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RENT STABILIZATION

Apartment Transfers: Can Tenants Take Their Regulatory Status With Them?


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Sometimes a landlord and a tenant agree that the tenant will move from one apartment in a building to another. If the tenant is rent controlled, can she take that status with her, even though the new apartment cannot be rent controlled by law? If the tenant is stabilized and moves into a deregulated unit, has he forfeited his stabilized status?

The answer, not surprisingly, depends upon the intentions of the parties, as Justice Carmen Victoria St. George recently held in *McDonald v. JBAM TRG Spring*, 58 Misc 3d 1213(A) (Sup. Ct. N.Y. Co. 2018).

Genesis of the Rule

One of the first cases to address the issue of whether regulatory status can be transferred was *Brettler v. Weaver*, 14 Misc 2d 1031 (Sup. Ct. Kings Co. 1958). There, the landlord occupied the top floor of a two-family house, and sought to evict the tenant from the ground floor because the landlord's wife could no longer climb the stairs. The rent agency granted the certificate of eviction on the condition that the tenant would move into the landlord's former apartment. Although that apartment would be technically no longer subject to rent control (apartments that were vacated by landlords became decontrolled as a matter of law), the Rent Administrator declared that the tenant would take her rent-controlled status with her.

In the subsequent Article 78 proceeding, Supreme Court held that the Legislature's intent behind the decontrol statute—to encourage landlords to vacate their own apartments so as to add those apartments to the rental market—would not be served by "penaliz[ing] a tenant occupying a controlled apartment who exchanges same with his landlord for the convenience and comfort of the latter."

One year later, in *Capone v. Weaver*, 7 AD2d 1004 (1st Dept. 1959), *rev'd* 6 NY2d 307 (1959), the First Department, under facts similar to those in *Brettler*, interpreted the deregulation statute literally and declared that the tenant's new apartment would not be controlled. The Court of Appeals reversed, holding:

In dealing with the landlord's application for an eviction order, the Administrator quite properly took into consideration the circumstance that the landlord offered to expedite its issuance by an exchange of apartments with the tenant. At that time, the tenant's possession of the second-floor apartment was under statutory

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tenure which he was loath to relinquish. The Administrator solved the impasse by imposing conditions which, if accepted and the parties did accept them had the effect of continuing the tenant's tenure.

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Had the exchange of apartments been wholly voluntary, the exemption would undoubtedly have operated in favor of the landlord. Under the circumstances of this case, it cannot be said that the tenant voluntarily gave up possession of a controlled apartment in order to take over one that was decontrolled.

The *Capone* rule remains good law. In *Widerker v. Castro*, 188 Misc 2d 571 (Civ. Ct. Kings Co. 2001), the rear wall of a building adjacent to the tenant's apartment partially collapsed. Pursuant to an agreement with the landlord, the tenant moved to a nearby building that the landlord also owned. The tenant's attorney had the foresight to provide in the agreement that her move was "'at the request and for the convenience'" of the landlord. Applying *Capone,* the court ruled that the tenant remained rent-controlled. *See also Saad v. Elmuza*, 12 Misc 3d 57 (App. T. 2d and 11th Judicial Districts 2006) ("because tenant moved from her rent-controlled first-floor apartment into the second-floor apartment in 1978 at the prior landlord's request and for the prior landlord's convenience, her rent-controlled status transferred from the first-floor apartment to the second-floor apartment").

In *91 Real Estate Assoc. v. Eskin*, 46 Misc 3d 40 (App. T. 1st Dept. 2014), a tenant in a converted building moved from a rent-stabilized apartment (8E) to a temporarily exempt apartment so that the owner could combine 8E with 8F. Citing *Capone* and other cases, the Appellate Term ruled in the tenant's favor:

> If a tenant is stabilized and moves into a deregulated unit, has he forfeited his stabilized status? The answer, not surprisingly, depends upon the intentions of the parties.

