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RENT STABILIZATION

The Strange Case Of HSTPA Part J

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In *520 Tinton, L.P. v. Harlem United*, 2020 WL 3477757 (N.Y. Civ. Ct. 2020), the court addressed an obscure portion of the HSTPA, embodied in the Part J amendments thereto. These amendments granted protection from non-primary residence evictions to not-for-profit entities that provide "scatter site" housing for the homeless. This article will explore whether the Part J amendments are constitutional. There is much to suggest that they are not.

Non-Primary Residence

ETPA § 5(a)(11) provides in relevant part that New York City may not declare a housing emergency with respect to "housing accommodations which are not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, as determined by a court of competent jurisdiction." This language reflects the state's policy that the city's housing crisis should not be "'exacerbated by tenants using their rent-controlled and rent-stabilized apartments only occasionally.'" *Cox v J.D. Realty*, 217 AD2d 179, 185 (1st Dept 1995).

One type of tenant that has been particularly vulnerable to eviction based on non-primary residence is a "corporate tenant," *i.e.*, a non-corporeal entity that is the rent-stabilized tenant of record and uses the apartment to house a person, or persons, with some connection to the entity. A corporation, of course, cannot be said to live in an apartment, primarily or otherwise.

Over the years, especially with the advent of luxury deregulation and vacancy bonuses, landlords sought to evict corporate tenants so as to deregulate the unit or at least increase the rent. The rule that emerged was that a corporate tenant could only survive a primary-residence challenge where "the lease specifies a particular individual, *and* no perpetual tenancy is possible." *Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 205 (1st Dept 1997); *see also Fox v 12 E. 88 LLC*, 160 AD3d 401, 402 (1st Dept 2008); *Avon Bard Co. v Aquarian Found.*, 280 AD2d 207, 209 (1st Dept 1999).

> Whenever a not-for-profit tenant raises Part J as a defense to a non-primary residence eviction, the landlord should allege that Part J is unconstitutional. It remains to be seen how the courts will so rule.

Perpetual Tenancies

The phrase "no perpetual tenancy is possible" brings us to the Court of Appeals' landmark ruling in *Manocherian v Lenox Hill Hosp.*, 84 NY2d 385 (1994) (*Manocherian I*), which in turn brings us to the Part J amendments. Co-author Jeffrey Turkel represented the prevailing owner in *Manocherian I.*

In *Manocherian I*, the landlord rented various rent stabilized apartments to Lenox Hill Hospital, which, in turn, sublet the apartments to its nurses. When a nurse died, retired, or ceased to be employed by the hospital, Lenox Hill would then rent the apartment to another nurse.

The landlord in *Manocherian I* commenced non-primary residence proceedings against the hospital to recover the hospital's apartments. Lenox Hill lobbied the Legislature for relief, which quickly passed Chapter 940 of the Laws of 1984. Chapter 940 amended RSL § 26-504(a)(1)(f) to provide that "[w]here a housing accommodation is rented to a not-for-profit hospital for residential use, subtenants authorized to use such accommodations by such hospital shall be deemed tenants." Thus, as long as a nurse primarily occupied an apartment, Lenox Hill passed the primary residence test. Because Lenox Hill was unlikely to go out of business, and because there

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would always be a new nurse to replace the departing nurse, Lenox Hill effectively had a perpetual tenancy.

The Court of Appeals in *Manocherian I* struck down Chapter 940 for a number of reasons, one of them being that the statute created in Lenox Hill's favor a tenancy of infinite duration:

Because Lenox Hill Hospital has enjoyed a corporate existence since 1917, the enactment also confers a tenancy quite different in kind, degree and potential from the human, personal successorships countenanced in *Braschi v Stahl Assocs. Co.* (74 NY2d 201, 214, *supra*) and *Rent Stabilization Assn. v Higgins* (83 NY2d 156, *supra*; *cf.*, *Sullivan v Brevard Assocs.*, 66 NY2d 489, *supra*). These cited successorships were narrowly recognized and permitted precisely because of the analytic-policy underpinning of averting personal afflictions of real people. They are consistent with the anti-eviction goals of the ETPA and RSL. The statute is not.

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The statute vests renewal rights in an entity of unlimited existence, a notion directly contrary to another goal of the RSL and ETPA - to free up apartments, fairly and appropriately, as soon as practicable.

84 NY2d at 398, 399.

The Part J Amendments

Over the past several years, New York City has supported various not-for-profit entities that provide "scatter site" housing for tenants who are homeless or are otherwise in danger of becoming homeless. The not-for-profit is the rent-stabilized tenant of record, and its affiliates, like the nurses in *Manocherian I*, are subtenants who rotate through the units.

In the course of enacting the HSTPA, the Legislature apparently realized that these not-for-profits could be subject to eviction based on non-primary residence. Ignorant of, or failing to learn the lesson of, *Manocherian I*, the Legislature amended ETPA 5(a)(11) in a manner almost *identical* to the stricken language in Chapter line 942:

For the purposes of this paragraph, where a housing accommodation is rented to a not-for-profit for providing… permanent housing to individuals who are or were homeless or at risk of homelessness, affiliated subtenants authorized to use such accommodations by such non-for-profit shall be deemed to be tenants.

> The phrase "no perpetual tenancy is possible" brings us to the Court of Appeals' landmark ruling in 'Manocherian v Lenox Hill Hosp.' which in turn brings us to the Part J amendments.

This language would appear to create a perpetual tenancy in favor of not-for-profit organizations, as such entities will simply replace homeless or potentially homeless occupants with another such person upon vacancy. Because the universe of potential replacements is endless, so is the tenancy.

'520 Tinton'

In *520 Tinton*, the landlord sought to recover an apartment rented to Harlem United, a not-for-profit entity. The landlord served Harlem United with a *Golub* notice when the lease expired on August 31, 2019. The notice recited that Harlem United, "'by its very definition,' does not have a primary residence in which it resides, and that its lease 'does not contain an individual who is designated to reside the subject premises.'" Harlem United moved dismiss, citing the Part J amendments.

The court (Lutwak, J.) denied the motion, holding that the notice adequately described the grounds for eviction. The court further stated that "nowhere in Harlem United's moving papers is there any proof that it provides 'permanent housing to individuals who are or were homeless or at risk of homelessness,' which petitioner correctly points out is a question of fact that cannot be determined at this juncture."

Notably, the court *sua sponte* observed that:

Nonprimary residence of the tenant of record is grounds for nonrenewal of a lease and commencement of a proceeding by the landlord to recover possession upon the expiration of the existing lease term after service of the requisite notices. 9 NYCRR §§ 2524.4(c), 2524.2. A statutory exception to the primary residence requirement for nonprofit hospitals that rent apartments for residential use by their affiliated subtenants was found to be unconstitutional in the case of *Manocherian v Lenox Hill Hosp*. (84 NY2d 385 [1994]), unless a specific individual was named in the lease, *see generally Manocherian v Lenox Hill Hosp*. (229 AD2d 197, 203 [1st Dep't 1997]).

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