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Rent-Stabilization in Illegal-Use Buildings

In neighborhoods like Gansevoort, Chelsea, Tribeca, Williamsburg, Greenpoint, and Long Island City, building developers are in a race to rehabilitate old manufacturing buildings, usually for purposes of selling off individual units as residential condominiums or other like projects.

The problem perennially faced is that there have been an increasing number of conversions of such loft-type commercial and manufacturing buildings to residential use without compliance with applicable building codes and laws and without regard for local laws regarding minimum housing maintenance standards.

With development still on the upswing, it has become extremely lucrative to seek out vacancies of the currently occupied units. Hence, there has been a recent upsurge of cases commenced where landlords have sought the ejection of tenants occupying any noncompliant lofts.

The problem for the litigator and for the landlords and tenants of the affected buildings is the often-contradictory decisions being issued almost monthly with each result very dependant on the venue of the building in question.

In what has now become a fashionable gambit to "save" the tenancy in such buildings, counsel for loft tenants have recently been quick to assert as a defense and a counterclaim that the tenants in those buildings, which typically number more than six units, are protected by the Emergency Tenant Protection Act (ETPA).

Court of Appeals

The Court of Appeals seemingly addressed this issue head-on in a decision entitled *Wolinsky v. Kee Yip Realty Corp.*, 2 NY3d 487, 779 N.Y.S.2d 812, 812 N.E.2d 302 (2004) (*Wolinsky*). In finding that the tenants were not protected by the Rent Stabilization Law and Rent Stabilization Code, the Court of Appeals reached the following conclusion:

Reading the ETPA and Loft Law together, we agree with the courts below that tenants' illegal conversions do not fall under the ambit of the ETPA.... The statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives. If the prior-enacted ETPA already protected illegal residential conversions of manufacturing space, significant portions of the Loft Law would have been unnecessary (see e.g., Multiple Dwelling Law §286 [3]). Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the



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"loft pioneers" (footnotes omitted)

Following the Court's holding in *Wolinsky*, the Appellate Division of the Second Department recently had before it a matter entitled *Glovesman Realty Corp. v. Jeffreys*, 18 AD3d 812, 795 N.Y.S.2d 462 (2nd Dept. 2005) (*Glovesman*), wherein the plaintiff-owner entered into commercial loft leases with the defendant-tenants. In rejecting the position of the tenants that they were subject to rent stabilization, the Appellate Division found as follows:

The Supreme Court erred in determining that the defendants were entitled to the protections of the Emergency Tenant Protection Act of 1974 (ETPA) (L 1974, ch 576, §4, as amended). The defendants' illegally converted lofts are not eligible for protection under the Loft Law (see Multiple Dwelling Law art 7-C). Further, these illegal conversions are not entitled to the protections of the ETPA (see *Wolinsky v. Kee Yip Realty Corp.*, 2 NY3d 487, 493, 812 N.E.2d 302, 779 N.Y.S.2d 812). Thus, the defendants' cross-motion for summary judgment dismissing the plaintiff's first cause of action for an ejection should have been denied.

Exception Carved Out

In an attempt to carve out an exception which would allow rent-stabilized status to inure to the benefit of tenants, tenant advocates began to argue that if the building is located in a zoning district where residential use could be either legalized or obtained as of right, they should not be bound by *Wolinsky* and *Glovesman*.

The first lower court case to adopt the exception advocated by tenants was *480-486 Broadway, LLC v. No Mystery Sound*, 11 Misc3d 1056A, 815 N.Y.S.2d 404 (Civ. Ct., N.Y. 2006) (*Mystery*), wherein the court set forth the following exception to *Glovesman* in a decision that opened the door for loft tenants in obtaining the possibility of rent stabilization:

...*Glovesman* is not dispositive of whether the applicability of the ETPA is limited to residential tenants also covered by the Loft Law. While in *Glovesman* the Second Department stated that the defendants' lofts were not eligible for protection under the Loft Law and were also not entitled to the protections of the ETPA, in its short decision the court did not discuss the factual findings upon which it relied; offered no explanation for its holding, and, notably, did not discuss whether it concurred with the lower court's finding that the premises at issue were capable of being legalized.

