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As It Turns Out, *Yellowstone* Waivers Are Enforceable

By Jeffrey Turkel and Joshua Kopelowitz

In an earlier article, "Are Yellowstone Waivers Enforceable?," *New York Law Journal*, April 10, 2014, at 4, col. 1 (http://bit.ly/2tXUR3P), we explored whether a commercial tenant could waive its common law right to seek a *Yellowstone* Injunction. At that time, there was no appellate authority directly on point. This all changed on Jan. 31, 2018, when the Appellate Division, Second Department ruled in *159 MP Corp., v Redbridge Bedford, LLC*, 2018 WL 635946, 1 (2d Dept 2018) (http://bit.ly/2u580b8) that the "commercial tenants' voluntary and limited waiver of declaratory judgment remedies in their written lease is valid and enforceable, and not violative of New York's public policy …"

Recap: What is a *Yellowstone* Injunction?

In *Universal Communications Network, Inc. v 229 West 28th Owner, LLC*, 85 AD3d 668 (1st Dept 2011), the First Department summarized that the "sole purpose of a *Yellowstone* injunction is to maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture."

Yellowstone Waivers In Commercial Leases Are Enforceable

In *159 MP Corp.*, plaintiffs-tenants entered into commercial leases for retail and storage space. Each lease was to run for 20 years from May 1, 2010, with a 10-year renewal option. In each lease, the tenants, in sum, waived their rights to bring a declaratory judgment action with respect to any default notice sent pursuant to the lease, which constitutes an implicit bar to obtaining a *Yellowstone* injunction. The commencement of such an action was grounds for immediate termination of the leases.

Defendant-landlord served each of the plaintiffs a notice to cure alleging various lease defaults. Before the cure period expired, plaintiffs moved for a *Yellowstone* injunction staying and tolling the cure period and enjoining defendant from terminating the leases or commencing a summary proceeding.

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Yellowstone Waivers

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Supreme Court (Schmidt, J.) denied plaintiffs' motion, holding that such relief was prohibited by the leases. The Court held that plaintiffs had the opportunity to cure the alleged defaults and/or resolve the dispute through a summary proceeding, such that they were not without a remedy. The Court did not reach the issue of whether the *Yellowstone* waiver violated public policy.

The Majority's Decision Upholding the Waivers

The Second Department affirmed Supreme Court by a 3-1 margin, mainly relying on principles of freedom of contract. The majority first held that a "bedrock principle of our jurisprudence is the right of parties to freely enter into contracts …. Not only is the freedom to contract constitutionally protected, but federal and New York courts have recognized that the autonomy of parties to contract is itself a sacred and protected public policy that should not be interfered with lightly…" *Id*. at 6.

The majority continued:

> "To hold that the waiver of declaratory judgment remedies in contractual leases between sophisticated parties is unenforceable as a matter of public policy does violence to the notion that the parties are free to negotiate and fashion their contracts with terms to which they freely and voluntarily bind themselves. The fact that with the benefit of hindsight, a party believes that it had agreed to an unfavorable contractual term, does not provide courts with authority to rewrite the terms of a contract or to extricate parties from poor bargains … the plain language of the lease riders reflects the parties' mutual intent to adjudicate disputes by means of summary proceedings. Declaratory and Yellowstone remedies are rights private to the plaintiffs that they could freely, voluntarily, and knowingly waive. We therefore enforce the waivers in the lease riders and decline to strike them …."

The Second Department next held that the plaintiffs had "the burden of demonstrating a triable issue of fact as to whether the waiver provisions violate public policy," and had not done so "where the record is silent as to the consideration they received in exchange for their waivers." Such language allows for the possibility that a *Yellowstone* waiver, under the right facts, could be deemed unconscionable.

The majority next addressed the dissent's concern that without declaratory relief to toll the cure period, plaintiffs would be without any remedies to save their leases because there is no statutory authority permitting a commercial tenant to commence a summary proceeding. The majority rejected that argument, noting that "plaintiffs had the contractual right to receive notices to cure and an opportunity to correct any claimed breaches" within the negotiated cure period. *Id*. at 8. The majority also observed that plaintiffs maintained the right to seek money damages from defendant if defendant were to breach the contract or commit tortious conduct injurious to persons or property. Lastly, the majority noted that "plaintiffs did not surrender the right to

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"[F]ederal and New York courts have recognized that the autonomy of parties to contract is itself a sacred and protected public policy that should not be interfered with lightly …."

