

MEMORANDUM

TO: All REF Attorneys and Legal Assistants

DATE 8/30/93

FROM: Gary R. Connor *gmc*

RE: "Non-purchasing Tenant"

Attached is a copy of an affidavit that Mary Sabatini DiStephan recently submitted to the Kings County Housing Court. This affidavit sets out the Bureau's interpretation of non-purchasing tenant under GBL §352-eeee(1)(e). Essentially, the Bureau's position is that non-purchasing tenants under a plan include tenants who rent units from the sponsor or holder of unsold shares after the effective date of a plan as well as those who were tenants at the time the plan was accepted for filing.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART 18J

-----X  
BARRY PAIKOFF, PARTNER  
PRS DEVELOPMENT ASSOCIATES,

Petitioner-Landlord,

-against-

EMIL HARRIS,

Respondent-Tenant.  
-----X

INDEX NO. L&T 83897/93

AFFIRMATION

STATE OF NEW YORK     )  
                          )     ss.:  
COUNTY OF NEW YORK    )

MARY SABATINI DiSTEPHAN, an attorney duly admitted to practice in the courts of the State of New York, affirms the following under penalty of perjury:

1. I am the Director of Regulatory Compliance in the Real Estate Financing Bureau of the the State of New York Department of Law (Office of Attorney General Robert Abrams). This Bureau in the Attorney General's Office is responsible, inter alia, for the regulations governing the conversion of occupied residential property to cooperative ownership (hereinafter "conversion cooperatives"). Therefore, as the Director of Regulatory Compliance for the Bureau, I am familiar with the regulations governing conversion cooperatives, and with the Attorney General's interpretation and application of the provisions of the General Business Law for conversion cooperatives.

2. I submit this Affirmation to assist this Court in determining the meaning of the term "non-purchasing tenant," as

used in G.B.L. § 352-eeee.

3. The definition of "non-purchasing tenant" can have important consequences for conversion cooperatives. For example, under G.B.L. § 352-eeee(2)(c)(ii), in a non-eviction conversion plan a "non-purchasing tenant" cannot be evicted except for a breach by the tenant of his or her obligations, such as non-payment of rent or illegal use or occupancy of the premises. Similarly, under G.B.L. § 352-eeee(2)(c)(iv), in a non-eviction conversion plan the rentals of a unit not subject to rent regulation nonetheless cannot be subject to unconscionable rent increases beyond ordinary rentals for comparable apartments. Thus, even when otherwise not protected by rent regulation (such as the Rent Stabilization Law), under the General Business Law so-called "non-purchasing tenants" in non-eviction conversion cooperatives are protected against not-for-cause evictions as well as against unconscionable rent increases.

4. The statute defines "non-purchasing tenant" as follows:

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.

G.B.L. § 352-eeee(1)(e) (emphasis added).

5. Under this definition, a tenant who is already living in a conversion cooperative at the time the plan becomes effective is a non-purchasing tenant. However, the term "non-purchasing tenant" also includes a tenant who rents a vacant unit after the effective date of the plan, as long as the tenant does

not sublet the unit from a purchaser under the plan. The position of the Office of the Attorney General is that a sponsor or holder of unsold shares is not a "purchaser under the plan." Therefore, the position of the Office of the Attorney General is that a tenant who rents a vacant unit after the plan's effective date from a sponsor or holder of unsold shares is a "non-purchasing tenant" under G.B.L. § 352-eeee.

6. The Attorney General's Office explicitly adopted this interpretation of the statutory term "non-purchasing tenant" nearly two years ago. The issue arose in the context of the passage of G.B.L. § 352-e (2-d), which provides certain protections for a cooperative corporation or condominium association if a sponsor or investor fails to make monthly payments for its units. In this context, questions arose concerning the definition of "non-purchasing tenant." The Office of the Attorney General stated that the term "non-purchasing tenant" did not only apply to tenants who resided in the building prior to its conversion and, quoting the definition found in G.B.L. § 352-eeee(1)(e), explained this conclusion as follows:

[I]f a sponsor or holder of unsold shares rents a vacant unit after the plan becomes effective, such tenant is a non-purchasing tenant. Additionally, the last sentence of the definition seems to indicate that there is a difference between coops that are rented (sublets) and condos (prime lease). We do not think the statute intended this distinction. However, the definition clearly would exclude as a "non-purchasing tenant" a tenant of a bona fide purchaser under the plan, unrelated to the sponsor although a tenant who was in occupancy at the time the plan was declared effective is clearly a "non-purchasing tenant" even if the unit is later sold as an occupied unit to a third party.

See Memorandum to REF Attorneys from Mary Sabatini DiStephan (dated September 16, 1991) (emphasis added) (copy attached hereto as Exhibit "A").

7. This understanding of the meaning of "non-purchasing tenant" makes sense, both as a matter of statutory construction, and as a matter of public policy.

8. With regard to statutory construction, the plain import of "purchaser under the plan" is someone who purchases shares allocated to an apartment under the conversion plan. This would not include a sponsor. While a sponsor may hold shares allocated to an apartment, the sponsor does not purchase them. Indeed, under the Attorney General's regulations, shares remain as "unsold shares" until "purchased by a purchaser for occupancy." See 13 N.Y.C.R.R. § 18.3(w)(1) (copy attached hereto as Exhibit "B"). Since shares still held by a sponsor are, by definition, "unsold" shares, a sponsor would not be a "purchaser under the plan."

9. Moreover, the definition of "non-purchasing tenant" would make no coherent sense if a sponsor were a "purchaser under the plan." If a "purchaser under the plan" could include the sponsor, then any tenant who moves into a conversion cooperative after the plan's effective date necessarily would be renting from a "purchaser under the plan," and therefore would not be a "non-purchasing tenant." Yet, this would entirely negate G.B.L. § 352-eeee(1)(e), which expressly states that the definition of "non-purchasing tenant" includes "a person to whom a dwelling

unit is rented subsequent to the effective date."

10. Aside from ordinary principles of statutory construction, public policy likewise supports the Attorney General's view that the term "non-purchasing tenant" includes tenants who rent from a sponsor after the plan's effective date. One of the primary concerns of the Attorney General's regulation of conversion cooperatives is to insure that landlords do not use the conversion process simply as a device to escape legal protections for tenants, such as those found in the Rent Stabilization Law. For example, a landlord with a building containing six residential units (and therefore ordinarily subject to the Rent Stabilization Law), can convert the building to a cooperative merely by selling the shares for one of the six apartments. If vacancies occur in the other apartments, the landlord-as-sponsor can rent those apartments free of ordinary rent regulation. The General Business Law treats such tenants who thereafter rent from the sponsor as "non-purchasing tenants," precisely to afford these tenants a measure of protection against not-for-cause evictions and unconscionable rent increases, even though they are no longer subject to ordinary rent regulation.

If the term "non-purchasing tenant" were otherwise read to exclude tenants who rent from the sponsor, this would undermine the statute's goal of protecting the interests of tenants in conversion cooperatives.

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MARY SABATINI DISTEPHAN

8/30/93