This holding by the court in *Mystery* was subsequently adopted by the court in *Otus v. Northside Development LLC*, 12 Misc3d 1186(A), 824 N.Y.S.2d 764 (Sup.

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Ct., Kings. Cty. 2006) (*Otus*), a case in which the zoning for the building in issue permitted residential use as of right pursuant to the city Zoning Resolution. In distinguishing *Wolinsky*, the Court held:

In *Wolinsky*, the Appellants rented commercial units and converted them for residential use in violation of the Zoning Resolution. At bar, it is undisputed that the building is in a mixed-use district which permits residential use as of right.

In granting the tenants rent-stabilized rights, and in seeking to distinguish *Gloveman*, the court in *Otus* committed a rather material error in the following paragraph:

Defendant cites the Appellate Division decision in *Gloveman*, in support of its position. The Court in *Gloveman*, citing *Wolinsky*, also stated, the "illegal conversions are not entitled to the protections of the ETPA." However, the *Gloveman* decision neither states in what manner the conversions were illegal, nor which statute, ordinance or regulation the conversions violated...in its decision in *Gloveman*, the Appellate Division did not explicitly discuss whether the conversions in question could be made legal under the existing Zoning Resolution. Rather, that Court simply concluded, these "illegal conversions are not entitled to the protections of the ETPA." 18 AD3d 812, 795 NYS2d 462.

'Mystery' and 'Otus'

A careful analysis of the decisions reveals that *Mystery* and *Otus* are flawed on two counts, the second of which will be discussed *infra*. As the appellate record bears out, the property in *Gloveman* did indeed concern a building where residential use was not precluded by the Zoning Resolution, and was in fact permitted as of right. Accordingly, the Appellate Division in *Gloveman* was extremely conscious of the fact that it was denying ETPA coverage to a conversion even where the Zoning Resolution permitted residential use as of right.¹

Therefore, had either the *Mystery* or *Otus* courts examined the record in *Gloveman*, they would have become immediately aware of the factual findings upon which it relied, and that the premises at issue were certainly capable of being legalized.

The Appellate Term of the Second Department in *Coraster Holding Co. Inc. v. Mastny*, 12 Misc3d 13, 816 N.Y.S.2d 817 (A.T. 2nd Dept. 2006) (*Coraster*), recognized the inherent error of the *Otus* and *Mystery* courts in their analysis of *Gloveman* and, following the *Gloveman* court, ruled that the tenants were not entitled to rent-stabilized status even though pursuant to the factual underpinnings of the *Coraster* case, "the building could be, and had to be, legalized" and further notwithstanding the fact that the "landlord had already filed plans with the Loft Board to legalize the building, including the subject unit."

Therefore, the lower courts in the Second Department must be constrained by *Gloveman* to hold that illegally converted spaces are not entitled to rent-stabilization protection even where residential use of the spaces are capable of legalization until the Appellate Division vacates its decision in *Gloveman* or the decision is reversed on appeal.²

In a very recent decision further signifying the glaring schism between the two departments in their approach to this issue, the Appellate Division of the First Department recently issued a decision entitled *Duane Thomas LLC v. Wallin*, 2006 N.Y. App. Div. LEXIS 14750 (1st Dept. 2006) (hereinafter *Wallin*), which involved a building located in the Tribeca Mixed Use District and in which a temporary residential certificate of occupancy covering the unit was obtained by the landlord a few years prior. It held that a "unit capable of being legalized...may thereafter be subject to rent stabilization."³

The Appellate Division ruling in *Wallin*, now the prevailing case in the First Department, heavily influenced the court in *142 Fulton LLC v. Hyatt*, 2007 N.Y. Misc. LEXIS 174 (Sup. Ct., N.Y. Cty. 2007) (*Hyatt*), the most recent case to address these issues. *Hyatt* correctly perceived the conflict between the First and Second department and, as a New York County court, appropriately found itself bound by *Wallin* and held that the tenants' units may be subject to the ETPA.