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fully litigate and defend themselves in any summary proceeding that the defendant might commence in Civil Court ….” *Id*.

Dissent

In her dissent, Justice Francesca E. Connolly opined that the waiver violated public policy. Justice Connolly wrote that a tenant's broad waiver of the right to seek declaratory relief — and, implicitly, a *Yellowstone* injunction — should be void because the enforcement of same would deprive a commercial tenant of any affirmative and meaningful means of accessing the courts to protect it leasehold interest.

Conclusion

Practitioners advising landlords, at least in the Second Department, should strongly consider whether to include a *Yellowstone* waiver when drafting a commercial or retail lease. Attorneys advising tenants should either attempt to strike the waiver or, at least, obtain something of value in return. The outcome will depend on the relative bargaining positions of the parties, the precise free market approach that the Second Department endorsed.

One thing is for certain: *Yellowstone* waivers will ultimately result in many leasehold forfeitures. It remains to be seen whether the legislature or the Court of Appeals will be willing to accept that result.

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REAL PROPERTY LAW

No Tacking of Adverse Possession Claims

Lorenz v. Soares
NYLJ 1/18/18, p. 21., col. 2.,
Supreme Ct., Westchester Cty.
(Giacomo, J.)

In an action to establish title by adverse possession, true owner sought summary judgment. The court granted true owner's motion, holding first that under the 2008 adverse possession statute, adverse possessor's occupation was permissive, and second, that adverse possessor could not tack his possession on to the possession of his predecessors.

The rear boundary of adverse possessor's parcel abuts the rear boundary of true owner's parcel. The two parcels front on different streets. When adverse possessor purchased his parcel in 2005, a chain link fence existed near the boundary between the two parcels. In fact, the fence was located on true owner's land, 10 feet from the actual boundary between the parcels. Adverse possessor claims to have mowed the grass in the 10-foot strip since the time of his purchase, and planted arborvitae in the strip in 2010. In 2015, true owners removed the fence, prompting adverse possessor to bring this action to quiet title to the disputed strip.

In awarding summary judgment to true owner, the court relied on the 2008 adverse possession statute, which deems permissive the existence of *de minimis* non-structural encroachments including shrubbery, plantings, and sheds and which also deems permissive the acts of lawn mowing or similar maintenance. Because adverse possessor's claim had not vested before 2008, the new statute was applicable. The court rejected adverse possessor's effort to tack his possession on to that of his predecessors, noting first that his predecessor had testified that the shed the predecessor had erected never encroached into the disputed strip, and second that adverse possessor had presented "no evidence that their predecessors intended to and actually turned over possession of the disputed property with the portion of the land included in the deed." Finally, the court denied adverse possessor's motion to amend the complaint to add a cause of action based on the doctrine of practical location of boundaries, noting that there was no evidence to suggest that true owner had every acquiesced in the fence as the boundary between the parcels.

A current occupier of a boundary strip can tack possession to a predecessor if the successive owner presents evidence that the prior owner intended to transfer the undescribed portion of the parcel.

COMMENT

A current occupier of a boundary strip can tack possession to a predecessor if the successive owner presents evidence that the prior owner intended to transfer the undescribed portion of the parcel. Testimony of a prior owner's representative is usually sufficient to support a tacking claim. The court in Brand v. Prince, *35 N.Y.2d 634, relied on testimony by the lawyer of the estate that sold the property to the current owner, and held that pointing out the boundary lines to the successive owner at the time of sale was sufficient evidence of an intent to turn over possession of the property.*

Even without the testimony of the seller or the seller's representative, a tacking claim may succeed based on the successor owner's own testimony that the prior owner had indicated that the disputed strip was part of the land conveyed. In Eddyville Corp. v. Relyea, *35 A.D.3d 1063, the court held that successor owner's testimony that the predecessor had made it clear that successor would be entitled to use the strip for parking cars and storing boats was sufficient to support a tacking claim. In* Eddyville, *there was also testimony from prior tenants who testified that the strip had always*

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been treated as part of the parcel conveyed.

