ALM | LAW.COM

New York Law Journal

LANDLORD-TENANT LAW

Retroactively Reshaping the Analysis of Succession

By Gary M. Rosenberg and Ethan R. Cohen
August 6, 2024

In prior articles in August 2023 and February 2024, we explored how the New York State Legislature had recently passed bills that retroactively defined the "fraud exception" to the pre-HSTPA four-year statute of limitations and lookback rule for rent overcharge claims, raising issues about the constitutionality of legislation that retroactively defines provisions of law, while purporting to clarify prior law.

These issues will potentially be addressed by the New York State Court of Appeals next year in actions in which leave to appeal has already been granted, including *Burrows, et al. v. 75-25 153rd Street LLC* and *Aras, et al. v. B-U Realty Corp., et al.*

Following the theme of retroactive definitions, this article explores a different facet of the same initial bill, S-2980-C, pursuant to which the Legislature retroactively defined when a tenant is considered to have "permanently vacated" a rent-stabilized apartment for purposes of determining succession rights for family members, which was previously undefined by the Legislature.

In doing so, the Legislature upended more than a decade of consistent caselaw in the First Judicial Department on which landlords and tenants have relied to determine their rights, but on the other hand, purportedly resolved a split in the First and Second Judicial Departments regarding this issue.

Gary M. Rosenberg

Ethan R. Cohen

Yet, because this new definition necessarily applies retroactively to past conduct, often where such conduct is more than a decade old, it again raises issues about the constitutionality of legislation that retroactively defines operative provisions of law.

Generally, pursuant to, *inter alia*, New York Public Housing Law §14(4)(a) and Rent Stabilization Code §2523.5(b)(1), a family member of a rent-stabilized tenant is entitled to succeed to the rent-stabilized rights of the tenant where the tenant "has permanently vacated" the apartment and the family member has co-resided with the tenant in the apartment as a primary residence for at least two years "immediately

GARY M. ROSENBERG *is the founding member of Rosenberg & Estis and chairman of the firm.* **ETHAN R. COHEN** *is a member of the firm and head of its appellate litigation department.*

prior to the permanent vacating" of the apartment by the tenant (or a period of at least one year where such person is a senior citizen or a disabled person).

If the family member co-resided with the tenant of record for the requisite time period immediately prior to the tenant "permanently vacating" the apartment, the family member is entitled to be named as a rent-stabilized tenant on the renewal lease that was offered to the tenant.

Therefore, the date on which the tenant of record is considered to have "permanently vacated" an apartment is critical to determining succession rights.

In the First Department, a mountain of caselaw, since at least 2012—affirmed by the Appellate Division in 2019 and 2021—has consistently held that a tenant of record who moves out of an apartment but continues to sign and return renewal leases to the landlord and/or pay rent in his or her own name

Therefore, there will be many cases now where the Legislature has rendered a family members' succession claim to be time-barred by changing the definition of "permanently vacated" for purposes of succession.

"cannot be found to have permanently vacated [an] apartment at any time prior to the expiration of the last lease renewal" that he or she signed (*Well Done Realty, LLC v. Epps*, 177 AD3d 427 [1st Dept 2019]; *see 186 Norfolk LLC v. Euvin,* 192 AD3d 414 [1st Dept 2021]; *Third Lenox Terrace Assoc. v. Edwards*, 91 AD3d 532 [1st Dept 2012] ["although the apartment was no longer her primary residence after 1998, Cynthia, having continued to pay the rent and execute renewal leases extending through November 2005, cannot be found to have permanently vacated the apartment at any time prior to the expiration of the last lease renewal on November 30, 2005"]; *GVS Properties IV LLC v. Marte*, 66 Misc3d 139[A] [App Term, 1st Dept 2020]; *Sonora Assoc. LLC v. Valencia*, 66 Misc3d 148[A] [App Term, 1st Dept 2020]; *West 48th Holdings LLC v. Herrera*, 66 Misc3d 150[A] [App Term, 1st Dept 2020]; *Diagonal Realty LLC v. Arias*, 66 Misc3d 150[A] [App Term, 1st Dept 2020]; *206 W. 104th St. LLC v. Zapata*, 45 Misc3d 135(A) [App Term, 1st Dept 2014]; *525 W. End Corp. v. Ringelheim,* 43 Misc3d 14 [App Term, 1st Dept 2014]; *Extell Belnord LLC v. Eldridge*, 42 Misc3d 143[A] [App Term, 1st Dept 2014]; *PS 157 Lofts LLC v. Austin*, 42 Misc3d 132(A) [App Term, 1st Dept 2013], *appeal dismissed* 25 NY3d 1186 [2015]; *BCD Delancey LLC v. Jian Gou Lin*, 42 Misc3d 132[A] [App Term 2013]; *360 W. 55th St., L.P. v. De George*, 36 Misc3d 126(A) [App Term, 1st Dept 2012]; *William 165 LLC, v. Ser-Boim*, 68 Misc3d 771 [Civil Ct, New York County 2020]; *90 Elizabeth Apt. LLC v. Eng*, 58 Misc3d 300 [Civ Ct, New York County 2017]; *RSP UAP-3 Prop. LLC v. Schulz*, 2017 NY Slip Op 32859[U] [Civ Ct, Bronx County 2017]; *ST-DIL LLC v. Kowalski*, 2015 NY Slip Op 31713[U] [Civ Ct, New York County 2015]).

