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Preventing Fraud in Affordable Housing

By Jeff Seiden

The 421-a Affordable Housing Program has become more prevalent in New York City as more and more landlords and developers have chosen to obtain significant tax benefits in exchange for restricting rentals of 20% of their building to low-to-middle income families. In many instances, this program permits a low or middle income family to live in a luxury building, while paying a reduced rent and being afforded the protections of the Rent Stabilization Law.

To qualify for one of these coveted units, an applicant must meet strict household and income qualifications. Many of these buildings have significant waiting lists, sometimes in the hundreds. This has led many applicants to withhold information about members of their household and their assets in an effort to qualify for these Affordable Units. Once a tenant does qualify and becomes a tenant, he/she must certify household composition and income on an annual basis as a condition of continued tenancy. This has led to a new wave of litigation as the Affordable Housing Program has strict rules regarding fraudulent applications and/or false certifications.

In its strongly worded recent decision in 501 West 41st St. Associates v. Annunziata (2013 NY Slip Op 51922(U)), the Appellate Term held that the failure of a Tenant to fully disclose his assets and income is a non-curable ground for eviction as it constitutes a material noncompliance with the Affordable Housing Program. In the Annunziata case, the trial Court found that Respondent-Tenant Frank Annunziata's

initial 2002 application failed to disclose hundreds of thousands of dollars in funds held in joint accounts with his mother in a New Jersey bank to, and further he failed to disclose this income on each of his 2003-2006 annual income certifications.

In 2002 Annunziata filed an application to occupy an Affordable Unit. Based on the information he provided in his application about his income, he met the income requirements, which is calculated based upon household size and the Area Median Income (AMI). The application included a certification, in which Mr. Annunziata agreed that the contents of his application were true and accurate and that he would be subject to eviction if his application was incomplete.

As part of the Affordable Housing Program, Annunziata was also required to execute Rider to the Lease, which outlines the rules and obligations of the program. The lease Rider stated that

“any false, fraudulent, misleading or incomplete statement, representation, certification, documentation or other information...in connection with tenants application for the apartment, tenant’s initial certification of eligibility, or any recertification shall constitute material noncompliance under the lease, in which...tenant shall be subject to eviction.”

Annunziata’s fraud was not discovered until after he filed his 2007 recertification, five (5) years after he took occupancy of the Affordable Unit. The landlord discovered that Mr. Annunziata was claiming interest income on his taxes from a savings account in a New Jersey Bank. The landlord asked for account verification from that bank and learned that Mr. Annunziata was a joint holder of multiple accounts, none of which were

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listed on his initial application in 2002, nor any of his annual recertifications. These accounts contained funds in excess of \$200,000.

At trial Mr. Annunziata made two claims; (1) that the jointly held funds were his mother's and not his "assets," and (2) that he did not intentionally fail to disclose his assets on his application and annual recertifications. He also testified that he never made any deposits or withdrawals' from these accounts.

Judge Wendt ruled that Mr. Annunziata's testimony was not credible. Mr. Annunziata had signed signature cards for at two (2) of these accounts, giving him full access to the funds. The Court determined that these accounts were assets that should have been disclosed on his initial application and annual recertifications. Despite the fact that Mr. Annunziata had been residing in Affordable Unit for five (5) years when these accounts were discovered, the Court ruled it still constituted grounds for termination. This holding should aid landlords in enforcing the rules of the Affordable Housing Program as it is irrelevant how long the tenant had been living in the low-income unit when the fraud is discovered.

The Court also rejected Annunziata's argument that his lack of intent to deceive the landlord was a defense. The Court ruled the Low Income Rider, prohibited a tenant who submitted a false certificate to claim that he did not "intend" to mislead the landlord. Clearly, if the Court were to permit a tenant from using the lack of intent as an excuse for noncompliance, it would create a loophole, and certainly would encourage fraud, making the LIHTC rules almost impossible to enforce.

Mr. Annunziata also argued unsuccessfully that New Jersey banking laws should apply in determining ownership of the funds in the accounts, since the funds were located in a bank in New Jersey. Mr. Annunziata asserted that N.J. Statute §17:16l-4(a), mandates a presumption of half ownership of a joint account absent proof of net contributions. The Appellate Term affirmed Judge Wendt's rejection of that argument. The Court ruled that, since the low-income unit was located in New York, New York law would control. The New Jersey Banking statute Mr. Annunziata sought to utilize applies to determining ownership of the contents of an account where there is dissolution of a joint account, or determining ownership of an asset for testamentary disposition, bankruptcy, or divorce, which was not the case at bar.

In rejecting Mr. Annunziata's argument, the Court adopted the HUD Regulations for determining the measure of his interest in the joint account. Pursuant to Section 5-7(D)(1) of the HUD Manual, 50% of the income derived from the accounts is attributable to Mr. Annunziata as a result of being a joint owner. The Court interpreted the HUD handbook as not requiring a landlord to adopt a particular state's banking laws when determining eligibility for an Affordable Unit in New York. To do so, would permit an applicant to place his money in a joint account in another state or foreign country and permit him to claim that the money is not an asset for purposes of determining eligibility for low-income housing. Such an interpretation would permit unqualified persons to obtain low-income units and withhold them from the people the program was designed to help.

The Court adopted the landlord's argument that this breach of the Affordable Housing Program was material and not curable. The Court held the language in the

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lease was interpreted to mean that a false certification in the initial application and/or annual recertification cannot be cured. Consequently, Mr. Annunziata's argument that the landlord's failure to serve a notice to cure was rejected.

The biggest challenge for landlords who manage Affordable Units is to ensure that the information they receive from applicants and tenants is truthful and complete. The Appellate Term has made a strong statement that the failure of a Tenant to fully disclose their assets and income, no matter when it is discovered, constitutes material noncompliance with the Affordable Housing Program and will be grounds for eviction. This decision is a positive step in enabling Landlords efforts to enforce the Affordable Housing Program rules and regulations and to protect their receipt of tax credits.

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