

CTQ-2014-00004

Court of Appeals
STATE OF NEW YORK

IN THE MATTER OF MARY VERONICA SANTIAGO-MONTEVERDE,

Debtor,

MARY VERONICA SANTIAGO-MONTEVERDE,

Appellant,

V.

JOHN S. PEREIRA, CHAPTER 7 TRUSTEE,

Respondent.

*On a Question Certified by the United States Court of Appeals
For the Second Circuit (USCOA Docket No. 12-4131 – bk)*

**BRIEF OF *AMICI CURIAE* NEW YORK CITY BANKRUPTCY
ASSISTANCE PROJECT AND MFY LEGAL SERVICES, INC. IN
SUPPORT OF APPELLANT**

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INTEREST OF AMICI CURIAE

The New York City Bankruptcy Assistance Project at Legal Services NYC (the “NYC BAP”) and MFY Legal Services, Inc. (“MFY”) appear as *amici curiae* in support of the Appellant in this case. Allowing the lawful occupant(s) of an apartment unit with occupancy and succession rights to be deprived of those rights by a bankruptcy trustee acting in concert with a landlord seeking to force the surrender of such rights would eviscerate rights and protections available to such lawful occupants under the New York rent stabilization regime.¹

The NYC BAP provides free bankruptcy assistance to low-income residents of New York City, holding weekly workshops and helping debtors prepare and file Chapter 7 petitions. MFY established the Low-Income Bankruptcy Project (LIBP) in September 2012 to serve New York City residents who are in need of bankruptcy protection, but who are unable to afford an attorney, and provides full representation and *pro se* assistance to debtors in Chapter 7 cases. If Chapter 7 trustees are permitted to force rent-stabilized tenants to surrender their apartments, the low-income clients of the NYC BAP and MFY will face increased difficulty in achieving financial stability and their fresh starts will be hindered.

¹ Respondent, Mr. Pereira, has been administering Chapter 7 consumer cases as a panel trustee for over thirty years. *Amici* do not question that his actions appear to be motivated by his duty to marshal assets for the estate.

The NYC BAP’s and MFY’s interests are straightforward. The outcome of this case will affect all individual debtors and potential debtors under the Bankruptcy Code who also benefit from New York City’s decades-old rent stabilization regime. This case is therefore critical to the people *Amici* serve: low-income New Yorkers who may have to rely on the Bankruptcy Code’s protections to avoid dependency on public assistance and/or homelessness. A decision by the Court authorizing the assignment of a lawful occupant’s rent-stabilization rights could have disastrous effects on low-income individuals and their ability to file for bankruptcy relief. Therefore, *Amici* urge the Court to find that those rights cannot be monetized by a bankruptcy trustee, or a creditor, acting in concert with a landlord seeking to force the surrender of such rights.

QUESTION CERTIFIED TO THIS COURT

Whether a debtor-tenant possesses an interest in the value of the right to occupy her rent-stabilized apartment unit that may be exempt from her bankruptcy estate pursuant to New York State Debtor and Creditor Law Section 282(2) as a “local public assistance benefit.”²

Consistent with the directive from the United States Court of Appeals for the Second Circuit that this Court may also “reformulate or expand the certified

² *In re Santiago-Monteverde*, 747 F.3d 153 (2d Cir. 2014).

question as it deems appropriate,”³ *Amici* offer alternative state law grounds for this Court to find that a Chapter 7 Trustee may not assume and assign a debtor-tenant’s rent-stabilized lease for the benefit of creditors. In accepting the Second Circuit’s invitation to “reformulate and expand the certified question,” *Amici* urge this Court to answer the following question in the negative: When the New York rent stabilization regime provides the lawful occupant(s) of an apartment unit with occupancy, renewal and succession rights, can those rights be monetized by a bankruptcy trustee, or a creditor, acting in concert with a landlord seeking to force the surrender of such rights?

STATEMENT OF FACTS AND OF THE CASE

Appellant Mary Santiago-Monteverde (“Ms. Santiago”) has lived in her apartment in the East Village section of lower Manhattan for over forty years. During that time, she has dutifully paid her rent and otherwise complied with the provisions of the rent stabilization laws. When her husband died in June 2011, Ms. Santiago was unable to pay her debts and filed for Chapter 7 bankruptcy. Instead of receiving a fresh start, Ms. Santiago has been the victim of an agreement

³ *Id.* at 159.

between a bankruptcy trustee and her landlord to cause the involuntary surrender of her apartment.⁴

Ms. Santiago objected to this transaction, asserting before the U.S. Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) that the value of her rent-stabilization benefits are exempt from her bankruptcy estate under Section 282(2) of New York’s Debtor & Creditor Law.⁵ The Bankruptcy Court ruled that the exemption was not available to her, and the U.S. District Court for the Southern District of New York (the “District Court”) affirmed.⁶ After the Second Circuit received briefing and heard oral argument on the issue, it certified the question to this Court. This Court accepted the certification in its Order issued on May 13, 2014.

