De Facto Rent Stabilization in New York City

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De facto rent stabilization is a judicially created doctrine through which buildings that would not otherwise be subject to rent stabilization can become rent regulated. This article discusses the origins of de facto rent stabilization and its use as a defense in summary eviction proceedings in New York City. It also explores issues that repeatedly arise in such cases, as well as best practices for attorneys defending tenants that have a viable de facto defense. This article does not address lofts, which have a unique status in New York City and a separate body of applicable case law that pertains to the creation of residential dwelling units in formerly commercial space.

Overview and Context

Tenants who reside in rent-stabilized apartments in New York enjoy numerous benefits. Among them are the right to a renewal lease, limits on what a landlord may charge for rent, and the possibility for certain members of the tenant's family to succeed to the tenant's lease. Because many landlords view these rights as burdensome restrictions, litigation regarding whether rent regulations apply to a particular apartment is common and often hard fought. Over the past several years, a new front has opened in this battle—de facto rent stabilization.

De facto rent stabilization is a judicially created doctrine wherein buildings that would not otherwise be subject to rent stabilization become rent regulated. It applies to buildings built prior to 1974 in which the landlord (or some other actor) creates six (or more) dwelling units where there were previously fewer than six. The doctrine is a natural extension and application of the definitions and rules established in the laws that govern rent stabilization.

Courts most often apply the doctrine in litigation involving smaller buildings such as two-family homes that have been subdivided into multiple rooms and rented out to single individuals. In our experience, the tenants in these buildings are vulnerable. They are generally some combination of low income, formerly homeless, formerly incarcerated, and unable to find housing in more expensive parts of the housing market. They are, in other words, tenants in need of the many protections offered by rent stabilization.

As aptly put by one court, de facto cases involve balancing "various factors in light of an explicit public policy that seeks to preserve affordable residential housing." Bravo v. Marte, 64 Misc. 3d 1223(A), 2019 N.Y. Misc. LEXIS 4320 (Civ. Ct. Kings Cty. 2019). Each case has "some aspects of a sui generis investigation and there is no formula that has or can be applied in any particular instance." Instead, courts must look at a number of factors, "some quantifiable and some nuanced . . . to discern whether a space is a housing accommodation within the meaning of rent stabilization." Bravo, 64 Misc. 3d 1223(A), *33. In this article, we summarize and synthesize those factors.

Legal and Administrative Background

There are three laws that provide the foundation for the doctrine of de facto rent stabilization (and all forms of rent regulation in New York). They are:

- The Emergency Tenant Protection Act (ETPA) (NY CLS Unconsol, Ch. 249-B, § 1 et seq.)
- The Rent Stabilization Law (RSL) (NYC Administrative Code 26-501 et seq.) –and–
- The Rent Stabilization Code (RSC) (9 NYCRR § 2520.1 et seq.)

New York City has enjoyed different forms of rent regulation since the early 20th century. The modern form of rent regulation finds its roots in the ETPA, which the New York State legislature enacted in 1974 in response to an ongoing housing shortage in major metropolitan areas. See KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Cmty. Renewal, 6 A.D.3d 28, 32, (App. Div. 2004). The law incorporated New York City's preexisting system of rent regulation (created by the RSL) and also expanded regulation to cover all buildings containing six or more units and built prior to January 1, 1974. See N.Y. Unconsol. Laws, Ch. 249-B, § 5.

Under the authority delegated by the ETPA, New York City and the New York State Division of Housing and Community Renewal (DHCR) created the rules and regulations—the RSC—that govern rent-stabilized housing today. N.Y. Unconsol. Laws, Ch. 249-B, § 10; NYC Administrative Code 26-511 (b). DHCR is the state agency tasked with overseeing rent regulation, and the RSC is the body of law it uses in doing so.

For purposes of analyzing de facto rent-stabilized housing, the most important provisions of law are Section 27-2004(a)(13) of the New York City Administrative Code, also known as the Housing Maintenance Code, and Section 2520.6 of the RSC. The first provision provides that a "[d]welling unit shall mean any residential accommodation in a multiple dwelling or private dwelling." NYC Administrative Code 27-2004(a)(13). The second provision defines a "housing accommodation" as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment, and all services, privileges, furnishings, furniture and facilities supplied in connection with the occupation thereof." 9 NYCRR § 2520.6(a).

