Finkelstein Newman LLP

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HOW COMFORTABLE WAS THAT COUCH?

You can't blame Mary Hershberger for trying to stake a succession claim to her grandmother's (below market) rent-controlled Manhattan apartment. We would like one, too.

As we have previously reported, certain family members may "succeed" to a regulated unit–that is, remain in the apartment as a tenant in their own right–provided they have lived in the apartment with the tenant-of-record for at least two years immediately preceding the tenant-of-record's demise or relocation. (When the person claiming the succession right is a senior citizen–62 years of age or older–or a disabled individual, that contemporaneous-occupancy timeframe is reduced to one year.)

Currently, the regulations permit a succession claim by a tenant's spouse, children, stepchildren, parents, stepparents, brothers, sisters, grandparents, grandchildren, fathers-in-law, mothers-in-law, sons-in-law or daughters-in-law. [Any person who shared an "emotional and financial commitment and interdependence" with the tenant may also qualify. However, in order to determine whether a claimant meets this latter standard, courts will examine a variety of factors, with no one element or group of elements being more persuasive than others.]

While Hershberger, as the tenant's granddaughter, had a right to stake a succession claim, there were a few problems with her position. First, she appears to have maintained one or more places of residence in Queens County and many of her personal documents pointed to those Queens addresses (rather than the Manhattan unit). Second, the trial court did not believe that Hershberger contemporaneously occupied the one-bedroom apartment with her grandmother and home health aide. As a result, the New York County Housing Court found that Ms. Hershberger could not satisfy her burden of proof and was not entitled to remain in possession of the rent-controlled space.

On appeal, the Appellate Term, First Department, affirmed the trial court's determination, noting as follows:

> We agree that appellant, the granddaughter of the deceased tenant of record, failed to meet her affirmative obligation to establish succession rights to the rent controlled tenancy…The documentary evidence bearing on respondent's

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WHO GETS THE FAMILY FARM?

In *Matter of Brignole*, the Richmond County Surrogate's Court was asked to decide who was entitled to ownership of the family farm: Mr. Brignole's nephew or a charity?

Mr. Brignole's will created a trust which granted his spouse income for life and, upon her death, any remaining assets were to be given to charity. There was a specific carve-out to this bequest that was in dispute. Mr. Brignole's will also provided as follows:

> "I would like my wife to turn the Farm (Pocono View Farm) in the Poconos to my nephew…because after speaking to him, he has business acumen."

Unfortunately, Mrs. Brignole died before she could effect her husband's wishes with respect to the farm's transfer and the New York State Attorney General argued that the property became part of the "residuary estate" which belonged to charity.

The Richmond County Surrogate's Court disagreed with the Attorney General and concluded that the farm should go to Brignole's nephew. On appeal, the Appellate Division, Second Department, sided with the Surrogate:

> Upon a sympathetic reading of the entire will, the Surrogate's Court properly concluded that the decedent intended to give his wife the power to take Pocono View Farm (hereinafter the farm) out of the trust and to transfer it to the petitioner, the decedent's nephew…Further, a letter of intent sent to the petitioner by the attorney for the executor of the decedent's will supports the Surrogate Court's determination that the decedent's wife intended to convey the farm to the decedent's nephew before her death.

Finally, a case that makes sense.

If you have any questions or comments about this article, please contact partner Daniel Finkelstein at 212-619-5400 x 209 or email him at DFinkelstein@FinkelsteinNewman.comm. To join the debate, visit us at www.nyreblog.com.

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> residence during the relevant time period listed not the subject Manhattan apartment, but alternate addresses in Queens, and the trial court, as fact-finder, reasonably could discredit respondent's testimony concerning her makeshift sleeping arrangements in the subject one-bedroom apartment occupied by her grandmother and a home health aide. "On a bench trial, the decision of the fact-finding court should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses."…We have considered and rejected appellant's remaining arguments.

If you have any questions or comments about this article, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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WHATEVER LOLA WANTS, LOLA GETS

If you think landlord-tenant law is bad, trying getting a liquor license in the City of New York. The approval process is often riddled with an array of technical objections and vocal community opposition that could significantly impede or delay an establishment's opening.

If you don't want to take our word for it, just ask the owners of Ginx, Inc., doing business as "Lola." According to statute–Alcohol Beverage Control Law section 64(7)(f)–if an applicant seeking a liquor license is located within 500 feet of three or more preexisting licensed establishments, a license may not be given until such time as the Liquor Authority consults with the local community board (after a hearing and notice) and the Authority formally finds that the approval is in the "public interest."

Although the Liquor Authority substantially complied with the law (in that it conducted the required hearing, and issued a written decision reciting the positions presented by Lola and the local community board), the Authority's decision apparently omitted the reasons for granting Lola a license. In a lawsuit later filed with the New York County Supreme Court, a local community group challenged the legality of the license's grant–based on the decision's error or omission–and successfully persuaded a Supreme Court Judge to annul the approval.

On appeal, the Appellate Division, First Department reversed, reiterating established precedent that administrative agencies are entitled to considerable deference and that a court should not substitute its judgment for that of an agency unless there was no "rational basis" for the agency's decision, or the agency's conduct was "arbitrary and capricious."

In this particular instance, the appellate court was not persuaded that the Liquor Authority violated governing law in a significant way. As the court observed:

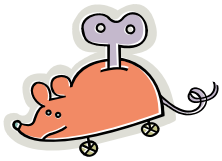
> Here, the Authority conducted a hearing, and produced a five-page report leading to its determination.
>
> What is missing from the Authority's decision is a specific expression of its reason or reasons for its finding that granting a liquor license is in the public interest. CPLR 7806, however, permits us to remit the matter to the Authority for further proceedings….
>
> Thus, we reverse the judgment, vacate the direction to the Authority to cancel the liquor license, and remit to the Authority, pursuant to CPLR 7806, directing it only to properly state its reasons for granting the liquor license.

Looks like Lola may not be jinxed after all.

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

ANIMAL SHELTER LIABLE FOR STOLEN KISSES

Darlene Feger sued the Warwick Animal Shelter in Orange County Supreme Court for money damages and to recover possession of "Kisses," her stolen cat. Apparently, the shelter accepted the white purebred Persian cat knowing that the animal had been purloined. And, to confound matters further, it was also alleged that Kisses had been released for adoption and her new custodians now called her "Lucy."



After preliminary motion practice, the Supreme Court dismissed Ms. Feger's case against the Animal Shelter finding "statutory immunity" pursuant to the Agriculture and Markets Law section 374(3). On appeal, the Appellate Division, Second Department, found that while Ms. Feger could not recover "emotional" or "punitive" damages, she could still pursue her case for the animal's recovery. However, since there was still a question as to whether "Lucy" and "Kisses" were the identical cat, a trial was needed to resolve that aspect of the dispute.

What's stolen Kisses worth? And, will the Supreme Court compel the animal's new custodians to fork over Kisses?

Stay tuned!

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