Any forced surrender of a rent-stabilized apartment is void under the New York rent stabilization regime. The lower courts erred in implicitly allowing Respondent to assist the landlord’s *ultra vires* attempt to strip Ms. Santiago of the protections afforded her by the rent stabilization laws. Ms. Santiago’s rights under the rent-stabilization regime cannot be sold; they are personal rights. Moreover, even if the rent-stabilization rights constitute property rights, such rights are

⁴ Appendix (“App.”) 75-76. Upon litigation, the Landlord proposed a settlement of the tenancy issue that Ms. Santiago rejected. The substance of that settlement offer—and Ms. Santiago’s reasons for rejecting it—are irrelevant to the question at issue here.

⁵ App. 73.

⁶ App. 93-100; App. 154-57

exempt from process, and Respondent lacks the legal capacity and authority to administer and monetize such rights for the benefit of creditors.

RENT-STABILIZATION AND BANKRUPTCY: AN OVERVIEW

New York City has long been one of the most expensive residential real estate markets in the country, with high demand and low vacancy pushing rents into the stratosphere. In numerous laws and regulations enacted since the 1970s, the State Legislature and the City Council have found that “a serious public emergency continues to exist in the housing of a considerable number of persons within the state [or city] of New York.”⁷ New York City’s rent stabilization laws and regulations form a comprehensive system designed to preserve affordable housing for the City’s low-income, working poor, and middle class residents.⁸ Recognizing that, unlike virtually every other area of the country, New York is a city of lifelong renters, the State Legislature and the City Council have enacted a comprehensive regime of regulations designed to protect “over two million New Yorkers who call their apartments ‘home.’”⁹ These laws provide protection from eviction except for cause and the perpetual right to a renewal lease for rent

⁷ See, e.g., N.Y.C. Admin. Code §§ 26-501, 26-502; N.Y. EMERGENCY TENANT PROTECTION ACT § 2 (1974) (renewed 2011).

⁸ See FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, FACT BRIEF: RENT STABILIZATION IN NEW YORK CITY 3 (2012), hereinafter FURMAN CENTER REPORT, available at http://furmancenter.org/files/publications/HVS_Rent_Stabilization_fact_sheet_FINAL.pdf (stating that “stabilized units are home to lower income households than market-rate units”).

⁹ Statement of Sen. Skelos, Sen. Bill 5856, bill jacket at 20, *et seq* (reporting that 62% of rent-stabilized households make \$50,000 a year or less).

stabilized tenants.¹⁰ These provisions, coupled with the rent stabilization laws' limitations on rent increases, give tenants reassurance that they will be able to meet their housing costs in the future. Rent stabilization benefits individual tenants and the city as a whole by "providing an adequate supply of affordable housing."¹¹

Rent stabilization covers 986,840 units of housing in New York City: 31% of all units in the city and 45.4% of all rental units.¹² Units are subject to rent stabilization in various ways: some buildings by virtue of their age and size, others in exchange for city property tax benefits.¹³ The median contract rent in rent-stabilized units was \$1,050 as of 2011; for unregulated units the median rent was \$1,369.¹⁴ Even so, residents of rent-stabilized units paid, on average, a larger percentage of their income in rent than residents of non-regulated units: 32.1% compared to 30.5%.¹⁵

Tenants in rent-stabilized apartments maintain longer-term tenancies compared to the entire New York City population. In New York City overall, just 7.1% of all market-rate renters moved in to their current apartments more than 20 years ago. However, 23.1% of the city's rent-stabilized tenants have resided in the

¹⁰ 9 N.Y.C.R.R. § 2524.1; *see also Caine v. Carreker*, 116 Misc.2d 419, 457 N.Y.S.2d 682 (App. Term 1st Dep't 1982) ("the right to a renewal lease is one of the cornerstones of the rent stabilization system").

¹¹ *Drucker v. Mauro*, 30 A.D.3d 37, 40, 814 N.Y.S.2d 43, 45 (App. Div. 1st Dep't 2006).

¹² FURMAN CENTER REPORT 1.

¹³ *Id.*

¹⁴ NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, 2011 HOUSING VACANCY SURVEY 6 (hereinafter HPD REPORT).

¹⁵ *Id.* at 7.

same apartment for two decades or more.¹⁶ The divide is even more striking in Manhattan below 96th Street: in that part of the city, 35.2% of rent-stabilized tenants moved in before 1991, as compared to just 2.7% of market-rate tenants.¹⁷ These figures demonstrate that rent stabilization provides an important measure of residential continuity in an ever-changing city, and that rent-stabilized tenants are less mobile and less able to seek new housing accommodation than those renting at market rates.

The benefits of rent-stabilization accrue disproportionately to the city's most vulnerable residents: the poor, the elderly, and residents of color. Median income for rent-stabilized tenants is \$36,600, compared to \$52,260 for market rate tenants.¹⁸ A total of 17.4% of rent-stabilized households are headed by an individual over the age of 65 – more than double the rate for non-regulated units – and 56% of non-regulated units are occupied by non-white renters, compared to 63.7% of rent-stabilized units.¹⁹

Losing a rent-stabilized apartment can be catastrophic for a low-income renter, as comparable affordable housing can be unobtainable.²⁰ For many tenants, rent stabilization also brings access to ancillary rent reduction benefits that are not

¹⁶ FURMAN CENTER REPORT 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 4-5.