Gracecor v. Hargrove

Interpreting these provisions, the Court of Appeals in Gracecor v. Hargrove laid the foundation for the doctrine of de facto stabilization. Gracecor v. Hargrove, 90 N.Y.2d 350 (1997). In Gracecor, a landlord attempted to evict a tenant in a lodging housing, arguing that the semi-enclosed cubicle the tenant inhabited could not be rent stabilized. Gracecor Realty Co. v. Hargrove, 160 Misc.2d 963, 694 (App. Term 1994). The Civil Court dismissed the case, and the landlord appealed the decision all the way up to the Court of Appeals, losing each step along the way.

The Court of Appeals ultimately "affirm[ed] the order of the Appellate Division because under the facts of this particular case, the area in question constituted a 'housing accommodation' not expressly excluded from the coverage of the rent-stabilization laws." Gracecor, 90 N.Y.2d at 354. The court ruled that determining whether a dwelling unit qualifies as a housing accommodation subject to rent stabilization "is a fact-intensive question substantially turning on the intent and behavior of the parties." Gracecor, 90 N.Y.2d at 355. The court listed multiple factors that should be considered in this analysis, including:

- The length of time a landlord allows a person to occupy the same space
- Any limitations on the occupant's use and control of the premises –and–
- Evidence the occupant's intent to make a home in the unit

Gracecor, 90 N.Y.2d at 356.

Gracecor was an important decision that protected the homes of countless single-room-occupancy tenants. However, the reasoning in that case would not be applied to buildings in which there had been conversions or subdivisions for another 16 years.

Joe Lebnan, LLC v. Oliva

In *Joe Lebnan, LLC v. Oliva*, the Appellate Term of the Second Department applied Gracecor's reasoning to a case involving a building illegally converted from five to eight units. Joe Lebnan, LLC v. Oliva, 39 Misc.3d 31 (App. Term 2013). In that case, the landlord argued that illegal apartments could not become rent stabilized unless the owner "knew of and acquiesced in the unlawful conversion of space from commercial to residential use and the owner sought to legalize the conversion." Joe Lebnan, 39 Misc.3d at 32. The Appellate Term rejected this analysis. Citing Gracecor, the appellate term noted that "the Rent Stabilization Code's definition of a 'housing accommodation'

is that 'part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment,' and this 'functional definition is not limited by any physical or structural requirements.'" Joe Lebnan, 39 Misc.3d at 33 (internal citations omitted).

Ultimately, the Appellate Term ruled that the apartment in question is rent stabilized and affirmed the dismissal of the petition.

Robrish v. Watson

Two years later, the Appellate Term issued a similar ruling in Robrish v. Watson, 48 Misc. 3d 143(A), 2015 N.Y. Misc. LEXIS 3222 (App. Term 2015). Like *Joe Lebnan*, *Robrish* involved a building that had been illegally subdivided; the two-family house at issue in that case had been cut up into 10 individual rooms, each rented to a different person. Again relying on the ruling in *Gracecor* and the RSL, the court ruled that "an individually rented room in a rooming house is a housing accommodation, and therefore . . . a building with six or more individually rented rooms is subject to rent stabilization, regardless of whether any structural changes were made to the premises." Robrish, 48 Misc. 3d 143(A), *2.

Since the seminal rulings in *Joe Lebnan* and *Robrish*, there have been multiple cases in each borough in which tenants have successfully litigated de facto stabilization defenses. For examples, see Table of Cases (subject building had an illegal sixth unit and was thus subject to rent stabilization).

This is a promising development for countless vulnerable tenants but actually succeeding with this defense can be difficult. We turn now to the key legal issues the practitioner will need to navigate.

Key Legal Issues

Almost all residential eviction proceedings in New York City are summary proceedings brought pursuant to Article 7 of the Real Property Actions and Procedure Law (RPAPL). N.Y. Real Prop. Acts. Law § 701 through N.Y. Real Prop. Acts. Law § 768. Certain legal issues come into play when a tenant raises de facto rent stabilization as a defense in an Article 7 proceeding. Each is discussed below.

