

MEMORANDUM

TO: Review Attorneys and Paralegals

DATE: 1/14/88

FROM: Nancy Kramer and Mary Sabatini DiStephan *MSD*RE: Estates of Tenants -- Right to Buy and Sponsor's Ability to Count  
Toward Effectiveness (Replaces memorandum of May 15, 1987)

Recent court decisions have led us to a revision of our conclusions about whether estates of deceased tenants must be given the right to sign subscription agreements and whether those subscription agreements can be counted toward effectiveness.

1. Must Estates Be Given the Right to Buy An Apartment? Answer: No.

This issue arises when a tenant died, during the red herring stage of a conversion or after a black book was issued, without subscribing to purchase his or her unit. The real issue is usually entitlement to the insider price.

The Court of Appeals held last year in De Kovessey v. Coronet Properties, 69 NY2d 448 (1987), that a sponsor is not obligated to sell the shares for an apartment to the heirs of a rent-controlled apartment. We were not certain whether the DeKovessey holding applied to rent-stabilized apartments, but it is becoming clear that the lower courts believe it does. See McGinnity v. 405 E. 3rd St. Associates, NYLJ of 12/30/87, a copy of which is attached. Justice Stecher reached the same conclusion in a hearing on an application for a temporary restraining order to stop a closing in 1000 Park Avenue Tenants Association v. Raynes and Abrams. This is contrary to the position taken earlier by the Appellate Division, Second Department, in De Christoforo v. Shore Ridge Associates, 116 AD2d 123 (1984).

2. If Sponsors Voluntarily Give Estates the Right to Buy at the Insider Price Can They Be Counted Toward Effectiveness? Answer: Generally no.

Bona fide tenancy is a key element in determining whether a subscription agreement can be counted. General Business Law Sections 352-eee(2)(c)(i) and (d)(i) and 352-eeee(2)(c)(i) and (d)(i). For New York City non-eviction plans, an alternate standard is the expression of an intent to occupy (or have a member of one's immediate family do so) when the unit becomes vacant. An estate will generally not qualify under either criteria and thus can not be counted. There is an exception: if the plan permits assignment and the estate assigns its agreement to a person who intends to reside there. Barring such special circumstances, estates cannot be counted toward effectiveness.

Review Attorneys and Paralegals (continued)  
page 2

The conclusion that estates cannot count toward effectiveness except in special, rare, circumstances is a new one, based on recent decisions from the courts. It should be applied prospectively only, to plans not yet declared effective.

NK,MSD/dc  
attachment

ment in his favor on his second counterclaim. Defendants 405 East 63rd Street Associates and M. J. Raynes, Inc. (hereinafter referred to collectively as "Landlord") request that this court search the record and grant partial summary judgment dismissing the complaint.

This is an action for a declaratory judgment as to the legal rights of the parties with respect to apartment PH-C, 405 East 63rd Street, New York, New York, a rent-stabilized building which has been converted to cooperative ownership. Pliss alleges that he is entitled to purchase the shares of stock to the apartment at the insider price by virtue of his being the tenant of record or, in the alternative, by virtue of his being the Administrator of the Estate of McGinnity, the tenant in occupancy on the date of the cooperative conversion. Defendants assert that he is not entitled to purchase the shares of stock under either theory. The shares of stock allocated to the apartment are presently owned by defendant 405 East 63rd Street Associates.

On or about May 17, 1965, Pliss entered into a written lease to the premises with landlord's predecessor. The lease was extended and/or renewed upon the expiration of its term several times through March 31, 1985. In each case, the written lease was executed by both the landlord and Pliss, as tenant.

Pliss vacated the premises sometime in 1970, and McGinnity moved into the apartment, where he lived openly for approximately fifteen years. Nonetheless, as stated, Pliss signed all of the renewal leases in his own name. Pliss alleges that on or about November, 1970, he assigned all of his right, title and interest in the apartment to McGinnity. There is no writing evidencing the alleged assignment. It is undisputed that the consent of the landlord to the purported assignment was never sought nor granted.

