HOW DO I KNOW IF MY TENANT IS RENT STABILIZED (OR NOT)?

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How Do I Know If My Tenant Is Rent Stabilized (Or Not)?

by Michelle A. Maratto, Esq.

I know it is time to write an article when I answer the same question over and over again for various clients. By such standard, this article is years overdue. In it I seek to clearly and briefly answer three questions:

1. Why is it so hard to tell if an apartment is Rent Stabilized?

2. What makes an apartment subject to Rent Stabilization?

3. What makes an apartment not subject to Rent Stabilization?

Therefore, this article should be useful to those conducting due diligence when contemplating acquiring a building, or to those contemplating litigation.

I. WHY IS IT SO HARD TO TELL IF AN APARTMENT IS RENT STABILIZED?

There is no official list somewhere that definitively tells the world which apartments are subject to Rent Stabilization and which are not.

The New York State Division of Housing and Community Renewal ("DHCR") has jurisdiction over matters relating to Rent Stabilization and DHCR maintains some records. But the records DHCR maintains contain information that is largely self-reported by landlords and that is not controlling with regard to an apartment's Rent Stabilization status. Therefore, year after year a landlord can report to DHCR that an apartment is "permanently exempt", but that does not make it so.

Moreover, a current or former tenant may have signed a document acknowledging that an apartment is not subject to Rent Stabilization. But this, also, does not make it so. Parties may not contract in or out of Rent Stabilization coverage.[1]

I would like one thin dime for every time a landlord-client showed me that an apartment was long ago registered with DHCR as permanently exempt or that the tenant himself signed a lease rider acknowledging that the apartment is not Rent Stabilized, and suggested to me that these facts mean that the apartment is not Rent Stabilized. These facts are meaningless and these pieces of paper are worthless.

How do you ever get a definitive answer on an apartment's Rent Stabilization status? With some exceptions, the last word on whether or not an apartment is Rent Stabilized is in the hands of the courts. Until a judge is satisfied that an apartment is not Rent Stabilized, the matter is always, in some measure, unsettled. As you will see from the balance of this article, for some apartments the matter is way more unsettled than for others. This article is designed to come in handy for those apartments where circumstances make the matter unclear.

Why is this so complicated? Because it is. There are many statutes and mountains of case law that, when woven together, make up the rent regulatory scheme in New York City. There are rules, and exceptions to the rules, and exceptions to the exceptions to the rules. This is life in the proverbial Big City.

Practical Tip! Before we go any further, take heed of what I have said so far. The court is the last word. When doing your due diligence about the status of an apartment be sure to check with the various courts' files in the county in which the real property is located to see if the matter has been previously litigated and decided. I once had a young lawyer come to me and tell me about all the research he had done on whether or not a Loft apartment was Rent Stabilized or not. In passing, he mentioned that the client told him there was a court case regarding the apartment many years ago. I told him he needed to get that file. He told me that the Civil Court archives going that far back were hard to navigate and incomplete. I said – look anyway. He looked and he found a decision deregulating the apartment. All the research he did was an unnecessary reinvention of the wheel. The answer was in the court files!

II. WHAT MAKES AN APARTMENT SUBJECT TO RENT STABILIZATION?

There are three sets of circumstances that will alert me, as a veteran landlord and tenant practitioner, to the possibility that an apartment is subject to Rent Stabilization. They are:

(A) The building was built before 1974 and contains six or more units.[2]

(B) The building is or was part of a tax benefit program, such as J-51, 421-a, or the Private Housing Finance Law.[3]

(C) The building is (or was) a Loft.

If any of these circumstances are present, my job as a landlord's (or a tenant's) lawyer is to look more closely. If we are going into court and any of these circumstances exist, then I MUST look more closely and have the answer, because the court will demand it.

III. WHAT MAKES AN APARTMENT NOT SUBJECT TO RENT STABILIZATION?

If a building has less than six units and was constructed after 1974, but without being part of a tax abatement program like those mentioned above, and it is not a Loft, then we have all we need to confidently assert that the apartments in the building are not Rent Stabilized.

But if the circumstances in § II, above, are present, then we need to start looking for exceptions. And here we go!

A) Exceptions to Rent Stabilization Status Where the Building was Built Before 1974 and Contains More Than Six Units.

