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The New York Loft Law

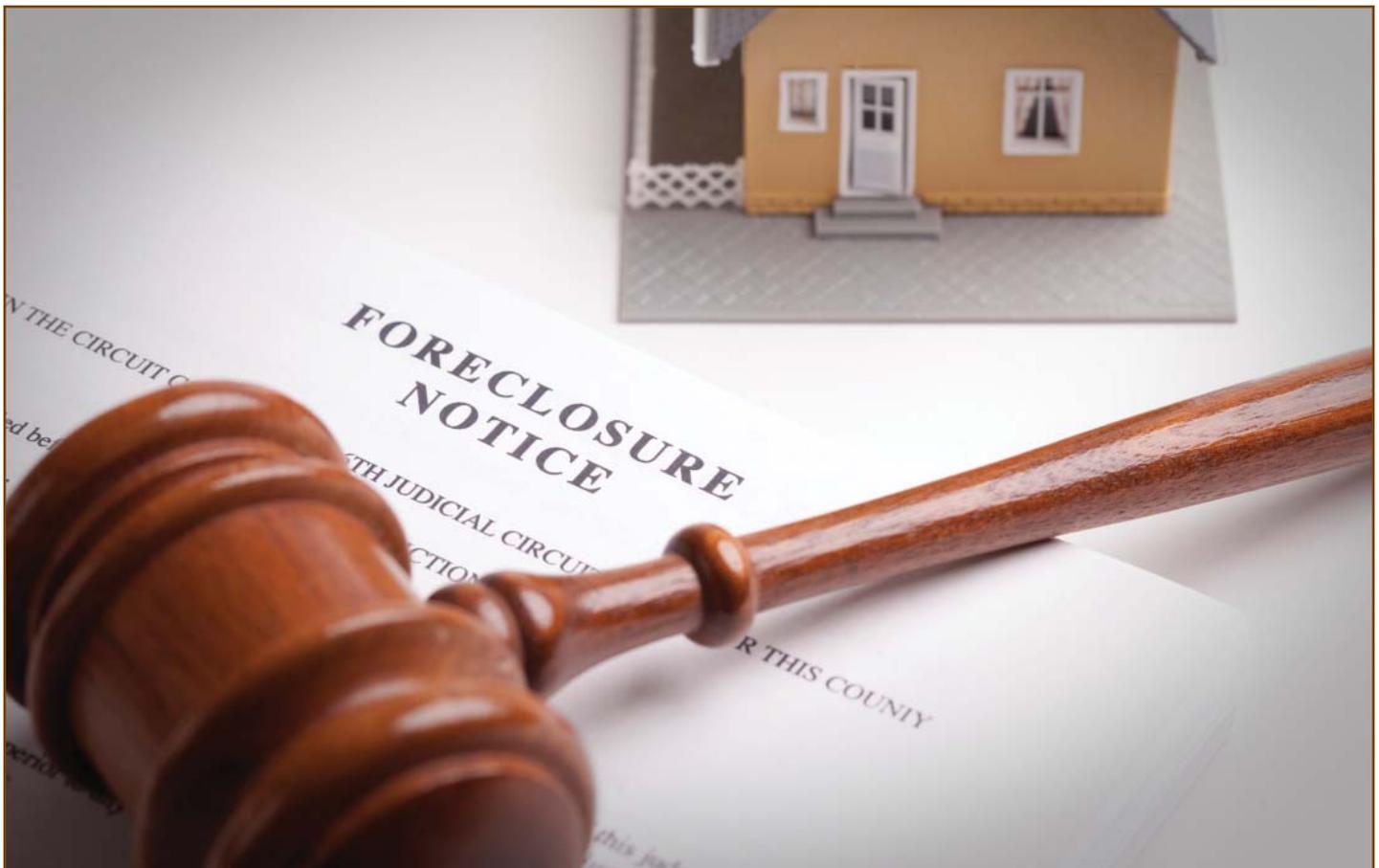
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The New York Loft Law

By Gerald Lebovits and Linda Rzesniowiecki

I. Introduction

Nonresidential New York City buildings sometimes contain residential loft dwellings. Lofts are open, unpartitioned spaces with high ceilings in buildings formerly used as commercial, manufacturing, or warehouse space.

The Loft Law of 1982¹ and cases interpreting the Emergency Tenant Protection Act ("E.T.P.A.") of 1974² offer rights to residential occupants of certain lofts covered by these statutes and impose obligations on loft owners. Initially because of the needs of artists for live-work space, these laws recognize that the best use of former commercial, manufacturing, and warehouse buildings is residential loft use; that residential occupants who did substantial work to improve the raw, industrial space to make them habitable should be protected; that residential occupants who improved their space should be compensated; that some residential occupants of loft buildings without residential certificates of occupancy ("CO") might be protected from eviction without cause and have the right to continued occupancy at a regulated rent; and that building owners might be obligated to obtain a residential CO to legalize the residential use.

This article is intended to familiarize practitioners with some legal intricacies pertaining to lofts.

To understand the Loft Law, it is important to read:

- The Loft Board's Web site.³
- The regulations that implement the Loft Law.⁴
- Loft Board meeting minutes.⁵
- Court cases that interpret the Loft Law.

- The 3,545 cases the Loft Board has decided to date.⁶
- Proposed legislation to extend the Loft Law.⁷

Lawyers should also read two treatises on landlord-tenant law with helpful sections on the Loft Law: Daniel Finkelstein and Lucas Ferrara, *Landlord and Tenant Practice in New York*, Chapter 18 (West 2009); and Hon. Fern Fisher and Andrew Scherer, *Residential Landlord—Tenant Law in New York* §§ 6:79–6:119 (West 2009).

It is also essential to understand the rent-stabilization system. The courts read the Loft Law and the Rent Stabilization Law ("R.S.L.") and Code ("R.S.C.") *in pari materia*.⁸

"Initially because of the needs of artists for live-work space, [the Loft Law... and cases interpreting the E.T.P.A.]... recognize that the best use of former commercial, manufacturing, and warehouse buildings is residential loft use..."

