New York Law Journal

Real Estate Update

Monday, July 2, 2007

The Fine Lines in Suing to Evict Tenants' Families

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When it comes to subletting, relatives are in an entirely different category than other persons. Relatives stand at the boundary line between family members who occupy the premises as an incident of the family relationship1 and strangers who bought into the right or privilege to occupy the premises.2

While occupancy as an incident of a family relationship is not a well-understood or even particularly explained concept in the legal literature, it springs from family law and that field's overarching goal to preserve family structures.

The fundamental unit of analysis is the married couple, known at common law as a single person, but now well-recognized as two distinct individuals. Yet that common law attitude survives in many ways. From this understanding arose Rosenstiel v. Rosenstiel, which forbids one to bring a licensee proceeding against a spouse if the eviction sought is from the marital home.

Thus, landlord-tenant law is forced to understand concepts like "marital home" and the closely related concept of the "family home." Generally speaking, family members living with the tenant of record, occupy the premises as "an incident of the family relationship."

As stated in 61 Jane St. Assocs. v. Kroll,3

It is obvious that tenant himself is not and has not been in a landlord-tenant relationship with his own children, and the children have been permitted to reside in the apartments as an incident with the family relationship.

Thus, a family member enjoys a kind of presumption that any premises in which he lived with his folks as part of the family home merely remains the family home if the folks leave. In such circumstances, the landlord is said to be relegated to nonprimary residence proceedings.

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The difference is crucial. For an illegal sublet proceeding, the maxim, "If at first you don't succeed, try, try again," holds true. A new proceeding can be commenced immediately upon the technical collapse of its predecessor. But for a nonprimary residence proceeding, the "try, try again" is typically at two-year intervals.

Under the most recent readings of the law, the presumption that premises occupied by one other than the tenant is a sublet or assignment is swept away if the current occupant is a family member of the tenant of record - provided there was cohabitation between the current and previous occupants of the apartment.

Proviso Disregarded Ex Cathedra

This last proviso is being increasingly disregarded by trial judges speaking ex cathedra, although their written decisions have not yet gone that full distance.4 These decisions from the trial courts find their origin in Alta Apts., LLC v. Weisbond,5 a case whose majority holding is only made clear when one reads the dissent. The majority says simply:

This thin record so far developed raises triable issues as to the nature and extent of Spencer [Weisbond]'s occupancy in the apartment, matters peculiarly within respondents' knowledge. We note that the record is devoid of any evidence tending to show that Spencer had extensive occupancy ties to the subject apartment . . . and, indeed, that Spencer's own affidavit appears to acknowledge that he never contemporaneously resided in the subject apartment with [his] father. (citations omitted)

Theory of Law

To use the court's own words, this is "thin." Yet, it is the springboard of this entire theory of the law. In these few words, the court sets forth four rules:

1. Where the case rests within the knowledge of the tenant, summary judgment in this kind of scenario is not ripe.

2. The tenant has the burden of proof.

3. The tenant must demonstrate extensive occupancy ties.

4. The extensive occupancy ties have to have occurred during a period of cohabitation.

What this does not tell us is what is meant by "extensive occupancy ties." However, what is crucial from the majority opinion is that the court says, "This holdover proceeding, seeking possession of a rent-stabilized apartment on the ground that the tenant of record, Barton Weisbond, violated the lease by subletting or assigning the premises to his son, Spencer Weisbond, is not susceptible to summary dismissal." In other words, it is possible for a parent to sublet illegally to his own son.

The dissent will have nothing of it. It holds:

1. Illegal sublet proceedings do not lie when the court deems that the case is better brought as a nonprimary residence proceeding.

2. The landlord has the burden of establishing prima facie that there is a sublet within a family before being able to get disclosure.

3. The landlord has the burden of establishing a contractual relationship between the tenant of re-

cord and the family member actual occupant.

Deriving Majority's Holding

While one hates to derive the majority's holding from the dissent, one has little choice but to recognize that in this case, the majority must be deemed to have implicitly found the antithesis of each of the dissent's points, as follows:

1. The landlord has the choice of bringing a nonprimary residence proceeding or illegal sublet proceeding as the landlord seems best advised. The availability of one does not preclude the other.

2. Where all the facts are in possession of the tenant, the landlord has ample need for and entitlement to disclosure of those facts before suffering a summary dismissal of his cause of action.

3. Where an apartment is held by a person other than the tenant of record, the landlord is entitled to the same presumption of assignment, regardless of whether the person holding the apartment is a close relative of the tenant of record.

The first of these points is basic to our understanding of Civil Procedure in English-speaking countries. With rare exceptions for elections of remedies, it is a fundamental assumption that it is up to the plaintiff to decide which cause of action his facts will support.6 It is not for the court to make this decision. This is indeed one of the teachings of the recently notorious case Pultz v. Economakis,7 where the lower court had arrogated to itself the description of the proper cause of action for the landlord only for the purpose of selecting one that was sure to fail.

