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Charging Roommates In Rent-Controlled Units Comes Under Scrutiny

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WHETHER rent-regulated tenants could permissibly charge roommates amounts in excess of the maximum permissible rent was an issue initially resolved in 1990 by the Appellate Division, First Department, in *520 East 81st Street Assoc. v. Roughton-Hester.*[1] In *Roughton-Hester* the landlord sought the eviction of a tenant of a rent-stabilized apartment on the ground that the tenant unlawfully made a profit on the rent she charged a roommate. The court ultimately found dismissal of the proceeding proper, holding that a landlord may not evict a tenant for "profiteering" with respect to the rent charged a roommate.

The court reasoned that although the Legislature had specifically indicated its intent to prohibit "profiteering" in sublet situations, it had deliberately remained silent as to such practices committed by a tenant with regard to a roommate. The court also held that neither the lease nor any law governing rent-stabilized apartments permits a landlord to evict a tenant for earning a profit from the rent charged a roommate and that only the landlord was restricted as to the amount of rent that it may charge.

However, in 2000 the legislature effectively overruled *Roughton-Hester* when it amended the Rent Stabilization Code to include RSC §2525.7(b), which prohibits a tenant from charging a roommate an amount greater than said roommate's proportionate share of the rent and creates a rent overcharge remedy for the aggrieved roommate. The legislative provisions, however, did not directly address the issue of whether a tenant who overcharged a roommate could be evicted for the offending behavior. This issue was addressed for the first time in *RAM 1 LLC v. Mazzola,* NYLJ, June 8, 2001, p.17, col. 1 (Civil Court, New York Co.), in which it was determined that a landlord could maintain a possessory cause of action against a tenant who overcharged his or her roommate. The decision was ultimately upheld by the Appellate Term, First Department, in *RAM 1 LLC v. Mazzolla*, NYLJ, Jan. 1, 2002, p.18, col. 1.

Yet the legislature did not make any similar amendments to the Rent Control Law, thus leaving open the issue of whether a rent-controlled tenant can permissibly charge roommates amounts in excess of the maximum permissible rent, and it is this issue on which lower court judges and now the Appellate Term and Appellate Division have recently reached conflicting decisions.

In August 2002, the Civil Court in *270 Riverside Drive, Inc. v. Braun,*[2] in which the authors' firm represented the landlord, determined that a rent-controlled tenant could permissibly charge his multiple roommates a total rental amount that exceeded the maximum legal rent for the apartment. Therein, the tenant was sharing two of the bedrooms in his 10-room

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rent-controlled apartment and was charging his two roommates an aggregate rent of $1,275 per month where the maximum collectible rent for the premises was only $1,192 per month. These arrangements between the rent-controlled tenant and his various roommates continued for more than six years. The court ultimately found this overcharge to be a "de minimus variation from the maximum legal collectable rent" and held the landlord was without legal remedy.

The Appellate Term recently affirmed the lower court's decision in *Braun*,[3] relying in large part on *Roughton-Hester* and holding that the tenant's actions in *Braun* merely "partake of apartment sharing arrangements." The court also held that "restrictions against profiteering ... have traditionally not been applied to living arrangements involving roommates." The Appellate Term further found that since the legislature did not make any amendments to the Rent Control Law similar to RSC §2525.7(b) and since rent control regulations did not provide for eviction proceedings on this ground, a rent-control tenant was not prohibited from charging a roommate an amount greater than said roommate's proportionate share of the rent.

Well prior to the Appellate Term issuing a decision in *Braun* in February 2003, the Civil Court revisited this same issue in *41 West 72 LLC v. Bondy*.[4] Carol Bondy was a rent-controlled tenant who had received the benefit of rents far below fair market value for 40 years. She had been charging various roommates $1,000 per month during a five-year period where the maximum legal rent for the subject apartment had risen from $793.05 to $857.37.

The court refused to grant the landlord a judgment of possession based upon proportional rent share arguments based on a para materia interpretation of the Rent Control and Rent Stabilization Laws. However, the court refused to dismiss the proceeding because the tenant had charged a gross rent in excess of the maximum collectible rent. The court relied on §2205.1(a) of the NYC Rent and Eviction Regulations[5] and the Appellate Division's recent decision in *BLF Realty Holding Corp. v. Kasher*,[6] allowing eviction of a tenant who overcharges a roommate under the Loft Law.

Interestingly, *Kasher*, supra, cites with approval to *Hurst v. Miske*[7] in which the court included rent-controlled tenants in its analysis of a class of tenants who "forfeit their rights and are subject to eviction" for profiteering. The result in *Bondy*, supra, is not surprising given the clear and unambiguous language of §2205.1(a) of the NYC Rent and Eviction Regulations[8] and §26-412(a) of the NYC Administrative Code,[9] both of which provide in relevant part that "[I]t shall be unlawful, regardless of any contract, lease or other obligation heretofore entered into, for any person to demand or receive any rent for any housing accommodations in excess of the applicable maximum rent." The Appellate Term in the *Braun* matter acknowledged in its decision that *Kasher* prohibits a rent-controlled tenant from subletting and profiteering.

The legislature has left open the issue of whether a rent-controlled tenant can permissibly charge roommates amounts in excess of the maximum permissible rent.