II. The Loft Law

A. Brief Summary

The New York State Legislature promulgated the Loft Law, codified in the New York State Multiple Dwelling Law ("M.D.L.") at §§ 280 through 287, on June 21, 1982. The Loft Law applies to all cities of more than one million in New York State.⁹ As a practical matter, the only buildings and units the Loft Law covers are in New York City, in the boroughs of Manhattan, Brooklyn and Queens.

The Loft Law introduced and defined a new concept: "interim multiple dwelling." This concept derives from "multiple dwelling," which M.D.L. § 4(7) defines as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied, as the residence or home of three or more families living independently of each other." The word "interim" was used because the buildings were in the process of becoming multiple dwellings and would achieve that status as soon as their owners obtained a residential CO.¹⁰ M.D.L. § 281 applies the concept "interim multiple dwelling" to an entire building ("IMD building") or a portion of a building ("IMD unit"). The Loft Law applies to IMD buildings and IMD units.¹¹

A building or part of one is an IMD if it passes a four-part test: (1) it was "at any time" occupied for "commercial, manufacturing or warehouse purposes"; (2) it lacks a CO issued under M.D.L. § 301 (a type of residential CO); (3) it was occupied from April 1, 1980, to December 1, 1981 (the "window period"), for residential purposes by three or more families living independently of each other; and (4) the building is located in a zone that allows residential use.

In 1987, the Loft Law was amended to include a new subdivision 4 to section 281. Subdivision 4 eliminated the residential-zoning requirement for IMDs so long as the IMD was residentially occupied on May 1, 1987, in addition to the April 1, 1980–December 1, 1981 window period.

The Loft Law covers buildings containing three or more units. In contrast, a building must have six or more apartments to be covered under the Rent Stabilization Law and Code.¹²

The Loft Law (1) acknowledges that occupants use some nonresidential buildings for residential purposes;¹³ (2) requires owners to make the buildings and the units safe for residential uses by complying with applicable building codes and ultimately obtaining a residential CO;¹⁴ (3) gives owners the right to collect rent from residential occupants, even when the building has no residential CO, so long as the owner is completing code-compliance steps under the Multiple Dwelling Law within specified time periods;¹⁵ (4) gives residential occupants the right to continued occupancy, even though they are occupying their units contrary to the building's CO or to the lease's use clause;¹⁶ (5) regulates the rent;¹⁷ (6) gives residential occupants the right to sell the improvements they made to their units to render them habitable;¹⁸ and (7) provides that buildings will enter into the rent-stabilization system once they obtain a residential CO.¹⁹

From time to time, legislators have introduced bills to expand the Loft Law by re-defining the window period to cover residential occupants who began their residential occupancy of nonresidential buildings after April 1, 1980 (the beginning of the Loft Law's window period). The Legislature has not yet passed these bills. A bill is pending²⁰ that would cover residential occupants who resided in their units 12 consecutive months, from January 1, 2008 to December 31, 2009.

B. The Loft Board

M.D.L. § 282 established the New York City Loft Board. The Loft Board currently consists of nine members,²¹ including a chair and members of the following special-interest groups: the general public; residential occupants; owners; and the manufacturing industry. In practice, the Loft Board also includes a member who represents the New York City Department of Buildings ("D.O.B."). The Loft Board, which meets once a month,

must implement regulations to effectuate the Loft Law and to resolve disputes between owners and residential occupants. The New York City Civil Court, Housing Part (commonly called the Housing Court), and the Supreme Court have concurrent jurisdiction to resolve coverage disputes.²² No statute of limitations applies to filing a coverage claim in court²³ or with the Loft Board.²⁴ The Loft Board delegates to administrative law judges from the New York City Office of Administrative Trials and Hearings ("OATH") its duty to hear disputes.²⁵ The administrative law judges then write reports and recommendations. In one of its monthly meetings, the Loft Board will accept or reject the proposed order or remand for some purpose.

Confusingly, the agency established to support the Loft Board's work is also called the Loft Board.²⁶ All references in this article to the Loft Board refer to the agency called the Loft Board, unless otherwise indicated.

C. The Regulations

The Loft Board's regulations are published in Volume 29 of the Rules of the City of New York ("R.C.N.Y.").²⁷ The regulations are entitled:

- "Organization and Voting" (29 R.C.N.Y. § 1-01).
- "Rules and Regulations, Method of Adoption" (29 R.C.N.Y. § 1-02).
- "Meetings" (29 R.C.N.Y. § 1-03).
- "Minutes and Transcripts" (29 R.C.N.Y. § 1-04).
- "Public Access to Minutes and Record/Procedures" (29 R.C.N.Y. § 1-05).
- "Applications to the Board" (29 R.C.N.Y. § 1-06).
- "Limitations on Applications" (29 R.C.N.Y. § 1-06.1).
- "Reconsideration of Determination" (29 R.C.N.Y. § 1-07).
- "Appeal from Determination of the Director, or Determination of a Hearing Officer Under Section 2-04" (29 R.C.N.Y. § 1-07.1).
- "Ex Parte Communications on Pending Applications" (29 R.C.N.Y. § 1-08).
- "Action by the Board on Its Own Initiative" (29 R.C.N.Y. § 1-09).
- "Administrative Authority and Correspondence" (29 R.C.N.Y. § 1-10).
- "Petitioning the Board to Adopt Rules" (29 R.C.N.Y. § 1-11).
- "Code Compliance Work" (29 R.C.N.Y. § 2-01).
- "Harassment" (29 R.C.N.Y. § 2-02).
- "Hardship Applications" (29 R.C.N.Y. § 2-03).
- "Minimum Housing Maintenance Standards" (29 R.C.N.Y. § 2-04).
- "Registration" (29 R.C.N.Y. § 2-05).
- "Interim Rent Guidelines" (29 R.C.N.Y. § 2-06).
- "Interim Rent Guidelines II" (29 R.C.N.Y. § 2-06.1).
- "Sales of Improvements" (29 R.C.N.Y. § 2-07).
- "Coverage and Issues of Status" (29 R.C.N.Y. § 2-08).
- "Subletting and Similar Matters" (29 R.C.N.Y. § 2-09).
- "Sales of Rights" (29 R.C.N.Y. § 2-10).
- "Fees" (29 R.C.N.Y. § 2-11).
- "M.D.L. Section 286(2)(ii) Rent Adjustments" (29 R.C.N.Y. § 2-12).