Who Is Right?

The answer is not so simple. In one respect, the decisions emanating from New York County all cited to and partially relied upon the *Mystery* case which, as it has been demonstrated, never examined the full appellate record to discern that the building in *Gloveman* could be legalized and thus failed to fully appreciate the basis of the holding in *Gloveman*.

Moreover, with all the focus on *Gloveman*, courts have seemingly overlooked *Wolinsky* and its full import. The Court of Appeals in *Wolinsky* hinged its ruling on the basis that one of the primary purposes of the Loft Law was to stop conversions of loft spaces for unauthorized residential use and did not limit and confine the Legislative intent of the Loft Law to only those zoning lots in which a variance for residential use could not ultimately be obtained. As the Court of Appeals in *Wolinsky* correctly perceived, the "window period" set forth in §281 of the Multiple Dwelling Law was a legislative pronouncement that unauthorized residential conversions by tenants will no longer be tolerated and will not be protected by the rent stabilization laws and that rewarding tenant with rent-stabilized protec-

tion after the enactment of the Loft Law frustrates the very legislative intent set forth in the Loft Law.

There remains the issue of first point raised by the *Mystery* court in attempting to distinguish *Wolinsky*, to wit, that "the Court of Appeals acknowledged the possibility that the ETPA could provide protection to tenancies capable of becoming legalized." In this respect, the *Mystery* court is partially correct. The Court of Appeals in *Wolinsky* took pains to note that:

the City has not acted to amend the Zoning Resolution to include purely residential use of M1-5B zoned space or to rezone tenants' neighborhood. Similarly, the Legislature has not adopted a new eligibility period that would confer Loft Law protections on later conversions. Such steps could make residential loft units like tenants' legal or capable of being legalized, *if such a change were deemed necessary or desirable*. We therefore conclude that the ETPA cannot be extended to these illegally converted lofts. (emphasis added)

Conclusion

The Court of Appeals thus left it to the Legislature to both amend the Zoning Resolution to provide for purely residential use, and for future amendments to the Loft Law to grant a greater number of units loft protection thereby allowing them to ultimately fall within the ambit of ETPA protection. However, despite this quite public invitation by the highest court of our state, this state's Legislature has apparently yet to deem such amendments necessary or desirable. If tenant advocates think that such units should be given rent regulatory protection reflecting a "new social need," they have only to muster enough votes and elect a Legislature that will modify or enact such a statute. Until such time, tenants and the courts in New York County that have granted them rent-stabilized status must show greater patience with what they may regard as the retrograde views of the electorate.



1. The Appellate Division decision in *Gloveman* was an appeal of Justice Nicholas A. Clemente's decision and order which stated that, "[i]n the case at bar, residential use is not prohibited by the zoning law."

2. See *Forrester v. American Package Co.*, 12 Misc.3d 1166A, 280 N.Y.S.2d 842 (Sup Ct., Kings Cty. 2006); *Caldwell v. American Packaging Co.*, 12 Misc.3d 1166A, 820 N.Y.S.2d 841 (Sup Ct., Kings Cty. 2006); *American Package Co., Inc. v. Kocik*, 12 Misc.3d 1166A, 820 N.Y.S.2d 841 (Sup Ct., Kings Cty. 2006). See also, *Sasson v. Gissler*, 11 Misc.3d 1063A, 816 N.Y.S.2d 701 (Civ. Ct., N.Y. Cty. 2005)

3. It bears note that the court in *Wallin* was fully cognizant of the contrary holding in *Gloveman* and implicitly said as much in its decision.