Burdens of Proof

As in any litigation, a critical step is to identify not only what must be proven, but who ultimately shoulders that burden. In a summary proceeding brought under Article 7 of the RPAPL "a landlord must allege that the apartment is subject to the New York City Rent Law and Rehabilitation Law, the New York City Rent Stabilization Law, or neither law." Villas of Forest Hills Co. v. Lumberger, 128 A.D.2d 701, 702 (App Div. 1987) (citations omitted). Specifically, courts have held that N.Y. Real Prop. Acts. Law § 741 requires that a landlord properly plead an apartment's regulatory status. 433 W. Associates v. Murdock, 276 A.D.2d 360, (App. Div. 2000) (holding that the regulatory status of an apartment is an "'essential element[]' to the landlord's prima facie case"). Given that the regulatory status of an apartment is part of a petitioner's prima facie case, once tenants "put into issue the rent-regulatory status of their apartment, it [becomes the] landlord's burden to prove at trial its allegation that the apartment was not rent regulated." 124 Meserole, LLC v. Recko, 55 Misc. 3d 146(A) (App. Term 2017). Accordingly at trial, the landlord must present sufficient evidence to support its contention that an apartment is exempt from the RSL.

In practice, this proof might consist of nothing more than testimony and a certificate of occupancy. At that point, the tenant would have to rebut the landlord's initial showing to establish that their dwelling unit is in a building built prior to January 1974 and that there are (or were) six or more dwelling units in the building. Because de facto stabilized units exist in buildings that have been converted and operated illegally, this can be difficult. Yet, where the landlord fails to carry its burden—whether the case involved issues relating to de facto rent or otherwise—the petition should be dismissed for lack of proof. See, e.g., Rapone v. Katz, 958 N.Y.S.2d 648 (App. Term 2011) ("We agree with Civil Court's determination that landlords failed to meet their burden of proving that the apartment at issue was exempt from rent stabilization[.]").

The "Base Date" Argument

In most cases, the number of dwelling units in the building is the key legal issue. To prevail in a de facto stabilized defense, a litigant need only prove that at some point in time, there were six or more units. The number of apartments originally created in the building is irrelevant. Often, landlords will argue that the "base date" is the relevant period for considering whether a dwelling unit is subject to the RSL. There are two versions of this base date argument. In one, the argument is that the court should only take into consideration the number of dwelling units in a building in 1974, the year the ETPA was passed. In the other, the argument is that the court should only consider the number of dwelling units in a building four years prior to a tenant raising the de facto stabilization defense. Courts have flatly rejected these arguments.

As soon as there are six or more units in a building built prior to 1974, all units in the building become rent

stabilized. This is true even when the building had fewer than six units on the base date. Indeed, the Appellate Division, First Department rejected a landlord's argument to the contrary three decades ago in Wilson v. One Ten Duane St. Realty Company, 123 A.D.2d 198, 201 (App. Div. 1987). In *Wilson*, the trial court had ruled that no rent regulation applied to an apartment because "there were less than six [units] (in fact, none) when the statute was enacted in 1974." The Appellate Division reversed, ruling that the ETPA extended the "protection of rent stabilization in face of a declared [housing] emergency," and that the plain language of the statue does not supply "an uncalled for base date that would" restrict its remedial purpose. Id.

Accordingly, in any number of cases, courts hold that a building is governed by the RSL and RSC if and when it is altered so as to contain six or more housing accommodations. Commercial Hotel, Inc. v. White, 752 N.Y.S.2d 779, 780 (App. Term 2002) ("Plaintiff's addition of a sixth unit (allegedly in 1992) brought all the units in the building under rent stabilization.").

Subsequent Reduction in Units Has No Effect on the Regulatory Status

Another argument that practitioners may encounter is that the building has been altered such that the number of dwelling units has been reduced to less than six. This argument, much like the base date argument, lacks merit. The Appellate Division, First Department said it in unequivocal terms: "[R]educing the number of residential units . . . subsequent to the base date for rent stabilization purposes, cannot effect an exemption from the pertinent regulations." Shubert v. New York State Div. of Hous. & Cmty. Renewal, 162 A.D.2d 261 (App. Div. 1990); see also Rashid v. Cancel, 9 Misc. 3d 130(A), 2005 N.Y. Misc. LEXIS 2165 (App. Term 2005) ("The alleged subsequent reduction in the number of housing accommodations to fewer than six . . . did not exempt the remaining units from rent stabilization.").

