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A LANDLORD CANNOT SEEK TO RECOVER THE SUBSIDIZED PORTION OF THE RENT FROM A SECTION 8 TENANT, EVEN AFTER THE SUBSIDY IS TERMINATED. IN A RENT STABILIZED APARTMENT, THE LANDLORD'S SOLE REMEDY IS TO COMMENCE A HOLDOVER PROCEEDING BASED UPON THE TENANT'S BREACH OF THEIR RENT STABILIZED LEASE, IF THE TENANT FAILED TO RECERTIFY.

As we have advised you in the past, the Appellate Term in both the First and Second Department has found that a landlord cannot collect the subsidized portion of the rent from a Section 8 tenant "even after the termination of the subsidy". See, Prospect Place HDFC v. Gaildon, App. Tm. 1st Dep't 2005 and Rainbow Associates v. Culken, App. Tm. 2d Dep't 2003.

The Appellate Term has however, indicated that should the parties subsequently enter into a new lease agreement, the landlord can then seek the higher rent pursuant to that new subsequent agreement. Presumably therefore, in the case of a rent stabilized tenant, once a renewal becomes due after a subsidy termination, the landlord of a rent stabilized tenant would be able to compel the tenant to sign a renewal at the full rent stabilized rent (or deem the lease renewed).

However, pursuant to a recent decision in 835-37 Trinity Avenue HDFC v. Royal, Civ. Ct. Bx. Co. 2010, Judge Sabrina Kraus determined that a rent stabilized tenant must be offered a renewal on the same terms and conditions as the prior lease. (i.e. renewal with a Section 8 subsidy included) Accordingly, the Court ruled that the landlord's sole remedy, at least with regard to a rent stabilized tenant, was to commence a holdover proceeding based on the breach of a substantial obligation of the tenancy, due to the tenant's failure to recertify with Section 8.

(See, however, Harlem Valley HDFC v. Williams, where Civil Court Judge Bruce E. Scheckowitz recently decided that a tenant's lost subsidy due to an increase in income would not entitle the landlord to maintain a holdover proceeding because the termination was not based on any wrongdoing by the tenant.)

Based upon this recent ruling, rent stabilized landlords who are faced with a lost subsidy due to a tenant's failure to recertify, must immediately commence a holdover, rather than sue for the full rent in a non-payment proceeding. A non-payment proceeding brought for the full rent against a rent stabilized tenant, even if a new lease is executed, will be dismissed. Rather, a holdover proceeding, seeking possession due to the tenant's breach of the lease, would be the proper way to proceed. Rent stabilized landlords therefore, must be diligent and determine the basis of a tenant's suspension and if the tenant has been suspended due to non-recertification, a landlord must proceed accordingly.

THE STATE SUPREME COURT HAS FOUND INVALID RENT GUIDELINES BOARD ORDER NOS. 40 AND 41 WHICH PERMITTED MINIMUM RENT INCREASES WHICH WERE POTENTIALLY GREATER THAN THE USUAL PERCENTAGE RENT INCREASES, IN CERTAIN CASES. THIS RULING WAS RECENTLY UPHELD BY THE APPELLATE DIVISION.

A Supreme Court Judge in New York County determined that Rent Guidelines Board Orders 40 and 41 were issued improperly and accordingly determined that the Orders were invalid. Specifically, Orders 40 and 41 permitted, for a limited period of time (i.e. October 1, 2008 through September 30, 2009 and October 1, 2009 through September 30, 2010 respectively) a landlord to take a minimum increase in place of a percentage rent

increase, if the minimum dollar increase was greater. The Court determined that the Rent Guidelines Board did not have the authority to create a "separate class" of tenancy under the Rent Stabilization Code, and that the authority to do so rests solely with the City Council. Since the City Council had not authorized the Rent Guidelines Board to act, the Court ruled that the orders and the minimum increases were invalid. It should be noted that the minimum increases initially authorized were limited to apartments which had not received a vacancy increase for the previous six years.

The Appellate Division has recently affirmed this decision, although the City of New York plans to appeal. Still, it is unclear how landlords should proceed. It would however seem prudent to reduce the rent for tenants in this category, going forward, to the appropriate percentage increase, if the minimum rent charged was greater. At the same time, landlords should reserve the right to seek the higher rent in the event the Court decision is ultimately reversed. There are however no clear cut answers to the questions created by this decision.

Another unresolved issue is registration and whether a landlord should continue to register at the higher rent level. In addition, what should landlords do about the rent already collected under the Rent Guidelines Board and in violation of the Court Order? Should the excess rent be refunded? If not, will DHCR ultimately determine that rents collected under Orders 40 and 41 were collected willfully? These issues will be resolved on a case by case basis until the appeal process is completed. However, based on the Appellate Division ruling it would seem prudent to implement percentage increases going forward.

As has occurred in the past, landlords are again being penalized for their reliance on DHCR policies which are subsequently set aside by the Courts.