²⁰ See HPD REPORT 4 (in 2011, vacancy rate for rent-stabilized units was 2.63%; vacancy rate for other regulated housing such as Mitchell-Lama, public housing, and HUD-regulated units was 1.4%; vacancy rate for units with asking rents below \$800 was 1.1%).

available in unregulated housing units.²¹ The rent stabilization laws contain automatic renewal provisions, protections against eviction, and survivor’s rights, ensuring that the benefits of a rent-stabilized tenancy continue to remain available to a tenant and his or her surviving family.²²

Bankruptcy affords debtors a “fresh start” – “a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’”²³ In order to facilitate this fresh start, the Bankruptcy Code and New York State law permit the debtor to retain certain interests in property as exempt from the bankruptcy estate.²⁴

For a debtor living in a rent-stabilized New York City apartment, nothing could be more important to achieving this fresh economic start than remaining in his or her home. In recent years, however, a troubling new practice has emerged among Chapter 7 trustees in New York City: in order to bring assets into the bankruptcy estate, trustees have sought to assume rent-stabilized leases of debtors

²¹ See 9 N.Y.C.R.R. § 2202.20(a), (b) (providing for Senior Citizen Rent Increase Exemption and limiting application of exemption to rent-regulated tenants).

²² See, e.g., 9 N.Y.C.R.R. § 2524.1 (containing restrictions on removal of tenant).

²³ *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

²⁴ See 11 U.S.C. § 522; see also *Rousey v. Jacoway*, 544 U.S. 320 (2005) (“[T]o help the debtor obtain a fresh start, the Bankruptcy Code permits him to withdraw from the estate certain interests in property, such as his car or home, up to certain values”).

under Section 365 of the Bankruptcy Code,²⁵ and then assign the leases back to the debtors' landlord, who is then free to evict the lawful tenant and raise the rent by issuing a vacancy lease.²⁶ This practice can be highly lucrative, generating repayment for creditors, and generous fees for the trustees, in what would otherwise be no-asset cases. Permitting the eviction of a tenant for reasons not contemplated under the rent stabilization laws can also provide a windfall to a landlord who would otherwise have no role in the bankruptcy proceeding. Debtors seeking a fresh start, meanwhile, are left facing eviction and possible homelessness, rather than benefiting from the fresh start promised by the Bankruptcy Code. Unscrupulous owners of rent-stabilized buildings have shown a penchant for bending the law to evict rent-stabilized tenants, and this practice of trustees, if endorsed, will almost certainly be abused.²⁷ For the reasons below, this practice must be stopped.

²⁵ For an overview of the operation of § 365, see Ira Herman, *Bankruptcy in* NEGOTIATING AND DRAFTING OFFICE LEASES 28-03 (John Busey Wood and Alan M. Di Sciullo eds., 2013).

²⁶ Doing so may also remove the apartment from rent regulation entirely, if the resulting vacancy increase is sufficient to bring the legal rent beyond the threshold for luxury deregulation. *See* 9 N.Y.C.R.R. § 2520.6.

²⁷ *See, e.g., Prometheus Realty v. City of New York*, 2009 WL 2440294 (N.Y. Sup.Ct. 2009) (upholding the Tenant Protection Act as “a rational response to what the City Council has determined is the potential for a growing problem of tenant harassment in New York City”), *aff'd* 80 A.D.3d 206 (App. Div. 1st Dep't 2010).

ARGUMENT

THE NEW YORK RENT STABILIZATION REGIME PROVIDES THE LAWFUL OCCUPANT(S) OF AN APARTMENT WITH OCCUPANCY, RENEWAL AND SUCCESSION RIGHTS THAT MAY NOT BE MONETIZED BY A BANKRUPTCY TRUSTEE.

- A. The New York Rent Stabilization Law and Code provide for occupancy, renewal and succession rights that are not subject to process and are beyond the reach of a lawful occupant’s creditors and any bankruptcy trustee.**

Occupancy and renewal rights under the New York Rent Stabilization Law and New York Rent Stabilization Code cannot be sold,²⁸ cannot be inherited,²⁹ would not be part of a marital estate,³⁰ and cannot be attached by a creditor outside of bankruptcy.³¹

C.P.L.R. 5201(b) enumerates the property interests that may be reached to satisfy a judgment. It permits a creditor to reach only a judgment debtor’s property, not otherwise exempt, “which could be assigned or transferred”, i.e.,

²⁸ Although a tenant may sublet, the tenant may not take a payment in excess of the legal rent, and the renewal and occupancy rights remain with the tenant, not the subtenant. 9 N.Y.C.C.R. § 2525.6(d) and (e).

²⁹ Although a family member may succeed to a tenant’s rent-stabilization rights, if that person resided with the tenant for two years prior to the tenant’s death, 9 N.Y.C.C.R. § 2520.6(o), the successor’s rights are his or her own rights under the statute as a co-occupant, not the inherited rights of the deceased tenant. *See South Pierre Assocs. v. Mankowitz*, 844 N.Y.S.2d 552, 553 (N.Y. App. Term 2007) (succession rights are not automatically vested in a potential successor upon the death of a tenant, but remain inchoate until judicial determination).