As a result, in some circumstances, the present use of a building will matter much less than its past use. For example, in *Robrish*, the Appellate Term noted that "[b] y the time of the trial, tenant was the only individual left living in the house." Robrish, 48 Misc. 3d 143(A), *1. That fact notwithstanding, the court reversed the judgment that had been granted in favor of the landlord and held that "the petition should have been dismissed on the ground that landlord failed to serve the required rent stabilization notices" because the evidence showed that there had been "10 different tenancies entered into by landlord with 10 different individuals for 10 different rooms in his house." Robrish, 48 Misc. 3d 143(A), *1.

Finally, the legality of the created housing accommodations is irrelevant. Judges will sometimes raise this issue, asking if it is possible to legalize the potentially de facto stabilized units. While this is an interesting question, it is irrelevant to the inquiry as to whether a unit is de facto stabilized or not. Rosenberg v. Gettes, 723 N.Y.S.2d 598 (App. Term 2000) (holding that it was appropriate to "count[] basement level apartments for purposes of determining whether a building has the requisite six housing accommodations for stabilization jurisdiction, notwithstanding that those apartments did not appear on the certificate of occupancy or were otherwise 'illegal'").

A Prior Owner's Actions Are Not a Defense

Landlords often contend that while a building may be de facto rent stabilized, it was a prior owner who allowed the configuration and the new owner should not have to treat any occupants as rent stabilized. The courts have unequivocally rejected this argument. In *Rashid v. Cancel*, the appellate term held that a landlord acquires a building "subject to those rights and protections enjoyed by the building's tenants at the time of acquisition." Therefore, any lack of knowledge as to basement or other illegal use "does not give rise to an exemption from rent stabilization." Rashid v. Cancel, 9 Misc. 3d 130(A) (App. Term 2005).

As another court put it, "[a] de facto rent stabilization status can be created even when the current owner had no knowledge of the alterations." 2042a Pacific LLC v. Kelley, 2017 NYLJ LEXIS 2611, *12 (Civ. Ct. Kings Cty. 2017).

The Landlord Must Have Knowledge of Acquiesce in the Conversion

A key issue that can prevent tenants from claiming rights under the RSL is whether the landlord knew or should have known of the reconfiguration of the subject building. Case law suggests that tenants who conceal the use of a building will not be able to obtain any rent-stabilization benefits. For example, in *111* on *11 Realty Corp. v. Norton*, the trial court held that the petitioner in that case had actual knowledge of de facto stabilized units, and furthermore, "even if the court were to find that petitioner did not have actual knowledge . . . such knowledge is imputed to petitioner by virtue of the principal's refusal to visit the residential lofts prior to petitioner's purchase of the building." 111 on 11 Realty Corp., 189 Misc. 2d 389 (Civ. Ct. Kings Cty. 2001). The court further ruled that it did not matter if "conversion to residential occupancy was completed prior to the petitioner's purchase of the building [because] at the time the petitioner purchased the building there were eight separate [residential] units." 111 on 11 Realty Corp., 189 Misc. 2d 389, 397.

On appeal, however, the Appellate Term reversed that decision, holding that the respondents "concealed the fact that the premises were being used residentially and that the landlord's principal . . . credibly testified that they were unaware of the residential use." 111 on 11 Realty Corp. v. Norton, 5 Misc. 3d 28 (App. Term 2004).

Where, however, landlords turn a blind eye or approve of tenants' use of a building, courts are likely to confer regulated status to the tenants. For example, in *Gloverman Realty Corp. v. Jerfferys*, the court held that the plaintiff "knew that defendants had created residential space in their lofts and that the tenants and subtenants were living there, and . . . had agreed to lease them the property on that basis." Because the plaintiff in that case admitted these facts, "a triable issue of fact no longer exists as to plaintiff's knowledge of, and acquiescence in the conversion of the property to residential use. Thus, defendants are entitled to the protections afforded under the RSL and the ETPA." Gloverman Realty Corp. v. Jerfferys, 2003 NYLJ LEXIS 244, *7 (Sup. Ct. Kings Cty. 2003).