THE RULING IN ROBERTS V. TISHMAN SPEYER PROPERTIES L.P. WHICH FOUND THAT OWNERS RECEIVING J-51 TAX BENEFITS COULD NOT DEREGULATE APARTMENTS WILL HAVE A FAR REACHING IMPACT.

The fallout from the Roberts v. Tishman Speyer Properties, L.P. decision is still being felt throughout the real estate industry and in the courts in the State of New York. As the Roberts case proceeds in the State Supreme Court, many questions remain as to the applicability of the decision and the effect it will have on landlords and tenants whose apartments were deregulated while the building owners were receiving J-51 tax benefits. It is estimated that 40,000 units in 400 buildings are affected by the decision and that, to date, 200 J-51 overcharge complaints and six tenant class actions have been filed.¹

Given the substantial number of units implicated by Roberts, the biggest question appears to be whether or not it should be applied retroactively. The owners argue that they relied in good faith for years on DHCR's interpretation of the Rent Stabilization Law allowing luxury deregulation of apartments if the acceptance of J-51 benefits was not the only reason that the apartment was regulated in the first instance. Tenants argue that Roberts merely interpreted existing laws that owners had misinterpreted and misapplied in the past. Recently, Justice Richard Lowe, who is presiding over the Roberts case ruled on a motion that the Court of Appeals decision was an interpretation of existing law and that the decision would be applied retroactively.

Other questions remain as to whether or not tenants who prove overcharge will be entitled to treble damages, whether the four year statute of limitations for rent overcharge will apply, and what claims tenants who vacated as a result of improper deregulation will have. These issues and others will undoubtedly be determined in various class actions, administrative agency and individual proceedings which are currently pending or on the horizon. Some issues, however, may be resolved by the State Legislature where legislation is pending which would allow owners to return J-51 benefits and waive future

benefits in exchange for the right to deregulate their units. Proceeds from the return and waiver of the benefits would be used to subsidize rents for income eligible tenants. Governor Patterson also recently introduced a bill which would require owners within 6 months of the passage of the bill, to refund to tenants affected by Roberts any amounts collected in excess of the legal rent for the four years prior to the 10/22/09 Roberts ruling.

The New York County Housing Court, in two recent decisions of interest, interpreted and applied the Roberts decision. In WG Associates LLC v. Scott, Judge Bruce Scheckowitz held that buildings receiving 421-G tax exemptions and abatements were subject to Roberts rent regulation. In 72A Realty Associates v. Lucas, Judge Peter Wendt found that the Roberts ruling was to be applied retroactively so as to give rent stabilization rights to a tenant who moved into an apartment that had previously been luxury deregulated, but was still receiving J-51 benefits at the time she moved in. The ruling, although apparently the first to apply Roberts retroactively, seems limited to its facts in that tenant's lease did not have a rider advising her that her apartment would become deregulated upon expiration of the J-51 benefits. The ruling did find, however, that the four year statute for rent overcharge applied to limit the tenant's claim and that treble damages would not apply as the landlord had not committed a fraud or conscious evasion of the Rent Stabilization Law.

¹ NYLJ 5/24/10 pg. 1

IN A PROJECT BASED SECTION 8 BUILDING, THE PRELIMINARY NOTICES REQUIRING A TENANT TO RECERTIFY MUST BE PROPERLY WORDED FOR A LANDLORD TO SEEK MARKET RENT.

Recent case law has established that the court will dismiss a landlord's claim for market rent in a HUD subsidized building if the landlord fails to include the slightest detail required by the HUD Handbook in the preliminary and reminder notices sent to a tenant.

Landlords receiving a subsidy administered under HUD Handbook 4350.3 REV-1 (hereinafter "Handbook"), are required to

have tenants sign an initial notice at the time that they sign their new lease each year. The landlord is then required to send a first reminder notice 120 days before the recertification anniversary date. If a response is not received by the landlord to this first reminder notice, the landlord is required to send a second reminder notice to the tenant 90 days before the anniversary date. If a response is not received by the landlord to the second reminder notice, the landlord must send out a third reminder notice 60 days before the certification anniversary date.

Landlords must maintain a copy of these notices in the tenant file. The notices must document the date the notice was issued. Although it is well known by landlords that the above notices must be sent as a precondition to a landlord's ability to charge a tenant market rent, many landlords are not aware that if they fail to maintain copies of these notices noting the day that they were issued, they will be unable to collect market rent from the tenants in housing court. Even if tenants enter into stipulations in housing court agreeing that they owe market rent, the courts have shown that they will vacate those stipulations if landlords cannot show that they sent the proper notices required by the HUD Handbook prior to charging the tenants market rent.

