

Substantial Rehabilitation: A Road to Regulatory Exemption

A building that is substantially rehabilitated on or after January 1, 1974 is exempt from coverage by the Rent Stabilization Law. Although the exemption occurs as a matter of law (that is, once the owner completes a post 1/1/74 rehab, the building is exempt), when it is a close question, an owner may want to obtain a binding ruling from DHCR, rather than proceeding at risk.

In a recent decision, DHCR granted our firm's application for a ruling that a certain building was exempt from rent regulation based

upon substantial rehabilitation. The decision is of interest for several reasons.

First, DHCR granted the application notwithstanding the fact that the rehabilitation was done in two phases, rather than at one time. Specifically, the work was commenced in 1989 by the prior owners of the building. However, the prior owners never completed the work and the building remained vacant and uninhabitable until 1999, when the current owner (our client) purchased the building. After

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To Stipulate or To Litigate, That is the Question

After a proceeding has begun in Housing Court, an Owner or Property Manager may be faced with the decision whether to settle the case (by entering into a Stipulation of Settlement with the Tenant) or having a Judge decide the case after a trial. Having expended the time, effort and money involved in the commencement of legal proceedings, clients often ask: "Why should I settle a proceeding with a Tenant by a Stipulation of Settlement?"

A Stipulation -- which has been "so-ordered" by the Court -- is often the Owner's best friend. A Stipulation provides the Owner with remedies that a Court may not have the ability to order after a trial. A Stipulation negotiated between the parties may provide protections and rights that are superior to what the Court might order after the trial. Finally, a Stipulation provides some sense of certainty. The Owner

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Special Points of Interest:

- The "so ordered" stipulation is a contract and a court order.
- DHCR declares regulatory exemption for substantial rehabilitation, despite tenant defenses.

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knows what it has achieved. Going to trial, even on the case that appears to be a “slam dunk,” always entails some risk that the outcome may not be what is anticipated.

The overwhelming majority of Housing Court proceedings (both residential and commercial) are settled by a Stipulation. If the Stipulation is acceptable to the Court, it is signed -- or “so ordered”-- by the judge. A Stipulation is a unique document in that it is a contract between the two parties that also becomes an Order of the Court after it is signed by the judge.

Because the Stipulation is viewed by the courts as a binding and enforceable contract, it affords the Owner not only the protections that an out-of-court contract can provide, but, in the context of a summary proceeding (non payment or holdover), the Tenant often waives its defenses and counterclaims and may be made subject to an eviction if the tenant breaches the Stipulation.

In a recent case that our firm handled (*Rusi Holding Corp. v. Gods Kids Konstruction, Inc.*), we successfully negotiated a stipulation which ultimately

resulted in the Tenant’s eviction. This case illustrates the effectiveness of a strategic negotiation plan, proper implementation via the stipulation and the resultant difficulty, thereafter, for a Tenant (or Owner) to vacate a Stipulation of Settlement.

Rusi was a commercial non-payment case where a Tenant, a child day care center, had a variety of complex defenses. The Tenant alleged that (a) the building’s Certificate of Occupancy did not permit the use as a day care

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center, such that the Tenant was excused from paying rent pursuant to Multiple Dwelling Law; (b) a constructive eviction had occurred due to alleged violations; and (c) the Owner failed to perform certain work or cooperate with the Tenant with certain work that was required in the building in order to amend the Certificate of Occupancy to legalize the Tenant’s day care center use.

After the Tenant answered the non-payment petition and the Court assigned a court date, we appeared in Court

with the Tenant and its attorney and negotiated a Stipulation of Settlement, which was so-ordered by the Court. The Stipulation of Settlement provided for a final judgment and the issuance of a warrant of eviction and provided the Tenant with time to pay the rent arrears. Despite the Tenant’s answer to the petition and the myriad reasons why it should not have to pay any rent to the Owner, the Stipulation was negotiated without any compensation or rent reduction being given to the Tenant.

The highest Court in the State of New York, the Court of Appeals, has ruled in *Hallock v. State of New York*, that the courts should be very reluctant to

set aside a Stipulation of Settlement that has been so-ordered by the Court. Other appellate courts have ruled that so-ordered Stipulations of Settlements are important tools for settlement and must be favored by the courts.

After entering into the Stipulation, the Tenant in *Rusi v. Gods Kids Konstruction*, began to make the payments under the Stipulation, but was unable to make all the required payments. The Tenant then tried to undo the Stipulation.

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purchasing the building, the current owner completed the renovation and filed the application.

Second, DHCR granted the application even though the current owner did not obtain a permanent certificate of occupancy until December 2003 – more than 16 months after the application was filed.

While DHCR did not grant the application until the current owner obtained a C of O, the agency allowed the owner time to obtain a C of O.

Finally, DHCR noted that various tenants of the building had alleged that (a) there were outstanding violations relating to the building; (b) the building “had a record of mismanagement”; and (c) the rehabilitation was substandard. DHCR,

rejected all of these arguments, ruling that even if any or all of the allegations were true, this would not negate the fact that the building had been substantially rehabilitated, such that the exemption results.

This article was written by Phillip Billet who practices in the firm’s Administrative Law Department and represented the successful owner in the case that is described.

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The Tenant’s new attorney made several motions to try to have the Stipulation vacated. The judge gave great weight to the decisions by the appellate courts and detailed the significant threshold that a litigant must meet in order to vacate a Stipulation of Settlement. The Court refused to undo the Sti-

pulation leaving the Tenant with no defenses, no ability to meet its obligations under the Stipulation, and thereby resulting in the Tenant’s eviction.

Certainly, not every proceeding should be settled by a Stipulation of Settlement. By entering into a Stipulation of Settlement, the Owner sometimes makes some form of compromise. But, giving some

concession that is acceptable may save significant time and money, while also obtaining a valuable enforcement mechanism if the Tenant does not do what it is required to do under the Stipulation.

This article was written by Brian Haberly and Martin Meltzer, who are an associate and partner in the firm’s Litigation Department.

“May I Quote You?”

Howard Wenig provided a series of tips to readers of *The Apartment Law Insider* in its article “How To Improve Your Managing Agent Contract.”

Kara Rakowski’s representation of noted restaurateur **Henry Meer** regarding his pending DHCR demolition application was described in a series of articles in *The Tribeca Tribune*.

Joshua Losardo addressed a question in *The New York Post’s* “Don’t Panic” column regarding the propriety of a co-op charging a sublet fee when it is reflected in the co-op’s bylaws.

BELKIN WENIG & GOLDMAN, LLP

New York Office

270 Madison Avenue
New York, New York 10016
(Tel): (212) 867-4466
(Fax): (212) 867-0709

Connecticut Office:

125 Main Street
Westport, Connecticut 06880
(Tel): (203) 227-1534
(Fax): (203) 227-6044

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Belkin Wenig & Goldman, LLP
270 Madison Avenue
New York, New York 10016

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