Panic Over 'Branic'? Shelter Occupant Entitled to Rent-Stabilized Lease

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Imagine: A gas explosion on Park Avenue causes the city to temporarily relocate residents to a nearby hotel while their building undergoes repairs. Some of them enjoy their temporary accommodations, claim a permanent tenancy and demand rent-stabilized leases and benefits. Are people truly entitled to rent stabilization because they happened to have spent time at a temporary shelter as their homes are rebuilt? Applying the Appellate Division, First Department's, decision in *Branic International Realty v. Pitt*,[1] the answer would be yes. The New York Court of Appeals will hear argument on Oct. 22.

The First Department held in *Branic* that a beneficiary of a city-administered shelter plan, in temporary occupancy in a shelter continuously for six months, is a "permanent tenant" under the Rent Stabilization Code, entitled to rent-stabilization benefits, including a rent-regulated lease. The Branic decision is far-reaching, as no court has ever granted rent-regulated status to a temporary benefit shelter recipient. The court failed, however, to consider the temporary nature of the housing and the specific limitations of "shelter" accommodations under the Social Services Law.

Case Background

New York City provides housing for the homeless, including a public assistance shelter allowance for those in need of emergency housing. To meet this need, the New York City Human Resources Administration (HRA) contracts with property owners and not-for-profit community-based corporations to provide shelter and related services. When HRA determines that sufficient emergency housing is unavailable, it contracts with single-room occupancy (SRO) facilities such as SRO hotels, to provide shelter for the homeless.

Branic International Realty Corp. owns an SRO hotel with rent-stabilized units. Branic and HRA entered into a "memorandum of understanding" (MOU) whereby HRA agreed to rent 134 Branic hotel rooms as shelter accommodations. In January 2003, HRA referred its client, Phillip Pitt, to Branic's hotel for emergency housing. Pitt remained at Branic's hotel for the next four years, until April 2007, and HRA paid Pitt's rent. By September 2006, Pitt was the sole HRA client at Branic's facility, refusing to relocate. HRA's MOU with Branic expired in December 2006. HRA notified Branic that Pitt no longer resided at the facility and payments would stop in April 2007. HRA ceased paying for Pitt's room, but Pitt continued living there without paying.

> The Branic decision is the first to grant rent-regulated status to a temporary benefit shelter recipient.

In June 2007, Branic commenced a licensee holdover proceeding, claiming that Pitt's right to occupy the shelter unit was terminated when HRA ended Pitt's shelter benefits. Each side moved for summary judgment. Pitt denied being a licensee, but claimed to be a "permanent tenant" under the Rent Stabilization Code. The Housing Court dismissed, holding that Pitt was a permanent rent-stabilized tenant under Rent Stabilization Code 9 NYCRR 2520.6(j), protecting him from eviction. The Appellate Term, First Department, reversed.

The Decision

The Appellate Division, First Department, reversed the Appellate Term and granted summary judgment to Pitt, finding he was entitled to a rent-stabilized lease having established occupancy of the unit for a minimum of six months, thus designating him as a "permanent tenant" under RSC 2520.6(j). The First Department relied principally on two sections of the RSC:

- RSC 2520.6(j), which defines "Permanent tenant" for housing accommodations in hotels as "an individual or such individual's family members residing with such individual, who have continuously resided in the same building as a principal residence for a period of at least six months."
- RSC 2520.6(m), which defines a "hotel occupant" as "any person residing in a housing accommodation in a hotel who is not a permanent tenant. Such person shall not be considered a tenant for the purposes of this Code, but shall be entitled to become a permanent tenant as defined in subdivision (j) of this section, upon compliance with the procedure set forth in such subdivision."

Reconciling the two RSC sections, the First Department concluded that no landlord-tenant relationship is needed to become a permanent tenant. The only requirement for establishing permanent tenancy is six months or more of continuous residence in a particular hotel unit.

The Appellate Division referenced the HRA/Branic memorandum of understanding, which provides that an "Eligible Person" can become a permanent tenant and that such a person may only be removed with cause. Pitt's occupancy in an SRO hotel for more than six months entitled him to protections afforded a permanent tenant.

The court also held that the HRA/Branic MOU was not a "lease" under RSC 2520.11(b), which exempts an SRO room

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from the Rent Stabilization Code provided it is rented, operated or used by a government agency. The court stated that the MOU does not show the "surrender of absolute possession and control of property to another party for an agreed-upon rental." The court reasoned that Branic agreed to set aside "at most" 134 rooms for eligible homeless people referred to it by the HRA, which only agreed to pay for those rooms filled, not to fill all the rooms. Citing case law, the court held that without precise terms such as the number of rooms to be occupied and paid for by HRA, the MOU could not be considered an RSC-exempted lease.

Analysis

As noted, the Branic decision is the first to grant rent-regulated status to a temporary benefit shelter recipient, but overlooks the irreconcilability of RSC 2520.6(j) with the Social Services Law, rules and regulations (18 NYCRR).