On the other hand, a mere statement by the current occupant that he had knowledge of the prior owner's intent, without testimony about any manifestations of that intent, is not enough to support a tacking claim. Thus, in MKG Georgica LLC v. Popcorn*, 2015 NY Slip Op 30255, Suffolk County Supreme Court found successor's testimony of his 'first-hand knowledge' of the prior owner's intent insufficient to overcome true owner's summary judgment motion. In* MKG*, the current adverse possessor purchased from an estate, so the prior owner could have exhibited no manifestations of an intent to transfer the disputed land to the current occupant.*

Issues of Fact Preclude Injunction Requiring Removal of Encroachments

Kimball v. Bay Ridge United Methodist Church

NYLJ 1/26/18, p. 26., col. 4.,
AppDiv, Second Dept.
(memorandum opinion)

In landowner's action against a neighboring church for declaratory and injunctive relief, landowner appealed from Supreme Court's grant of summary judgment to the church on its counterclaim for removal of cladding and a drip edge that encroached on the church's land. The Appellate Division modified, concluding that disputed questions of fact remained about whether the church was entitled to an injunction requiring removal of the encroachments.

Landowner shared a party wall with a church building until the church building was demolished in 20098. In 2015, landowner installed cladding and a drip edge on the wall, and brought this action for declaratory and injunctive relief. The church counterclaimed, seeking an injunction requiring removal of the encroaching cladding and drip edge. Supreme Court granted the injunction, concluding that the cladding and the drip edge encroached on the church's land.

In modifying, the Appellate Division first concluded that Supreme Court had properly found that the cladding and drip edge encroached onto the church's land. But the court then noted that, under RPAPL 871(1), a party seeking to enjoin an encroachment must establish not only the existence of the encroachment, but also that the benefit to be gained by compelling removal would exceed the harm that would result from granting injunctive relief. In this case, triable issues of fact remained about whether the balance of equities weighed in the church's favor. As a result, the church was not entitled to summary judgment.

Statute of Limitations Bars Foreclosure Claim

Deutsche Bank National Trust Co. v. Adrian

NYLJ 2/2/18, p. 27., col. 3., AppDiv, Second Dept.
(memorandum opinion)

In mortgagee bank's foreclosure action, the bank appealed from Supreme Court's grant of mortgagor's motion for summary judgment dismissing the complaint. The Appellate Division affirmed, holding that the statute of limitations barred the bank's foreclosure action.

In 2006, mortgagor executed a mortgage to secure a note. After mortgagor defaulted on the note, mortgagee brought a foreclosure action on April 11, 2008, thus accelerating the debt. On April 8, 2014, mortgagee bank send mortgagor a 90-day notice pursuant to RPAPL 1304, but then discontinued the foreclosure action. On July 8, 2014, mortgagee brought the instant action to foreclose on the same mortgage. Mortgagor moved to dismiss, contending that the action was time-barred under the six-year statute of limitations, and mortgagee bank appealed.

In affirming, the Appellate Division held that mortgagee's filing of the initial foreclosure action constituted an election to accelerate the entire debt, and that mortgagee's discontinuance of that action did not constitute an affirmative act revoking the election to accelerate. As a result, the current foreclosure action was time-barred because it was not institute until more than six years after mortgagee bank's initial election.

Permission Bars Prescriptive Easement Claim

Serafin Props. v. Amore Enters. Inc.

NYLJ 2/13/18, p. 17., col. 3.,
Supreme Ct., Erie Cty.
(Walker, J.0.)

In an action by landowner to establish a prescriptive easement over neighbor's abutting property, the parties went to trial after the court denied their respective summary judgment motions. After a bench trial, the court concluded that landowner's use of the disputed parcel had been permissive, and accordingly held that landowner did not have a prescriptive easement.

Landowner, neighbor, and two other owners own parcels in a small industrial park. Owners of all of the parcels had used the driveway on neighbor's land for more than a decade before landowner acquired its parcel from one of its affiliates in 2007. Neighbor contended that the use was permissive, precluding a prescriptive easement claim.

In awarding judgment to neighbor, the court relied on testimony by neighbor's president that, before neighbor purchased the property, he had confirmed, before the village board, that he would continue to permit other members of the industrial park to use the driveway as long as there was some chipping in of repairs. The court also relied on a 1995 letter from attorneys from neighbor's predecessor to landowner's predecessor confirming that neighbor has permitted the predecessor and its tenants to use the driveway, and reiterating that "there is no easement benefitting" landowner's property.

