Finkelstein Newman LLP

The Real Estate Litigation Leaders

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ILLEGAL SUBLETS: WHEN FAMILY MATTERS

Although many residential leases prohibit subletting, tenants residing in buildings with four or more residential units may seek to obtain the landlord's permission before subleasing to a third party and that approval many not be unreasonably withheld. But if a tenant sublets an apartment without first securing the landlord's consent, the landlord may bring a proceeding to terminate the lease and evict all of the unit's occupants on the grounds of "illegal subletting." For the past several years, New York courts have struggled with the issue of whether a landlord may maintain in an illegal-sublet proceeding when the "unauthorized" occupant is a tenant's immediate family member. For one reason or another, our appellate courts have discouraged the use of a proceeding on such grounds.

In *Hudson St. Equities Group, Inc. v. Escoffier*, a 2003 decision issued by the Appellate Term, First Department, the landlord commenced an illegal-sublet proceeding alleging that the tenant had sublet the apartment to his foster brother without the landlord's consent. Ultimately, the court concluded that there was no basis for eviction because the occupant was a close family member that had "extensive occupancy ties" to the apartment. Apparently, the familial relationship between the tenant and the remaining occupant and the extent of the occupant's prior use of the apartment were dispositive factors.

In a strongly-worded dissent, the Honorable William P. McCooe asserted that the key legal issue was whether the tenant and his foster brother contemporaneously resided in the apartment. He explained that the key distinction between a roommate (a permissible co-occupant) and an illegal sublessee was simultaneous occupancy by the tenant and the occupant in question. In the dissent's view, contemporaneous occupancy by the tenant and his foster brother was necessary in order to find the arrangement permissible in the absence of the landlord's consent. Because there was proof at trial that the tenant resided in Alabama, and not with the alleged illegal occupant, Judge McCooe concluded that the tenant's foster brother was an "illegal sublessee." Clearly, there is an obvious difference between allowing someone to live *with* you, and allowing someone to take sole possession of space for a portion, or the remainder, of your lease term. While landlords have attempted to invoke this distinction and Judge McCooe's dissenting opinion to support their "illegal sublease" cases brought against relatives, this strategy continues to meet an unwavering resistance.

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In *235 W. 71 St. LLC v. Chechak*, a 2004 decision issued by the Appellate Term, First Department, the court found that a mother's occupancy of her son's apartment was not an illegal sublet because of her "historical contacts to [the] apartment." Though the son was named tenant under the lease at the time this case was commenced, the mother had, at one time, been the tenant of record for the unit. The landlord contended that the mother's occupancy constituted an illegal sublet because the tenant did not live in the apartment with his mother. The court rejected this argument and held that the landlord's proper recourse was a nonprimary residence proceeding, since a family member, who had historical contacts to the unit, occupied the apartment in the tenant's absence. Judge McCooe, in yet another dissent, argued that the landlord should have had a chance at trial to establish that the mother's occupancy of her son's apartment constituted an illegal sublet. The Appellate Division, First Department, disagreed with Judge McCooe and upheld the outcome of the *Chechak* case and confirmed that a landlord cannot prevail in an illegal-sublet proceeding brought against a tenant's immediate family member who has close ties to the premises.

In yet another case, *Alta Apts., LLC v. Weisbond*, the landlord sought to recover possession of a rent-stabilized apartment on the ground that the tenant had illegally sublet or assigned the apartment to his son. In this 2005 decision, the Appellate Term, First Department, concluded that summary judgment for the tenant was not appropriate because there was insufficient evidence that the son had extensive occupancy ties to the premises or that he ever resided in the apartment with his father. Presumably, the majority would have found the arrangement permissible had such evidence been presented. In a dissent, the Honorable Phyllis Gangel-Jacob argued that summary judgment for the tenant should be upheld. In her view, a landlord seeking to terminate a lease on the ground that the tenant illegally sublet its apartment had the burden of proving the existence of a "leasehold" relationship between the tenant and the unauthorized occupant. If the landlord only offered evidence that the subject premises were no longer the primary residence of the tenant, Judge Gangel-Jacob opined that the landlord's appropriate recourse was a nonprimary residence proceeding.

Most recently, in *Arlin, LLC v. Arnold*, the landlord brought an illegal-sublet proceeding on the ground that the tenant illegally sublet his rent-stabilized residence to his brother. Apparently, the tenant's brother resided in

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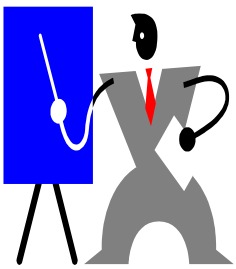

JUNE 6, 2006

Landlord and Tenant Law in New York

On Tuesday, June 6, 2006, from 8:30 A.M. to 4:30 P.M., partners Jonathan H. Newman and Robert Finkelstein will be the featured speakers at a Lorman-sponsored CLE. Joining them will be Bruce Feffer (Bruce Feffer & Associates) and Bruce S. Leffler (Goldfarb & Fleece)