D. Renewal Statutes

The 1982 Loft Law expired on June 21, 1992, and has been renewed several times. The most recent renewal statute passed on April 23, 2008, and expires on May 31, 2010. The legislature will likely continue to renew the Loft Law as long as buildings remain in the Loft Board's jurisdiction. A list of the buildings currently in the Loft Board's jurisdiction, approximately 300, can be found on the Loft Board's Web site.²⁸

E. Registration

Owners of multiple dwellings, net lessees, and all agents in actual control of a multiple dwelling are required to register their buildings with the New York City's Department of Housing Preservation and Development ("D.H.P.D.").²⁹ Similarly, landlords³⁰ of IMDs are required to register their buildings with the New York City Loft Board.³¹ Failure to register bars recovery of rent.³² Annual renewal registration statements must be filed before June 30.³³ The annual filing fee is \$500 for each IMD unit.³⁴

F. Minimum Housing Maintenance Standards

The Loft Board's Minimum Housing Maintenance Regulations³⁵ require landlords to provide ten basic services to residential occupants: (1) water supply and drainage, (2) heat,³⁶ (3) hot water,³⁷ (4) electricity, (5) gas, (6) smoke detectors, (7) public lighting, (8) entrance door security, (9) elevator service,³⁸ and (10) window guards.³⁹ In addition, landlords must provide services specified in the lease or rental agreement in effect on June 21, 1982 (the statute's effective date), and, in addition, services not specified in the lease but which were nonetheless provided as of June 21, 1982.⁴⁰

Loft Board inspectors—not D.H.P.D. inspectors, who enforce the New York City Housing Maintenance Code (H.M.C.)—inspect IMD buildings and units at the Loft Board's request or upon receiving a residential

occupant's complaint.⁴¹ The inspectors will place violations as necessary. A Loft Board enforcement attorney may bring an administrative proceeding against a landlord accused of violating the Minimum Housing Maintenance Regulations, and owners may be fined as much as \$1,000 per violation after a hearing before an OATH administrative law judge.⁴²

An IMD tenant suffering from lack of services may file a diminution-of-services application with the Loft Board, which will then refer it to OATH for a hearing. The IMD tenant also has the option of filing an HP (Housing Part or repair) proceeding in Housing Court to compel an owner to correct violations.⁴³

G. Harassment

The Loft Board's regulatory definition of harassment⁴⁴ is almost identical to the Rent Stabilization Code's definition of harassment.⁴⁵ Both laws prohibit landlords from disturbing a residential occupant's "comfort, repose, peace or quiet"⁴⁶ with the intent to encourage the tenant to vacate the premises or waive any legal rights. Tenants of apartments subject to rent control or rent stabilization may file a harassment application with the New York State Division of Housing and Community Renewal (D.H.C.R.). Owners found guilty of harassment by the D.H.C.R. may be fined up to \$5,000 for each violation.⁴⁷ Aggrieved residential occupants may file a harassment application with the Loft Board, which will then refer it to OATH for a hearing. A guilty landlord may be fined up to \$1,000 for each violation.⁴⁸

The Loft Board's regulations entitled "Harassment" contain several provisions peculiar to IMDs. An owner's willful violation of the code-compliance timetable⁴⁹ may be evidence of harassment,⁵⁰ actions by third-party nonresidential tenants "shall be presumed not to constitute harassment,"⁵¹ and owners found guilty of harassment may not decontrol an IMD unit after they purchase

the improvements⁵² of a residential occupant.⁵³ The Loft Board's finding of harassment will remain in effect until the landlord files an application to terminate the harassment finding, the landlord proves at a hearing that landlord is no longer harassing the residential occupants, and the nine-member Loft Board grants the application to terminate the harassment finding.⁵⁴ Landlords seeking to terminate a harassment finding must prove that they have ceased engaging in conduct constituting harassment; that they have achieved compliance with M.D.L. Article 7B; that they have paid all civil penalties to the Loft Board; that there is no outstanding harassment, and that the building is properly registered.⁵⁵

IMD tenants harassed by their landlords may bring an action in Supreme Court for an order enjoining the landlord from engaging in harassment.⁵⁶ Since the New York City Council's enactment of Local Law 7 of 2008,⁵⁷ tenants—including IMD tenants—also have the option of filing a Housing Court proceeding alleging harassment.

H. Sales of Improvements

Under M.D.L. § 286(6), residential occupants have the right to sell the improvements they made to the subject premises. This issue usually arises when a residential occupants wish to vacate their unit. The outgoing tenant has the option to offer the improvements for sale directly to the owner or to offer the improvements for sale to a prospective tenant, sometimes referred to as an "incoming tenant." Any offer to sell to an incoming tenant is subject to the owner's right to purchase the improvements at fair-market value.

If the owner purchases the improvements, the IMD unit may be deregulated if the unit is subject to rent regulation solely under M.D.L. Article 7-C (the Loft Law); the unit is not receiving a real-estate tax exemption or abatement; and the subject

building contains fewer than six IMD units.

The statute provides that an owner found guilty of harassment may not deregulate a unit after purchasing the improvements and that there may be only one sale for each IMD unit—that is, the incoming tenants may not sell their improvements to a second incoming tenant.

The Loft Board's regulations set forth a procedure that the outgoing tenant, the incoming tenant, and the owner must follow.⁵⁸ The procedure begins when the outgoing tenant serves the owner with a disclosure form, providing, among other things, the following information: the outgoing tenant's intention to relocate; a list and description of the improvements; a written copy of the offer to purchase, setting forth all the terms, including the price; and the incoming tenant's identity and contact information.⁵⁹

If the owner is not properly registered with the Loft Board when an owner is served with a disclosure form, the Loft Board's regulations prohibit the owner from challenging the proposed sale between the outgoing tenant and the incoming tenant. The Loft Board's regulations also provide that the owner must file a Sales Record form with the Loft Board within 30 days after the sale.

