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LAW ON TENANCIES IN LOFTS UNSETTLED[1]

The steady decline of manufacturing in New York City after World War II resulted in the growing vacancy of loft buildings which had been constructed to house small manufacturers, primarily in southern Manhattan and along Brooklyn's waterfront. During the 1960s and 1970s individuals engaging in various artistic fields and who sought space in which to both live and work moved into these loft spaces. As the number of individuals increased, the City and State legislatures acted to regulate what had become a somewhat chaotic situation.

The City modified its zoning regulations to encourage residential conversion without penalizing viable manufacturing uses, while the State amended the Multiple Dwelling Law [MDL] to require that converted buildings be brought up to code for residential use. The amended law also allowed owners to collect rent while the buildings were being brought up to code and recoup much of the cost of legalization through rent increases to residential tenants, paid over 10 or 15 years. The loft tenants had the right to continued occupancy and regulated rents.

These changes in the MDL became known as the "Loft Law" and are codified in Article 7-C of the MDL. The New York City Loft Board was established to resolve issues regarding the

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legalization and regulation of certain loft buildings converted to residential use.

Recently, New York City has seen a rise in loft occupancy in Brooklyn and other now fashionable districts. However, the Loft Law, as written, only covers buildings that on Dec. 1, 1981, had been occupied since April 1, 1980, as the residence or home of any three or more families living independently of one another.

Desperately seeking a forum for their claims, tenants in properties converted for residential use and not covered by the Loft Law have sought to litigate in the courts the same issues that led to the initial law's enactment in 1982. Inherently intertwined with this issue is the determination of under what circumstances are buildings containing six or more residential housing accommodations subject to the protection of rent stabilization law. This article will examine some of the recent trends in judicial decisions regarding application of rent regulations to lofts.

Residential or Commercial?

Following enactment of the Loft Law, many owners felt that there would be no way for new tenants to obtain rent stabilized status if they did not meet the requirements of the Loft Law. The belief was that with the enactment of the Loft Law, loft tenants had a remedy and that the courts would not grant them additional protections if they did not qualify for loft status. Nonetheless, in order to prevent scrutiny by building inspectors, in the 1980s and 1990s owners and tenants frequently entered into commercial leases for loft units. Sometimes the parties tacitly

understood that the loft would be used at least partially for residential purposes; however, some tenants simply moved into loft units after giving assurances that they intended to operate commercial enterprises even when no such use was intended.

Regardless of the true nature of the occupancy, disputes between owners and tenants began to arise. Tenants expected residential type services in buildings that were commercial and not suited for residential tenants. Inevitably, the loft tenant stopped paying rent and owners found themselves precluded from evicting or collecting rent since many loft buildings lacked the residential certificate of occupancy that allows an owner to legally collect rent.

Owners bringing summary holdover or nonpayment proceedings based on the commercial leases they had entered into with the tenants found that some courts were not enforcing the clear and unambiguous lease terms prohibiting residential occupancy once the tenant was able to show that the loft unit was converted and/or used residentially. Mandel v. Pitkowsky, 425 N.Y.S.2d 926, 102 Misc.2d 478 [App. Term, 1st Dept. 1979], aff'd 76 A.D.2d 807 [1st Dept. 1980]; Ninth Ave. Corp. v. Randall, 199 A.D.2d 13, 604 N.Y.S.2d 101 [1st Dept. 1993].

Turning to the commercial landlord tenant parts of the Civil Court, owners found that courts would not adjudicate most cases where a tenant claimed to be living in the nominally commercial space. The housing parts of the Civil Court would not grant an owner relief in a nonpayment proceeding because of the lack of a

residential certificate of occupancy in many of these buildings. Owners ran into problems if they brought residential holdover proceedings as well. Many loft buildings had three or more individuals living in them, yet since the buildings were not properly registered as multiple dwellings, owners could not satisfy the pleading requirement in a holdover petition that the building was registered as a multiple dwelling. The housing court therefore would not evict the loft tenants even where they were not paying rent and their leases had expired.

Having no other alternative, owners soon discovered that they would be forced to bring actions in the Supreme Court under a theory of ejectment. The supreme courts, having equitable power, had the ability to look beyond the technical requirements of summary proceedings and to grant an owner possession if the tenant was not paying rent or simply was living in a loft unit without the benefit of a lease. However, in defense of these proceedings, loft tenants responded that they were entitled to protection of rent stabilization since more than six residential units existed in a building built prior to 1974. The Appellate Division has characterized tenants' claims of a perpetual right to a renewal lease while also denying an obligation to pay rent as a "bizarre 'Catch-22' situation." Hornfeld v. Gaare, 130 A.D.2d 398, 515 N.Y.S.2d 258 [1st Dept. 1987].Rent Stabilization.