In all of these cases, family members who did not timely assert succession rights when the tenant of record actually moved out were unable to establish succession rights many years or more than a decade later, because they could never establish that they co-resided with the tenant for the two years prior to the tenant permanently vacating at the expiration of the last signed renewal lease—as the tenant admittedly did not reside in the apartment for those years.

The effect of these holdings was that, if a tenant moved out of an apartment but, instead of a family member asserting succession rights, the tenant continued to execute renewal leases and/or pay rent in his or her own name, the tenant vitiated the succession claim of the family member by not timely advising the landlord that they had vacated. This resulted in consistent summary judgment rulings denying succession rights in the First Department, often more than a decade after the tenant vacated.

As one court explained the reasoning: "[T]he claim must still be timely asserted after the vacatur date… The reason behind this is twofold. First, under the Code, the burden is on the successor tenant to assert said right…Second…the Code contemplates that these issues will be addressed when the lease comes up for renewal after the tenant of record vacates…*However, if a succession claim is not timely*

asserted, it tends to impair a landlord's ability to investigate and prosecute its rights…" (*Malone v. Sapinsky*, 31 Misc3d 1239(A) [Civ Ct, New York County 2011] [citations omitted] [emphasis supplied]).

In the Second Department, however, in *Matter of Jourdain v. New York State Div. of Hous. & Community Renewal*, 159 AD3d 41 (2d Dept 2018), *lv dismissed* 24 NY3d 1009 (2019), the Appellate Division disagreed with the First Department, holding that, although the language of the operative statute and regulation is ambiguous, and could support the First Department's reading, "we conclude that…DHCR intended the 'permanent vacating of the housing accommodation by the tenant' to mean the time that the tenant permanently ceased residing at the housing accommodation, and that the mere execution of a renewal lease and the continuation of rent payments by the tenant after the tenant permanently ceases to reside at the housing accommodation does not extend the relevant time period."

Thus, in the Second Department, the relevant time period in which a family member must reside with the tenant is the period prior to when the tenant ceases actually residing in the apartment, regardless of whether the tenant continued to signed renewal leases.

In 2023, the Legislature passed S-2980-C, which was signed into law in December 2023. Therein, the Legislature amended Public Housing Law § 14(4)(a) to provide that: "'permanently vacated' shall mean the date when the tenant of record permanently stops residing in the housing accommodation regardless of subsequent contacts with the unit or the signing of lease renewals or continuation of rent payments."

In turn, DHCR amended Rent Stabilization Code §2523.5(b) to provide that: "A tenant shall be considered to have permanently vacated the subject housing accommodation when the tenant has permanently ceased residing in the housing accommodation. The continued payment of rent by the tenant or the signing of renewal leases shall not preclude a claim by a family member…in seeking tenancy."

This new definition vitiated more than a decade of caselaw in the First Department, on which landlords have relied in determining their rights and investigating claims. In S-2980-C, the Legislature provided that this new definition applies to "all pending proceedings," which means that it purportedly applies retroactively in pending cases.

Moreover, even in future cases that have not yet been commenced, the law necessarily applies retroactively to past conduct in such cases because it applies where the tenant of record vacated many years, or even a decade, earlier, but continued to sign renewal leases.

Until now, landlords in the First Department relied on the consistent caselaw holding that they need not investigate or be able to produce records establishing that a family member did not actually reside with a tenant many years, or a decade, earlier.

However, under the new retroactive definition, a landlord who relied on this case law may now be required to litigate whether a family member resided with a tenant *at any time in the past*, even more than a decade ago, instead of during the two years prior to the most recent renewal lease.

