

Part 1 of 2

Reviewing the Ramifications of "Succession Rights" to Local Owners

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WHITE PLAINS—A situation in Westchester County recently came to light that caused a review of the long held doctrine of "Succession Rights."

In this particular situation, the tenant of record vacated an apartment subject to the Emergency Tenant Protection Act (ETPA) in order to reside permanently in a nursing home, hospital or other similar type of facility. Prior to vacating the apartment and taking up residence elsewhere, the tenant of record was living in the apartment with a companion.

Apparently, they have been residing together in the unit for more than 20 years continuously. Furthermore, although they were not married, they did maintain a "marriage like" relationship. The tenant of record received some form of aid and/or rent subsidy. Her companion did not contribute to the rent and did not support the tenant of record in any way.

This set of facts presents an interesting dilemma with regard to the doctrine of succession rights: does a 'non-traditional' family member have succession rights to an ETPA apartment in Westchester County?"

While conventional wisdom would seem to suggest that the law of succession rights applies in the same way as in New York City's Rent Stabilization Code and the related regulations, this is not necessarily the case. At the outset it should be noted that under ETPA succession rights apply as a result of case law and the doctrine was not separately codified as it was under rent stabilization. The effects are largely the same, except when it comes to the narrow issue of a "non-traditional family member's" entitlement to succession rights.

Definitions

Under the law, a family member of a tenant of record is entitled to succeed to the tenancy of the tenant of record upon said tenant vacating the apartment. Persons that are not family members as defined by the statute relevant to rent stabilized apartments, so called "non-traditional" family members, may still be entitled to "succession rights" provided that they can prove the "emotional and financial commitment and interdependence between such person and the tenant."

Among the factors relevant to this determination are:

- longevity of relationship
- sharing of household and other necessary expenses

- intermingling of finances
- engaging in family-type activities and holding out publicly as family members
- formalizing legal obligations (e.g., in a will)
- any other pattern of behavior that evidences the intention to create a long-term, emotionally committed relationship.

Residential Landlord Tenant L. in N.Y. § 4:210 (citing 9 NYCRR § 2520.6(o)(2) (NYC RSC); 9 NYCRR § 2204.6 (d)(3)(i) (NYC Rent and Eviction Regs)).

While this is only directly provided for in the relevant statutory authority covering rent stabilized buildings within New York City, case law has held that this doctrine also applies to the jurisdictions covered by ETPA and this has long been the opinion of the Division of Housing and Community Renewal ("DHCR"). DHCR takes the position that the proposed successor to the tenant of record would probably be able to establish that he is a "non-traditional" family member.

Giving Proof

However, "succession rights" is essentially an affirmative defense to a holdover (eviction) proceeding and if a landlord chooses to contest the claim that a person is a non-traditional family member, the burden is on the proposed successor to prove that he/she is entitled to succession rights as per the above factors.

The leading case in applying this matter to communities governed by ETPA (as opposed to the RSC and the Rent and Eviction Regulations of New York City) is *One Vincent Road Realty Co. v. Mulqueen*, 5/12/89 N.Y.L.J. 30, (col. 2). This case is at least to some degree distinguishable from the facts that we have presented as the *One Vincent Road* case, which involved a situation where the sons of the tenant that vacated the ETPA unit were seeking to enforce succession rights.

While there may still be some dispute over whether succession rights should apply to the ETPA communities the rationale set forth by the Court in *One Vincent Road* does appear sound in its application of this doctrine to ETPA communities through existing statutory law and case law with a true or traditional family member.

An Important Distinction

The distinction mentioned above, however, is important in that under the set of facts that

are pertinent to this analysis the proposed successor would have to show that he is entitled to "succession rights" as a "non-traditional" family member. This is not covered by the rationale of the Court in *One Vincent Road* or, apparently, the statutes relevant to ETPA.

This is only covered by the City of New York because when the doctrine of "succession rights" was codified the legislature specifically incorporated that part of the doctrine, but only in New York City law.

The Court in *One Vincent Road* details the relevant portions of the Tenant Protection Regulations (TPR) and how an analysis of the provisions of the TPR make the doctrine of succession rights applicable to the TPR. Among other things, the Court held:

- TPR §2503.5(a) requires that "every landlord shall notify the tenant in occupancy" of the impending end of his lease, and "offer to renew the lease ..."
- TPR §2504.4(d) provides that a landlord need not offer a renewal lease where the "housing accommodation is not oc-

cupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction."

- TPR §2505.7(e) provides that "no action or proceeding based upon the non-primary residence of a tenant may be commenced prior to the expiration date of his lease."

- Finally, TPR §2500.2(h) defines "tenant" as: "a tenant, subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodation." (In the context of a primary residence case, the terms "tenant" and "lessee" have essentially identical meaning, as have "subtenant" and "sublessee.")

The Court also stated that "the absence of a succession provision from the TPR was not intended to limit renewal rights to tenants named in the lease."

Finally, the Court noted:

- TPR §2504.4(d) limits the succession rights implicit in TPR §2500.2(h) by stating that the landlord is not required to offer a renewal lease when only "subtenants or occupants" occupy the housing accommodation as their primary residence. Real Property Law §235-f(b) defines "occupant" as "a person, other than a tenant or a member of the tenant's immediate family, occupying a premises with

the consent of the tenant or tenants."

The Court in this case upheld the succession rights because the lease provided for the occupancy by the tenant and members of the tenant's immediate family. The Court noted that "TPR §2500.2(m) defines 'immediate family' as 'Husband, wife, son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother.'"

Finally, the Court discussed the limitation that the TPR places on succession rights, stating "TPR §2504.4(d) limits the succession rights implicit in TPR §2500.2(h) by stating that the landlord is not required to offer a renewal lease when only 'subtenants or occupants' occupy the housing accommodation as their primary residence."

The case law and statutory law recited provides a basis for answering the posed question. Part Two of this article will feature a brief discussion of the history of succession rights and strategies in litigation involving this issue.

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