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COOPERATIVES & CONDOMINIUMS

Questions of Fact Bar Summary Judgment in Condominium's Claim For Improper Alterations

Forestal Condominium v. Davydov
NYLJ 1/26/18, p. 23., col. 6., AppDiv, Second Dept.
(memorandum opinion)

In condominium's action for declaratory and injunctive relief against a unit owner, condominium appealed from Supreme Court's denial of its summary judgment motion. The Appellate Division affirmed, holding that questions of fact remained about the dealings between the condominium and the unit owner with respect to the unit owner's alterations to his apartment.

The condominium's bylaws preclude unit owners from making structural additions, alterations or improvements to a unit without the prior written consent of the condominium's board. When the unit owner made alterations without approval, the condominium brought this action. Supreme Court denied the condominium's summary judgment motion.

In affirming, the Appellate Division noted that the bylaws provide that the condominium board has 30 days to respond to written alteration requests, and that failure to response within 30 days would constitute consent to the proposed alteration, addition, or improvement. In this case, the condominium's submissions did not eliminate questions of fact about what requests the unit owner made of the condominium board, and what responses the condominium provided. As a result, the condominium had not established an entitlement to summary judgment.

Sponsor Did Not Breach Purchase Contract

Clements v. 201 Water Street LLC
NYLJ 1/29/18., p. 19., col. 3., AppDiv, First Dept.
(memorandum opinion)

In condominium purchasers' action against sponsor for a determination that the sale contract was void and that purchasers were entitled to return of their down payment, purchasers appealed from Supreme Court's dismissal of the complaint. The Appellate Division modified to declare in sponsor's favor, and to strike the declaration that tenants were not entitled to return of the down payment, holding that the contract remained valid and enforceable.

Purchasers agreed to buy the subject condominium unit while it was under construction. The agreement required the sponsor to set a closing date concurrently with or after obtaining certificates of occupancy for the building or for the subject unit, and required the sponsor to use best efforts to procure certificates of occupancy within two years of the issuance of the building's first temporary certificate of occupancy or the first unit's temporary certificate of occupancy. At a time when sponsor had not yet obtained certificates of occupancy, purchasers brought this action, contending that the agreement was unenforceable because it gave the sponsor sole and absolute discretion to set a closing date. Supreme Court disagreed and dismissed the complaint.

In modifying, the Appellate Division agreed with Supreme Court that the agreement was valid and enforceable because it required the sponsor to make best efforts to obtain the certificate of occupancy, and because the law implies a term requiring that closing occur within a reasonable time. The court, however, deleted the provision holding that purchasers were not entitled to return of the down payment, concluding that the determination was premature because purchasers might still close on the unit.

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Unit Owners Did Not Have Exclusive Right To Elevator Shaft

Chu v. Klatskin
NYLJ 2/14/18, p. 30., col. 5., AppDiv, First Dept.
(memorandum opinion)

In an action by condominium unit owners to establish an exclusive right to a portion of a decommissioned elevator shaft, unit owners appealed from Supreme Court's dismissal of the complaint. The Appellate Division affirmed, holding that the unit owners' claim was precluded by the condominium declaration.

Unit owners own the only units on the 11th floor of the condominium building and claimed exclusive rights to the 11th floor portion of a decommissioned and ultimately removed freight elevator shaft adjected to the wall of their joined residential units. They relied on language in the declaration giving the owners of two or more units who benefit exclusively from an adjacent or appurtenant common element the exclusive right of use of that common element. Supreme Court dismissed their complaint, and unit owners appealed.

In affirming, the Appellate Division focused on another provision in the condominium declaration providing that the elevators and elevator shafts are common elements except that "two of the elevators are reserved for the exclusive use of the Residential Unit Owners and one elevator is reserved for the exclusive use of the Commercial Unit Owners." Because the freight elevator adjacent to unit owners' units belonged to the commercial owners at the time unit owners purchased their units, unit owners did not have rights to the elevator or elevator shaft. Nothing in the language of the condominium's governing documents had changed since that time.

LANDLORD & TENANT

Denial of Remaining Family Member Status Upheld

Matter of Aponte v. Olatoye
NYLJ 2/16/18, p. 25, col. 4.,
Court of Appeals
(Opinion by Wilson, J.; concurring opinion by Rivera, J.)