The Loft Board allows an owner to challenge a sale on the grounds that the offer is not a bona fide arm's-length offer; the owner made or purchased the improvements offered for sale; or the offer exceeds the improvements' fair-market value. The third ground is the most common ground for a challenge. An owner who objects to the incoming tenant's suitability must initiate an action on that ground in a court of competent jurisdiction.

If an owner challenges a proposed sale without a good-faith intention to purchase the improvements or if the owner's valuation of the improvements has no reasonable relationship to fair-market value (that

is, the owner makes a "low ball" offer), then the Loft Board may deny the owner's challenge application and also find the owner guilty of harassment.⁶⁰

According to the Loft Board's regulations, residential occupants of a unit "which has been legalized and is registered with" the D.H.C.R.⁶¹ may also sell their improvements, and the owner may deregulate the unit after buying them.

I. Sales of Rights

M.D.L. § 286(12) provides that after the effective date of the Loft Law, "an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit." A sale of improvements allows an owner to deregulate the unit, but the owner remains obligated to obtain a residential CO for the unit. A sale of rights gives the owner the option of returning the unit to non-residential use and relieves the owner of the obligation to obtain a residential CO for the unit.⁶² A sale of rights is a deregulatory event "where coverage under Article 7-C was the sole basis for such rent regulation."⁶³ When an owner chooses to use the unit for residential purposes after the sale of rights and the unit is subject to coverage under the Emergency Protection Act of 1974 (e.g., it is a pre-1974 building containing more than six units), the unit remains rent regulated.⁶⁴

J. Code-Compliance Work

M.D.L. § 284 is the heart of the Loft Law. It requires owners to legalize their buildings and the individual units for residential use. The Legislature divided the legalization process into four steps and set deadlines to complete each step. The steps are filing an alteration application; obtaining an approved alteration permit; achieving compliance with M.D.L. Article 7B;⁶⁵ and taking all necessary and reasonable action to obtain a residential certificate of occupancy.

The owner's architect must describe in two ways the work that must be performed in the building's

common areas and in IMD units to achieve compliance with Article 7B: in a drawing (e.g., a blueprint) and in words, referred to as a "narrative statement." The owner's architect must serve the residential occupants with a copy of the narrative statement. Then the Loft Board schedules a conference to discuss the proposed plan with owners and residential occupants, along with their architects and attorneys, and gives residential occupants a deadline to dispute the plan.

Residential occupants must give access to their unit to the owner, the owner's construction crew, and owner's architect so that the owner can achieve compliance with M.D.L. Article 7-B.

M.D.L. § 284 sets forth deadlines to complete each of the four code-compliance steps for IMD owners and their architects. If the owner does not comply with the deadlines, then the Loft Board's enforcement attorney or an aggrieved residential occupant may file an application with the Loft Board. The Loft Board will refer this application to OATH for a hearing, and OATH will issue a report and recommendation that it will submit to the nine-member Loft Board. The nine-member Loft Board may issue an order imposing a civil penalty of \$1,000 against the owner for each missed deadline. (The D.O.B. will, however, accept filings from owners and their architects after the deadline has passed.)

Each time the Loft Law has been renewed, the deadlines associated with the last two code-compliance steps have been extended. The result is a long list of deadlines but higher civil penalties for recalcitrant owners. In *In re Korean Ass'n of N.Y., Inc.*, Loft Board Order No. 3416 (Mar. 28, 2008), for example, the Loft Board imposed a civil penalty against the owner of a West 24th Street, Manhattan building for missing the following 14 deadlines:

Deadlines set forth in the 1992 renewal statute:	Requirement	Authority
October 1, 1992	Alteration Application	M.D.L. § 284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(i)
October 1, 1993	Alteration permit	M.D.L. § 284(1)(ii) 29 R.C.N.Y. 2-01(a)(5)(ii)
April 1, 1995	7B compliance	M.D.L. § 284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(iii)
October 1, 1995	CO	M.D.L. §284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(iv)

Deadlines set forth in the 1996 renewal statute:	Requirement	Authority
October 1, 1996	Alteration Application	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(i)
October 1, 1997	Alteration permit	M.D.L. § 284 (1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(ii)
April 1, 1999	7B compliance	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(iii)
June 30, 1999	CO	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(7)(i)

Deadlines set forth in the 1999 renewal statute:	Requirement	Authority
September 1, 1999	Alteration Application	M.D.L. § 284(1)(iv) 29 R.C.N.Y. § 2-01(a)(7)(iv)
March 1, 2000	Alteration permit	M.D.L. § 284(1)(4) 29 R.C.N.Y. § 2-02(a)(7)(iii)
May 1, 2002	7B compliance	M.D.L. § 284(1)(iv) 29 R.C.N.Y. §2-01(a)(7)(iii)
May 31, 2002	CO	M.D.L. § 284(1)(iv) 29 R.C.N.Y. § 2-01(a)(7)(iv)

Deadlines set forth in the 2007 renewal statute:	Requirement	Authority
September 1, 1999	Alteration Application	M.D.L. § 284(1)(v) 29 R.C.N.Y. § 2-01(a)(8)(i)
March 1, 2000	Alteration permit	M.D.L. § 284(1)(v) 29 R.C.N.Y. § 2-01(a)(8)(ii)

The current renewal statute requires owners to file an alteration application by September 1, 1999; obtain a building permit by March 1, 2000; achieve M.D.L. Article 7-B compliance by May 1, 2010; and obtain a residential certificate of occupancy by May 31, 2010.

In addition to the threat of civil penalties imposed by the nine-member Loft Board, another enforcement tool, set forth in M.D.L. § 284, is the specific-performance action. Three or more residential occupants may bring a specific-performance action in Supreme Court against an owner

not in compliance with the code-compliance timetable. That action, if successful, will result in a court order requiring the owner to comply with the law. Disobeying a court order will subject an owner to a civil- or criminal-contempt proceeding or both. The contempt proceeding might result in a jail term.