The court in *IA2 Serv., LLP v. Quinipanta* went slightly further, ruling that while "[t]here has been no showing that the landlord actively knew that the basement was being used residentially . . . there is likewise no showing that he undertook any steps to learn, limit or otherwise investigate" the space. In ruling in favor of the tenant, the *Quinipanta* court pointed to the following factors: the landlord spent a "minimal" amount of time at the building; the tenant did not hide his presence (he had a barking dog and a crying baby, received early morning deliveries, and had constant interactions with neighbors); and the landlord knew the tenant was performing some construction in the basement. In light of those factors, the court imputed knowledge of residential use to the landlord. IA2 Serv., LLP v. Quinipanta, 64 Misc. 3d 1220(A) (Civ. Ct. Kings Cty. 2019).

In short, a landlord cannot be taken by surprise that its building has become subject to the RSL by virtue of the tenants' use without permission. See, e.g., Benroal Realty Assoc., L.P. v. Lowe, 9 Misc. 3d 4 (App. Term 2005). Yet, knowledge and even perhaps willful blindness will preclude the landlord from claiming an exemption from the RSL. Moreover, as addressed above, so long as the contemporary owner had or should have knowledge, a subsequent landlord cannot use lack of knowledge as a defense. Indeed, "a de facto rent stabilization status can be created even when the current owner had no knowledge of the alterations." 2042a Pac. LLC v. Kelley, 2017 NYLJ LEXIS 2611 (Civ. Ct. Kings Cty. 2017).

Evidence

While the de facto stabilization doctrine enjoys considerable success at the appellate level, in our experience, Civil Court judges maintain exacting standards in the proof they require to apply the doctrine. Practitioners need to produce ample evidence that there are/were more than six units in a building. Fortunately, there are several readily available sources of such evidence.

When Was the Building Built?

This fact normally will not be in dispute and thus there will be no need for the respondent to submit evidence at trial. However, on summary judgment, the party moving bears the burden of showing there are no material issues of fact in dispute and thus would need to present evidence on this point. While it can be difficult, in our experience, to obtain admissible document evidence showing precisely when a building was built, there are many documents that will give you a clear indication that it was built before 1974. The Automated City Registrar Information System (ACRIS) is an online database of documents recorded with the New York City Department of Finance relating to interests in real property. Using ACRIS, you can easily see if there were sales or other transfers involving a building before 1974. Similarly, a building built before 1928 should have an I-Card, which would be available on the HPD website. See, e.g., 2042a Pac. LLC v. Kelley, 2017 NYLJ LEXIS 2611, *12 (Civ. Ct. Kings Cty. 2017).

How to Prove Six or More Units

One of the most persuasive pieces of evidence is Department of Buildings (DOB) violations. Because de facto units are so often illegally converted, it is common for the DOB to place violations on the properties in which you are litigating. These violations are easily found on the DOB's website and easily subpoenaed. Courts give great weight to DOB violations, and they are clear evidence of how many units are in a building.

Such violations are so persuasive that appellate courts have affirmed orders dismissing cases based on that alone. For example, in *Ortiz v. Sohngen*, the court ruled that a DOB violation was "prima facie evidence that the premises contained more than the approved six residential units." The landlord in that case offered only "bare statement in affidavits . . . to the effect that the building has always been composed of five residential units and one commercial units" to rebut the DOB violation. The court rejected the landlord's conclusory evidence, ruling that it had not "provided sworn proof on personal knowledge to rebut the

DOB's determination." In fact, the violation itself indicated that the "landlord was fined for the violation and paid the fine." Under those circumstances, the DOB's determination that there were six or more units was conclusive. Ortiz v. Sohngen, 56 Misc. 3d 19, 21 (App. Term 2017) (citation omitted).