In an article 78 proceeding brought by tenant's son challenging the New York City Housing Authority's denial of his application for "remaining family member" (RFM) status, the Housing Authority appealed from the Appellate Division's reversal of Supreme Court's denial of the petition. The Court of Appeals reversed and reinstated the denial, holding that the Authority's denial was not arbitrary or capricious, and that the son had not properly raised anti-discrimination claims at the administrative hearing.

Tenant's son moved into his mother's one-bedroom apartment in 2009 to care for her through her dementia. The housing authority denied two requests by the son for permission to live with his mother in the apartment. After his mother's death, the son applied for RFM status, which would have permitted him to remain in the apartment. The housing authority denied the request because the son had not been entitled to live in the apartment with his mother because of overcrowding under the housing authority's rules. Because the son lacked permanent permission to live in the apartment while his mother was alive, the authority concluded that the son was not entitled to RFM status. When the son brought this article 78 proceeding to challenge the determination, Supreme Court denied the petition, but the Appellate Division reversed. The housing authority appealed.

In reversing and dismissing the petition, the Court of Appeals noted that the housing authority's rules would have permitted the son to obtain permission to care for his mother as a temporary resident, even if his occupation would otherwise have constituted overcrowding. Occupation as a temporary resident, however, would not have entitled the son to RFM status. The court concluded that the housing authority policy, which precluded the son from bypassing the authority's 250,000 household waiting line, was not arbitrary and capricious. The court's majority declined to consider the son's claims under anti-discrimination statutes because the son had not raised those claims at the administrative level.

Judge Rivera, concurring, concluded that the son's associational discrimination claim was properly before the court, but concluded that the claim should be dismissed because he did not establish that the denial of permanent residency status was related to his association with his disabled mother. She went on to argue, however, that the housing authority cannot rely on rules and presumptions to deal with claims under the anti-discrimination statutes. Instead, she concluded that the authority must engage in an interactive process that gives individualized consideration to each disability claim.

Occupant Entitled to Succession Rights to Stabilized Apartment Even If Named Tenant Continued To Sign Leases After Moving Out

Matter of Jourdain v. New York State Division of Housing and Community Renewal
NYLJ 2/2/18, p. 26., col. 1., AppDiv, Second Dept.
(Opinion by Hall, J.)

In occupant's article 78 proceeding to review DHCR's determination that she was not entitled to succession rights in her apartment, landlord appealed from Supreme Court's grant of the petition. The Appellate Division affirmed, holding that occupant was entitled to succession rights even though the named tenant had moved out of the apartment years before expiration of the most recent lease.

Occupant lived in the apartment with her daughter, the named tenant, from the inception of the daughter's tenancy in 2003. In 2008, the daughter and her husband moved out of the rent-stabilized apartment and moved to Virginia. Named tenant continued to pay the rent, and renewed the lease in September 2009 for a term to expire on Dec. 31, 2011. In September 2011, landlord served occupant with a notice of intention not to renew the lease because the named tenant had not been seen around the property since February 2010. Occupant then filed a complaint with DHCR asserting succession rights to the apartment. DHCR initially concluded that occupant had succession rights, prompting landlord to bring an article 78 proceeding, in which the parties ultimately stipulated to remit the matter to DHCR. This time, DHCR concluded that occupant was not entitled to succession rights, relying on the First Department's decision in *Third Lennox Terrace Assoc. v Edwards*, 91 AD3d 532. Occupant then brought this article 78 proceeding. During the course of the proceeding, DHCR again reversed itself, now concluding that occupant had succession rights. Supreme Court agreed, and granted occupant's petition.

In affirming, the Appellate Division started with section 2523.5(b)(1) of the Rent Stabilization Law, which grants succession rights to a senior citizen family member who has "resided with the tenant" for "a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant." Landlord argued that the named tenant did not permanently vacate the apartment until the expiration of her last renewal lease in December 2011, and that occupant did not "reside with" the named tenant during the year before that date, because the named tenant did not reside in the apartment after she moved to Virginia in 2008. The court rejected this reading

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of the statute, holding that named tenant had "permanently vacated" the apartment when she moved out, despite her subsequent lease renewal. The court emphasized that occupant would have been entitled to succession rights if she had sought those rights as soon as her daughter moved out, and could see no rational reason why she should be treated differently because her daughter had continued to pay rent and executed a renewal lease after leaving the apartment.

