Civil Court Committee's Express Lunch Program – Rent Regulation Caselaw Update

By Helene W. Hartig

On Thursday, February 16, 2017, the ***Civil Court Committee*** sponsored an interactive "lunch and learn" program. This "express" one-hour presentation provided a relaxed educational setting for new and experienced attorneys, opposing counsel, law clerks, Judges, and court personnel to simultaneously "break bread" and to share insights, experience and expertise. The topic for the hour was the criteria used to determine whether a market rate rental apartment is actually rent stabilized and how practitioners can best assist landlords, tenants and would be investors in assessing whether a rent overcharge has occurred.

Interacting with a near capacity crowd, seasoned attorneys ***Eileen O'Toole***, a partner at the landlord oriented law firm Borah Goldstein Altschuler Nahins and Goidel PC, and ***Elizabeth Donoghue***, a partner at the tenant focused law firm Himmelstein McConnell Gribbens and Donoghue, reviewed their extensive hand out materials and explained the far reaching ramifications of the Appellate Division's landmark decision, *Altman v. 285 W. Fourth LLC*, 127 AD3d 654 (1st Dep't 2016).

According to O'Toole and Donoghue, prior to *Altman*, appellate courts held that apartments could be automatically removed from the protections afforded by rent stabilization when a departing rent stabilized tenant vacated an apartment and the rent for the incoming new tenant (including vacancy allowances and individual apartment improvement increases) exceeded the vacancy deregulation threshold ($2,000.00 in the *Altman* case). Conversely, in *Altman*, the Appellate Division, First Department held that it was the rent of the departing tenant, and not the incoming occupant, that was the determinative factor. As such, pursuant to *Altman*, a unit could only be removed from rent regulation when the last legal rent for the departing (as opposed to the incoming) exceeded the deregulation threshold at the time of vacatur.

Post *Altman* decisions have revealed that this issue is still not settled. For example, as our presenters explained, in *233 E. 5th St. LLC v. Smith*, 54 Misc3d 79 (App. Term, 1st Dep't 2016), Judge Stoller followed the reasoning set forth in *Altman* and held that a unit was improperly deregulated. However, in January 2017, he was reversed by the Appellate Term, First Department. The three justice panel in that forum held that the unit in question had crossed the luxury threshold while it was vacant and was thus was no longer constrained by rent regulation. The Court also observed that the case could not be decided in a vacuum and that following *Altman* as precedent "would effectuate a sea change in nearly two decades of settled statutory and decisional law." *Altman* has also been rejected in other situations, such as *Aimco 322 East 61 Street v. Brosius*, 50 Misc3d 10 (App. Term, 1st Dep't 2015). In *Brosius*, Justice Mendez held that a landlord who combined two apartments and created one apartment that did not previously exist was not bound by the restrictions created by Altman and allowed to collect a market rent.

What is the bottom line for puzzled practitioners? Do not be discouraged by the inconsistent judicial guidance and lack of clear direction from the Division of Housing and Community Renewal, the administrative agency charged with overseeing and administering rent laws. O'Toole also emphasized the importance of researching an apartment's history in order to figure out whether an existing rent is justified. As a preliminary step, O'Toole suggested reviewing the landlord's files and back-up documentation, which would presumably include examining rent histories, leases, contractors invoices for individual improvements, cancelled checks, and other documents that could reasonably explain how the rent was increased over the years. O'Toole also recommended checking whether there are tax benefits, such as a J-51 tax abatements, in effect that may impact the landlord's ability to charge a fair market rent for a particular unit.

Donoghue, generally agreed with O'Toole regarding the importance of research, which would presumably include checking the rent registrations and histories available from the DHCR to determine any discrepancies in the rent, the court's online record system for prior relevant rulings, and the Department of Buildings website to check whether permits had been filed for claimed individual apartment improvements that would justify an increase. Donoghue, a tenant's advocate, also reminded the audience of the fact that in today's economic climate, many tenants routinely complain that the rent is simply too high. As such, *Altman* is of great importance, as it affords great protection to tenants who may have been misled, albeit inadvertently, by their landlords. The result of a reversal can be a boon to once struggling tenants by ensuring an affordable "capped" rent and a substantial refund. For this reason, Donoghue advises market tenants in buildings with six or more units to obtain their rent histories from the Division of Housing and Community Renewal and to review the history with counsel before their current lease expires, along with a proof of their payment history. It could be a life changer.

Editor's Note: Since the February 16, 2017 program, the Court of Appeals has agreed to review the landlord's appeal of the Appellate Division's decision in *Altman*. Stay tuned.

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