If the building was built before 1974 and has more than six units, the most common reasons that a unit in the building would NOT be subject to Rent Stabilization are:

1. The Building was Converted to a Co-Op and the Tenant is NOT the First Tenant in the Unit After Conversion.

If a building was converted to a co-op and the tenant in the unit is NOT the first tenant in the unit after the time of conversion, ie. a "non-purchasing tenant", then the apartment is probably exempt from Rent Stabilization.[4]

2. The Unit was Luxury Deregulated, which was Properly Documented with the DHCR.

If the rent legally hit $2,500.00 and some other criteria were met, then the unit may have been luxury de-regulated.

Here is the problem I find with this exception. The phrases "legally hit $2,500.00" and "some other criteria" are areas of incredible detail that are way beyond the scope of this article. You need someone who knows the rent laws to assess whether or not the rent has "legally" made it to $2,500.00.

Moreover, luxury deregulation of an occupied apartment may only be obtained by way of an application to the DHCR.

The problem I have is when landlords come to me and tell me the apartment is de-regulated because the rent is over $2,500.00. This is circular reasoning and leads nowhere. The information I need is this – why did the rent get to be over $2,500.00?!

Finally, note that there is no luxury de-regulation option for Lofts or for buildings subject to Rent Stabilization via a tax abatement program.

3. The Building was Substantially Rehabilitated.

If the building was substantially rehabilitated when it was vacant and the owner did not submit the building to a tax abatement plan that made the building temporarily Rent Stabilized, then none of the units in the building are Rent Stabilized.

In general, DHCR will find that a building has been substantially rehabilitated and is, therefore, exempt from coverage under the Rent Stabilization Law, where the owner demonstrates that the following criteria have been met:

a. At least 75% of the building-wide and apartment systems must each have been completely replaced with new systems. Additionally, all ceilings, flooring and plasterboard or wall surfaces in common areas must have been replaced; and ceiling, wall, and floor surfaces in apartments, if not replaced, must have been made as new as determined by DHCR.(5)

b. The rehabilitation was commenced in a building that was in a substandard or seriously deteriorated condition. The extent to which the building was vacant of residential tenants when the rehabilitation was commenced shall constitute evidence of whether the building was in fact in such condition. Where the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time.

Moreover, to document a claim of substantial rehabilitation, the landlord needs records demonstrating the scope of the work actually performed in the building. These may include an itemized description of replacements and installations, copies of approved building plans, architect's or general contractor's statements, contracts for work performed, appropriate government approvals, and photographs of conditions before, during, and after the work was performed, and proof of payment by the owner for the rehabilitation work may be required.(6)

Again, it's up to a court (or DHCR, which has concurrent jurisdiction with the court) to decide whether or not substantial rehabilitation has occurred.

I once had a case where substantial rehabilitation had certainly occurred but the landlord did not bother to get DHCR's opinion on the project. Therefore, we found ourselves in Supreme Court arguing with a serially deadbeat tenant about his Rent Stabilization status, trying to reconstruct the details of a construction project that was over a decade old.

One final thing to add to this section -- the Rent Stabilization Law specifically states that it does NOT apply to a building for which the certificate of occupancy was obtained after March 10, 1969. Sometimes you do not even need to start thinking about the scope of the rehabilitation, you can just check when the certificate of occupancy was first obtained.[7]

B) Exceptions to Rent Stabilization Status when the Building is or was Part of a Tax Benefit Program, Such as J-51, 421-A, or the Private Housing Finance Law.

N.Y. Real Prop. Tax Law § 421-a, designed to encourage new construction of New York City residential housing, provides for a partial real-estate tax exemption over a period of at least 10 years. A provision of New York City Law, known as "J-51," designed to encourage rehabilitation of property as housing accommodations, provides for real-estate tax-abatement and exemption over a period of years. In return for tax programs like this, landlords must submit the building to rent regulation for the duration of the tax-benefit period, even when a building is constructed after 1974, and would otherwise be exempt from rent regulation.

Rent Stabilization goes away when the tax abatement burns off, but only under the following circumstances:

1. Housing accommodations subject to the law remain regulated until a vacancy occurs, at which time free-market rents may be charged.