Owners not in compliance with the code-compliance timetable may not collect rent from residential occupants who do not pay rent for the period during which the owner is out of compliance.⁶⁶

K. Rent Regulation

M.D.L. § 286(2) regulates the rent that may be charged to a residential occupant before the building is legalized. This section had required the Loft Board to promulgate regulations under this section within six months of the Loft Law's effective date. The resulting regulation, now published at 29 R.C.N.Y. § 2-06, is often called Loft Board Order No. 1. The first reference point in establishing the rent is either the rental amount set by the lease which was in effect as of December 21, 1982 (the regulation's effective date), or the last rent "paid and accepted by the owner" as of the regulation's effective date. The owner is then allowed one increase under 29 R.C.N.Y. § 2-06(c).

This increase may be as low as seven percent or as high as thirty-nine percent, depending on the circumstances. Generally speaking, if the last rent increase was recent, the increase will be lower; if the last rent increase happened years ago, the increase will be higher. Although the Rent Stabilization Law allows rent increases every one or two years upon a lease renewal, IMD owners may increase the rent only upon compliance with a code-compliance step. Thus, an owner may obtain a six percent increase upon filing an alteration application with the D.O.B,⁶⁷ an eight percent increase upon obtaining an approved alteration application,⁶⁸ and a six percent increase upon complying with M.D.L. Article 7-B.⁶⁹

The code-compliance increase becomes payable on the regular rent payment date (e.g., the first day of the month) in the month following the month in which the code-compliance step is achieved.⁷⁰ This statutory and regulatory scheme is intended to provide owners with an incentive to achieve code compliance as soon as possible. The base rent results from the rent in effect as of December 21, 1982, plus the Loft Board Order No. 1 increase and the statutory code-compliance rent increases.

IMD owners are not expected or permitted to offer residential occupants renewal leases. In this respect, residential occupants of IMD units are more akin to rent-controlled tenants than to rent-stabilized tenants: they are statutory tenants.

L. Code-Compliance Rent Adjustments and Entry into Rent Stabilization System

After the owner complies with M.D.L. Article 7-B, the owner may apply to the Loft Board, on the Loft Board's official application form, for rent increases for "all necessary and reasonable costs" associated with code compliance.⁷¹ In addition to submitting the completed Loft Board's form, the owner must enclose an itemized statement of costs, bills marked paid, cancelled checks (or receipts for work performed), construction contracts, and a certified copy of a temporary or final residential certificate of occupancy issued by the D.O.B. If an owner does not apply for a code-compliance increase within nine months of obtaining a CO, the owner is deemed to have waived its right to a code-compliance rent increase.

The Loft Board's regulations include items organized into an 11-category schedule of costs intended to include all necessary and reasonable costs of code compliance: (1) demolition, (2) masonry, (3) metals, (4) carpentry, (5) doors and windows, (6) finishes, (7) specialties, (8) equipment, (9) conveying systems (elevators), (10) mechanical, and (11) electrical. The central part of the form is Part C of the five-part application form: the schedule of costs. Rent adjustments are not allowed for curing pre-existing violations or deferred maintenance costs in common areas or commercial units. Because the allowable cost for many items is defined in terms of square footage or lineal feet, the project's architect or general contractor is best equipped to complete this section of the form. The cost schedule was composed in September 1984; the costs set forth are now out of date due to inflation. The

regulations therefore provide that the costs will be "indexed annually... based upon the average of the annual percentage change reported in the Dodge Building Cost Index and the Engineering News-Record Building Cost Index for New York as of September of each year."⁷²

Work performed within a specific IMD unit is allocable to the residential occupant of that unit. Each residential occupant pays an equal share of the costs for work outside the IMD units. Work performed in the common areas or in a nonresidential unit capable of serving both the residential and nonresidential units is allocated according to a three-part formula that takes the square footage of each unit into consideration.

The owner may submit to the Loft Board an application that has been pre-certified by an architect, who represents that the work has been performed, and by a certified public accountant, who represents that documentary proof has been submitted for each expenditure and that the claimed costs do not exceed the costs set forth in the Loft Board's schedule plus indexing. If the application is not pre-certified, the Loft Board's auditor fulfills the role of the certified public accountant but does not inspect the premises to ascertain whether the work has been performed. (Indeed, it would be impossible to determine, for example, whether plumbing, now hidden behind the walls, was installed.)

Once the auditor's report is complete, the Loft Board serves the residential occupants with a copy of the owner's application and the residential occupants and the owner with a copy of the auditor's report. The residential occupants have 45 days to file an answer. The answer may question whether the work was necessary and reasonable, criticize the quality of the work, or question the actual cost. The residential occupants' answer must include corroborating evidence, such as contractor's estimates, invoices, and architect's statements. If the Loft Board determines that

the tenant's answer raises a genuine issue of material fact, the Loft Board may ask the owner to file additional information or evidence, inspect the premises (this is rarely done), schedule an informal conference, and, if all else fails, refer the matter to OATH for a hearing.

The tenant pays the cost of code compliance over the course of 10 years if the owner pays cash for the work, or 15 years if the owner finances the cost of construction. Thus, the total cost of code compliance attributable to each residential occupant is divided by 120 or 180 to arrive at a monthly charge.

Unlike major capital improvement (MCI) rent increases permitted by the Rent Stabilization Law and Code, the code-compliance increase drops off after 10 or 15 years and is not part of the permanent rent base.

After the owner obtains a final residential CO, the Loft Board issues a final rent order. In accordance with M.D.L. § 286(3), the final rent order sets the initial legal regulated rent; requires the owner to offer to the residential occupants leases "subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of 1974"; and requires the owner to register the building with the D.H.C.R. as a rent-stabilized building.

There are three basic components to the initial legal regulated rent: the "base rent";⁷³ the monthly code-compliance rent adjustment (there is a prospective and retroactive component), if any,⁷⁴ and a percentage increase applicable to either a one-year lease or a two-year leases established by the New York City Rent Guidelines Board (R.G.B.).

The R.G.B. meets once a year to establish rent increases for rent-stabilized apartments, rent-stabilized hotel units, and units formerly subject to the Loft Law. Under the current R.G.B. Order,⁷⁵ the percentage increases that apply to renewal leases are the same for rent-stabilized apartments and for lofts. In earlier years,

the percentage increase was lower for loft units.⁷⁶ A vacancy allowance applies to rent-stabilized apartments but not to lofts.