The courts have also made it clear that even if the landlord sent out all required notices and maintained the proper copies to be entered as exhibits in court, if the notices sent by the landlord are missing any of the information required by the HUD Handbook, the landlord will not be able to collect market rent from a defaulting tenant. Landlord's claims for market rent have been dismissed for the landlord failing to include even the most minute detail in the required notices. See Good Neighbor Apartment Associates v. Rosario, NYLJ, July 9, 2008 at 26, col. 1 [landlord's failure to provide required information in each of the recertification notices prohibits it from demanding fair market rent], Goldstein v. Bush, WL 1602661, 2001 NY Slip Op 50016[U] [failure to state a cut-off date in a reminder notice prohibits landlord from charging fair market rent].

All of the information required in the

initial notice as well as the procedures for how the notice must be executed and maintained by the landlord are contained in Handbook 7-7(B)(1). The Handbook in 7-7(B)(1) states:

1. Initial Notice. Upon initial signing of the lease and at each annual recertification, the owner must provide an Initial Notice to the tenant.
 - a) The Initial Notice must do the following:
 - i) Refer to the requirements in the HUD model lease regarding the tenant's responsibility to recertify annually.
 - ii) Specify the cutoff date (the 10th day of the 11th month after the last annual recertification) by which the tenant must contact the owner and provide the required information and signatures necessary for the owner to process the recertification.
 - b) The tenant must sign and date the initial notice to acknowledge receipt the owner or manager must sign and date the notice as a witness.
 - c) The owner must maintain the notice with original signatures in the tenant's file and provide a copy of the signed notice to the tenant.

The information that must be included in the first reminder notice is in Handbook chapter 7-7(B)(2). Handbook chapter 7-7(B)(2) states:

2. First Reminder Notice
 - a) Owners must provide tenants with a reminder notice at least 120 days prior to the recertification anniversary date.
 - b) The First Reminder Notice must do the following:
 - i) Refer to the requirements in the HUD model lease regarding the tenant's responsibility to recertify annually.
 - ii) State the name of the staff person at the property to contact about scheduling a recertification interview, the contact information for this person, and how the contact should be made. The owner may propose an interview date as long as the tenant has the option to reschedule the interview for a more convenient date and time.

- iii) Give the location, days, and office hours that property staff will be available for recertification interviews.
- iv) List the information that the tenant should bring to the interview.
- v) State the cutoff date by which the tenant must contact the owner and provide the information and signatures necessary for the owner to process the recertification.
- vi) State that if the tenant responds to the owner after the specified cutoff date (10th day of the 11th month after the last annual recertification), the owner will process the annual recertification but will not provide the tenant 30 days notice of any resulting rent increase.
- vii) State that if the tenant fails to respond before the recertification anniversary date, the tenant will lose the assistance and will be responsible for paying the market rent.
- c) Owners must maintain a copy of this notice in the tenant file documenting the date the notice was issued.

The information that must be included in the second reminder notice is described in Handbook Chapter 7-7(B)(3). The Handbook states in Chapter 7-7(B)(3):

3. Second Reminder Notice
 - a) If the tenant fails to respond within 30 days of the First Reminder Notice, the owner must provide a Second Reminder Notice approximately 90 days prior to the tenant's recertification anniversary date informing the tenant that his/her recertification information is due.
 - b) The Second Reminder Notice must provide the tenant with all of the information given in the First Reminder Notice. (see subparagraph in regard to First Reminder Notice)
 - c) Owners must maintain a copy of this notice in the tenant file documenting the date the notice was issued.
4. Third Reminder Notice
 - a) If the tenant does not respond to the Second Reminder Notice before 60 days prior to the recertification anniversary date, the owner must

provide the tenant a Third Reminder Notice no later than 60 days prior to the anniversary date. This notice also serves as a 60-day notice to terminate assistance, and as a 60-day rent increase notice.

- b) The Third Reminder Notice must do the following:
 - i) Provide the tenant with all of the information given in the First Reminder Notice. (see subparagraph in regard to First Reminder Notice)
 - ii) Specify the amount of rent the tenant will be required to pay if the tenant fails to provide the required recertification information by the recertification anniversary date and state that this rent increase will be made without additional notice.
- c) Owners must maintain a copy of this notice in the tenant file documenting the date the notice was issued.

As discussed above, all of the information required by the Handbook must be in each of the notices. The slightest omission or variance will lead to dismissal. For example, if a landlord sends out a third reminder notice stating that should the tenant fail to recertify, the tenant will be charged market rent, but fails to state the exact amount of market rent, this would likely lead to dismissal of the proceeding.

Since the courts are so quick to dismiss landlords claims for market rent, landlords must be careful to devise systems where they will be sure that all of their notices conform with the rules in the Handbook. Landlords should use the notices provided by HUD in the Handbook as a template for their own notices. Thereafter, they should go through their notices while using the proper subsection of chapter 7-7 of the Handbook as a checklist, to make sure that all of the necessary information is in the notices. Furthermore, landlords should make sure that they have procedures in place that assure that the notices they send out will always be filed in their proper places as well as proof that the notices were sent. The best way for landlords to protect themselves would be to send out the notices by either certified mail, or with a certificate of mailing, but this is not a requirement of the HUD Handbook.