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RENT STABILIZATION

Owner Occupancy Update Six Years After 'Pultz'


By **Warren A. Estis**
And **Jeffrey Turkel**

On June 3, 2008, the New York State Court of Appeals issued its unanimous ruling in *Pultz v. Economakis*, 10 NY3d 542 (2008). In *Pultz*, the landlord sought to evict, on owner occupancy grounds, the nine remaining rent stabilized tenants in a 15-unit building, so as to convert the building into a single-family house. The tenants argued that owner occupancy on such a scale violated the spirit of the city's rent stabilization law (RSL). The Court of Appeals disagreed, holding that the relevant language of the RSL—that an owner could recover "one or more" rent stabilized apartments for personal use—meant what it said.

Tenant advocates and politicians decried the Pultz decision, asserting that it would lead to a flood of "mass evictions." These advocates vowed to amend the RSL to eliminate owner occupancy outright, or to at least limit the number of apartments that could be recovered.

So what has developed in the owner occupancy landscape over the intervening six years? The answer: Not much.

Notwithstanding a small number of owners who have attempted to vacate entire buildings, the flood of "mass eviction" owner occupancy proceedings has not materialized. Nor has there been any legislation limiting an owner's right to recover an apartment based on personal use. Instead, the owner occupancy landscape is dominated by the same issues that dominated pre-*Pultz*: the sufficiency of the notice of non-renewal, relocation for senior citizens, and the landlord's good faith.

WARREN A. ESTIS *is a founding partner at Rosenberg & Estis.* JEFFREY TURKEL *is a partner at the firm and represented the prevailing owner in 'Pultz v. Economakis.'*

Sufficiency of the Notice

Section 2524.2(b) of the Rent Stabilization Code (RSC) provides that a notice requiring a rent stabilized tenant to vacate or surrender possession—including a notice of non-renewal in an owner occupancy proceeding—must state "the facts necessary to establish the existence of such ground." Relying on this language, tenants have frequently moved to dismiss owner occupancy petitions on the ground that the notice of non-renewal was factually and/or legally insufficient.

That strategy worked, for a time, in *Giancola v. Middleton*, 21 Misc3d 34 (App Term 2d and 11th Dists 2008). In *Giancola*, the Appellate Term majority (Pesce and Rios, JJ.) held that the landlord's notice of renewal was insufficient because it "merely tracked the language for nonrenewal upon the ground of owner occupancy and provided the name of the person seeking to occupy the apartment, without setting forth any factual allegations to support landlords' claim of a good faith intention to occupy tenant's apartment" (internal citation omitted).[1] Justice Joseph Golia dissented, writing that "the notice contains the actual name of the family member who is going to occupy the premises as his primary residence as well as his relationship to the owner."[2] Golia held that such information was more than sufficient to satisfy the RSC.

The Second Department thereafter reversed. 73 AD3d 1056 (2d Dept 2010). The unanimous court stated:

> The petitioners' notice of non-renewal satisfied the requirements of the Rent Stabilization Code. The notice identified that the ground for recovery of the apartment was its anticipated use by a member of the petitioners' immediate family, and set forth the date by which the apartment was to be vacated. The notice also set forth facts necessary to establish the ground for the vacatur, as it identified the petitioners' son, by name, as the immediate family member who would occupy the apartment as a primary resident, and further stated that recovery of the premises for use by the son was sought in good faith (internal citations omitted).[3]

Notwithstanding a small number of owners who have attempted to vacate entire buildings, the flood of "mass eviction" owner occupancy proceedings, feared in the wake of 'Pultz,' has not materialized.

Following the Second Department's ruling in *Giancola*, the Appellate Term took a more relaxed view regarding the sufficiency of notices of non-renewal in owner occupancy proceedings. See e.g. *Gutnick v. Ramos*, 30 Misc2d 135(A) (App Term 2d, 11th and 13th Dists 2011); *Lee v. Nicolosi*, 28 Misc3d 134(A) (App Term 2d, 11th and 13th Dists 2010).

The case law in the First Department is less clear than in the Second Department. In *Hirsch v. Stewart*, 63 AD3d 74 (1st Dept 2009), the notice of non-renewal directed the tenant to vacate on or before Oct. 31, 2005, and further stated:

> … the landlord will not renew your lease based upon the fact that the Landlord seeks possession of [the apartment] for the landlord's own use. The landlord seeks to recover possession of [the apartment]

for personal use and occupancy of himself as his primary residence in the City of New York (material in brackets in original).[4]

The First Department held that the notice was insufficient because it merely stated the grounds for non-renewal, rather than the supporting facts.