COMMENT

The First and Second Department differ in their interpretation of the "permanently vacated" provision in the Rent Stabilization Code 2523.5 (b)(1). In Third Lenox Terrace Assoc. v. Edwards, *91 A.D.3d 532, the court held that a named tenant who ceases to use an apartment as a primary residence does not permanently vacate the apartment so long as the named tenant continues to renew leases and pay rent. In* Third Lennox, *the named tenant moved out of the apartment in 1998, but continued to pay rent by money orders issued in her name and personally executed renewal leases extending until 2005. The court denied succession rights to an occupant who had lived in the apartment since 1995, holding that the occupant had not established that she lived with the named tenant with the named tenant for two years immediately preceding 2005.*

Since the ruling in Third Lenox, *courts within the First Department have consistently ruled that a named tenant who continues to pay rent and sign renewal leases has not "permanently vacated" the apartment, leaving any occupant without succession rights.* See, e.g., 206 W. 104th St. LLC v. Zapata, *45 Misc. 3d 135(A) (holding that the named tenant had not permanently vacated because he continued to sign renewal leases and pay rent with checks in his name.);* Well Done Realty, LLC v. Epps, *2018 N.Y. Slip Op 50259(U);* Mia Terra Realty Corp. v. Sloan, *57 Misc. 3d 141(A).*

Prior to Jourdain, *the Second Department courts generally followed* Third Lenox*'s definition of "permanently vacating." In* M&B Lincoln Realty Corp. v. Thompson, *49 Misc.3d 154(a), the Court held that because the tenant continued to sign renewal leases and pay rent, she did not permanently vacate the apartment, despite moving out.* See also, Jols Realty Corp v. Nunez, *43 Misc.3d 129(a) (court held that named tenant could not be deemed as permanently vacated, as she continued to execute renewal leases and pay rent on behalf of the occupant);* see also, Cadillac Leasing, LP v. Kiely, *2016 NY Slip Op 50388(U).*

However, six months after Jols, *the Second Department Appellate Term deviated from its previous analysis, holding that the Rent Stabilization Code does not preclude succession rights "solely on the ground that the tenant of record has not maintained her primary residency in the stabilized apartment during the two-year period prior to her permanent vacating of the apartment."* Mexico Leasing, LLC v. Jones, *45 Misc.3d 127(a). The Court permitted the adult children and grandchild of the named tenant to exercise succession rights, even though the named tenant had since moved to Pennsylvania, emphasizing that the succession provisions focus on preventing dislocation of long-term occupants after the head of a household permanently vacates. In* Jourdain, *the Second Department itself rejected the* Third Lennox *approach and held that a named tenant "permanently vacates" the apartment when he or she ceases occupying the apartment as a residence.*

Tenant Entitled to Succession Rights to Rent-Controlled Apartment

Matter of Underhill-Washington Equities, LLC v. Division of Housing and Community Renewal (DHCR)

NYLJ 1/16/18, p. 20., col. 2., AppDiv, Second Dept. (memorandum opinion)

In landlord's article 78 proceeding to review DHCR's denial of its petition for administrative review of a determination that tenant is entitled to succession rights to the rent-controlled apartment, landlord appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that DHCR's determination was rationally based on the administrative record.

Tenant's sister was the original tenant of record of the apartment, but current tenant has lived in the apartment since 1972. In 2005, the sister purchased a home in Florida due to her daughter's health issues, and vacated the apartment. She continued to pay rent. In 2009, landlord brought a holdover proceeding to evict tenant and his sister on the ground that sister no longer maintained the apartment as her primary residence. The sister and the tenant answered, maintaining that they lived in the apartment, but the court dismissed the petition on the ground that landlord had failed to comply with notice and filing requirements. Then, in 2011, tenant commenced an administrative proceeding before DHCR, seeking a determination that he was entitled to succession rights. Landlord then brought a second holdover proceeding, and tenant and his sister again maintained that they had resided together in the apartment since 1971. By contrast, in the administrative proceeding, sister conceded that she had vacated the apartment in 2005. DHCR's rent administrator nevertheless concluded that tenant was entitled to succession rights, and the Deputy Commissioner upheld that determination, denying landlord's petition for review. Supreme Court denied landlord's article 78 petition.

