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The Evolution of Rent Stabilization by Ambush

Ever since its initial passage in 1969, the entire concept of rent stabilization has been fraught with controversy.[1] While public policy experts continue to debate the wisdom of the existence of the entire system, legal experts are left to puzzle out when and where it does and does not apply.

The over-arching assumption of rent stabilization is that unless there is a specific denominated exemption from rent stabilization, it applies to every rental unit in the city of New York and those other areas that have declared a housing emergency warranting its imposition.[2] Recognizing that each stabilized unit reaches deeply into the public pocket for financing, debate in the nearly 40 years of the system has seen a shift in emphasis from whether a unit is exempt from rent regulation to whether it qualifies for rent regulation.

Always lurking in the background of this entire debate is the realization that the only claim rent stabilization can make to constitutionality is in its implied assumption that all units in the system are only temporarily rent stabilized.[3]

The Ordinary Scenario

While in the ordinary scenario when a person in the business of being a landlord rents an apartment to some stranger coming in off the street, there will be no question of whether or not the apartment is subject to rent stabilization, as soon as there is some kind of previous relationship between the landlord and the tenant or between the occupant and the most recent tenant, that kind of clarity of answer is replaced by a fog of uncertainty.

Consider the child who moves in with a parent to take care of the parent during a final illness. Upon the passing of the parent, the child succeeds to the rent stabilization rights in the apartment, provided certain criteria are met, chiefly, how long the child was there and whether both the child and the parent were primarily resident in the apartment simultaneously for the requisite period of time. Longevity of presence is fairly easy to measure on a calendar, but that adverb "primarily" calls for an evaluation of a good deal of evidence, some of which may be highly subjective in content, leading potentially to surprising results.[4]

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'Santos' only speaks to that situation where there is subterfuge by the occupant creating a false aura of stabilization and the landlord is duped.

What if the landlord is unaware of these nuances or even unaware of the facts that could give rise to the nuanced questions? What if that landlord treats the apartment as rent stabilized by complying with all the various rituals called for by rent stabilization: registration of the apartment with the state, issuance of lease renewal offers, usage of rent stabilization form leases and lease renewals, confining rent increases to those which are permitted by rent stabilization? It would seem that this behavior on the part of the landlord waives any objection to cloaking the child with these succession rights.

Not so.

Erroneous registration of an apartment as stabilized will not create stabilization rights. "Rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel."[5]

Status Set at Start of Occupancy

In *NYU v. Benison*,[6] the court made clear that a tenant's stabilization status is set at the commencement of the tenant's occupancy, and rent stabilization cannot be imposed by continuing to permit occupancy by the nonstabilized tenant. In *Benison*, the tenant commenced his occupancy of the otherwise rent stabilized university building as a nonregulated "affiliate" of the school. Though he ceased his university affiliation, the school entered into several lease renewals with him, increasing his rent in the amounts set for rent stabilized apartments. The *Benison* court reviewed this history and held that:

> The fact that petitioner, even after tenant's affiliation ceased, chose to continue tenant's occupancy upon terms advantageous to the tenant, did not vest stabilization rights in the tenant or require petitioner to again renew tenant's lease at a time when the accommodations were needed to provide housing for present affiliates. Nor is it dispositive that tenant's rent during this period was calculated in accordance with stabilization guidelines (*Trustees of Columbia University v. Mitchell*, NYLJ, May 18, 1984, p. 6, at 1). Coverage under a rent regulatory scheme is a matter of statutory right and cannot be created by waiver or estoppel (see *Wilson v. Duane St. Realty Co.*, 123 AD2d 198, 200).

In *Heller v. Middagh Street Assoc.*,[7] the Second Department rejected a claim that the use of

rent stabilization riders and rent stabilization renewal forms would create stabilization by contract. Along the same lines, the First Department has declared that rent stabilization cannot be imposed by agreement, even if that agreement is a court-ordered stipulation. In *546 West 156th Street HDFC v. Smalls*,[8] the parties had resolved a prior eviction proceeding with a so-ordered stipulation that granted the tenant a two-year stabilized lease with a preferential rate. The landlord entered into a lease with a stabilization rider, registered the unit as stabilized, and granted several renewals on stabilization forms, despite its being a nonprofit cooperative not subject to rent stabilization. In reviewing the situation, the First Department noted that:

> In determining whether a dwelling unit is subject to rent regulation, what the parties think might be its status or even what they agree to be its status is not dispositive; what is controlling is whether the premises meet the statutory criteria for protection under the applicable regulatory statute.

Of course, the crucial language in that is "what the parties think might be its status or even what they agree to be its status is not dispositive." The court concluded that, though the court-ordered stipulation purported to "grant her a tenancy pursuant to the Rent Stabilization Code of N.Y.C.," the stipulation would be enforceable only to the extent it sets the amount of the rental for the two years specified therein, and any attempt to create rent stabilization by contract must be rejected.

Not Created by Ambush

The latest appellate authority specifically expands the idea that rent stabilization cannot be created by waiver, estoppel, or contract into the newly clarified doctrine that rent stabilization cannot be created by ambush. In *New York City Property Mgt., LLC v. Santos*,[9] the occupant of the apartment had fraudulently altered the lease by adding his name and signing it as cotenant. The landlord, apparently unaware of the ruse, went ahead and signed the altered lease and accepted rent from the fraudulently added new tenant.