³⁰ *Cudar v. Cudar*, 98 A.D.3d 27, 35 (N.Y. App. Div. 2012) (holding that leasehold interest to use and occupy a rent-controlled apartment “is neither marital nor separate property”).

³¹ *See Kashi v. Gratsos*, 712 F. Supp. 23, 26 (S.D.N.Y. 1989) (holding that a rent-regulated lease “is not an attachable property interest in the hands of the lessee”).

property that a judgment debtor has the power to assign or transfer.³² Ms. Santiago's rent-stabilized rights plainly do not meet this criterion. By prohibiting a rent stabilized tenant from subletting his or her apartment for more than two years, as well as restricting occupancy and renewal rights to the rent stabilized tenant/occupant, the rent-stabilization regime clearly precludes an outright transfer and assignment of the lease.³³

Thus, Ms. Santiago's creditors could not expect to satisfy their claims by reaching her occupancy and renewal rights.³⁴

As occupancy, renewal and succession rights do not constitute property of Ms. Santiago's bankruptcy estate, Ms. Santiago's exemption of those rights is superfluous, but not erroneous. A debtor in a bankruptcy case is permitted out of an abundance of caution to exempt assets or rights that may not be property of the estate.³⁵ Courts should not strike cautious exemptions of rights that are not actually property of the bankruptcy estate.³⁶

³² N.Y. Civ. Prac. L. & R. § 5201(b); *see also* Siegel-NYPRAC § 486; *cf. Abkco Indus., Inc. v. Apple Films, Inc.*, 39 MY.2d 670, 674 (N.Y. 1976) (profit-sharing rights under a licensing agreement were attachable because they were assignable).

³³ *See* 9 N.Y.C.R.R. § 2525.6(e)1, (d); *see also Kashi v. Gratsos*, 712 F.Supp. 23, 26 (S.D.N.Y. 1989) (a rent-regulated lease “is not attachable property interest in the hands of the lessee.”).

³⁴ *See In re Bygaph, Inc.*, 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986) (Section 365 “is not designed to afford a landlord with a benefit in addition to that which he originally bargained for under the original lease.”); *In re Prime Motor Inns, Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994) (“[The] objective of Section 365 . . . is to protect the landlord, not to improve its position.”).

³⁵ *See In re Hilsen*, 405 B.R. 49, 60 (Bankr. E.D.N.Y. 2009) (holding that parties objecting to debtor's exemption of conditional right of occupancy did not show that the exemption was not properly claimed, because the right was a personal right and not property of the bankruptcy estate); *In re Brand*, 251 B.R. 912, 916 (Bankr. S.D. Fla. 2000) (overruling trustee's objection to

B. Only lawful occupants of a rent stabilized unit hold occupancy, renewal and succession rights under the New York rent stabilization regime and such rights are “personal” to such lawful occupants.

A rent-stabilized occupant has rights that come from two sources: (i) the rent-stabilized lease, and (ii) the Rent Stabilization Law and Rent Stabilization Code.³⁷ While a rent-stabilized lease may be an “unexpired lease” within the meaning of 11 U.S.C. § 365 that may either be assumed or rejected, the rights created by the New York rent stabilization regime in favor of a qualified occupant are a distinct bundle of statutory rights personal to the occupant and not derived from the lease.³⁸

debtor’s exemption of an elective share in his wife’s will, which the debtor had listed on his schedules “out of an abundance of caution,” because the elective share was a personal right and not property of the bankruptcy estate).

³⁶ See cases cited *supra* note 35.

³⁷ N.Y.C. Admin. Code §§ 26-501–26-520; 9 N.Y.C.R.R. §§ 2520–2530; see *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 674–75 (2d Cir. 1995) (regarding rent-stabilized leases and tenants’ anti-eviction rights under the Rent Stabilization Law as separate rights and concluding that repudiation of the leases would be “fruitless” as long as the tenant retained anti-eviction rights). The Second Circuit concluded in *Diamond* that the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) preempted the anti-eviction laws because Congress passed FIRREA to avoid large-scale “financial hemorrhaging” by maximizing the net present value return from the sale of thrift assets. The economic importance of this goal, together with a clear conflict with the Rent Stabilization Law, led the Second Circuit to conclude that in the limited situation in which a FIRREA debtor is a landlord, FIRREA preempts the Rent Stabilization Law’s anti-eviction provisions. The Bankruptcy Code balances multiple goals, and its “principal purpose” is a fresh start for the debtor. *Marrama v. Citizens Bank of Mass.*, 127 S.Ct. 1105, 1107 (2007). When the debtor is the tenant, the goal of a fresh start is served by *preserving* the anti-eviction right, not by preempting it.

³⁸ *E.g.*, 9 N.Y.C.R.R. § 2525.6(d) (providing that if a tenant sublets, the renewal and occupancy rights remain with the tenant); *Evans v. Schneider*, 183 Misc.2d 114, 117–18 (N.Y. Civ. Ct. 1999) (holding that the automatic stay does not apply to a landlord’s notice of intent to terminate a rent-stabilized lease because the tenant’s renewal right “may have practical value to both the tenant and landlord, [but] it is not an interest that can properly be sold on the market and to which a monetary value can be assigned”).