In affirming, the Appellate Division rejected landlord's argument that judicial estoppel precluded DHCR from relying on tenant's sister's affidavit regarding her departure from the apartment, noting that the holdover proceedings in which the sister had made contrary assertions had never been litigated to a conclusion. Moreover, the court

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concluded that in any event, the focus should be on preventing displacement of family members who have resided with tenants for long periods of time. In this case, landlord did not contest tenant's status as a family member who has resided in the apartment since 1972

Landlord Did Not Establish Use of Apartment to Facilitate Drug Trading

551 West 172nd Street LLC v. Taveras
NYLJ 1/31/18, p. 26., col. 2., AppTerm, First Dept. (memorandum opinion)

In landlord's summary holdover proceeding, landlord appealed from Civil Court's judgment dismissing the proceeding. The Appellate Term affirmed, holding that landlord had not met its burden of establishing that the premises had been used to facilitate trading in drugs and that the tenant knew or should have known of the illegal drug activity.

Tenant's adult son, who lived with tenant, had engaged in the sale of drugs. Landlord brought this proceeding, relying both on statutory grounds and on lease provision authorizing termination if tenant created a nuisance of engaged in activity detrimental to the safety of other tenants. In dismissing the proceeding, Civil Court concluded that there was little evidence that the son used the apartment or the building in an illegal trade or business, and no evidence that she knew or should have known of her son's activities.

In affirming, the Appellate Term noted that after a bench trial, an appellate court should not disturb findings of fact unless the trial court's conclusions could not be reached under a fair interpretation of the evidence. Here, there was no basis to disturb the trial court's conclusions, especially because the tenant was a full-time home attendant who slept away from the apartment one night a week.

421-G Buildings Subject To Luxury Deregulation

Kuzmich v. 50 Murray Street Acquisition LLC
NYLJ 1/19/18, p. 23., col. 3., AppDiv, First Dept. (memorandum opinion)

In tenants' action for a declaration that their apartments are subject to rent stabilization, landlord appealed from Supreme Court's grant of partial summary judgment declaring the apartments subject to rent stabilization and ordering that a special referee be designated to determine the amount of overcharges and attorney's fees due to tenants. The Appellate Division reversed and held that apartments receiving 421-g tax benefits are subject to luxury deregulation.

Landlord's building receives tax benefits pursuant to section 421-g of the Real Property Tax Law. Landlord set the initial rent for apartments at a price in excess of the threshold for luxury deregulation. Tenants challenged landlord's action, contending that receipt of tax benefits under section 421-g precluded landlord from taking advantage of the luxury decontrol provisions of the rent stabilization law. Supreme Court agreed, and awarded partial summary judgment to tenants.

In reversing, the Appellate Division held that the section 421-g(6)'s prefatory phrase "[n[otwithstanding the provisions of any local law for [rent stabilization]" should be read in tandem with the statute's coverage clause. The court observed that the prefatory phrase was necessary to extend rent stabilization coverage to certain dwellings in buildings receiving 421-g benefits. The prefatory phrase was not, the court held, designed to carve 421-g buildings out of the rent stabilization law's luxury deregulation provisions. The court acknowledged that its holding meant that most 421-g buildings would never be rent stabilized because rents in virtually all apartments in those buildings exceed the luxury decontrol threshold. The court concluded, however, that the legislatures was aware of that consequence when it enacted the statute.

Incarcerated Son Not Entitled to Succession Rights

528 West 123rd St. LLC v. Baptiste
NYLJ 3/2/18, p. 26., col. 1., AppTerm, First Dept. (memorandum opinion)

Tenant's son appealed from Civil Court's rejection of his claim for succession rights to tenant's rent-stabilized apartment. The Appellate Term affirmed, holding that tenant's incarceration at the time of his father's death precluded the claim.

Tenant died in 2015. His son began living with him in August 2012, but has been incarcerated since November 2013 and will not be eligible for release until March 2021. As a result, the son did not reside with the tenant for the requisite two-year period before the father's death.

In affirming Civil Court's denial of succession rights, the Appellate Term rejected the son's claim that his incarceration is a protected "temporary absence" within the meaning of section 2523.5(b)(2) of the Rent Stabilization Code. The court noted that the enumerated temporary absences included military service, time as a full-time student, and relocation for employment purposes, but held that allowing a lengthy period of incarceration to qualify as a temporary absence would not further the purposes of the rent stabilization code's primary residence requirement, which is designed to return underutilized apartments to the marketplace.

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