



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Disclosure Requirements for Occupied Conversions
Regarding Tenant Protections from
Eviction and Unconscionable Rent Increases**

June 19, 2013

The New York State Department of Law (DOL) has seen a recent increase in the number of offering plans for non-eviction conversion of buildings from residential rental status to cooperative or condominium ownership. This memorandum sets forth the disclosure requirements related to the provisions of General Business Law (GBL) §§ 352-eee and 352-eeee) and relevant judicial decisions that determine when unregulated tenants become protected from eviction and from unconscionable rent increases, and the extent of such protections for unregulated tenants whose tenancy commences after an offering plan is declared effective.*

Statutory Protection Against Eviction in Non-Eviction Plans

Both GBL § 352-eee (governing conversions in certain jurisdictions in Nassau, Rockland and Westchester Counties) and GBL § 352-eeee (governing conversions in New York City) require that non-eviction plans state that “[n]o eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy.” GBL §§ 352-eee(2)(c)(ii), 352-eeee(2)(c)(ii).

Both sections define “[n]on-purchasing tenant” as, “[a] person who has not purchased under the plan and who is a tenant entitled to possession at the time the plan is declared effective or a person to whom a dwelling unit is rented subsequent to the effective date. A person who sublets a dwelling unit from a purchaser under the plan shall not be deemed a non-purchasing tenant.” Id. §§ 352-eee(1)(e), 352-eeee(1)(e).

* This memorandum does not address the timing or scope of protections for non-purchasing seniors or disabled persons under GBL §§ 352-e, 352-eee, and 352-eeee.

Protection Against Unconscionable Rent Increases

The GBL further provides that non-purchasing tenants “shall not be subject to unconscionable increases beyond ordinary rentals for comparable apartments during the period of their occupancy.” Id. §§ 352-eee(2)(c)(iv), 352-eeee(2)(c)(iv).

Protections Generally Commence When a Plan is Declared Effective

Construing these provisions, the Appellate Division, First Department, has held that, “[w]here an unregulated tenancy has expired” before an offering plan is declared effective, “absent some special circumstance, the tenant retains only the minimal protections applicable to the common-law ‘tenant at sufferance.’” MH Residential I, LLC v. Barrett, 78 A.D.3d 99, 104 (1st Dep’t 2010) (citation omitted). Applying this principle, the First Department has found that unregulated tenants “whose leases had expired and holdover proceedings commenced,” but no “warrants of eviction” had yet “issued” when the offering plan was declared effective, are not entitled to protection from eviction under GBL § 352-eeee(2)(c)(ii).

In the absence of a controlling decision from another Department of the Appellate Division, a decision of the First Department is binding on trial courts located in other departments. See Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664 (2d Dep’t 1984). Thus, unless and until another Department of the Appellate Division disagrees with MH Residential I or the issue is presented to the Court of Appeals, the First Department’s holding in MH Residential I is binding on trial courts state-wide.

“Special Circumstance”

A “special circumstance” is, almost by definition, something that cannot be defined by hard-and-fast rules. There are no reported judicial decisions interpreting the phrase “special circumstance.” Under the First Department’s decision in MH Residential I, the courts may determine that “special circumstance[s]” are present allowing for greater protection for tenants.

Unregulated Tenants Who First Occupy Unsold Apartments After the Plan is Declared Effective

The applicability of protections from eviction and unconscionable rent increases after the offering plan has been declared effective depends on the location of the building or complex undergoing conversion.

The Appellate Term, Second Department--the court to which appeals from housing court decisions in Kings, Queens, and Richmond Counties are directed--has held that unregulated tenants who first occupy sponsor-owned apartments after the offering plan is declared effective are protected from eviction and from “unconscionable” rent increases. Geiser v. Maran, 189 Misc. 2d 442, 445 (App. Term 2d Dep’t 2001); Paikoff v. Harris, 185 Misc. 2d 372, 377-78 (App. Term 2d Dep’t 1999).

The Appellate Division and Appellate Term, Second Department, have not addressed whether, in jurisdictions in Nassau, Rockland, and Westchester Counties subject to GBL § 352-eee, non-purchasing tenants who rent unsold apartments or units after the offering plan is declared effective are protected from eviction and from unconscionable rent increases. However, the relevant provisions of GBL §§ 352-eee and 352-eeee are identical, so, absent a contrary decision, Geiser and Paikoff should control in GBL § 352-eee jurisdictions.

The Appellate Term, First Department (Bronx and New York Counties) has reached the opposite conclusion, and has held that unregulated tenants who rent unsold apartments or units after the offering plan is declared effective are not protected from eviction or from “unconscionable” rent increases. Park West Village Assocs. v. Nishoika, 187 Misc. 2d 243, 245 (App. Term 1st Dep’t 2000).

Model Disclosures

All offering plans for tenanted non-eviction conversions must disclose when the protections from eviction and from unconscionable rent increases commence and whether they apply to tenants whose tenancy commences after the offering plan is declared effective. These disclosures should be included in the “rights of existing tenants” section of the offering plan. See 13 NYCRR §§ 18.3(m)(1)(iii), 23.3(n)(7).

Given the existing state of the law, the following paragraphs are examples of disclosures that are acceptable for plans and amendments to plans for conversions of buildings or complexes located in Kings, Queens, Richmond, Nassau, Rockland, and Westchester Counties:

Under this non-eviction offering plan, tenants whose leases expire and against whom holdover proceedings are commenced before the offering plan is declared effective retain only the minimal protections available to the common-law “tenant at sufferance,” and **ARE NOT PROTECTED** from eviction for failure to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases absent some special circumstance, as found by a court of competent jurisdiction.

Tenants who lease unsold [apartments/units] after the offering plan is declared effective are protected from eviction for failure to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases. Unconscionable increases are defined by law as increases that are “beyond ordinary rentals for comparable apartments during the period of their occupancy.”

Given the existing state of the law, the following paragraphs are examples of disclosures that are acceptable for plans and amendments to plans for conversions of buildings or complexes located in Bronx and New York Counties:

Under this non-eviction offering plan, tenants whose leases expire and against whom holdover proceedings are commenced before the offering plan is declared effective retain only the minimal protections available to the common-law “tenant at sufferance,” and **ARE NOT PROTECTED** from eviction for failure to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases absent some special circumstance, as found by a court of competent jurisdiction.

Tenants who lease unsold [apartments/units] after the offering plan is declared effective **ARE NOT PROTECTED** from eviction for failure to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases. Unconscionable increases are defined by law as increases that are “beyond ordinary rentals for comparable apartments during the period of their occupancy.”

This memorandum is effective immediately. All non-eviction offering plans submitted for conversion of buildings from residential rental status to cooperative or condominium ownership that have not yet been accepted for filing by the DOL must include such disclosure.