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RENT REGULATION

Luxury Deregulation: The 'ICF Service Date' Rule


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High-income luxury deregulation was added to the Rent Stabilization Law (RSL) pursuant to the Rent Regulation Reform Act of 1993. RSL §26-504.3(a)(1) addresses the issue of whose income is to be counted:

> Total annual income means the sum of the annual incomes of all persons who occupy the housing accommodation as their primary residence other than on a temporary basis, excluding bona fide employees of such occupants residing therein in connection with such employment and excluding bona fide subtenants in occupancy pursuant to the provisions of section two hundred twenty-six-b of the real property law.

Although the statute talks about counting the income of household occupants, it does not specify the date that is to be used to determine who lives in an apartment for purposes of luxury deregulation.

The Division of Housing and Community Renewal (DHCR) ultimately developed a bright-line test, measuring apartment occupancy as of the date the owner serves the income certification form (ICF). This test, like most bright-line tests, is not entirely satisfactory and has led to results that have aggrieved both owners and tenants.

DHCR's Operational Bulletins

As noted, the statute provides no guidance for determining the date upon which household composition is to be determined for purposes of counting income. In 1994, DHCR promulgated Operational Bulletin 94-1 (OB 94-1) to govern, inter alia, high income luxury deregulation procedures. OB 94-1, however was silent on this issue.

On Dec. 18, 1995, DHCR promulgated Operational Bulletin 95-3 (OB 95-3) to replace OB 94-1. This time, DHCR addressed the issue, stating:

> Commencing January 1, 1996… the operative date for the determination of who is a tenant, cotenant or occupant who must be identified on the ICF, and whose income, if any, will be included in total annual income, will be the date of service of the ICF upon the tenant.

Finally, in December 2000, DHCR codified this rule at RSC § 2531.2(b)(2).

First Department Decisions

The First Department initially considered this issue in *A.J. Clarke Real Estate Corp. v. New York State Div. of Hous. & Community Renewal*, 307 AD2d 841 (1st Dept. 2003). There, the First Department approved DHCR's bright-line test:

> DHCR's ruling correctly reflects a statute that speaks in the present tense about the persons

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whose incomes are to be considered. Rent Stabilization Law §26-504.3(a) defines 'total annual income' as 'the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant of a lease *who occupy the housing accommodation* and all other persons that occupy the housing accommodation as their primary residence on other than a temporary basis' (emphasis added). Rent Stabilization Law §26-504.3(b) provides that the landlord 'may provide the tenant or tenants residing [in a housing accommodation] with an income certification form… on which such tenant or tenants shall identify all persons referred to in subdivision (a) of this section,' with certain exceptions not relevant here. As DHCR argues, if the Legislature had intended inclusion of the incomes of all persons named on the lease, or all persons in occupancy of apartment at a specified time prior to service of the ICF, it would have said so.

In *A.J. Clarke*, the owner served the ICF in March 2000, approximately two months after the tenants of record vacated, leaving only their daughter in occupancy. Her income was below the deregulation threshold. Thus, DHCR's bright-line test worked in favor of the tenant. See also *Chatsworth Realty Corp. v. New York State Div. of Hous. & Community Renewal*, 56 AD3d 371 (1st Dept. 2008) (tenant's estranged husband vacated the apartment before owner served the ICF); *103 East 86th St. Realty Corp. v. New York State Div. of Hous. & Community Renewal*, 12 AD3d 289 (1st Dept. 2004) (husband permanently vacated prior to service of ICF).

DHCR's bright-line test worked against the tenant in *Doyle v. Calogero*, 52 AD3d 252 (1st Dept. 2008). There, the tenant's husband lived in the apartment on the ICF service date, but did not occupy the apartment during the two preceding years, during which income is measured for luxury deregulation purposes. Addressing DHCR's bright-line rule, the First Department held that because "the application of this rule here will permit consideration of a new occupant's income as part of rent destabilization proceedings is not a basis for us to revisit the issue." See also *Power v. New York State Div. of Hous. & Community Renewal*, 61 AD3d 544 (1st Dept. 2009).