The occupant has two key rights created by the the New York Rent Stabilization Law and New York Rent Stabilization Code: first, the right to renew the lease for the unit occupied at a rent-stabilized rate;³⁹ and second, if the landlord fails to renew the lease, the right to occupy the unit on the same terms.⁴⁰ These rights are created by the statute scheme, not by the lease; therefore, they are purely statutory rights and are not contractual rights.

When the tenant occupies an apartment pursuant to a lease, the lease rights and the statutory rights appear to be intertwined. But the rights under the lease are actually separate from the rights created by the statutory scheme. Thus, an occupant retains anti-eviction rights under the New York’s rent stabilization laws and rules, even after his or her lease has expired or been repudiated.⁴¹

Such occupancy and renewal rights, therefore, are not property rights, and they are not rights that can be transferred.⁴² Rather, such rights are personal. Therefore these rights never become “property of the [bankruptcy] estate” when a

³⁹ 9 N.Y.C.R.R. § 2524.1(a).

⁴⁰ 9 N.Y.C.R.R. § 2523.5(d) (“Except as provided in Part 2524 of this Title, the failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by the RSL and this Code and the tenant shall continue to have the same rights as if the expiring lease were still in effect.”).

⁴¹ *Diamond*, 45 F.3d at 674–75; *see Baginski v. Lysiak*, 154 Misc. 2d 275, 594 N.Y.S.2d 99 (App. Term, 2nd & 11th Dists. 1992) (rent stabilized tenants become month to month tenants with statutory protections upon expiration without renewal of the rent stabilized lease).

⁴² 9 N.Y.C.R.R. § 2525.6; *see also* N.Y. Civ. Prac. L. & R. § 5201 (only assignable or transferable rights are attachable property interests); *Kashi v. Gratsos*, 712 F. Supp. 23, 26 (S.D.N.Y. 1989) (a lease for a rent-controlled apartment is not an attachable property interest under § 5201 because it is not assignable).

bankruptcy petition is filed.⁴³ It is absolutely clear that New York State never intended to bestow some kind of gift *asset* upon occupants of rent stabilized apartment units, much less give away a valuable, alienable, asset.⁴⁴ Rather, the purpose of rent stabilization is to assure occupants that their rents will not increase to the point where they are unaffordable due to the ongoing housing emergency, i.e., a shortage of available housing units. Indeed, treating rent stabilization rights as an asset that can be monetized would directly contravene the very purpose of rent stabilization in New York—“forestall[ing] profiteering [and] speculation.”⁴⁵

In *In re Hilsen*,⁴⁶ the Bankruptcy Court for the Eastern District of New York held that a conditional right of occupancy of real estate owned by a trust, granted to the beneficiary of the trust, was not a property right, but a personal right.⁴⁷ Because the right was inalienable and did not include the right to exclude others from possession, the right to lease and collect rents, or the right to force a sale, it did not have the characteristics of a life estate, and was instead a personal right that was not subject to administration as a property right.⁴⁸ The occupancy right under New York Rent Stabilization Law and New York Rent Stabilization Code has the

⁴³ *In re Hilsen*, 405 B.R. 49, 60 (Bankr. E.D.N.Y. 2009) (holding that “a conditional right of occupancy is more closely akin to a personal right rather than a property right” and thus is not property of the bankruptcy estate and cannot be transferred or exercised by the trustee).

⁴⁴ See N.Y.C. Admin. Code § 26-501.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 59-60.

same nature: it is a conditional,⁴⁹ non-transferable right for an individual person to occupy a particular piece of real property. Like the right to occupy trust property, the right to remain in a rent-stabilized apartment is not a property right.

The renewal right is also a personal right. The renewal right gives the occupant of a rent-stabilized apartment the option to renew a lease. It thus creates the possibility of the tenant obtaining a property right—a new lease. But a personal right that if exercised creates a property right, is not itself a property right.⁵⁰ The court in *In re McCourt* held that a surviving spouse’s privilege to elect against a deceased spouse’s will was not a “property right *in esse*, but only a property right *in posse* which springs into existence only if the statutory right is exercised under the conditions which create the right only as of the time of the exercise of the election.”⁵¹ The personal right of election, because it was not a “property right *in esse*,” was not property of the surviving spouse’s bankruptcy estate.⁵² The trustee in bankruptcy could not require the surviving spouse to exercise the right, even if exercising the right would allow the trustee to reach assets.⁵³ The tenant’s renewal right, under the New York Rent Stabilization Law and New York Rent Stabilization Code, if exercised, gives rise to a property

⁴⁹ *E.g.*, 9 N.Y.C.R.R. § 2524.3 (listing wrongful acts of tenant that justify eviction) and § 2524.4 (listing grounds for refusal to renew lease, including recovery of possession for owner’s personal use and occupancy).

⁵⁰ *In re McCourt*, 12 B.R. 587, 589–90 (Bankr. S.D.N.Y. 1981).

⁵¹ *Id.*

⁵² *Id.* at 591.

