

# CLIENT ADVISORY

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JULY 2001

## ITS ALL IN THE DETAILS

The owner of a building located at 1825 Foster Avenue in Brooklyn brought a nuisance holdover action against a tenant alleging that the tenant was in violation of his lease by “permitting the occupant(s) of the apartment to cause unreasonable and disturbing noises to emanate from the apartment, including persistent and regular banging on the ceiling as well as repeated and unnecessary flushing of the toilet many times in a row”, which, the owner alleged, interfered with the rights of and unreasonably annoyed other residents of the building. In a case entitled Foster Arms Apts. Corp. v. Schreiber (N.Y.L.J., June 6, 2001), the court, without going into how the landlord knew that the tenant’s flushing was both excessive and unnecessary, or why the tenant was banging on the ceiling (rather than his or her floor), held that the facts as alleged by the landlord were insufficient to establish proper grounds for a nuisance holdover proceeding.

The court held that “ a notice of termination which merely recites legal grounds for the eviction, but fails to set forth any of the facts upon which the ensuing proceeding would be based is insufficient”. Accordingly, the Notice to Cure and Notice to Terminate as drafted were ruled insufficient because this landlord had failed to include specific times and dates for the alleged toilet flushing and ceiling banging.

This case, and other similar cases, make clear that unless an owner can allege with specificity the instances of activity that are alleged to violate the tenant’s lease, the owner’s claims may not be sustainable. We urge buildings with problem tenants to have building staff (and/or complaining residents) maintain a log of complaints (especially noise complaints) so that when and if a proceeding is needed to enforce the lease, the owner is able to make specific and concrete allegations.

## OUT OF MIND IS NOT NECESSARILY OUT OF SITE

Approximately three (3) years after selling its business and assigning its lease to its purchaser, a former tenant brought suit against its former landlord for real estate tax overcharges.

In 546 Gramatan Avenue Corp. v. Grambro Realty Corp. (N.Y.L.J. 6/20/2001), it seems that 546 Gramatan Avenue Corp., the former tenant, somehow found out that its former landlord had been over-billing real estate taxes based upon an incorrect base year figure. The 1984 lease provided that the former tenant was liable for one-seventh (1/7) of any increased taxes over the base year of 1983. The landlord, at the request of its accountants, sent a representative to the local tax office more than 2 years after the former tenant had vacated. The visit revealed that the landlord had overbilled the former tenant in the amount of \$834.40 for ten (10) years. Although the landlord discovered the overcharge, the landlord did nothing to reimburse the tenant for the overbilling. After somehow learning of this circumstance, the former tenant sued for the return of

10 years of overcharges with interest, alleging that its former landlord had known all along about the overcharge and had committed fraud.

At trial, the former tenant was apparently unable to prove that its former landlord had knowledge of the overcharge prior to 1996. Furthermore, the former tenant also admitted that it had only inquired of the correct 1983 base year in 1996, already 2 years after it had vacated the premises, leading the court to conclude that both the former tenant, and its professional representatives, had been negligent by apparently not confirming the base year with the tax collector's office at any time from 1984, the date of the lease, through 1996.

The court finally concluded that since the action for the recovery of the overcharge had not been commenced until September 12, 1997, and the former tenant had vacated the premises on November 21, 1994, this action was not a summary proceeding between a landlord and tenant, but an action for breach of contract (the lease), resulting in the court's imposition of the six (6) year statute of limitations for contract actions upon the former tenant's claim for ten (10) years of overcharges. With the statute of limitations being tolled upon the commencement of the action, the court only allowed the former tenant to go back to September 12, 1991 through November 21, 1994, the date the former tenant vacated. Thus, the former tenant was limited to, but also nevertheless entitled to, reimbursement for three (3) years of overcharges and a small portion of a fourth year.

### **PROFITING FROM A ROOMMATE MAY SOON BE UNPROFITABLE**

On June 4, 2001, Judge Larry S. Schachner of New York County Housing Court issued a ruling in RAM I v. Mazzola, that landlords may evict a tenant for charging their roommate more than their "fair share" of the legal rent. The tenant, Jean E. Mazzola, a 70 year old retiree who took in a roommate in her Park Avenue apartment, was charging her roommate \$2,200. per month, while only paying \$1,847.77 as the legal rent. Presently, a "fair share" has been generally interpreted as half of the legal rent. The landlord moved to evict both the tenant and her roommate based upon state regulations regarding roommate overcharges that have been newly codified by the State Division of Housing and Community Renewal. The court held that the landlord could rely upon the new state regulations as a basis for its eviction action. The tenant is appealing the judge's ruling.

This case is of great interest to landlords and tenants because, as reported in the New York Times on June 5, 2001, the 1999 Census Bureau study showed that 158,238 New Yorkers were living in rent-stabilized apartments with non-relatives. However, while we feel it is important that we make you aware of this pending matter, it is as important that we emphasize that this case is in fact still pending, that the ruling made by Judge Schachner is being appealed by the tenant's counsel, and the recodified rent regulations promulgated by the State Division of Housing and Community Renewal, upon which the landlord relied, are themselves being tested by separate actions. Nevertheless, because of this case's widespread potential to impact New Yorkers, we will follow this matter and attempt to keep you informed of developments as they are reported.