

Legal Alert: “Net Effective Rent” and Rent Concessions for Rent Stabilized Apartments

April 12, 2021

Recently, New York County Supreme Court Justice Arlene Bluth denied an owner's motion to dismiss in one of seven lawsuits alleging rent overcharges in 421-a buildings, *Chernett et al. v. Spruce*, Sup. Ct. NY County, Index No. 159188/2020. The tenants in these putative class actions have alleged that the temporary construction rent concession, marketed as the "net effective rent," offered by owners should be the legal stabilized rent upon which their renewal leases must be based. When an owner markets the "net effective rent" it amortizes the rent, often over a 12-month period, showing how much the actual rent paid will be after deducting the rent concession. If the tenants are successful, the legal stabilized rent for the apartments will be reduced for the remainder of the benefit period. The basis for the Court's denial of the motion to dismiss was the Owner's failure to meet its burden to show that the documentary evidence utterly refuted Plaintiffs' claims.

Discovery will now proceed to provide the tenants with the opportunity to demonstrate that their rent concessions as alleged by Defendant should not be construed in accordance with the Court of Appeals decision in *Century Operating Corp. v. Poplizio*, 60 N.Y.2d 483 (1983), wherein the Court rejected a tenant's claim that a 2-month rent concession should apply to all subsequent renewal leases.

While these seven lawsuits are focused only on buildings receiving the 421-a tax abatement, they could ultimately result in the creation of legal precedent that diminishes an owner's right to offer concessions in buildings that are not in receipt of tax benefits.

Before the enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), and as relied upon by the Owner in *Chernett*, DHCR's Fact Sheet No. 40 specifically identified the difference between a rent concession and a preferential rent, providing:

Concessions

There are two types of rent concessions. One is a concession for specific months, as for example, where the lease provides that the tenant will not have to pay rent for one or more specific months during the lease term. This type of concession is not considered a preferential rent.

The other type is a prorated concession, where the dollar value of the rent-free month(s) is prorated over the entire term of the lease and not tied to a specific month or months. A prorated concession is really the same as a preferential rent and will be treated in the same manner.

The present Fact Sheet 40 removed this language when it was revised in September 2019. DHCR has not provided a reason for removal of the language.

Tenants will undoubtedly argue that a concession should be treated as a preferential rent since regardless of which method is used the amount of rent paid during the term of the lease would be less than the legal regulated rent. Rent Stabilization Law § 26-511(c)(14), as amended by the HSTPA, provides in pertinent part that where the amount of rent charged to and paid by the tenant is less than the legal regulated rent, that rent will be the basis for increases until the tenant vacates (provided the legal rent is otherwise

HWRD Horing Welikson Rosen & Digrugilliers PC
A T T O R N E Y S A T L A W

preserved). If an owner is inclined to offer a rent concession, it is advisable to consult with counsel prior to doing so in order to ensure the offer is a concession, which is typically a specific month or months of free rent, and that a preferential rent has not been established. However, due to the uncertainty pertaining to this issue we strongly suggest that, if possible, concessions be avoided.

Please feel free to contact Randi B. Gilbert, Esq. at rgilbert@hwrpc.com or Jillian N. Bittner, Esq. at jbittner@hwrpc.com of the Administrative Law Department with any further questions.