M. Differences Between Former IMD Units and Rent-Stabilized Apartments

It is important to know whether a rent-stabilized apartment was formerly subject to the Loft Law; some exemptions from rent regulation do not apply to apartments unless they became subject to the Rent Stabilization Law and Code “solely by virtue of Article 7-C of the Multiple Dwelling Law.”⁷⁷ One way to find out whether a building was formerly subject to the Loft Law is to ask the Loft Board’s Freedom of Information Law officer. These buildings are not listed on the Loft Board’s Web site.

A rent-stabilized apartment that became vacant on or after June 19, 1997, with a legal regulated rent of \$2,000 or more a month, becomes exempt from rent regulation, but this exemption does not apply to apartments that became subject to the Rent Stabilization Law and Code “solely by virtue of the Article 7-C of the Multiple Dwelling Law.”⁷⁸ If the rent of a rent-stabilized apartment reaches \$2,000 or more and the federally adjusted gross income of all persons occupying the apartment as a primary residence is \$175,000 or more, then D.H.C.R. may issue an order of deregulation, but, here, too, this exemption does not apply to apartments that became subject to the Rent Stabilization Law and Code “solely by virtue of Article 7-C of the Multiple Dwelling Law.”⁷⁹

Owners of rent-stabilized apartments often achieve deregulation by waiting for a vacancy and imposing a vacancy increase permitted by the current R.G.B. Order; by making improvements to the apartment and then increasing the rent by an amount equal to one-fortieth of the cost of the improvements;⁸⁰ or by doing both these things. In this manner, the rent will reach \$2,000 more quickly and result in deregulating the rent-stabi-

lized apartment. Owners of former IMD units may not, however, deregulate in this fashion.

III. E.T.P.A.

Before the Loft Law was enacted, residential occupants argued, sometimes successfully, that the Emergency Tenant Protection Act (E.T.P.A.) of 1974 protected them from eviction.⁸¹ One author explained the E.T.P.A. as follows: “In 1974, the legislature enacted the Emergency Tenant Protection Act., which enabled New York City and certain other Municipalities to regulate apartments completed before January 1, 1974. Emergency Tenant Protect Act of 1974, §§ 8621 to 8634 (McKinney’s Unconsolidated Laws)...”⁸² The author continued: “The Emergency Tenant Protection Act also brought under New York City’s Rent Stabilization System all housing units in buildings of six or more units that had been decontrolled under the Vacancy Decontrol Law or that had been built between March 10, 1969 and January 1, 1974.”⁸³

Since the Loft Law’s passage, residential occupants of nonresidential spaces who did qualify for Loft Law coverage sometimes have asserted claims that they are covered by the Rent Stabilization Law and Code by virtue of the E.T.P.A. In *Wolinsky v. Kee Yip Realty Corp.*,⁸⁴ residential occupants of a loft building located on Grand Street in Manhattan asserted E.T.P.A. coverage. The building did not have a residential CO. According to the New York City Zoning Resolution, the building was in an M1-5B zone, which allows light manufacturing use and use for joint living-work quarters for artists. However, the residential occupants were not artists. The residential occupants entered into commercial leases with the owner commencing in July 1997. They took occupancy of raw loft space and converted the space to residential use at their own expense. The *Wolinsky* court declined to extend E.T.P.A. coverage to “these illegally converted lofts.”⁸⁵

The *Wolinsky* court explained that the Loft Law was adopted in June 1982 and adopted an “eligibility period” (April 1, 1980 to December 1, 1981) that was “closed at the time of the enactment.”⁸⁶ The Legislature thereby “demonstrated its intent to provide the benefits of the Loft Law only to existing residential tenancies and not to encourage new conversions of loft space.”⁸⁷ Thus, the *Wolinsky* court appeared to shut the door on E.T.P.A. coverage for residential occupants who do not qualify for Loft Law coverage.

Some language in *Wolinsky* gave hope to tenant advocates. The Court of Appeals referred to the Appellate Division’s decision on review,⁸⁸ which, according to the Court of Appeals, found that the E.T.P.A. “does not extend to tenancies that are illegal and incapable of becoming legal.”⁸⁹ Tenants have used this language to argue that their tenancies are legal—in accordance with the zoning resolution—or are capable of becoming legal, if the owner of the building had applied for a zoning variance or if the building were located in a zone where the city was contemplating a zoning change. Thus, their tenancies might be subject to protection.

Following *Wolinsky*, the Appellate Division, First Department, in *Duane Thomas, L.L.C. v. Wallin* ruled that residential occupants may be subject to E.T.P.A. protection if it “appears that the unit is capable of being legalized.”⁹⁰ In contrast, the Appellate Division, Second Department, in *Caldwell v. American Package Co.*, adopted a four-part test, finding E.T.P.A. coverage only where (1) the owner knew of and acquiesced in the residential conversion; (2) the conversion was undertaken at the residential occupants’ expense; (3) zoning permitted residential occupancy (in other words, the occupancy was capable of becoming legalized); and (4) after the residential occupants had asserted their E.T.P.A. claim, the owner nonetheless took steps to convert the premises to residential use.⁹¹

One year later, in *South Eleventh Street Tenants Association v. Dov Land*,⁹² the owner's motion for summary judgment was denied because the tenants presented sufficient documentary proof of ability to meet the four-prong test announced in *Caldwell*, thereby raising issues of fact precluding the grant of summary judgment to the owner.

Following *Caldwell*, the landlord-tenant bar recognized that to establish E.T.P.A. protection, the standards differ in the First and Second Departments, sometimes leading to dissonant results for loft tenants in Manhattan and Brooklyn.⁹³ The law in this area continues to develop.

IV. Conclusion

Any attorney handling a matter regarding a nonresidential building would do well to investigate whether there are residential occupancies. If the attorney discovers a residential occupancy, various laws and agencies might offer the occupant labyrinthine protections in that maze we call New York landlord-tenant law.