For example, in *GVS Properties IV LLC v. Marte*, 66 Misc3d 139(A) (App Term, 1st Dept 2020), the tenant moved out in 2003, but continued to sign renewal leases until 2016. In *Third Lenox Terrace Assoc. v. Edwards*, 91 AD3d 532 (1st Dept 2012), the tenant moved out in 1998, but continued to pay rent and sign renewal leases extending through 2005.

In *Sonora Assoc. LLC v. Valencia*, 66 Misc3d 148(A) (App Term, 1st Dept 2020), the tenant moved out in 1983, but continued to sign renewal leases until 2018. In *West 48th Holdings LLC v. Herrera*, 66 Misc3d 150(A) (App Term, 1st Dept 2020), the tenant moved out in 2004, but continued to execute renewal leases until 2017. In *206 W. 104th St. LLC v. Zapata*, 45 Misc3d 135(A) (App Term, 1st Dept 2014), the tenant moved to Puerto Rico in the 1990s, but continued to sign renewal leases until 2006. In all of these cases, and many more, succession rights were denied, but the analysis would be entirely different under the new law. The new retroactive definition of "permanently vacated" would have likely changed the result in all of the above First Department cases, and required the landlord to litigate whether a family member co-resided with a tenant more than a decade ago.

However, until now, landlords in the First Department did not believe they needed to keep decades of records or investigate decade-old claims to preserve the ability recover apartments from tenants.

Notably, in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. and Community Renewal*, 35 NY3d 332 (2020), the Court of Appeals held that portions of the HSTPA were unconstitutional as applied retroactively to past conduct, including because it would "upend[] owners' expectations of repose relating to conduct that may have occurred many years prior," particularly where landlord "reasonably relied on pre-HSTPA statutory and regulatory provisions to destroy records," and because "application of the amendments to past conduct would not comport with retroactivity jurisprudence or requirements of due process."

A similar analysis could apply here, and will likely be litigated in the years to come. To wit, a Landlord who listened to the First Department for a decade may now suddenly be stuck disputing whether a family member co-resided with a tenant of record more than a decade ago, which may be all but impossible to prove or disprove, rather than litigating whether a family member co-resided with the tenant of record only within the two years prior to the expiration of the most recent renewal lease.

However, even if the new law applies retroactively, the issues of waiver and laches may prevent family members from belatedly asserting succession rights years or a decade later. Courts generally hold that "where an occupant does not timely assert a succession claim, it is generally deemed waived" (*Malone v. Sapinsky*, 31 Misc3d 1239(A) [Civ Ct, New York County 2011], citing *South Pierre Assoc. v. Mankowitz*, 17 Misc3d 53 [App Term, 1st Dept 2007]; *see Third Lenox Terrace Assoc.*, 23 Misc3d 126 [A] ["To ensure the fair and orderly resolution of succession disputes, the governing Code provision contemplates the timely interposition of succession claims"]). This should remain true whether or not the definition of "permanently vacated" has changed–but the application of these principles, and the constitutionality of the new retroactive definition of "permanently vacated" as applied to past conduct, is yet to be seen.

Moreover, due to the Legislature's retroactive change in the definition of "permanently vacated," the Legislature has potentially rendered many family members' succession claims to be barred by the applicable statutes of limitations, including the six-year statute of limitations for a declaratory relief action, contract claim, enforcing a statutory right, or any action for which no limitation is specifically prescribed.

Namely, by the new definition, the Legislature has now provided that the family members' succession claim matured and accrued when the tenant actually vacated the apartment, which may be more than six years ago in many cases, including in most of the cases cited above.

Before the new law, the family members' succession claim did not accrue in the First Department until the tenant permanently vacated at the expiration of the last signed renewal lease, but now, the Legislature has deemed the succession claim as maturing and accruing many years or a decade earlier, when the tenant actually stopped residing in the apartment.

Therefore, there will be many cases now where the Legislature has rendered a family members' succession claim to be time-barred by changing the definition of "permanently vacated" for purposes of succession. Indeed, a succeeding family member is only entitled to be named on the renewal lease following the permanent vacature of tenant, but in cases where the tenant vacated many years ago, the tenant has already signed the renewal lease and subsequent renewal leases.

The Legislature has certainly weaved a tangled web here, without necessarily considering these issues. Notably, however, the new definition of "permanently vacated" has already been applied in at least one case in the First Department, by the Civil Court of Bronx County in *Owl Creek Properties, LLC v. Timmons*, Index No. L&T 302566/21.