On or about Dec. 1, 1984, the managing agent forwarded a renewal lease for the period from April 1, 1985 through March 31, 1987 addressed to Pliss at the premises. McGinnity typed his name above that of Pliss on the renewal lease, signed his own name and returned the lease to the landlord on or about Jan. 25, 1985. Pliss never executed that renewal lease. The landlord rejected the renewal lease tendered by McGinnity. This action for a declaratory judgment was commenced by McGinnity on or about Feb. 28, 1986.

McGinnity died on Nov. 24, 1986. At the time of his death, there was an offering plan for conversion to cooperative ownership which afforded the right to all tenants in occupancy to purchase shares of stock for their apartments at the insider's price.

That branch of the motion seeking leave to substitute Pliss, in his capacity as Administrator of the Estate of Robert E. McGinnity, deceased, is granted without opposition. If a party dies before a verdict or decision is rendered in an action and his claim is not thereby extinguished, substitution of his personal representative is mandatory (CPLR 1015(a); *Wisdom v. Wisdom*, 111 AD2d 13).

As to the right to purchase, the Court of Appeals recently ruled that the unexercised right of a deceased "tenant in occupancy" to purchase shares of stock offered in a cooperative conversion plan at the insider price may not be exercised by the deceased's estate, since that would result in an unwarranted windfall to the heirs without furthering the legislative policy of protecting "tenants in occupancy," particularly the elderly and disabled, from unjust, unreasonable and oppressive rents, uncertainty, hardship, and dislocation in connection with the conversion process (*DeKovessey v. Coronet Properties Co.*, 69 NY2d 448). *DeKovessey dealt with rent-controlled apartments rather than a rent-stabilized apartment, as in this case. This factor alone, however, does not compel a different result, insofar as the heirs and estate of McGinnity are concerned. The statute governing cooperative conversions also speaks in terms of "tenants in occupancy" (General Business Law §352-eeee [2][d][i]), without differentiating between rent-stabilized and rent-controlled apartments.*

Pliss admits that in or about November, 1970, he moved out of the apartment and assigned all right, title and interest in apartment PH-C to McGinnity. Having expressly relinquished his right to possession of the apartment prior to the date the cooperative conversion plan was accepted for filing by the Attorney General, he cannot be considered a tenant in occupancy entitled to purchase the shares allocated to the apartment during the exclusive period (*Weinstein v. Hohenstein*, 69 NY2d 1017). It is undisputed that Pliss relinquished all rights in the apartment; he did not pay the rent and he installed an illegal assignee without seeking the prior written consent of the landlord (compare *Burns v. 500 East 83rd St. Corp.*, 59 NY2d 784). Because Pliss parted with his entire interest in the demised premises without any right of reversion, an assignment of the lease was effected by operation of law. He thereby lost the right to purchase the shares of stock by virtue of his being named in the lease as the tenant (*McSpadden v. Dawson*, 117 AD2d 453).

Accordingly, that branch of plaintiff's motion seeking summary judgment is denied and defendants' request for partial summary judgment is granted to the extent of declaring that neither McGinnity, nor Pliss, in his representative capacity as Administrator of the Estate of McGinnity, has the right to purchase the shares of stock for the apartment.

Pliss' cross-motion seeking summary judgment on his second counterclaim is denied and partial summary judgment is granted in favor of defendants to the extent of declaring that Pliss is not entitled to purchase the shares of stock to the apartment at the insider price. Landlord's counterclaims against Pliss, Pliss' other counterclaim against landlord and plaintiff's claim for damages are severed.

Settle order.

#### IA PART 14

Justice Altman

McGINNITY v. 405 E. 63RD ST. ASSOCIATES—Plaintiff moves for an order: (1) pursuant to CPLR 1015 and 1021, substituting Stephen Austin Pliss (Pliss) as Administrator of the Estate of Robert E. McGinnity (McGinnity), deceased; and (2) pursuant to CPLR 3212, granting summary judgment in favor of plaintiff for the relief requested in the complaint. Counterclaim defendant Pliss cross-moves for an order, pursuant to CPLR 3212(e), granting partial summary judgment

NYLJ  
12/30/87  
p. 10