Although somewhat less common, the Department of Housing Preservation and Development (HPD) also places violations for illegally converted units. A court can take judicial notice of HPD violations, which, pursuant to N.Y. Mult. Dwell. Law § 328(3), are "prima facie evidence" of their contents. Accordingly, in *Souffrant v. Kidd*, for example, the court found that HPD violations were sufficient to grant the respondent summary judgment. Souffrant v. Kidd, 2018 NYLJ LEXIS 1740 (Civ. Ct. Kings Cty. 2018).

Another plentiful source of credible evidence can be found in the Housing Court's records. Owners of de facto stabilized buildings will often bring cases against multiple tenants in the building. Practitioners should search the court's system for both the petitioner's name and the building address. If you find cases for other respondents, review those files. The court can take judicial notice of the contents of those files, which will often identify tenants and the room they are occupying. This frequently results in compelling evidence. For example, in *Castell v. Nembard-Smith*, the court stated:

> As evidenced by petitioner's two holdover proceedings against two separate individuals, residing in two separate residential units in the premises' basement, under L&T 055362/20 15 and L&T 58835/20 16, besides the four apartments registered with HPD, at least two additional residential units also existed, at one time, in the basement. Adding the two basement units petitioner sought to recover in prior holdover proceedings to the existing four units registered with HPD, would bring all the units in the building under rent stabilization, as they would total six units.
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> . . .
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> Petitioners' own actions of commencing those two basement holdovers against two separate basement "tenants" residing in two separate basement dwelling units, who, according to the petitions in each case, each entered into possession under a rental agreement with the petitioners, are evidence of at least two dwelling units that existed in the basement.

Castell v. Nembard-Smith, 2017 NYLJ LEXIS 1458, *17 (Civ. Ct. Kings Cty 2017).

Finally, practitioners should spend ample time preparing witness testimony. Practitioners should be prepared to elicit detailed testimony about the physical configuration of the building in question. Typically, the authors will have a witness take the fact-finder on a virtual walk-through of the building. We start at the front door and have the witness describe the physical layout of each floor. We supplement this description with photographs of each individual dwelling unit (or, more often, the door to each unit). Witnesses should point out details like multiple mailboxes, numbers on each door, and communal cooking facilities. Advocates should take photographs of each of the most salient features demonstrating occupancy by more than six unique households. Sometimes, credible testimony is the dispositive difference. See IA2 Serv., LLP v. Quinipanta, 2019 N.Y. Misc. LEXIS 4193 (Civ. Ct. Kings Cty. 2019) ("Respondents' testimony was sufficient to establish the use of the basement as a dwelling unit, the sixth such unit at the premises.").

In addition to configuration, it is important for practitioners to elicit testimony about the arrangements the tenants have with the landlord. For example, in *Cummins v. Griffith*, the landlord rented out individual rooms in two different apartments. The landlord argued that it had only two tenants with leases in the building and therefore the building was not subject to the RSL. Cummins v. Griffith, 2018 NYLJ LEXIS 2443, *5–6 (Civ. Ct. Kings Cty. 2018). The court rejected the landlord's argument, ruling that while it was true that there was one written lease for each apartment, the landlord accepted individual rental payments from each tenant, and that "these men have exclusive use of their respective rooms." The court concluded that "notwithstanding the written leases with the occupants . . . signed as 'co-tenants,' petitioner's intention and actions have been to rent these units as shared housing." The court considered that the tenants were unrelated to each other, "did not know each other prior to moving in, moved in at separate times, live separately"; have exclusive access to their rooms; and pay their rent separately from each other. In light of these factors, the court found that the building was subject to rent stabilization. Id.

Landlords struggle to refute testimony like this. They may raise other legal defenses, but credible witness testimony establishing these facts is difficult to contradict.

Collateral Issues and Open Questions

There are a number of collateral issues and questions a practitioner should consider when dealing with a potential de facto rent stabilized building. This is a developing and rapidly changing area of law, so practitioners should prepare for a certain level of uncertainty and unpredictability. That said, there are three issues we have encountered in most cases we have litigated.

Department of Buildings Vacate Order

First, practitioners should consider the possibility that the DOB will place a vacate order on the building. Many de facto stabilized units were illegally constructed and their use is contrary to the authorized use of a given building. These units often raise serious safety issues, such as overcrowding and adequate fire safety. If a litigant raises the issue of de facto stabilization, it is possible that the DOB will take notice of the building and issue a vacate order.