Endnotes

- N.Y. Mult. Dwell. Law §§ 280–287 (McKinney Supp. 2010) (terminating May 31, 2010 pursuant to L.1982, c. 349, § 3).
- N.Y. UNCONSOL. Laws §§ 8621–8634 (McKinney 2007). The cases include *Caldwell v. American Package Co.*, 57 A.D.3d 15, 866 N.Y.S.2d 275 (1st Dep't 2008); *Duane Thomas L.L.C. v. Wallin*, 35 A.D.3d 232, 826 N.Y.S.2d 221 (1st Dep't 2006); and *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (Sup. Ct., App. T. 1st Dep't 1979), *aff'd on opinion below*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980), *overruled on other grounds*, *Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (Sup. Ct., App. T. 1st Dep't 2005).
- New York City Loft Board, <http://www.nyc.gov/html/loft/html/home/home.shtm> (last visited Feb. 6, 2010).
- New York, N.Y., R.C.N.Y. tit. 29, ch. 1 §§ 1-01–1-11 and ch. 2, §§ 2-01–2-12. (N.Y. Legal Publ'g Co. 2008), WL 29 RCNY §§ 1-01, *et seq.*
- Minutes from October 2009 to the present are posted on the Loft Board's Web site. Earlier minutes are available by making a Freedom of Information Law request to the Loft Board. The "legislative history" behind the Board's regulations can be found in the minutes of the Board's meetings.
- Cases decided after 1996 are available at New York Law School: CityADMIN Library, http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library (last visited Feb. 6, 2010). Cases decided before 1996 are available by making a Freedom of Information Law request to the Loft Board or by consulting Treiman's *Loft Board Reporter*.
- See A03715, A05667, A06368, S05881, available at <http://assembly.state.ny.us/leg/?by=k&q=loft>.
- See, e.g., *Axelrod v. French*, 148 Misc. 2d 42, 45, 559 N.Y.S.2d 918, 920 (N.Y. Civ. Ct., N.Y. Co. 1990), *modified*, 154 Misc. 2d 310, 594, 594 N.Y.S.2d 518 (Sup. Ct., App. T. 1st Dep't 1992).
- N.Y. MULT. DWELL. LAW § 281 (McKinney Supp. 2010).
- See discussion *infra* Section II. J on the owner's obligation to obtain a residential CO.
- The regulations promulgated under the Loft Law define "multiple dwelling unit" and "IMD unit" at New York, N.Y., R.C.N.Y. tit. 29, ch. 2 § 2-07(a) (N.Y. Legal Publ'g Co. 2008), WL 29 RCNY § 2-07(a).
- New York, N.Y., Admin. Code tit. 26, ch. 4, § 26-504(a) (West, Westlaw through L. 2008, ch. 652 and Local Law 51 of 2008); *91 Fifth Ave. Corp. v. New York City Loft Bd.*, 249 A.D.2d 248, 249, 672 N.Y.S.2d 301, 302 (1st Dep't 1998).
- N.Y. MULT. DWELL. LAW § 280.
- Id.* § 284.
- Id.* § 285(1).
- Id.* § 286(1).
- Id.* § 286(2).
- Id.* § 286(6).
- Id.* § 286(3).
- S05881, A05667, 232nd Sess. (2009).
- N.Y. MULT. DWELL. LAW § 282 provides that the Loft Board may consist of four to nine members.
- Tan Holding Corp. v. Wallace*, 178 Misc. 2d 900, 903, 683 N.Y.S.2d 414, 416 (N.Y. Civ. Ct., N.Y. Co. 1998), *rev'd on other grounds*, 187 Misc. 2d 687, 724 N.Y.S.2d 260 (Sup. Ct., App. T. 1st Dep't 2001).
- See *180 Varick St. Corp. v. Center for Entrepreneurial Mgmt.*, N.Y. L.J., Sept. 16, 1998, at 22, col. 3 (N.Y.C. Civ. Ct., N.Y. Co.).
- The Loft Board adopted a statute of limitations at some point but later repealed it.
- Before 1996, the nine-member Loft Board delegated its duty to hear disputes to hearing officers under the direct employ of the agency called the Loft Board.
- The Loft Board is located on the second floor of 100 Gold Street, New York, N.Y. Its telephone number is (212) 566-5663.
- The regulations are found at <http://24.97.137.100/nyc> under the heading "Rules of the City of New York." The rules are under Title 29.
- In 1983, 914 buildings were in the Loft Board's jurisdiction, and about currently 300 remain so. The 614 buildings that are no longer in the Loft Board's jurisdiction (because they have obtained their residential COs) are not listed on the Loft Board's Web site.
- N.Y. MULT. DWELL. LAW § 325 (McKinney 2001).
- The regulations define "landlord" as "the owner of an interim multiple dwelling, the lessee of a whole building part of which is an interim multiple dwelling, or the agent or other person having control of such dwelling." New York, N.Y., R.C.N.Y. tit. 29, ch. 2 § 2-04 (), WL 29 RCNY § 2-04(a) (N.Y. Leg. Publ'g Co. 2008).
- N.Y. MULT. DWELL. LAW § 284(2); 29 R.C.N.Y. § 2-05(b).
- N.Y. MULT. DWELL. § 325(2).
- NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-05(b)(8); 29 R.C.N.Y. § 2-05(b)(8).
- Id.* § 2-05(b)(10).
- Id.* § 2-04.
- The minimum temperature requirements are the same as those set forth in the New York City Housing Maintenance Code (H.M.C.). See New York, N.Y., Admin. Code tit. 27, ch. 2, N.Y.C. Admin. Code § 27-2029 (N.Y. Leg. Publ'g Co. 2008).
- The temperature requirements are the same as those set forth in the H.M.C. New York, N.Y. Admin. Code tit. 27, ch. 2, § 27-2031, N.Y.C. Admin. Code § 27-2031.
- Elevator service must be provided only to the extent that the service is legal. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-04(b) (9) (N.Y. Leg. Publ'g Co. 2008). Many nonresidential buildings have elevators that are not legal for noncommercial-passenger use.
- Id.* § 2-04(b)(8).
- Id.* § 2-04(c).
- Id.* § 2-04(e)(2).
- Id.* § 2-04(e)(4).
- N.Y.C. Admin. Code § 27-2115(h) authorizes occupants suffering from lack of services to bring an HP proceeding in Housing Court. IMD tenants may also