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"My Son, The Doctor"

RSL §26-504.3(a)(1) states that the incomes of "bona fide employees" of the tenant of record do not count toward household income. In *Matter of 926 Park Ave.*, DHCR Adm. Rev. Dckt. No. WL-410025-RT, issued May 29, 2009, the issue arose as to whether the income of Dr. Joseph Manne should be included for purposes of luxury deregulation. The tenant of record argued before DHCR:

> that Dr. Joseph Manne occupies the subject apartment solely as the primary care physician of the tenant, who is an invalid and has very serious, life-threatening medical ailments; that Dr. Joseph Manne is not a tenant of the apartment, and does not have a tenant relationship with the owner and has no status in the apartment other than as the provider of the required lifesaving medical care to the tenant.

There was one other factor, however: Dr. Manne was the tenant's son. DHCR ruled against the tenant, stating:

> the relevant issue in this proceeding is whether Dr. Joseph Manne was occupying the subject housing accommodation as his primary residence on other than a temporary basis in February 2007. If the subject apartment was, in

fact, his primary residence the reasons for that are not relevant for the purposes of luxury decontrol. The Commissioner notes that the tenant and Dr. Manne…both acknowledge that he lives with her. Although it is further asserted that Dr. Manne spends most of his time at the hospital where he works and that his activities at the apartment are exclusively connected with his providing the required medical care for the tenant, this does not affect his status as it relates to the issue of whether the subject apartment constitutes Dr. Manne's primary residence on other than a temporary basis.

Deceased Husband's Income

In the recent case of *Matter of Georgia Properties*, DHCR Admin. Rev. Dckt. No. ET-420054-RO, issued May 5, 2017, it was undisputed that the husband of the rent-controlled tenant was living in the apartment on the date the owner served the ICF. The tenant's husband, however, died thereafter. DHCR rejected the tenant's argument that her husband's death barred DHCR from counting his income:

Pursuant to DHCR Operational Bulletin 95-3…the operable date for determining occupancy for purposes of luxury decontrol is the date that the Income Certification Form (ICF) is served on the tenant. A review of the record below reveals that the ICF was served on the tenant in March 2011. Therefore, the relevant issue in this proceeding is whether the tenant's husband, John Wolf, was a qualified occupant of the subject apartment in March 2011, the relevant time period in this proceeding, in determining whether his income should be included in the relevant household income for the purposes of luxury decontrol. *The occupancy status of an individual at any time after the service of the ICF is not relevant in determining whether his/her income is to be included in the relevant household income in determining whether an apartment qualifies for high income rent deregulation* (italics supplied).

Tenant of Record's Income

DHCR's bright-line test applies even where a tenant of record was not primarily residing in the apartment on the ICF service date. In *Matter of Eastwood Towers*, DHCR Adm. Rev. Dckt. No. QC-410056-RO, issued on Sept. 19, 2002, the apartment was occupied by Sid Bernstein—the concert promoter who brought the Beatles to Shea Stadium—his wife, Geradline, and his son, Dylan. Sid's other son, Adam, was the tenant of record. The owner asserted that Adam's income should be counted whether or not he actually lived in the apartment. DHCR disagreed:

Section 2531.1(b) of the Rent Stabilization Code states that the total annual income for the purposes of luxury decontrol includes 'the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on a lease who occupy the housing accommodation and all other persons that occupy the housing accommodation as their primary residence on other than a temporary basis …' Therefore, the income of tenant's named on the lease is to be included in the relevant household income only if they occupy the subject apartment at the relevant time period. Therefore, the fact that Adam Bernstein is the named tenant on the lease and may have made the rent payments for the subject apartment is not relevant in determining whether his income should be included in the relevant household income for the purposes of luxury decontrol. The relevant issue is whether he was a qualified occupant of the subject apartment at the relevant time.