In our experience, this is a relatively rare occurrence. Even when the DOB issues violations for illegal use, it reserves full vacate orders for the most hazardous cases. Attorneys and litigants, however, should be aware of this risk and should advise clients accordingly.

Landlord Abandonment

Second, and far more common, is landlord abandonment. We have seen many landlords undertake a strategy of intentional neglect to force out tenants who successfully litigated de facto stabilization defenses. By denying essential services, allowing buildings to fall into severe disrepair, and refusing to guarantee basic safety (such as locks on the front door), landlords pressure their de facto stabilized tenants to vacate. This policy of neglect is often paired with more direct and explicit harassment.

Again, advocates need to have frank conversations with their clients about this possibility. It is also a good idea to have a plan for a second round of advocacy. This would likely include filing an HP petition. HP cases in de facto stabilized buildings are relatively untested but are likely a good means for forcing compliance with basic housing standards.

Rent Issues

Finally, assuming you are able to get a ruling establishing that a building is de facto rent stabilized, you should consider issues of rent and rent overcharge. If the building is occupied in a manner inconsistent with its certificate of occupancy, the tenants have no rent obligation until the usage complies with the certificate of occupancy. N.Y. Mult. Dwell. Law § 302(1). Tenants are within their rights to withhold rent until their landlord takes the step necessary to legalize their unit.

Furthermore, because de facto units are never registered with DHCR, there are difficult questions regarding what the rent should be, assuming the landlord takes steps to legalize the use. Section 2522.6 of the Rent Stabilization Code provides some guidance on this. That subsection of the RSC provides four options for determining the legal rent when the legal-regulated rent "cannot be determined, or . . . a full rental history . . . is not provided, or . . . is the product of a fraudulent scheme to deregulate the apartment." 9 NYCRR § 2522.6(b)(2). Those four options are:

1. The lowest registered rent for a comparable unit in the building
2. The complaining tenant's initial rent
3. The last registered rent paid by the prior tenant –or–
4. An amount based on data compiled by the DHCR

9 NYCRR § 2522.6(b)(3).

In de facto units, option two is the easiest to apply. It is rare to find any units registered with DHCR in de facto stabilized buildings, thus ruling out use of options one and three. Option four might be useful, but DHCR can be slow to act, and it can take a long time to get a final determination from the agency.

While the second option is the easiest to apply, it can also be problematic because de facto units are often, relatively, quite expensive. Despite the fact that they are small and illegal, New York City's tight housing market enables landlords to charge rents as high as $700 or $800 for a single room in an illegally converted building. Advocates should be prepared to request lower rents for their clients but should know that doing so is not always easy.

Looking Ahead

De facto rent stabilization is an important doctrine for advocacy on behalf of some of New York City's most vulnerable tenants. It can guarantee a measure of housing security for people who would otherwise become homeless. The doctrine has developed rapidly over the past several years and, thus, presents both exciting possibilities and unique challenges for advocates. This article should provide advocates with the tools they need to litigate this defense with confidence.

Table of Cases

As noted above, since the seminal rulings in *Joe Lebnan* and *Robrish*, there have been multiple cases in each borough where tenants have successfully litigated de facto stabilization defenses. The cases below provide a starting point for practitioners.