2. Alternatively, decontrol may occur upon the expiration of a tenant's lease after the tax benefits expire provided the tenant's initial lease and each renewal thereof contained a notice, in at least 12-point type, informing the tenant that the unit's protected status would eventually lapse.[8]

C) Exceptions to Rent Stabilization Status when the Building is a Loft.

A Loft (or "Interim Multiple Dwelling") is an old commercial building that is now used for residential purposes, which is in the process of obtaining a proper certificate of occupancy.[9] Lofts are administered by the Loft Board. You can know whether or not a building is a loft by looking at the Loft Board website[10] .

1. Sale or Abandonment of Tenant Improvements

Loft apartments are subject to the Rent Stabilization rent increases, unless the converter either sold or abandoned [11] the fixtures in the apartment to the building owner. In either case, the Landlord must file a report with the Loft Board.[12]

2. Sale of Improvements Only Stops Rent Stabilization While the Building is an IMD, Upon Getting the Permanent C of O, Rent Stabilization Status May Return

When a building stops being an Interim Multiple Dwelling upon receiving its permanent residential certificate of occupancy, if the building would otherwise be subject to Rent Stabilization (for example, if the building was built before 1974 and has more than six units, see above), then the units may become Rent Stabilized, even if the fixtures were sold or abandoned! Thus, the sale or abandonment of fixtures only gets you off the hook for Rent Stabilization until the building is legalized. When the building gets its permanent residential certificate of occupancy the inquiry starts anew.

IV. CONCLUSION.

I pride myself on writing articles for clients and potential clients that give a lot of real information that is useful, as opposed to mere marketing pieces. I never worry about "giving away my secrets." There are no secrets, the information is out here. In today's world, I believe that for a lawyer to be successful she needs to be better at sharing information, not better at hording it.

Nevertheless, each sub-section of this article could have its own article (or book), and it would not take the place of working with someone experienced in these areas (me or someone else, alas I am not the only game in town). Being wrong about the Rent Stabilization status of an apartment can have a devastating effect on a building's bottom line.

I often say to my litigation clients – Why didn't you come and ask me about this when you were acquiring the building? I could have warned you and you could have utilized this potential problem in your negotiations for a downward modification on the price. Increasingly, people are using my firm's services in that way – to avoid litigation, rather than to engage in it. It's cheaper to pay us for due diligence than for litigation. Although I am happy to be hired for either!

(1) Thornton v. Baron, 5 N.Y.3d 175 (2005).

(2) New York City Administrative Code 26-505(b).

(3) New York City Administrative Code 26-504(c).

(4) NY Gen. Bus. Law § 352-eee.

(5) List of Building-wide and Apartment Systems:

1. Plumbing 2. Heating 3. Gas supply 4. Electrical wiring 5. Intercoms 6. Windows 7. Roof 8. Elevators 9. Incinerators or waste compactors 10. Fire escapes 11. Interior stairways 12. Kitchens 13. Bathrooms 14. Floors 15. Ceilings and wall surfaces 16. Pointing or exterior surface repair as needed 17. All doors and frames including the replacement of non-fire-rated items with fire-rated ones

(6) DHCR Bulletin 95-2.

(7) NYCRR 26-505(d).

(8) In 254 Pas v. Gamboa, 16 Misc.3d 131(A) (App. Term 1st 2007), the lease rider in question failed to set forth the requisite notice of the "approximate date on which such benefit period is scheduled to expire", inasmuch as it specified an expiration date of June 30, 1991, when, in fact, the actual expiration date of the abatement was June 30, 1997. The court rejected Landlord's claim that this six-year discrepancy was de minimus, especially given the landlord's improper tender of a fair market lease in 1995. Although in Mayflower v. Deri, 36 Misc.3d 128(A) (App. Term 1st 2012), the court says that, "The notice provision contained in the parties' July 2, 2009 lease rider was not rendered invalid by any minor misstatement as to the approximate date on which such (tax) benefit period is scheduled to expire". The problem is that this case does not indicate how far off the date was.

(9) Multiple Dwelling Law § 281.

(10) http://www.nyc.gov/html/loft/html/home/home.shtml.

(11) Abandonment has not really been an option since 2006 when the Loft Board abandoned the regulations.

(12) Multiple Dwelling Law § 286(12).

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