In *Rudd v. Sharff*, 30 Misc3d 35 (App Term 1st Dept. 2010), however, the Appellate Term found for the landlord. In *Rudd*, a multiple-eviction case, the notice of non-renewal described the landlord's:

> … plan to convert the building to a single-family dwelling for himself, his named fiancée and her two children. In this connection the notices set forth in detail the contemplated use of the renovated space on a floor-by-floor basis, reflecting Rudd's plan to create a single, integrated structure that would serve as his primary residence and that of his fiancée and her children.[5]

Modifying the Civil Court, the Appellate Term held that the notice was sufficiently particularized to satisfy the test set forth in *Hirsch*. The court added:

> While acknowledging that the nonrenewal notices are 'quite lengthy in detail,' tenants assert that the notices are nonetheless jurisdictionally defective since they are to be based on 'factors dependent upon future contingencies which may or may not occur,' including the landlord's ability to effectuate its 'complicated,' building-wide renovation plan.[6]

Today, the owner occupancy landscape is dominated by the same issues that dominated pre-'Pultz': the sufficiency of the notice of non-renewal, relocation for senior citizens, and the landlord's good faith.

The Appellate Term rejected this argument, stating:

> However, any questions concerning the feasibility of the landlords' proposed renovations, as well as the ultimate issue of landlords' good faith intention to occupy tenants' apartments or the building as a whole, are more appropriately explored in discovery or a trial.[7]

Specific Drafting

The drafting and service of a "bullet-proof" notice of non-renewal is of critical importance to a landlord in an owner occupancy case. Should the case survive a challenge to the notice, the advantage shifts dramatically to the landlord. Assuming that the landlord is proceeding in good faith, and can prove that he or she actually intends to do with the apartment what is being claimed, an owner occupancy case is eminently winnable. Practitioners are advised to study *Hirsch* and *Giancola* to make sure that their notice of non-renewal will survive a dispositive motion.

Sometimes a notice of nonrenewal is properly drafted, but circumstances change such that the notice is obsolete. In *Harmon v. Mervine*, 34 Misc3d 1218(A) (NYC Civ Ct 2012), the landlords sought to recover a rent stabilized apartment so that their granddaughter, who would be attending Hunter College, could live in the city. By 2011, however, the landlords informed the court that due to ill health, their granddaughter would not be moving into the apartment, but that their grandson would. The Civil Court, on the tenant's motion, dismissed the petition based on a legally insufficient predicate notice:

> … all of the factually specific claims in the notice refer only to the granddaughter; if those are removed as no longer relevant what remains is a facially insufficient notice as it 'fail[s] to set forth allegations tending to support the stated ground for eviction that [are] fact specific as to this particular proceeding. The notice herein, once the facts relating to the granddaughter are deemed removed, would be insufficient as it would contain only the 'bare bones allegation concerning the … landlord's intent to primarily reside in the subject … premises' and the 'unamplified assertion' of where the landlord presently resides" (internal citations omitted, material in brackets in original).[8]

62 or Older?

RSL §26-511(c)(9)(b) states that if a landlord seeks to evict on owner-occupancy grounds a tenant who is 62 or older, the landlord will not succeed unless the landlord "offers to provide and if requested, provides an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area." Since the advent of luxury deregulation in 1993, finding a comparable vacant rent stabilized apartment has become almost impossible.

The "62 or older" requirement often creates a race against time, as the landlord seeks to recover the apartment before the tenant's 62nd birthday. In *Croman v. Leighton*, 12 Misc3d 73 (App Term 1st Dept. 2006), the tenant was 62 when the notice of non-renewal was served, and the tenant prevailed on summary judgment. In *Breyre v. Meyer*, 27 Misc3d 65 (App Term 1st Dept. 2010), however, the tenant reached her 62nd birthday "months after completion of a lengthy trial, entry of an unappealed possessory judgment in landlords' favor, and landlords' timely application for a warrant of eviction."[9] Appellate Term, affirming the Civil Court, found that the tenant's senior citizen status would not rescue her from eviction:

> The cited Code section [RSC §2524.4(a)] requires a landlord seeking to recover a stabilized apartment for personal use to offer an elderly or disabled 'tenant lawfully occupying' the unit 'an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area.' As the trial court properly recognized, by the time appellant is said to have turned 62, the parties' landlord-tenant relationship had long since been severed (material in brackets supplied).

Pultz reinforced the fact that where the landlord has survived a motion to dismiss or for summary judgment, he or she must still prove good faith.[10] Good faith is generally viewed as proof that the landlord and/or his or her family member actually intends to occupy the apartment in question. See e.g. *Fazio v. Joy*, 89 AD2d 604 (1st Dept. 1982), aff'd 58 NY2d 674 (1982).

In *Austin v. O'Brien*, 34 Misc3d 1203(A) (NYC Civ Ct Kings County 2011), the landlord admitted at trial on cross-examination that he had listed the building for sale just before trial. The Civil Court held that such conduct "directly undermined any good faith intention he may have had to obtain possession of the premises for his personal use."[11]

The case law establishes that owner occupancy wars continue unabated, albeit unchanged by *Pultz*.

1. 21 Misc3d at 36.
2. Id. at 37.
3. 73 AD3d at 1057.
4. 63 AD3d at 75.
5. 30 Misc3d 35 at 36.
6. Id.
7. Id.
8. 34 Misc3d at *3.
9. 27 Misc3d at 66.
10. 10 NY3d at 548.
11. 34 Misc3d at *3.