ISSUES ON THE AGENDA

- Anticipating Litigation: How to Win (Or Lose) Your Case
- Landlord-Tenant Litigation: A Primer
- Let's Make A Deal – Use And Goals Of A Stipulation Of Settlement
- Special Considerations in Commercial Landlord-Tenant Proceedings
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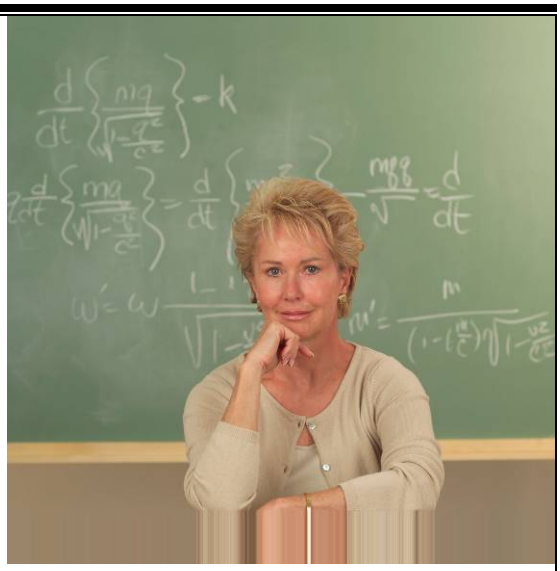
RECOVERING UNITS: SCHOOL'S *IN* FOR SUMMER



Disputes involving New York's Rent Stabilization Laws frequently conjure up images of landlords and tenants engaged in an endless "tug of war." On one side, landlords who would profit from the termination of rent-stabilized tenancies seek to end such leases by any lawful means. And, conversely, those fortunate tenants who still enjoy below-market rents and virtually guaranteed renewal leases hope to prolong the "perks" for as long as possible. While these competing interests occasionally involve an oppressive landlord and an indigent tenant, the standoff is not always that extreme or melodramatic. What about when the property owner is legitimately desirous of recouping its space in furtherance of a charitable or educational purpose? And how does such an organization recover possession from a rent-stabilized tenant? These were among some of the questions addressed by Housing Court Judge Marc Finkelstein in the case of *Teachers College v. Kadhi-Smith*.

The Rent Stabilization Code (RSC) provides that a not-for-profit institution may refuse to renew a rent-stabilized lease when the unit is required for the organization's charitable or educational purposes. However, there are two limitations. First, the organization must have acquired the property prior to the tenant's occupancy of the unit. And, second, units occupied by certain tenants who entered possession pursuant to written leases prior to July 1, 1978 are non-recoverable.

In this case, Teachers College met these threshold requirements and served a combined non-renewal and termination notice predicated on its need to recover the unit. When the tenant refused to vacate, the institution commenced a formal eviction proceeding.

In response to the tenant's motion to dismiss, the court looked to the RSC and reiterated that a predicate notice, based upon recovery for use by a not-for-profit institution, must state certain facts in order to establish the legal grounds for eviction. Merely reciting the legal basis for eviction, without additional facts upon which the claim was based, would have been insufficient. Familiar with the debate over a notice's sufficiency, having recently decided the same issue in *Riley v. Raphael*, Judge Finkelstein articulated that a legally sufficient notice requires the assertion of at least one fact relating to the landlord's claim for terminating and recovering possession of the unit. Thus, an organization need only provide a minimal recitation detailing that need in order for the notice to be a valid predicate for an eviction proceeding.

Teachers College claimed that it sought the unit to house a "faculty/staff member" it employed. It elaborated that it had insufficient housing accommodations for all of its personnel, and that the shortage of available apartments impeded its ability to effectively recruit faculty, many of whom must reside near the school's campus.

The tenant countered that the facts supplied by the school were generic and thus insufficient to serve as adequate notice for an eviction proceeding. The tenant further asserted that the institution showed no need to recover possession nor identified the specific faculty or staff member who required use of the particular apartment. Additionally, the tenant emphasized there was no indication this purported need arose during her most recent lease term. In summary, the tenant believed these omissions impaired her ability to prepare a defense to the eviction claim, rendered the proceeding defective, and that dismissal of the case was thereby warranted.

After carefully weighing these arguments, Judge Finkelstein declined to dismiss the case, and held the document which had been served by the school afforded the tenant ample opportunity to prepare a defense. Additionally, the court noted that should the tenant require amplification of the facts, she could move for discovery or serve a bill of particulars—both of which would assist her defense-related preparations.

At least one lesson reinforced by this case is that notices served within the context of landlord-tenant cases must meet minimal factual-recitation requirements, and that landlords should err on the side of caution—and provide as much elaboration as possible—since an unforgiving court's analysis could result in a proceeding's dismissal.

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.

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this apartment with the tenant as well as in various other apartments for a preceding three year period, and thereafter spent a few weeks at a time at the premises in question while primarily residing elsewhere. In 1998, when the tenant moved out, his brother moved in. The New York County Civil Court held that the brother's occupancy did not constitute an illegal sublet because of the familial relationship and the "longstanding connection to the subject apartment." After citing a string of cases, including those referenced above, the court concluded that "[a] landlord may not maintain an illegal-sublet proceeding against a tenant's immediate family member with a long-standing connection to the apartment, even if the primary tenant no longer lives in the apartment." The court further confirmed the standpoint that proof of the tenant no longer residing in the apartment, by itself, is insufficient to establish an illegal sublet.

In many instances, the law provides favorable treatment of tenants' family members. Examples in the landlord-tenant context include the right of relatives and significant others to live with the tenant without the landlord's consent, as well as the right of a rent-stabilized tenant's family members to succeed to the apartment if they meet certain conditions. Favorable treatment of relatives can also be found in other areas of the law, including negligence (e.g., actions for negligent infliction of emotional distress or wrongful death) and, trusts and estates (e.g., intestate succession rights and the right to contest wills offered for probate). These instances of "disparate treatment" have been justified by clearly articulated public-policy rationales and long-established precedent. While the cases we have examined in this newsletter may have achieved the "right" result and furthered public policy to some degree, what is lacking–in our opinion–is an underlying historical or precedential rationale justifying those outcomes.

If you have any questions or comments about this analysis, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

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