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RENT REGULATION

Succession: Appellate Term Case Highlights Tenant Deceptions

By **Warren A. Estis**

And **Jeffrey Turkel**

RSC §2523.5(b)(1) generally allows a family member or a non-traditional family member to succeed to a rent stabilized apartment where the occupant "has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years." In the recent case of *CBU Assocs., Inc. v. Forray*, 65 Misc 3d 132(A) (App Term, 1st Dept. 2019), the First Department, Appellate Term observed that an occupant, through a "persistent and systematic pattern of deception," can waive succession rights. The rule in the Second Department, Appellate Term, however, is somewhat more tenant-friendly.

'South Pierre Associates'

In *South Pierre Assoc. v. Mankowitz*, 17 Misc 3d 53 (App Term, 1st Dept. 2007), the rent stabilized tenant died in 1989. For the next three years, respondent Stanley Mankowitz forged "the tenant's name on no fewer than seven renewal leases and numerous rental payments." When the landlord, in 2002, demanded that the tenant notarize a document, Mankowitz informed the landlord of the tenant's death and demanded a lease in his own name.

Appellate Term rejected Mankowitz's succession claim, writing:

> On this record, and considering the severity and duration of respondent's fraudulent conduct, respondent must be deemed to have waived any claim that he might have had to succeed to the tenancy. The law is settled that succession rights are not automatically vested in a potential successor upon the death of a stabilized tenant, but remain inchoate until the occupant's status as a qualified successor [is] ratified by judicial determination at a time after the tenant's death, with the evidentiary burden on the succession issue generally resting with the claimed successor.
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> The ruse carried out by respondent herein, by which he affirmatively misrepresented both his status and that of the deceased tenant for well over a decade, represented a substantial departure from the ordinary course and, by necessity, unduly prejudiced petitioner in the prosecution of its eviction claim. (internal citations and quotation marks omitted, material in brackets in original).

'Third Lenox Terrace'

The issue again came before Appellate Term two years later in *Third Lenox Terrace Assoc. v. Edwards*, 23 Misc 3d 126(A) (App Term, 1st Dept. 2009). Tenant Cynthia Edwards vacated the apartment in 1998, but continued to sign renewal leases through 2005 so that her sister, Linda, could occupy the apartment. The landlord commenced a non-primary residence proceeding upon discovering Cynthia's absence, only to have Linda claim succession. Appellate Term rejected that claim based on both a failure of proof and waiver:

> Having continued to pay rent and execute renewals extending through October 2005, tenant cannot be found to have permanently vacated the premises at any time prior to the 2005 expiration of the last renewal lease that she executed. During the immediately preceding two-year period, there was no showing that respondent lived in the premises with tenant, since tenant concededly was not residing there. Nor can we close our eyes to the disturbing reality

WARREN A. ESTIS *is a founding member of Rosenberg & Estis.* JEFFREY TURKEL *is a member of the firm.*

that respondent and tenant purposefully concealed the fact that tenant was not residing in the apartment since 1998. In these circumstances, respondent must be deemed to have waived any succession claim" (internal citations omitted).

The Appellate Division thereafter affirmed based on Cynthia's failure of proof, but did not address the waiver issue. 91 AD3d 532 (1st Dept. 2012).

Over the next several years, Appellate Term denied a number of tenant succession claims, citing in each case the tenant's failure of proof, rather than any waiver of succession rights. *See Well Done Realty, LLC v. Epps*, 58 Misc 3d 160(A) (App Term, 1st Dept. 2018); *Mia Terra Realty Corp. v. Sloan*, 57 Misc 3d 141(A) (App Term, 1st Dept. 2017); *206 W. 104 St. LLC v. Zapata*, 45 Misc 3d 135(A) (App Term, 1st Dept. 2014).

Waiver recently made a comeback in *186 Norfolk LLC v. Euvin*, 63 Misc 3d 160(A) (App Term, 2019). There, citing an elaborate and decades-long scheme, the Appellate Term found that "considering the severity and duration of the deceptive conduct, respondent must be deemed to have waived any claim that he might have had to succeed to the tenancy."

In *CBU Assocs., Inc.*, *supra*, Appellate Term held that the occupants had failed to establish their succession claimed at trial, but noted, and disapproved of, occupants' pervasive fraud:

> We would be remiss if we did not note the extensive record support for the trial court's express finding that respondents engaged in a 'decades-long campaign of deception … misleading petitioner as to the whereabouts' of the statutory tenant. As detailed by the trial court, while the original tenant of record John Paddington and his wife Melanie Paddington died in 1967 and 1985, respectively, respondents paid rent in a joint checking account in the name of François and 'J. Paddington' for many years 'with the obvious effect of leading petitioner to believe that 'John Paddington' was still in the subject premises and paying the rent.' Furthermore, in a prior nonpayment proceeding against John Paddington, François 'appeared and falsely represented, by a stipulation that the court took judicial notice of the trial that [the record tenant] was alive but was not present at the time.' When petitioner then commenced an illegal sublet proceeding against John Paddington, respondents revealed for the first time that John Paddington 'had been dead for more than forty years at that point.' (material in brackets in original)

In the recent case of 'CBU Assocs., Inc. v. Forray,' the First Department, Appellate Term observed that an occupant, through a "persistent and systematic pattern of deception," can waive succession rights. The rule in the Second Department, Appellate Term, however, is somewhat more tenant-friendly.

