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RENT REGULATIONS

Owner-Occupancy Proceedings


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Rent Stabilization Code §2524.4(a)(1) provides that an owner can refuse to renew a rent-stabilized tenant's lease where the owner "seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the city of New York and/or for the use and occupancy of a member of his or her immediate family."

Owner-occupancy proceedings are difficult for tenants to defend. In a non-primary residence holdover, for example, the owner must affirmatively prove that the tenant does not primarily live in his or her apartment. In an owner-occupancy case, however, the owner must simply prove his or her good faith intent to actually move into the unit. The facts needed to prove good faith are necessarily within the owner's knowledge, and do not require investigation or discovery. If the owner can tell his or her story in a credible manner, he or she is likely to prevail.

This article will explore recent, or at least relatively recent, case-law involving owner-occupancy proceedings.

Attacks on Notice Of Non-Renewal

One strategy for tenants is to attack the sufficiency of the owner's notice of non-renewal. Should the notice fall, the case will be dismissed and the tenant will be entitled to a one- or two-year renewal lease.

Courts, however, have usually held that well drafted and detailed notices will suffice. In *Sung Yoon Kim v. Hettinger*, 58 Misc. 3d 159(A) (App. T. 1st Dept 2018), Appellate Term upheld a notice which stated that landlord:

> intends to 'recover possession of all of the apartments within the building, including the subject apartment' and convert the five-story, nine-apartment building to single-family dwelling for herself, her named husband and their two children. In this connection, the notice set forth in detail the contemplated use of the space on a floor-by-floor basis, reflecting the landlord's plan to create a single, integrated structure that would serve as a primary residence for herself and her immediate family. The notice also stated the current residence of the landlord and her family, alleging that they reside in an apart-

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* * *

A predicate notice in a holdover summary proceeding need not lay bare a landlord's trial proof, and will be upheld in the face of a 'jurisdictional' challenge where, as here, the notice is 'as a whole sufficient[ly] adequate[ ] to advise…tenant and to permit it to frame a defense.'

Tenants attacking a notice of non-renewal for lack of specificity have often been rebuffed; the landlord cannot reasonably be expected to prove every element of its case in a mere notice. Thus, in *Rudd v. Sharff*, 30 Misc. 3d 35 (App. T. 1st Dept 2010), Appellate Term wrote:

> While acknowledging that the non-renewal notices are 'quite lengthy and detailed,' tenants assert that the notices are nonetheless jurisdictionally defective since they are said 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. However, any questions concerning the feasibility of 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 appropriately explored in discovery or at trial.

A putatively valid notice, however can be undone by a change in the landlord's circumstances. In *Harmon v. Marvine*, 34 Misc. 3d 1218(A) (Civ. Ct. N. Y. Co. 2012), the landlords served a notice stating that they sought to recover the subject apartment for their granddaughter's use. Thereafter, the landlords reported that their granddaughter could not occupy the apartment due to unforeseen health issues, but asserted that they would instead seek to recover the unit for their grandson. Civil Court held that the notice of non-renewal was now defective:

> all of the factual specific claims in the Notice refer only to the granddaughter; if those facts are removed as no longer relevant what remains is a facially insufficient Notice as it 'fails to set forth allegations tending to support the stated grounds for eviction that [are] fact specific to the particular proceeding.'

In an owner-occupancy case, the owner must simply prove his or her good faith intent to actually move into the unit. The facts needed to prove good faith are necessarily within the owner's knowledge, and do not require investigation or discovery. If the owner can tell his or her story in a credible manner, he or she is likely to prevail.

In *Friedman v. Josef*, 50 Misc. 3d 138(A) (App. T. 2d Dept., 2d, 11th and 13th Jud. Dists. 2016), the owner served a notice of non-renewal on the husband (the tenant of record) and on his wife, who was an occupant. The husband died after the landlord prevailed at trial. The wife argued that she was entitled to a renewal lease as a surviving spouse. Appellate Term rejected this claim:

> Pursuant to RSC §2524.4(a)(4), a landlord is required to serve a 'tenant' with an owner-use nonrenewal notice. RSC §2520.6(d) defines a '[t]enant as a 'person…named on a lease… or who is…a party…to a rental agreement and obligated to pay rent for the use and occupancy of a housing accommodation.' Since occupant did not sign the most recent renewal lease, she

was not a tenant and was not entitled to a nonrenewal notice.

Relocation

RSC §2524.4(a)(2) provides that where the tenant or spouse in question is disabled or is 62 or over, the owner must provide the tenant with "an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area." The fact that such relocation may be impossible in today's market is demonstrated by *Nestor v. Britt*, 35 Misc. 3d 5 (App. T. 1st Dept 2012). There, the owner offered to relocate the tenant to various unregulated apartments, and agreed to provide financial assistance to pay the higher rent.

The Appellate Term ruled that the owner must offer the tenant a rent stabilized apartment, and that "an unregulated apartment does not serve to provide the tenant with the requisite 'equivalent or superior' housing situation… irrespective of whatever financial or tenancy terms may be agreed upon by the tenant and the building owners involved."

Good Faith

Once an owner-occupancy case goes to trial, the trial court must determine whether the landlord has established his or her good faith intention to occupy the apartment for the reasons stated in the notice of non-renewal. A handful of cases establish, somewhat predictably, that Appellate Term is reluctant to overturn a trial court's findings of fact or credibility. In *Sendowski v. Pilzer*, 47 Misc. 3d 142(A) (App. T. 1st Dept 2015) Appellate Term upheld the trial court's grant of possession to the landlord:

> The court's fact-based determination on the pivotal issue of good faith represents a fair interpretation of the evidence, based as it was on such stated factors as the building's close proximity to both the family real estate business, where Dorit is employed, and the residences of landlord's other children, who were already living in different buildings owned by landlord on the same street. Civil Court, having observed the witnesses' demeanor and heard the testimony, was in a better position to make findings of fact on the issue of good faith, especially as the issue rested in large measure on considerations relating to the credibility of witnesses.

See also Feria v. Johnson, 54 Misc. 3d 131(A) (App. T. 2d Dept., 2d, 11th and 13th Jud. Dists. 2017); *Brown v. Robards*, 129 Misc. 3d 129(A) (App. T. 1st Dept 2010).

In addition, courts will decline to determine issues of good faith or credibility on summary judgment. *See Rayapudi v. Littschwager*, 61 Misc 3d 127(A) (App. T. 1st Dept 2018).

Vacant Apartments

It is sometimes the case that an owner seeks a rent-regulated apartment for his or her own use, even though there may be a vacant or free market apartment in the building. It was established decades ago in *Reres v. Gabel*, 19 AD2d 724 (2d Dept. 1963), that "[w]hile the existence of comparable vacant housing accommodations owned by the applicant may be considered in determining the presence" of the owner's good faith, the statute does not require "an owner to occupy the housing accommodation which is not controlled and thus diminish his income from his property." This remains the law today. *See e.g. Shimko v. Chao*, 28 Misc. 3d 1212(A) (Civ. Ct. N.Y. Co. 2010).