The second of these points is based on fundamental fairness. Where a party has sufficient hard facts in its possession to give substantial reason to believe it is being actionably wronged, the law does not suffer it to see its case dismissed because it cannot spell out just what is happening before getting hit with a summary judgment motion. This is the genius of CPLR 3102(c) which under the right circumstances permits one to obtain disclosure even before the first paper is served in the action or proceeding.8 While one has to be sympathetic with the dissent's implied point that such disclosure can be designed as an instrument of harassment, that is why there are courts to supervise it and make sure that nobody's rights are violated.

The third point is where the majority and the dissent seem to take their great departure from each other. The law has long recognized a strong presumption of assignment or subletting9 when there is one occupying an apartment in the absence of the tenant of record.10 The dissent in Weisbond seeks to carve out an exception for close family members of the tenant of record. The majority will not hear of it. The majority's position is solidly grounded on cases like PLWJ Realty, Inc. v. Gonzalez,11

[T]he [. . .] court could fairly find that the small studio apartment had been vacant for more than one year; that tenant was not residing there; and that tenant's adult son and immediate family subsequently entered into possession. The record therefore supports the determination that there was an unlawful sublet/assignment without consent. Moreover, a departing tenant may not transfer possession to family members where there has been no concurrent occupancy . . . . Landlord was not required to serve a notice of nonrenewal since the petition was premised upon a breach of the lease and Real Property Law Â§226-1, not nonprimary residence. (citations omitted)

The dissent in Weisbond would appear to be based on cases like MF Holding, LLC v. Apostolopoulos,12 but it becomes evident that in all of those cases the tenant of record and the family member are living there together, at least part of the time.13 The Weisbrod majority has no problem with that, but speaks only of when the tenant of record has simply moved out.

Technically speaking, the landlord remains the one with the burden of proof in an illegal sublet or assignment proceeding. However, the presumption of assignment or subletting is enough to sustain that burden.

'Extensive Occupancy Ties'

Thus, the question in these family cases is the question of "extensive occupancy ties." As to this, under Weisbond, the tenant bears the burden of proof of the two issues, the "ties" and the previous cohabitation.14 Unless those are established, a tenant can indeed create an illegal assignment or sublet to a family member.

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Endnotes:

1. Rosenstiel v. Rosenstiel, 20 AD2d 71, 245 NYS2d 395, 1 TLC Licensee 1, TLC Serial #0060 (AD1 1963).

2. RPL Â§226-b.

3. 12 HCR 129A, 102 AD2d 751, 476 NYS2d 887 (AD1 1984); to the same effect, Seagrave Establishment Inc. v. Rothstein, 13 HCR 198C, NYLJ June 28, 1985, 12:1 (AT1); Connelly v. Martin, 16 HCR 106B, NYLJ March 30, 1988 6:4 (AT1); Taub v. Hampel, 29 HCR 600A, NYLJ Dec. 19, 2001, 22:6 (AT1).

4. Arlin LLC v. Arnold, 33 HCR 960B, 9 Misc3d 1114 (Civ NY Lebovits 2005); Metroka v. Andrews, 34 HCR 587B, NYLJ July 12, 2006, 26:1 (Civ NY Finkelstein).

5. 33 HCR 1048B, 10 Misc3d 40, 807 NYS2d 781 (AT1 2005).

6. See, CPLR 3017.

7. 35 HCR 123A, AD3d, NYS2d, NYLJ Feb. 22, 2007, 18:1 (AD1 2007).

8. Like most of CPLR 408, governing special proceedings, such disclosure can be had on motion only. There is therefore no theoretical barrier to its employment in the bringing of a summary proceeding.

9. It is important to realize, particularly in the case of family, assignment is the more likely scenario than subletting. The parents are likely to want to pass along an apartment to their children. They are not looking to have their children pay them for it. They are also not interested in coming back to the apartment, as would be implied in a sublet.

10. Carol Mgt. Corp. v. Britton Jr., 20 HCR 639A, NYLJ Oct. 29, 1992, 26:5 (AT 2 & 11); Kimmel v. Estate of Ling Kai K'Ung, 21 HCR 402A, NYLJ Aug. 6, 1993, 21:5 (AT1); Park Holding Co. v. Rosen, 24 HCR 534A, NYLJ Oct. 3, 1996, 24:1 (AT1).

11. 28 HCR 653B, NYLJ Oct. 31, 2000, 26:1 (AT1).

12. 30 HCR 222A, NYLJ April 26, 2002, 21:1 (AT1).

13. 801 Realty Co. LLC v. Perez, 31 HCR 37A, NYLJ Jan. 23, 2003, 19:3 (AT1); Santorini Equities, Inc. v. Picarra, 31 HCR 144A, NYLJ March 28, 2003, 20:1, HCR Serial #00013627 (AT1); Little v. Lando, 31 HCR 176A, NYLJ April 16, 2003 (AT1).

14. 235 W. 71st St. v. Chechak, 32 HCR 405A, NYLJ June 23, 2004, 27:1 (AT1).