- bring HP proceedings. *See, e.g., Doukas v. Pravda Brothers Realty Co.*, N.Y.L.J., July 26, 1995, at 22, col. 4 (N.Y.C. Civ. Ct., N.Y. Co.).
44. *Id.* § 2-02(b).
 45. N.Y.C.R.R. tit. 9, ch. VIII, § 2525.5 (2008).
 46. *Id.*; NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(b) (N.Y. Leg. Publ'g Co. 2008).
 47. Emergency Tenant Protection Act (E.T.P.A.) of 1974 § 12.a.(3)(ii), N.Y. UNCONSOL. Law § 8632a(3)(ii) (McKinney 2007).
 48. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(d)(ii).
 49. *See* Section II.J. for a discussion of the code-compliance timetable.
 50. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(c)(6)(iii) .
 51. *Id.* § 2-09(c)(6)(ii); *see, e.g., In re Application of Latin*, No. Loft Board Order #2555 (N.Y.C. Loft Bd. July 20, 2000), available at <http://archive.citylaw.org/loft/arch2000/LBO-2555.pdf>, *aff'd on recon.*, No. Loft Board Order #2747 (N.Y.C. Loft Bd. July 30, 2002), available at <http://archive.citylaw.org/loft/arch2002/LBO-2747.pdf>.
 52. *See* Section II.H. for a discussion of sales of improvements.
 53. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(c)(3) (N.Y. Leg. Publ'g Co. 2008).
 54. *Id.* § 2-02(d)(2)(i).
 55. *Id.*
 56. N.Y. REAL PROP. Law Real Property Law § 235-d (McKinney 2006).
 57. Local Law 7 of 2008 amended various H.M.C. sections and added new sections regarding harassment. *See* N.Y.C. Admin. Code §§ 27-2004(a)(48), 27-2115(h)(1), 27-2115(h)(2), 27-2115(m)(1), 27-2115(m)(2), 27-2115(m)(3), 27-2115(n), and 27-2120(b).
 58. *See* NEW YORK, N.Y., R.C.N.Y. tit. 29, § 2-07 (N.Y. Leg. Publ'g Co. 2008).
 59. *Id.* § 2-07(f)(2).
 60. *See* Section II.G. for a discussion of harassment and civil penalties.
 61. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-07(f)(1) (N.Y. Leg. Publ'g Co.).
 62. *Id.* § 2-10(c)(1).
 63. *Id.* § 2-10(c)(2).
 64. *Acevedo v. Piano Building, L.L.C.*, 2009 WL 4672663, 2009 N.Y. Slip Op. 09168, N.Y. L.J., Dec. 15, 2009, at 37, col. 3 (1st Dep't); *315 Berry St. Corp. v. Hanson Fine Arts*, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007).
 65. NY MULT. DWELL Art. 7B consists of §§ 275–279. Section 277 is essentially a building code that architects must follow when renovating a loft building for residential use.
 66. NY MULT. DWELL § 285 (McKinney Supp. 2010).
 67. *Id.* § 286(2)(ii).
 68. *Id.*
 69. *Id.*
 70. *Id.* § 286(2)(iv).
 71. *Id.* § 286(3); 29 R.C.N.Y. § 2-01(i)(2).
 72. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-01(j) (N.Y. Leg. Publ'g Co. 2008).
 73. The “base rent” includes the rent in effect as of Dec. 21, 1982, the Loft Board Order #1 rent increase, and the code-compliance increases (six percent, eight percent, and six percent).
 74. An owner may waive its right to a code-compliance rent adjustment. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-09(i)(2)(vi).
 75. 2009 Apartment and Loft Order #41 (N.Y.C. Rent Guidelines Bd. June 23, 2009), available at <http://www.housingnyc.com/downloads/guidelines/orders/AptOrder41.pdf>.
 76. 2002 Apartment and Loft Order #34. (N.Y.C. Rent Guidelines Bd. June 28, 2002), available at <http://www.housingnyc.com/html/guidelines/orders/order34.html>.
 77. N.Y.C.R.R. tit. 9, ch. VIII, R.S.C. §§ 2520.11(r)(5)(ii) and 2520.11(s)(2)(ii). A unit is subject to the Rent Stabilization Code by virtue of Multiple Dwelling Law Article 7-B only if the unit is located in a building containing fewer than six units.
 78. *Id.* § 2520.11(r)(5)(ii).
 79. *Id.*
 80. N.Y.C.R.R. tit. 9, ch. VIII, R.S.C. § 2522.4(a)(1).
 81. *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 480–81, 425 N.Y.S.2d 926, 928 (Sup. Ct., App. T. 1st Dep't 1994).
 82. Andrew Scherer, *Residential Landlord-Tenant Law in New York*, §§ 6:79–6:119 (West 2009–2010 ed.).
 83. *Id.* at § 4:11.
 84. 2 N.Y.3d 487, 812 N.E.2d 302, 779 N.Y.S.2d 812 (2004).
 85. *Id.* at 493, 812 N.E.2d at 305, 779 N.Y.S.2d at 815.
 86. *Id.* at 492, 812 N.E.2d at 304, 779 N.Y.S.2d at 814.
 87. *Id.* at 492–93, 812 N.E.2d at 304, 779 N.Y.S.2d at 814.
 88. *See Wolinsky I*, 302 A.D.2d at 328, 756 N.Y.S.2d at 515.
 89. *Wolinsky II*, 2 N.Y.3d at 491, 812 N.E.2d at 303, 779 N.Y.S.2d at 813.
 90. 35 A.D.3d 232, 233, 826 N.Y.S.2d 221, 222 (1st Dep't 2006).
 91. *See generally* 57 A.D.3d 15, 866 N.Y.S.2d 275 (2d Dep't 2008).
 92. 59 A.D.3d 426, 872 N.Y.S.2d 514 (2d Dep't 2009).
 93. *See, e.g., Warren A. Estis & William J. Robbins, Courts Differ on Rights of Tenants in Illegal Lofts*, N.Y. L.J., Dec. 3, 2008, at 5, col. 2.

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