⁵³ *Id.*

right—a new lease. But the renewal right is not itself a property right, so it cannot become property of a bankruptcy estate.

As stated above, occupancy and renewal rights under the New York Rent Stabilization Law and New York Rent Stabilization Code cannot be sold,⁵⁴ cannot be inherited,⁵⁵ would not be part of a marital estate,⁵⁶ and cannot be attached by a creditor outside of bankruptcy.⁵⁷ These rights do not have the characteristics of property rights.⁵⁸ Therefore, Respondent can have no authority to exercise or to assign such rights.⁵⁹ Even if the Respondent had the right to assume and assign *the lease*, which he does not, Ms. Santiago retains the *personal right to occupy* the

⁵⁴ Although a tenant may sublet, the tenant may not take a payment in excess of the legal rent, and the renewal and occupancy rights remain with the tenant, not the subtenant. 9 N.Y.C.C.R. § 2525.6(d) and (e)).

⁵⁵ Although a family member may succeed to a tenant’s rent-stabilization rights, if that person resided with the tenant for two years prior to the tenant’s death, 9 N.Y.C.C.R. § 2520.6(o), the successor’s rights are his or her own rights under the statute as a co-occupant, not the inherited rights of the deceased tenant. *See South Pierre Assocs. v. Mankowitz*, 844 N.Y.S.2d 552, 553 (N.Y. App. Term 2007) (succession rights are not automatically vested in a potential successor upon the death of a tenant, but remain inchoate until judicial determination).

⁵⁶ *Cudar v. Cudar*, 98 A.D.3d 27, 35 (N.Y. App. Div. 2012) (holding that leasehold interest to use and occupy a rent-controlled apartment “is neither marital nor separate property”).

⁵⁷ *See Kashi v. Gratsos*, 712 F. Supp. 23, 26 (S.D.N.Y. 1989) (a lease for a rent-controlled apartment is not an attachable property interest because a judgment creditor cannot reach assets in which the judgment debtor has no interest).

⁵⁸ *See In re Hilsen*, 405 B.R. 49, 59 (Bankr. E.D.N.Y. 2009) (distinguishing a “right to occupy,” which is personal in nature and non-transferable, from a life estate, which is an alienable property right and includes the right to exclude others, the right to lease and collect rents, and, under certain circumstances, the right to force a sale of real property).

⁵⁹ *Id.* at 60 (a trustee may not exercise a debtor’s personal right) (citing *In re McCourt*, 12 B.R. 587, 590 (Bankr. S.D.N.Y. 1981)).

apartment even after the termination of the lease, which is in keeping with the underlying policy goals of the rent stabilization regime.⁶⁰

C. Because the rent-stabilized apartment unit at issue is not the Bankruptcy Trustee’s primary residence, the Bankruptcy Trustee cannot qualify under the applicable Rent-Stabilization Regulations to “step into the shoes” of the lawful occupant(s) of that apartment unit.

A Chapter 7 Trustee succeeds only to the rights that could have been exercised by the debtor.⁶¹ If a bankruptcy trustee assumes a lease, he assumes it *cum onere*,⁶² subject to all the restrictions on the lease under applicable state law—including, with respect to the case at bar, all the restrictions imposed by the New York Rent Stabilization Law and New York Rent Stabilization Code. Because Ms. Santiago may not assign her rights under applicable New York law, Respondent, as bankruptcy trustee, has no authority to assign her rights.

Likewise, Respondent is without authority to assume the lease and the right to occupy the apartment unit presently occupied by Ms. Santiago. Respondent’s ability to assume the lease is subject to all restrictions on alienability imposed by the New York rent stabilization regime. Rent stabilization rights are based on

⁶⁰ 9 N.Y.C.R.R. § 2523.5(d); *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 675 (2d Cir. 1995) (a tenant’s anti-eviction rights remain even after repudiation of leases).

⁶¹ *See id.* (“[T]he estate succeeds only to the nature and the rights of the property interest that the debtor possessed pre-petition. Indeed, were we to find federal preemption of the state law restriction at issue here, the trustee would possess *greater* rights in the property than the debtor.”).

⁶² *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984).

physical occupancy of a rent-stabilized apartment.⁶³ Respondent does not and cannot occupy the apartment as his primary residence; as a result, Respondent does not and cannot qualify as a rent-stabilized occupant either in his individual capacity or in his capacity as Trustee.⁶⁴ The Trustee thus may not assume Ms. Santiago's lease.

D. Appellant's occupancy, renewal and succession rights cannot be assigned by Respondent, as such rights are not amenable to assignment under the New York rent stabilization regime.

Regardless of whether occupancy and renewal rights are property or personal rights, Ms. Santiago may not assign such rights. Under the New York Rent Stabilization Law and New York Rent Stabilization Code, Ms. Santiago has no right to assign the occupancy and renewal rights in exchange for payment.⁶⁵

⁶³ See, e.g., 9 N.Y.C.R.R. § 2520.6(o) (limiting succession rights to a tenant's co-occupants); *In re Muniz*, 1999 WL 182588, at *2–*4 (S.D.N.Y. Mar. 31, 1999) (even after warrant of eviction, rent-controlled or rent-stabilized tenant has the right “incident to his possessory status” to cure arrears and reinstate landlord-tenant relationship); *Aguaiza v. Vantage Props., LLC*, 2009 N.Y. Slip Op. 31144, at 13 (N.Y. Sup. Ct. May 21, 2009) (“[I]n most instances involving the vacancy of a rent regulated apartment and without ever having to sign a vacancy lease, a potential successor tenant's leasehold interest would accrue by virtue of his or her privity of estate grounded on the non-eviction or lease succession provisions of the Rent Stabilization Law and Code.”).