Section 491.2, 18 NYCRR, defines a "shelter for adults" as "an adult care facility established and operated for the purpose of providing *temporary* residential care, room, board, supervision, information and referral, and where required by the department or otherwise deemed necessary by the operator, social rehabilitation services for adults in need of *temporary accommodations*, supervision and services." (Emphasis added.) To paraphrase the Appellate Division in another case, "[u]nless temporary shelter is to become life-long housing," occupants of temporary shelter cannot become permanent tenants.[2]

To interpret RSC 2520.6(j) as in *Branic* "would convert a temporary expedient into a permanent entitlement. [S]uch a reading of the [statute]...would convert defendants from providers of shelter-of-last-resort into housing guarantors for an indeterminate portion of the population."[3] As explained in *McCain v. Koch*, shelter benefits "do not create an entitlement to continued residency in the emergency shelter of one's choice. Emergency shelter residents do not have a due process right to be housed in any particular neighborhood or type of housing."[4]

The rules and regulations under the Social Services Law reflect its mission to provide temporary shelter (with a goal of facilitating return to permanent housing). Rent allowances for hotel/motel facilities are "made for recipients *temporarily* housed in hotel/motel facilities." 18 NYCRR 352.3(e) (emphasis added). "Homeless" persons are those, in relevant part, with a primary night time residence that is "temporary," including "a supervised shelter, such as a hotel or motel or congregate shelter, which is designed to provide *temporary* accommodations." 18 NYCRR 387.1(u)(2)(i) (emphasis added). Families may be kept in so-called Tier I facilities for up to 21 days, absent certain conditions, and Tier II facilities must provide assessment services within 10 days of admission and be reviewed biweekly and revised as necessary to obtain permanent housing arrangements. 18 NYCRR 900.7 & 900.10.

Additionally, under RSC 2520.6(j), to become a "permanent tenant" one must be in a "housing accommodation," i.e., "that part of any building or structure, occupied or intended to be occupied by one or more individuals as a *residence, home, dwelling unit or apartment*, and all services, privileges, furnishings, furniture and facilities supplied in connection with the occupation thereof." RSC 2520.6(a) (emphasis added). But Branic providing its occupants with mere "shelter," is a more transient service not within the definition of "housing accommodation."

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For a "hotel" to confer "permanent tenancy" and rent-stabilization protections at least 51 percent of the "permanent tenants" must be provided with maid and linen services. RSC 2521.3(b). No occupants of Branic's hotel received maid/linen services, and none can be classified as "permanent" under the provisions that governed their entry into the facility (the Social Services Law and 18 NYCRR thereunder).

The MOU delineated that the unit was to be used by the HRA benefit recipients for "emergency housing," where "there is insufficient emergency housing programs operated by not-for-profit community based corporations for such programs to provide shelter and related services to HRA clients in need of emergency housing and eligible for a public assistance shelter allowance ('Eligible Persons')." Branic was identified in the memorandum as "an emergency housing facility."

The First Department characterized the MOU as providing "that an eligible person can become a permanent tenant and that Branic may not evict such a person without cause and notice to HRA." But the memorandum did not affirmatively state that an eligible person can become a permanent tenant, or grant authority for such a transformation. It merely referenced "a referred eligible person *who has become* a permanent tenant in accordance with the provisions of 9 NYCRR §§2520.6(j) and 2522.5(a)(2) of the New York City Rent Stabilization Code, or who has resided in the Facility [the Branic Emergency Housing Facility] for thirty (30) consecutive days or

longer." (Emphasis added.) The memorandum stated that such persons "shall only be removed or evicted pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order, as required by the New York City Unlawful Eviction Law."

The memorandum of understanding was an agreement, not a law, rule or regulation. A reasonable SRO operator could read the MOU to mean that the normal rules of eviction apply to one sent to the SRO who later became a permanent resident in the same manner anyone else would. The MOU did not telegraph that a shelter occupant who overstays can become a permanent tenant with RSC protections. It is implausible that Branic willfully agreed to that.

The purpose of the MOU and the Social Services Law was to find "shelter" accommodations for the homeless. Temporary shelter cannot be reconciled with "housing accommodation" required for permanent tenancy. The RSC exempts coverage for rooms or other housing accommodations in hotels where such housing accommodations are used for transient occupancy. RSC 2520.11(g).

Branic addresses rights vested in shelter occupants under contracts between landlords and the social service agency. This issue affects a large number of owners and managers of residential properties whose occupants may now declare permanent tenancy in an otherwise temporary shelter, especially where the city agency keeps a shelter recipient at a particular site beyond 30 days. The decision overlooks the temporary nature of shelter housing under the Social Services Law. Nor do the parties' briefs to the New York Court of Appeals specifically address this. The mere use of the building as a shelter with no permanent hotel units excludes the premises from RSC status.

Branic subverts the legislative intent of providing temporary shelter benefits to homeless individuals and families. It may result in homeless and emergency housed people seeking permanent RSC-protected accommodation in hotels. Conversely, hotel owners may reconsider their positions and refuse to contract for more than artificially short-term shelter accommodations, causing further disruption and administrative burden on an already strained population and system. Similarly, single-room occupancy operators will hesitate signing a city memorandum of understanding if it may mean having to recognize temporary shelter residents as permanent rent-stabilized tenants.

Hopefully, the Court of Appeals will limit *Branic* and reverse the unjust consequences of applying rent-regulated status to otherwise temporary shelter units.

1. *Branic Int'l Realty Corp. v. Pitt*, 106 A.D.3d 178, 963 N.Y.S.2d 210 (1st Dept. 2013), leave to appeal granted, 2013 Slip Op. 81582(U) (1st Dept. Aug. 6, 2013).
2. *Callahan v. Carey*, 307 A.D.2d 150, 153, 762 N.Y.S.2d 349, 352 (1st Dept. 2003).
3. Id.
4. *McCain*, 117 A.D.2d at 218, 502 N.Y.S.2d at 732.