General	**Brief Summary**
Case	
Beverly Holding NY, LLC v. Blackwood, 63 Misc.3d 160(A), 2019 N.Y. Misc. LEXIS 2863 (App. Term 2019)	Affirmed the trial court's dismissal of a holdover petition where five-unit building was converted to six units.
270 Glenmore Ave., LLC. v. Blondet, 55 Misc.3d 133(A), 2017 N.Y. Misc. LEXIS 1158 (App. Term 2017)	Vacating a stipulation with a final judgment when the tenant made a prima facie showing that "contrary to the allegations of the petition, tenant's apartment was rent stabilized as a result of the building having contained six residential units."
124 Meserole, LLC v. Recko, 55 Misc 3d 146(A), 2017 N.Y. Misc. LEXIS 2022 (App. Term 2017)	Ruled that de facto units "need not be legal or in conformity with building-code or other requirements" to confer rent stabilized status.
Edison 1205 LLC v. Brickhouse, 58 Misc.3d 1229(A), 2018 NY Slip Op 50308(U) (Civ. Ct. Queens Cty. 2018)	Dismissed petition where two-family home was illegally subdivided into 10 residential units because the predicate notice failed to state a cause of action under the RSL.
567 W. 184th LLC v. Martinez, , 2017 NYLJ LEXIS 1011 (Civ. Ct. N.Y. Cty. 2017)	Granted tenants summary judgment when they proved subject building had an illegal sixth unit and was thus subject to rent stabilization.
Feldheim v. Stuckey, 58 Misc.3d 719 (Civ. Ct. Bx. Cty. 2017)	Found that subject units were de facto rent stabilized when the petitioner's predecessor-in-interest illegally subdivided the building into six or more units.
Burden of Proof	**Quotation from case**
Case	
Towers Hotel Investors Corp. v. Davis, 85 Misc. 2d 451, 454 (App. Term 1975)	At 354: "[I]f the petitioner is claiming that the units are not covered by a statute, then it would have the burden of coming forth with evidence to establish that fact."
Alphonse Hotel Corp. v. Roseboom, 46 Misc. 3d 136(A), 2015 N.Y. Misc. LEXIS 6 (App. Term 2015)	"[L]andlord failed to meet its evidentiary burden to establish that . . . the unit is exempt from rent stabilization coverage."
375 N.Y. HDFC v. Jones, 47 Misc. 3d 1206(A) (Civ. Ct. N.Y. Cty. 2015), aff'd, 52 Misc. 3d 129(A) (App. Term. 2016)	"[T]he Court finds that Petitioner failed to meet its burden in establishing that the Subject Premises is exempt from rent stabilization and the petition is dismissed."
Base Date	**Quotation**
Case	
Barrington Travel Grp., Inc. v. Nivens, 14 Misc. 3d 1224(A) (Civ. Ct. N.Y. Cty. 2006), aff'd, 14 Misc. 3d 133(A) (App. Term 2007)	"While the certificate of occupancy describes the building as a five unit residential building, the affidavits . . . establish that the 'dentist office' was utilized for residential purposes for more than twenty-five years thereby creating a sixth residential unit and bringing the entire building under rent stabilization."

Subsequent Reduction of Units Case	Quotation
Ki Wai Leung v. Division of Hous. & Community Renewal, 266 A.D.2d 545, 546, (App. Div. 1999)	Court held that DHCR's "determination that the building owned by the petitioner was subject to the Rent Stabilization Code notwithstanding its conversion to a building with less than six apartments, was neither arbitrary nor capricious."
Rosenberg v. Gettes, 187 Misc. 2d 790, 791 (App. Term 2000)	"[A]ny attempt by landlord to reduce the number of residential units subsequent to the base date does not effect an exemption from rent stabilization."

Andrew Darcy, Supervising Attorney, Mobilization for Justice

Andrew Darcy is a Supervising Attorney at Mobilization for Justice, where his practice focuses on eviction defense in the Bronx. Before becoming a supervisor, Mr. Darcy was a Staff Attorney at MFJ, representing tenants involved in disputes with their landlords in the Bronx and Manhattan. He has advocated for tenants from pre-litigation stages through appeals, in cases involving, among others things, illegal lockouts, rent overcharges, allegations of nonpayment of rent, and breach of lease.

Before joining MFJ, Mr. Darcy was an associate at Cleary, Gottlieb, Steen & Hamilton LLP, where he was involved in complex commercial, antitrust, and securities matters, as well as government investigations. Mr. Darcy clerked for the Honorable Katharine S. Hayden, District Judge for the District of New Jersey.

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Brian Sullivan is a Senior Staff Attorney at Mobilization For Justice. His practice focuses on eviction defense in New York Civil and Supreme Court, and on tenant advocacy in a number of different forums. Mr. Sullivan has worked at Mobilization For Justice since graduating from law school. During that time he has served low-income New Yorkers in several practice areas, including landlord-tenant, foreclosure, and public benefits.