⁶⁴ See authorities cited *supra* note 63.

⁶⁵ A tenant may sublet an apartment for a maximum of two years, and the rent may not exceed the legal maximum. 9 N.Y.C.C.R. § 2525.6(e)(1). A tenant thus may not permanently transfer her rights, and may not engage in profiteering. A tenant may also assign a lease with the consent of the landlord, but not in exchange for payment. 9 N.Y.C.C.R. § 2525.6(e)(2). In fact, attempting to collect a payment in exchange for the lease would be rent gouging, a crime under New York law. N.Y. Pen. L. §§ 180.54–180.57.

The renewal and occupancy rights are generally not assignable.⁶⁶ Occupancy and renewal rights under the New York rent stabilization regime are not assignable property rights, although these rights have great practical value to the individuals who live in rent-stabilized apartments, most of whom struggle to pay even below-market rents.⁶⁷

A family member who resides with a tenant for at least two years prior to the tenant's death may succeed to the tenant's rights,⁶⁸ but the family member's succession rights are based on occupancy, not inheritance.⁶⁹ A living tenant does not have the right to assign her lease in exchange for payment or to assign her occupancy and renewal rights. Restrictions on the alienability of property rights are not preempted by the Bankruptcy Code.⁷⁰

⁶⁶ See N.Y. Real Prop. Law §226-b(1). If the tenant sublets, the renewal and occupancy rights remain with the tenant, not the subtenant. 9 N.Y.C.C.R. § 2525.6(d).

⁶⁷ For the majority of rent-stabilized tenants, their apartments are not affordable under the United States Department of Housing and Urban Development's benchmark. HUD's benchmark of affordability is a 30% rent-to-income ratio. The median rent-to-income ratio for rent-stabilized tenants is 35.2%. NEW YORK CITY RENT GUIDELINES BOARD, 2012 INCOME AND AFFORDABILITY STUDY 9 (2012).

⁶⁸ The Rent Stabilization Code limits succession to individuals who share a legal relationship, such as a spouse, parent, child, or stepchild, or an "emotional and financial commitment, and interdependence" with the departed tenant. 9 N.Y.C.R.R. § 2520.6(o).

⁶⁹ See 9 N.Y.C.R.R. § 2523.5(b)(1) (succession rights depend on co-occupancy with tenant).

⁷⁰ See *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487, 495 (3d Cir. 1997) (holding that a debtor-in-possession may not assign prejudgment tort claims in violation of state law, because to allow the transfer would be "tantamount to expanding the pre-petition rights of the debtor in the property of the estate simply because the debtor has commenced bankruptcy proceedings").

E. The New York rent stabilization regime prohibits a landlord from taking an action to forcibly evict the legal/rightful occupant of a rent-stabilized unit or terminate valid succession rights and the courts routinely have thwarted attempts to circumvent the rent stabilization rules and regulations.

The Rent Stabilization Code prohibits landlords from coercing a tenant into surrendering an apartment,⁷¹ and no provision or policy of the Bankruptcy Code allows a trustee to disregard state law.⁷² Furthermore, any agreement between a landlord and tenant to cause the surrender of a rent-stabilized apartment is void if the tenant is being displaced under coercion or duress.⁷³ Although the Rent Stabilization Code allows a tenant, in some instances, to accept a negotiated payment from a landlord in exchange for a settlement of all claims and the surrender of the apartment, such agreements to surrender are enforceable only

⁷¹ 9 N.Y.C.R.R. § 2524.1(a) (“As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, except on one or more of the grounds specified in this Code.”); *Reid v. DDEH 103 East 102 LLC*, 2008 N.Y. Slip Op. 51798, at *4 (N.Y. Sup. Ct. Aug. 20, 2008) (holding that tenant’s release of rights was invalid where the “deal was non-negotiable and [tenant] had no bargaining power to assert otherwise”); *see Grasso v. Matarazzo*, 180 Misc.2d 686, 688 (N.Y. App. Term 1999) (holding that an out-of-court, coerced surrender agreement “was unenforceable and prohibited under the Rent Control Law”); *Paniccioli v. Div. of Hous. & Cmty. Renewal*, 2007 N.Y. Slip Op. 50528, at *3 (N.Y. Sup.Ct. Mar. 21, 2007) (tenants may enter into voluntary stipulations in settlement of “a bona fide dispute,” but agreements must be made “at arms length”).

⁷² *See Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 502, 505 (1986) (“Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. . . . Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee’s powers.”).

