McCooe authored the dissent.

The majority wrote that the weight of the evidence established that the tenants divided their time "equally between New York and Florida each year" and that the landlord did not sustain the burden of proving non-primary residence. The majority was not swayed by the fact that the tenants pay their taxes to Florida but not to New York State. The majority concluded:

> In summary, this case presents a not uncommon "snowbird" situation where a tenant purchases a Florida property for use as a winter and/or vacation residence. In evaluating the history of this tenancy ... landlord has not established by preponderant evidence that tenants have forfeited their principal New York residence of long-standing (citations omitted).

Justice Gangel Jacob filed her own concurring opinion and viewed the case in terms of gender equity. Justice Gangel Jacob wrote that Mr. Lipsman's election of Florida as his primary residence could not be visited upon his wife:

> To the extent that Mr. Lipsman has apparently embraced Florida as his residence for its tax advantages and to preserve his assets in retirement, it is manifest that at least Mrs. Lipsman maintains all of her important ties here. Mrs. Lipsman lives in New York and winters in Florida. It is that simple. This is all the more important because to intimate that if Mr. Lipsman has moved his financial affairs to Florida, Mrs. Lipsman's primary residence also must automatically change to Florida flies in the face of every important ruling and enactment in this State that means to eradicate gender discrimination.

Justice McCooe, in his dissent, saw the case as a matter of deference to the findings of the trial court. Justice McCooe was also troubled by the fact that the tenants had accepted the benefits of the Florida homestead exemption:

> The factual findings of the Trial Court based upon credibility should be accepted particularly since its rejection has not been explained. Even assuming that these findings are rejected and the findings of the majority are accepted that they share their time approximately equally between New York and Florida, this would only equalize the amount of time they lived in each state. This would still leave the undisputed and

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overwhelming documentary evidence and the admission of the husband that he is a Florida resident based on substantially the same evidence as to both. While no one factor is controlling in a primary residence case, the cumulative evidence particularly the decision of the tenants to declare themselves Florida residents on their Florida income tax return, by seeking the benefit of the Florida tax laws and failing to pay New York state income tax are factors of greater importance since they are undisputed and unexplained.

The Appellate Division Affirms

The landlord then appealed to the Appellate Division, First Department. The Appellate Division affirmed the Appellate Term by a three-to-two margin.

The majority (consisting of Justices Angela M. Mazzarelli, Richard T. Andrias and Betty Weinberg Ellerin) held that Mrs. Lipsman had established that she maintains an ongoing "substantial physical nexus" with the apartment in New York "for actual living purposes." The majority concluded:

> It is uncontested that the Lipsmans have lived in the Bronx apartment for over 45 years, and that they raised their children in that apartment [citation omitted]. Denial of a renewal lease would undeniably have a devastating impact not only for Mrs. Lipsman, but also for her family, whose lives are rooted there, and who still come back to their childhood home to visit."

Justices David Friedman and Luis A. Gonzalez dissented in an opinion authored by Justice Friedman. The dissent focused on the public policy aspects of extending stabilization to protection to tenants who only live in an apartment half the time:

> Of course, we all sympathize with the Lipsmans' desire to maintain, at below-market cost, a connection with the home where they raised their children. The Rent Stabilization Code, however, was not intended to facilitate the pursuit of such a goal. Certainly, rent regulation was not instituted for the purpose of subsidizing adults, such as the Lipsmans' grown children, who, as the majority puts it, wish to "come back to their childhood home to visit." Again, by no means do I deprecate the desire of the Lipsmans and their children to maintain a connection with the Lipsmans' Bronx apartment; I merely observe that the rent regulation laws were intended to further other, more socially pressing concerns, namely, the shortage of affordable housing in New York City. It only exacerbates that problem to allow a tenant, who is not occupying an apartment as a primary residence, to use the rent regulation laws to keep that residence off the general housing market.

Counsel for the landlord in *Glenbriar* has indicated that the landlord will appeal, as of right, to the Court of Appeals. Thus, the Court of Appeals, unless it determines the case on narrower grounds, will have an opportunity to weigh in on the dramatic public policy issues at stake.

The *Glenbriar* case establishes that 33 years after non-primary residence became a ground for eviction, the courts remain sharply divided as to whether rent stabilization protection should extend to tenants who admittedly do not reside in their apartments for a substantial portion of the year, especially those who choose to pay their taxes to another state. The bench and bar, and thousands of "snowbirds," will be watching this case closely.

1. N.Y.L.J. Oct. 25, at 27, col. 2.
2. N.Y. Leg. Ann. 1971, p. 562.
3. 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).
4. 136 A.D.2d at 150.
5. 257 A.D.2d 201, 690 N.Y.S.2d 40 (1st Dep't 1999).
6. 257 A.D.2d at 206.