What was becoming apparent was that owners were not very likely to protect themselves by simply pointing to the use clause of the tenant's "commercial lease" and arguing that the tenant

has no right to residential rent protections. This argument was particularly unavailing where a tenant and others in the building convincingly testified that the owner knew that the tenant would be living in the building.

The 2001 case of Tan Holding Corp. v. Wallace, 187 Misc.2d 687, 724 N.Y.S.2d 260 [App. Term, 1st Dept.] represented an extension from the prevailing law regarding rent stabilization coverage for loft units. In the Tan Holding case, the Appellate Term determined that even though the purpose of the Loft Law is to confer rent-stabilized status on legalized "interim multiple dwellings," buildings that do not necessarily qualify for loft coverage pursuant to the Loft Law, for whatever reason, may still be subject to rent stabilization coverage pursuant to the Emergency Tenant Protection Act.

Most significantly, the Appellate Term rejected the landlord's argument that the location of the building in an area zoned for manufacturing which prohibits residential occupancy creates a bar to rent stabilization protection. The case caused many real estate practitioners to wonder if the Loft Law was rendered an extraneous piece of legislation by the Tan Holding court's decision since it seemed that tenants could have received through the courts most of the same benefits that the Loft Law bestowed without the Loft Law having been in existence.

Since the decision, some other courts have followed the rationale of Tan Holding v. Wallace in determining that buildings located in manufacturing districts are not precluded from rent

regulation. 111 on 11 Realty Corp. v. Norton, 189 Misc.2d 389, 732 N.Y.S.2d 840, 2001 N.Y. Misc. LEXIS 383 [Sup. Ct., Kings Cty. 2001].

In 182 Fifth Avenue, LLC v. Design Development, Inc., 300 A.D.2d 198, 751 N.Y.S.2d 739 [1st Dept. 2002] the Appellate Division upheld Justice Leland Degrasse's determination that the existence of the Loft Law does not prevent rent stabilization coverage since lofts are not specifically excluded from the Emergency Tenant Protection Act and rent stabilization coverage. The decision was partially based on the fact that the enactment of the Loft Law did not legislatively negate judicial determinations made prior to its enactment which found rent stabilization coverage in buildings containing six or more residential loft units that did not have a residential certificate of occupancy. See Mandel v. Pitkowsky, 102 Misc.2d 478, 425 N.Y.S.2d 926 [App. Term 1979] aff'd 76 A.D.2d 807, 429 N.Y.S.2d 550, 1980 N.Y. App. Div. LEXIS 11837 [1st Dept. 1980].

However, one of the most recent appellate cases on this issue, Wolinsky v. Kee Yip Realty, 2003 N.Y. App. Div. Lexis 1788 [1st Dept. 2003] acted to limit the decision in Tan Holding by refusing to extend rent stabilization coverage to "tenancies that are illegal and incapable of becoming legal." Id.

Primary Residence Issues.

Still, as in many rent regulated landlord-tenant relationships in New York City where tenancy is a cottage industry, some loft tenants have found ways to use the expanding

tenant protections to unfair economic advantage. Just as in run-of-the-mill rent regulated apartments, some tenants have taken to living away from the loft units for which they are seeking rent stabilized protection. For example, in one recent Supreme Court case, Kaminsky v. Wilson, Index No. 18187/98, decided after trial Oct. 10, 2002 [Sup. Ct., Kings Cty., Aliotta, J.] while the tenant had at one point lived in a Brooklyn commercial loft building since the early 1990s he decided to move to a residential building in 1999, after he stopped paying his rent at the loft space due to a dispute with the landlord over repairs.

During the course of the five-year litigation, the named tenant illegally sublet the loft unit to dozens of individuals, sometimes turning the rooms over in a month or two. The tenant admitted collecting tens of thousands of dollars in rent while not paying any rent to the landlord for many years. At the same time he admitted he paid phone and Con Ed bills at a Manhattan apartment owned by his mother and paid rent to her. The tenant registered his car in Manhattan and made thousands of phone calls from that apartment while advertising the loft for rent in the Village Voice.

After trial, the court found that the tenant had shown that although there were at least six residential units at the subject building he was not entitled to the protection of the rent stabilization laws because of the fact that he was not a primary resident of the premises and he had profiteered on the unit by charging and collecting rent while failing to pay any rent

himself. The court, however, did not allow the landlord to recover damages in the form of unpaid use and occupancy because the landlord's predecessor had known of the tenant's residential use and because the loft was not legal for residential use.