⁷³ *See cases cited supra* note 71.

when they are fully voluntary.⁷⁴ Where there is any indication of bad faith, overreaching on the part of the landlord, coercion, or duress, courts refuse to enforce surrender agreements.⁷⁵

Ms. Santiago is not voluntarily agreeing to surrender her apartment. Her landlord is attempting to force her surrender in violation of the Rent Stabilization Code.⁷⁶ Respondent is collaborating with the landlord to unlawfully and coercively evict Ms. Santiago. Respondent is attempting to use a statutory regime intended to protect tenants from eviction to extract value for creditors unavailable outside of bankruptcy.

The Bankruptcy Code does not immunize a trustee's legally wrongful acts, and the courts must not appear to sanction a trustee's participation in an unlawful coerced eviction. Furthermore, allowing Respondent to participate in an unlawful coerced eviction is an abuse of discretion by the lower courts.⁷⁷ Even if Respondent and the landlord enter into an agreement to force the surrender of the apartment, such an agreement is void under governing non-bankruptcy law.⁷⁸ The landlord and Respondent's proposed transaction would be void outside of bankruptcy. The Bankruptcy Code does not modify the landlord's rights and

⁷⁴ See cases cited *supra* note 71.

⁷⁵ See cases cited *supra* note 71.

⁷⁶ See cases cited *supra* note 71.

⁷⁷ See *In re Smith*, 507 F.3d 64, 73 (2d Cir. 2007) (bankruptcy court exceeds its discretion when its decision "cannot be located within the range of permissive decisions").

⁷⁸ See *Grasso*, 180 Misc.2d at 688 (coerced surrender agreements are void).

obligations under the Rent Stabilization Law,⁷⁹ and Respondent may not violate non-bankruptcy law.⁸⁰ If the Bankruptcy Code is wrongly interpreted to provide an exception to the Rent Stabilization Law’s prohibition against forced evictions, Chapter 7 trustees will find themselves selling the occupancy rights of virtually every rent-stabilized Chapter 7 filer to that tenant’s landlord. A Chapter 7 trustee must marshal assets for the benefit of the unsecured creditors.⁸¹ If an asset of the estate has value and can be sold, a Chapter 7 trustee must sell it for the benefit of the unsecured creditors.⁸² However, the trustee in Ms. Santiago’s case is attempting to monetize a legal interest that is not property of the bankruptcy estate which he has been appointed to administer.

The effect of allowing the proposed transaction in this case, combined with the duties of a Chapter 7 trustee, will lead to the evisceration of tenants’ rights in virtually all Chapter 7 cases involving rent-stabilized debtors in New York City. Indeed, if Chapter 7 trustees are permitted to sell or assign occupancy rights,

⁷⁹ See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (“Federal statutes impinging upon important state interests cannot . . . be construed without regard to the implications of our dual system of government. . . . To displace traditional state regulation in such a manner, the federal statutory purpose must be clear and manifest.”) (citations and internal quotation marks removed).

⁸⁰ See *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 505 (1986) (requiring trustee to comply with non-bankruptcy law).

⁸¹ 11 U.S.C. § 704(a)(1) (providing that the Chapter 7 Trustee shall “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest”); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 375 B.R. 719, 727 (S.D.N.Y. 2007) (“Although a Chapter 7 trustee is a fiduciary obligated to treat all parties fairly, *his primary duty is to the estate’s unsecured creditors.*”) (quoting *In re Balco Equities Ltd.*, 323 B.R. 85, 98 (Bankr. S.D.N.Y. 2005)).

⁸² See authorities cited *supra* note 81.

landlords will have every incentive to cause the filing of involuntary bankruptcy petitions against tenants for the sole purpose of forcibly evicting them.⁸³

Nearly a million New Yorkers who benefit from the rent-stabilization regime may be able to get a discharge,⁸⁴ but the price will be the loss of their rent-stabilized homes, leaving them to find alternative housing “at market,” to leave the City, or to become homeless. This result violates both the purposes and the provisions of the New York Rent Stabilization Law and New York Rent Stabilization Code and the purpose and operation of the federal bankruptcy laws. Instead of permitting coercive evictions, the Court should read the Bankruptcy Code and the Rent Stabilization Code in harmony, upholding the protections of both regimes.⁸⁵

CONCLUSION

For the reasons set forth above, the Court should find that when the New York rent stabilization regime provides the lawful occupant(s) of an apartment unit with occupancy, renewal and succession rights, those rights cannot be

⁸³ See 11 U.S.C. § 303 (provides for the filing of an involuntary bankruptcy case against an alleged debtor).

⁸⁴ MOON WHA LEE, SELECTED INITIAL FINDINGS OF THE 2011 NEW YORK CITY HOUSING AND VACANCY SURVEY 2, 4 (2012) (“[In 2011], there were 987,000 rent-stabilized units (occupied and vacant available), comprising 45 percent of the rental stock in 2011. . . . The vacancy rate for rent-stabilized units as a whole was 2.63 percent in 2011.”).

⁸⁵ See *BFP*, 511 U.S. at 544 (requiring “clear and manifest” statutory purpose in the Bankruptcy Code to displace state law) (citations and internal quotation marks removed); *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”).

monetized by a bankruptcy trustee, or a creditor, acting in concert with a landlord seeking to coerce the surrender of such rights.

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