A Look at Issues Involving Ancillary Services

COUNSELS' CORNER

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WHITE PLAINS—In the days when there is some difficulty renting apartments, or alternatively, keeping good tenants, or even in providing amenities in the building, landlords frequently offer inducements to tenants.

These can be of a variety, but the within comments will have to do with "parking" in an Emergency Tenant Protection Act (ETPA) community/building /apartment.

As every landlord and tenant knows, a parking space is a valuable commodity. It can be a space attached to a lease with the rent for the space included in the base rent, there can be a separate lease for the space, or it can be given on a temporary basis.

Generally, when a parking space is given as part of the lease, it is given to the tenant with the same conditions and caveats as the regular lease and rental. In other words, the rent increase for the space has to be with the same guidelines as exist for the apartment.

A Recent Scenario

In a recent case handled by this office, an owner client almost was subject to the cliché of "no good deed goes unpunished." Factually, as a familial accommodation, a tenant—let's call him Amos—was rented an apartment with a parking space included in the rent.

Thereafter, Amos was rented another parking space at a market rent. Years later, Amos came into possession of a third car and wanted a third parking space. Insofar as the policy of this landlord was to only provide a maximum of two parking spaces—and then only to tenants of two-bedroom apartments—the landlord was hesitant.

However, again, to accommodate this family relation, the landlord agreed to allow Amos the limited use (evenings only) of a third parking space, but only on a "month-to-month" basis, with the understanding that when the landlord needed the space for other tenants, it would be surrendered.

Amos' wife (on his behalf) signed a month-to-month application for the space and then used it until the Landlord advised that he wanted the space back. Amos at first agreed and then balked, arguing that under the Rent Stabilization Law (although this was an ETPA community) that the space became an "ancillary" or "essential" service once given to him and could not be taken back without a reduction in rent for loss of services. He filed a complaint with the Division of Housing and Community Renewal (now known as The New York State Homes and Community Renewal Agency, HCR) for loss of services. On the local level, DHCR found in his favor and directed a reduction in rent and the return of the third parking space.

The tenant claimed that as an ancillary service, the owner must continue to maintain the services as a matter of law until DHCR or the Court decided to the contrary. DHCR looked to "consistent DHCR policy … that a landlord may become obligated to continue furnishing services which it begins furnishing on the base date, or at some point subsequent thereto, related to the use of an apartment but not directly applicable to the apartment itself."

The "PAR Process"

The Landlord brought a Petition for Administrative Review ("PAR") which is the statutory procedure for challenging an unfavorable DHCR ruling, claiming that (1) the space was only rented on a month-to-month basis; (2) the space was "temporary;" (3) the statute / rules / regulations were different for New York City and Westchester; (4) the landlord's policy was to rent one space for a one-bedroom apartment and two spaces for two-and –three-bedroom apartments, and (5) this would deny other tenants the use of a parking space, albeit it a limited use, while indulging Amos' desire to keep his third vehicle with a parking space.

In a detailed and well-reasoned decision, DHCR found that the use of this third parking space was only "temporary" and the landlord was within its rights and not violating the law by requiring that the space be returned. (In a lawsuit started by the tenant for virtually the same relief demanding the return of the third space, the Supreme Court also found in the Owner's favor, stating that this was a "month-to-month" parking arrangement).

DHCR looked to, among other things, the fact that the application was "month-to-month," the service was not included in the apartment rent; there was a limitation on the use of the space for evenings only; and, in this situation, the space was actually outside the building and used for visitors during the day.

While it is not known which, if any of those factors, or the combination of same was determinative, it is clear that the most significant factor was that the space was taken as a "month-to-month" space and the Owner's policy as to limitation of the number of spaces was also an important factor.

Therefore, DHCR found that "the owner's decision to remove the parking space from the tenant's use did not constitute a decrease in ancillary services warranting a rent reduction."

Caution Is Urged

We believe that this case is a significant victory for the Owner in the DHCR recognition of the care that the Owner took herein in assuring that the application was "month-to-month," that the use of the space was temporary and that it conformed with the policy of the Owner in its assignment of spaces. We suggest that all Owners dealing in an ETPA (and RSL) environment be very careful when adding services that are not necessarily attendant to the use of the apartment, such as parking, pool, storage, use of roof, etc.

Appropriate documentation must be prepared with advice of counsel and signed by the Tenant and Owner before utilization of the particular amenity is commenced. Avoid having a disastrous and unnecessary result by some careful forethought and documentation.

Editor's Note: The authors are with Finger and Finger, A Professional Corporation. The firm is Chief Counsel to The Building and Realty Institute of Westchester and The Mid-Hudson Region (BRI). Finger and Finger is based in White Plains.