This decision could be said to have relied in part on the Court of Appeals case In the Matter of Lower Manhattan Loft Tenants et al. v. New York City Loft Board, 66 N.Y.2d 298, 487 N.E.2d 889, 496 N.Y.S.2d 979 [1985]. In that case the Court of Appeals held that despite the absence of a specific provision concerning same in the Loft Law, where a tenant seeks the protection of rent regulation he is required to show that he maintains the premises as his primary residence despite the fact that he is not subject to rent regulation at the commencement of the action.

The Lower Manhattan Loft Tenants Court found as a matter of public policy that construing state law as imposing on the property owner an obligation to convert space only used occasionally as housing would be inequitable and frustrate the rent regulatory laws whose stated purpose is to alleviate an acute housing shortage. Thus, in cases where loft tenants want the benefits of rent stabilization, landlords have another defense to such a claim by asking the court to engage in a determination of the tenant's primary residence pursuant to the standards set forth in Sommer v. Ann Turkel, Inc., 137 Misc.2d 7, 522 N.Y.S.2d 765 [App. Term, 1st Dept. 1987], which was cited by the court in Kaminsky.

The Kaminsky court also relied on the fact that the tenant had profiteered from the apartment while not paying any rent. The evidence in the case showed that the tenant had been earning approximately $2,000 a month in rental fees while not paying any rent for five or six years.

The court cited the seminal case of Continental Towers v. Freuman,128 Misc.2d 680, 494 NY.S.2d 595 [1st Dept. 1985] for the proposition that rent stabilization rights should not be granted to those who seek to defraud the landlord or their illegal subtenants. Continental Towers punishes tenants who commercialize or profit off their residences while seeking rent stabilization protections. Significantly, tenants have no opportunity to cure their default when they act to defraud landlords or subtenants in this manner since the public interest is not furthered by permitting a cure. See Continental Towers, supra.

Other Defenses.

Landlords have other defenses to a tenant's claim that they are entitled to rent regulatory protection, including the claim that it is simply not economically feasible to legalize the unit and bring it in compliance with the relevant housing codes. See Etlin v. Pepper, N.Y.L.J., April 26, 2000, p. 25 [Civ. Ct. Kings Co., Silber, J.]; see Bernard v. Scharf, 93 N.Y.2d 842, 675 N.Y.S.2d 64 [1st Dept. 1998], rev'd as moot 93 N.Y.2d 842, 711 N.E.2d 187 [1999]. Where a landlord can offer evidence tending to demonstrate it would be unduly burdensome or economically

infeasible to legalize the occupancy, an eviction order may be warranted, although the courts have left open the possibility that the tenant may be left with a claim for damages.

The Etlin case dealt with another point that is sure to receive more judicial treatment in the future, that is, what constitutes a housing accommodation that may be covered by rent regulations. Some loft tenants have attempted to create additional units by building partitions and creating more rooms and then claiming that each additional room constitutes a housing accommodation, apparently with the hope that they can get to the magic number of six residential units to obtain rent stabilized status. The Etlin court determined that a housing accommodation could consist of any separate dwelling unit in a Class "A" or Class "B" multiple dwelling.

This decision is problematic in some respects. The court relied on two cases in determining that a unit need not contain a bathroom or kitchen to be considered a separate dwelling unit in a Class "B" multiple dwelling. The two cases relied on by the court, Gracecor Realty Co., Inc. v. Hargrove, 160 Misc.2d 963 [App. Term, 1st Dept. 1994], aff'd 221 A.D.2d 237 [1st Dept. 1995], aff'd 90 N.Y.2d 350 [1997], and Becker v. Manufacturers' Trust Co., 262 AD 525 [1941], involved units constructed prior to April 30, 1956. Pursuant to New York City Administrative Code §§[27-2077 it became illegal to create "rooming units" which would qualify as a separate dwelling unit in a Class "B" multiple dwelling after that date. It seems likely that other courts will

have the opportunity to determine whether artificially and illegal multiple dwelling units are worthy of obtaining rent stabilized status.

It has become evident that there are a myriad of factual situations that can be applied to this re-emerging and seemingly ever changing area of law. The most frequent result has been that owners who were merely attempting to garner some income from buildings in what was a bad New York City rental market unwittingly subjected their buildings to rent regulation by failing to insist and insure that tenants were not residing in commercial spaces.

The parties to these arrangements should be mindful of the oft quoted Court of Appeals statement regarding the City's rent control law as an "impenetrable thicket confusing not only to laymen but to lawyers," Matter of Christopher v. Joy, 35 N.Y.2d 213, 220 [1974], in attempting to determine the role of the Rent Stabilization Law and Code in conjunction with the new emerging body of post-Loft Law litigation. One thing is certain: loft tenants will seek new ways to convince the courts that they come under the ambit of rent regulatory coverage while owners will respond with creative legal arguments to maintain the commercial character of their buildings.