While the above-cited cases involved intra-building relocations by rent-controlled, and not rent-stabilized, tenants, we discern no significant distinction between the two regulatory schemes that would justify eschewing this sound precedent here, when to do so would result in the type of 'disruptive practices' that both sets of rent laws were designed to avoid.

'Eckstein'

Tenants do not always win these cases. In *Eckstein v. New York Univ.*, 270 AD2d 208 (1st Dept. 2000), the tenant agreed to vacate a rent-controlled apartment and move into a 2,500 square foot unregulated loft in another building that NYU owned. The tenant was given a 10-year sweetheart lease at $275.00 per month, with a five-year renewal term at the tenant's option. In addition, NYU renovated the apartment at its sole cost, pursuant to tenant's exacting specifications. When the 15-year period expired, a dispute arose as to tenant's regulatory status. That dispute was settled by a stipulation whereby the parties agreed that the tenant would be treated as rent-stabilized.

After the tenant realized that NYU would be seeking his rent-stabilized apartment based on owner occupancy, the tenant sought a declaration that his loft was rent-controlled. The First Department ruled against him, stating:

Although the motion court properly denied plaintiff's motion for declaratory and injunctive relief, it should have also declared in defendant's favor and granted

defendant's cross-motion otherwise to dismiss the complaint because plaintiff's apartment is not subject to rent control since the vacatur of his prior rent-controlled apartment was voluntary and beneficial to him.

DHCR Cases

DHCR has consistently adhered to the *Capone* rule as well. *See Matter of Martinez*, DHCR Adm. Rev. Dckt. No. FQ-210062-RT, issued March 1, 2018 ("a tenant maintains his or her rent regulated status when he or she moves from a rent regulated apartment to a non-regulated apartment at the request of the owner"). In *Matter of Gil*, DHCR Adm. Rev. Dckt. No. QE-220014-RO, issued Oct. 15, 2003, DHCR resolved a factual dispute regarding the relocation in the tenant's favor:

The tenant stated that in 1992, the owner asked her to temporarily relocate to the first floor apartment so that he could renovate apartment #4 and subsequent to the renovations the landlord allowed his stepdaughter and husband to occupy apartment #4. The tenant alleged that the first floor apartment should be subject to Rent Control since she was relocated at the request of the owner. In reply, the owner alleged that the relocation was at the tenant's request as her elderly mother was unable to climb the stairs to the third floor. The Administrator found that the owner failed to submit sufficient evidence to prove the claim that the tenant had relocated voluntarily. Moreover, the Administrative found that the language contained in the rider attached to the tenant's initial lease for the first floor apartment implied that the landlord agreed to a reduced rent for the first year as an incentive to the tenant moving into the new apartment.

Practitioners are urged to act with care when memorializing a tenant's transfer from one apartment to another. A properly drafted agreement should address the regulatory issue head on, so as to avoid protracted litigation as to the status of the apartment.

'McDonald'

In *McDonald v. JBAM TRG Spring*, *supra*, the tenant lived in apartment 6, and transferred to apartment 4 in 2014. The landlord had erroneously treated apartment 6 as deregulated, in that the building was receiving J-51 benefits. Although there was a question as to whether apartment 4 was deregulated, as the landlord asserted, the court found that the tenant's rent-stabilized status in apartment 6 did not transfer to apartment 4:

The cases plaintiff cites in support of her contrary position all involve situations in which the move occurred solely to accommodate the landlord. Here, plaintiff concedes, and the evidence shows, that she wanted to move to another apartment in the building and the landlord accommodated her request.

Conclusion

In view of the case law, practitioners are urged to act with care when memorializing a tenant's transfer from one apartment to another. A properly drafted agreement should address the regulatory issue head on, so as to avoid protracted litigation as to the status of the apartment. In particular, the agreement should recite whether the tenant is moving on his or her own accord, or is moving for the benefit or convenience of the landlord.