Consequences

A body of law exists which states that tenants who commercialize their apartments forfeit the protection of rent regulation and are subject to eviction. Accordingly, where a tenant has been overcharging her roommates, the tenant cannot and will not be able to cure the violation. See, *Continental Towers Ltd. v. Freuman*;[10] *125 East 31st Street Realty Co. v. Watts*;[11] *Golden Properties v. Knox*.[12] In such instances, the tenant will lose the protection of the rent laws and forfeit the right to continued possession. See, *Regency Joint Venture v. Pearson*;[13] *East Four Forty Associates v. Barbet*.[14]

The fact that the tenant overcharging is a rent-controlled tenant, as opposed to either a rent-stabilized or loft law covered tenant, should not lead to a different result as the practice of profiteering for personal gain is antithetical to all rent regulation. Clearly a tenant should not be permitted to commercialize with an apartment in a manner that defrauds his landlord as well as his subtenants or roommates.[15]

Both rent-stabilized[16] and rent-controlled tenants have been stripped of their rights and benefits as regulated tenants where they were found to have exacted excessive rents from their subtenants. Specifically, Rent Stabilization Code §2525.6[b] prohibits a tenant from charging a subtenant more than the legal rent plus a 10 percent surcharge where the apartment is fully furnished. Where the tenant is in violation of this prohibition, RSC §2525.6[f] entitles the owners to terminate the tenancy.[17] While a specific statutory parallel does not appear in the Rent Control Law, courts have indicated a willingness to extend this principal to rent-controlled apartments as well.[18]

The Appellate Term's oft-cited decision, *Continental Towers v. Freuman*, involved eviction proceedings against rent-stabilized tenants based upon a tenant's commercializing of his or her apartment for monetary gain. In holding that such tenant is not entitled to a cure period pursuant to RPAPL §753(4), the Appellate Term held:

> [w]e think a cure in these circumstances would not be in furtherance of the public interest. The Rent Stabilization Law was enacted, in part, 'in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices' which were then prevailing due to an acute shortage of dwelling space (citations omitted). The integrity of the rent stabilization scheme is obviously undermined if tenants, who themselves are the beneficiaries of regulated rentals, are free to sublease their apartments at market levels and thereby collect the profits which are denied the main landlord. The rent payable by a subtenant is to be 'consistent with the provisions of the Rent Stabilization Law' (citations omitted); clearly, the rent extracted by this tenant, in excess of 100% of the stabilized rent, was not in any sense 'consistent' with the law. The tenant was commercializing with the apartment in a manner which defrauded his landlord as well as his subtenant. This prac-

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Given the long-standing tendency of the courts to prohibit rent gouging, profiteering and overcharging of any kind it seems only a matter of time before the courts and/or the legislature explicitly expand this prohibition to include rent-controlled roommate situations as well. Such an expansion would seem likely considering that "rent controlled units are more stringently controlled than rent stabilized units and the rent controlled tenant derives a higher benefit in rent regulation than that of a rent stabilized tenant."[20]

1. 157 A.D.2d 199, 555 N.Y.S.2d 70 (1st Dept, 1990).
2. *270 Riverside Drive, Inc. v. Braun*, N.Y.L.J. Aug. 28, 2002, at 18, col. 3 (New York Civil Court); N.Y.L.J. Dec. 2, 2002, at 19, col. 4 (New York Civil Court) (Court adheres to original decision after granting leave to reargue and/or renew); aff'd., Appellate Term, 1st Dept., N.Y.L.J., June 15, 2004, at p. 24, col. 1.
3. See, *270 Riverside Drive, Inc. v. Braun*, N.Y.L.J. June 15, 2004, at p. 24, col. 1 (App. Term 1st Dept.).
4. *41 West 72 LLC v. Bondy,* 2003 NY Slip Op 50810U, 2003 N.Y. Misc. LEXIS 457 (New York Civil Court).
5. 9 NYCRR §2205.1(a).
6. 299 A.D.2d 87, 747 N.Y.S.2d 457 (1st Dept. 2002).
7. 133 Misc.2d 362, 505 N.Y.S.2d 984 (New York Civil Court 1986).
8. 9 NYCRR §2205.1(a).
9. NYC Administrative Code §26-412(a).
10. *Continental Towers Ltd. v. Freuman*, 128 Misc. 2d 595, 494 N.Y.S 2d 595 (App. Term, 1st Dept. 1985).
11. N.Y.L.J., Nov. 27, 1987, p. 14, col. 1 (App. Term, 1st Dept.).
12. N.Y.L.J., May 13, 1998, p. 29, col. 1 (New York Civil Court).
13. N.Y.L.J., Feb. 2, 1994, p. 22, col. 6 (New York Civil Court).
14. N.Y.L.J. March 22, 1989, p. 23, col. 4 (New York Civil Court).
15. See, *Continental Towers v. Freuman.*
16. See, *Golden Properties, Inc. v. Knox*, N.Y.L.J., May 13, 1988, p. 29, col. 1 (New York Civil Court); *Continental Towers v. Freuman.*
17. Where a subtenant was willfully overcharged by a tenant, RSC §2526.1 imposes treble damages against the tenant as an additional penalty.
18. See, *Hurst v. Miske*; *Paulsen Real Estate Corp. v. Goldberg*, N.Y.L.J., Feb. 10, 1989, p. 26, col. 5 (Dist. Ct. Nassau Co. 1989).
19. *Continental Towers v. Freuman*, 494 N.Y.S. 2d at 595.
20. See, *Hurst v. Miske.*