Occupants Prevail

Landlords, however, are not uniformly successful in these types of cases. In *BPP ST Owner LLC v. Nichols*, 63 Misc 3d 18 (App Term, 1st Dept. 2019), the disabled son of the tenant of record did not seek succession immediately after his mother moved, but also did not engage in the kind of scheme that might result in the loss of succession rights. The Appellate Term ruled:

> The record before us discloses no misrepresentation by respondent and tenant, or any prejudice to landlord. Respondent resided in the premises since the inception of the tenancy, landlord was aware of respondent's occupancy for many years, respondent was identified as an occupant on renewal leases, and tenant made repeated (unsuccessful) attempts to add him to the lease. Indeed, it is clear that respondent would have been entitled to succession if he had sought it immediately after his mother moved, and neither tenant nor respondent had anything to gain by representing the tenant was still residing there. In fact, tenant's continued visits to the apartment and payment of rent are consistent with her son's fragile health and inability to work, and her own new residence just blocks away.

In *Park Tower So. Co. LLC v. Mandal*, 63 Misc 3d 134(A) (App Term, 1st Dept. 2019), the court observed that there were "serious and troubling issues regarding the forgery of the tenant's signature on renewal leases after her death." Notwithstanding, Appellate Term ruled that these were ultimately issues of credibility that could not be determined on summary judgment.

The Second Department

In *Jourdain v. New York State Div. of Hous. & Community Renewal*, 159 AD3d 41 (2d Dept. 2018), the tenant of record (Scherley) moved into the subject public housing apartment in

2003. Her mother, Marie, moved in with her at that time. Scherley vacated in 2008, but executed a renewal lease in 2009 which expired in 2011. After the landlord discovered the true facts, Marie claimed succession.

DHCR ultimately ruled that Marie was not entitled to succeed to the apartment. Marie then prevailed in an Article 78 proceeding. The landlord appealed, but DHCR then switched positions, asserting to the Second Department that its order denying succession had been properly annulled by Supreme Court.

The Second Department ruled in Marie's favor, stating:

> We conclude that, in promulgating Rent Stabilization Code §2523.5(b)(1), the DHCR intended the 'permanent vacating of the housing accommodation by the tenant' to mean the time that the tenant permanently ceased residing at the housing accommodation, and that the mere execution of a renewal lease and the continuation of rent payments by the tenant after the tenant permanently ceases to reside at the housing accommodation does not extend the relevant time period. Thus, the relevant one- or two-year period…in which the family member must 'reside with' the tenant is the one-or two-year period immediately prior to when the tenant ceases residing at the housing accommodation.
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> We can discern no reason why the DHCR would intend to deny succession rights to a *family member* who has resided in a unit for a long period of time merely because there was a period of time when the *named tenant* no longer resided there but still maintained some connection to the property. In this case, it is undisputed that Marie would have been entitled to succession if she had sought it immediately after her daughter moved out of the apartment in 2008. We see no rational reason to treat her differently solely because the named tenant later executed the renewal lease and continued to pay the rent while no longer residing there" (italics in original).

The Second Department then observed that its determination was not necessarily contrary to *Third Lenox Terrace*, which the Second Department found distinguishable on its facts:

> Here, Marie only executed one renewal lease after moving out of the apartment, as opposed to the three two-year renewal leases executed by the tenant in *Third Lenox* after she moved out. The execution of one renewal lease after having moved out of the apartment does not necessarily indicate an attempt to deceive the landlord.

Such language would seem to indicate that a court in the Second Department could indeed deny a succession based on waiver or prejudice to the landlord where there has been a pervasive scheme to defraud. For example, in *JIMS Realty LLC v. Barrett*, 62 Misc 3d 957 (Civ. Ct., Kings County 2019), the tenant of record (Inez) permanently vacated in 2004. Thereafter, her daughter (Durine) executed six renewal leases in her mother's name. The court held that the question of whether Durine intended to deceive the landlord would have to be determined at trial:

> Durine, a 73-year-old who allegedly emigrated to this country in her mid-30's, testified that she believed that she was permitted to 'sign legal documents' in Inez's name as her 'proxy'—as she had done when her mother was too ill to sign them herself. Contrary to the 'persistent and systematic pattern of deception' carried out by the non-traditional family member in *Mankiewicz*, a triable issue of fact exists as to whether Durine's misrepresentations to JIMS were born out of ignorance, rather than an intent to deceive. Any questions as to her credibility on this issue are not appropriately resolved on a motion for summary judgment.

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