Based on those facts, the court wrote:

> In this posture, it is far from clear that the prior owner's counter signature of the renewal lease form reflected a willing intention to convey full stabilization protection to respondent, an apartment occupant who, so far as shown, was unilaterally put into possession by the tenant at a time and under circumstances not presently disclosed in the abbreviated record.

This was an expansion by the court of a similar idea it discussed in *South Pierre Assocs. v. Mankowitz*[10]:

> The trial evidence plainly shows, and it is not seriously disputed, that respondent Mankowitz engaged in a persistent and systematic pattern of deception in concealing his occupancy status from petitioner for nearly 13 years following the death of the stabilized tenant in November 1989, by forging the tenant's name on no fewer than seven renewal leases and numerous rental payments. Respondent's course of deception was studied and purposeful—indeed, it was a stratagem admittedly implemented upon advice of counsel—and persisted through October 2002, when respondent, unable to comply with petitioner's request for the long deceased tenant to notarize a document, finally informed petitioner of the tenant's death and, for the first time, sought the issuance of a renewal lease in his (respondent's) name.

Although not developing the doctrine yet as clearly as in *New York City Property Mgt. LLC v. Santos*, supra, the court reasserted the now familiar principle, "The creation of a landlord tenant relationship, whether through succession or otherwise, 'should not be reduced to a matter of gamesmanship, seduction and artifice' (*Coleman v. Dabrowski*, 22 HCR 697B, 163 Misc2d 763, 765, 624 NYS2d 721 [1994])."

'Gamesmanship, Seduction…'

The difference between *Santos* and the earlier holdings is that in the earlier ones, we find the question to be whether a tenancy can be created by "gamesmanship, seduction, and artifice." By contrast, in *Santos*, the question is whether rent-stabilization status can be created by "gamesmanship, seduction, and artifice."

The standard by which this is measured under *Santos* is "willing intention to convey full rent-stabilization protection." This phrase at first appears redundant, for how would there be "unwilling intention?" How would there be "less-than-full rent stabilization protection?"

We would have to answer those questions first by saying that "willing intention" apparently is a standard beyond mere "intent" and is the court's way of saying that the landlord has to be consciously aware of the full set of facts and is acting on the real facts rather than acting in response to false pretenses. The phrase, "full rent stabilization protection" appears to be a reference to the doctrine developed under *546 West 156th Street HDFC v. Smalls*, supra which permits the parties to contract for various benefits for each other which resemble the kinds of benefits conferred by rent stabilization , but which prohibits the parties to contract to confer rent stabilization itself.

It is important to realize that *Santos* does not mean more than it means. It stands against stabilization by ambush. It does not speak to the ordinary landlord-tenant relationship where both parties enter the relationship with their eyes open and one side or the other might dislike rent stabilization and even intend that it not apply.[11] If the law requires it to apply, of course rent stabilization applies. *Santos* only speaks to that situation where there is subterfuge by the occupant creating a false aura of stabilization and the landlord is duped.

Intent Is the Key

When we look at the full quartet of doctrines examined in this article, we realize that they are all about intent. They are all a judicial examination of the legislative creation and perpetuation of rent stabilization. They are all a realization that each unit brought into rent stabilization costs the taxpayers money. Thus, it is always a question of intent whether a unit is to be subject to rent stabilization—the intent of the Legislature. It is clear that the Legislature meant for units to become rent stabilized only if they satisfied certain criteria, not by accident and certainly not by ambush.

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1. See generally, Salins and Mildner, "Scarcity by Design" (Harvard 1992).

2. *Matter of Salvati v. Eimicke*, 72 NY2d 784, 791 [1988].

3. *Manocherian v. Lenox Hill Hospital*, 84 NY2d 385 (1994).

4. In *Glenbriar Co. v. Lipsman*, 33 HCR 943A, 5 NY3d 388, 838 NE2d 635, 804 NYS2d 719, NYLJ 10/21/05, 18:5, HCR Serial #00015327, TLC Primary Residence 33, TLC Serial #0360, constitutional constraints compelled the Court of Appeals to let stand a factual finding it clearly loathed, that a married couple which spent virtually all their time together had for purposes of rent stabilization separate primary residences.

5. *Ruiz v. Chwatt Associates*, 247 AD2d 308 (1st Dept. 1998).

6. 16 HCR 381B, NYLJ Oct. 26, 1988, 21:3 & NYLJ Oct. 27, 1988, 23:2, HCR Serial #00020066, TLC Rent Stabilization Coverage 1, TLC Serial #0068 (AT1 Parness; Miller, McCooe).

7. 4 AD3d 332.

8. 43 AD3d 7 (1st Dept. 2007).

9. 35 HCR 909A, __Misc3d__, __NYS2d__, NYLJ Nov. 23, 2007, 37:1, HCR Serial #00016891 (AT1 McKeon; McCooe, Heitler).

10. 35 HCR 808B, __Misc3d__, __NYS2d__, NYLJ Oct. 16, 2007, 32:1, HCR Serial #00016816 (AT1 McCooe; Davis, Schoenfeld).

11. Famously in *Thornton v. Baron*, 33 HCR 576A, 5 NY3d 175, 833 NE2d 261, 800 NYS2d 118, NYLJ July 1, 2005, 18:1, HCR Serial #00015105, TLC Rent History 2, TLC Serial #0344 (Court of Appeals) the landlord and the tenant conspired to create a scheme to take the apartment out of rent stabilization so that they could share the profits of market rents.