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A More Equal Road to Succession in Regulated Apartments After *Obergefell* And the Marriage Equality Act

By Darryl M. Vernon

In *Obergefell v. Hodges*, 576 U.S. ___, 2015WL213646 (2015), the U.S. Supreme Court invalidated laws prohibiting marriage between same-sex couples. In New York, the right of a tenant not named on a lease to keep one's regulated apartment when the tenant named on the lease dies or vacates is in many cases a valuable right that affects whether one can remain in his home, or even in his city. Under the Rent Stabilization Code, spouses of a tenants of record do not share such a concern, as they have the automatic right to be added to the lease while residing there with the tenant of record. However, before New York's legalization of same-sex marriage, a gay person living with a tenant of record as a couple in a rent-regulated apartment did not have this automatic right to be added to a lease as a spouse, and could only claim that right through succession after the tenant of record died or vacated the apartment. *360 Associates v. Hyers and Pederson*, N.Y. County Civ.Ct. Index 72743/13 (2015), illustrates the resulting problems and the impact of *Obergefell*.

THE PEDERSON CASE

In 1988, Michael Pederson moved into the rent-stabilized apartment of Kemper Hyers, who was his partner of over 20 years. They had all the usual indicia of a marriage including shared accounts, family functions, and in general an emotional and financial interdependence. They wanted to marry, but were not legally allowed to do so. In 1993, they obtained a domestic partnership certificate with the City of New York and had a ceremony and celebration, with all the hallmarks of a wedding.

The landlord of their rent-stabilized apartment was fully aware of the relationship for the entire time and various documents acknowledged Mr. Pederson's occupancy and his potential rights to the apartment. In the year 2000, they both

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asked the landlord if they could add Mr. Pederson to the rent-stabilized lease as would be permitted for married couples. The landlord denied this request.

In 2009, some two decades after the relationship began, it ended. Mr. Hyers, the tenant of record, moved out of the apartment, leaving Michael Pederson to remain. A rent-stabilized renewal lease had been signed several months before the parties broke up. At the end of 2009, some five months after vacating, Mr. Hyers came back to the apartment on a temporary basis. Mr. Pederson accommodated Mr. Hyers and moved across the street. Mr. Pederson left most of his belongings in the apartment. While Mr. Hyers was back in the apartment, he signed a one-year renewal lease and shortly after that, left the apartment. Mr. Pederson returned. And when the renewal lease ended, the landlord sued to evict everybody.

The landlord argued that Mr. Pederson did not have any right to be added to the lease in 2000, as he was not married to Mr. Hyers. As to succession for people who are not married, the landlord argued that this would require showing at least two years of overlapping occupancy before the permanent vacatur of the tenant of record. From the landlord's perspective, Mr. Hyers only really vacated permanently in 2011, and for the two years before that, Mr. Pederson was not living with him, as he was across the street. The landlord added that Mr. Hyers' signing of one renewal lease in 2011, after the alleged permanent vacatur, should be fatal to any claim that Mr. Hyers permanently vacated in 2009.

Mr. Pederson countered that his right to succeed vested in 2009 when Mr. Hyers left. Therefore, the

Darryl M. Vernon, a member of this newsletter's Board of Editors, is a partner at Vernon & Ginsburg. The firm represented the tenants in *Pederson*.

fact that Mr. Pederson moved across the street temporarily did nothing to take away his rent-stabilized rights that had already accrued. Mr. Pederson also argued that he was unlawfully discriminated against when his request to be added to the lease as a spouse or domestic partner in 2000 was denied.

GENERAL RULES OF SUCCESSION IN REGULATED APARTMENTS

To establish succession rights to a rent-stabilized apartment, a rent-controlled apartment or a Mitchell-Lama subsidized apartment, a tenant must show as a threshold matter that he is an immediate family member of the tenant of record. Spouses, children, siblings, parents, grandparents, grandchildren and step-children and step-parents typically qualify. A succeeding tenant who does not fit into one of those relationships has the right to prove the existence of a non-traditional relationship that is similar to an immediate family relationship and is generally categorized by long-term emotional and financial commitment and interdependence to each other. This standard is harder than simply proving a lineage relationship. For example, many courts have found that a documented sharing of finances may be crucial to proving the relationship, despite the fact that many people that are married can't show that. The length of the relationship can also make the proof harder than, say, people who are married for only briefly and nonetheless will fit the immediate family definition.

Once the tenant seeking succession rights establishes a family relationship, the tenant must also prove, in most cases, that he resided with the departing tenant of record for at least two years before the tenant of record permanently vacated (or only one year if the succeeding tenant is either disabled or over 62 years old), and that the apartment was their primary residence during that period. If, however, the tenant of record signed renewal leases

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Pederson

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after departing, landlord can claim that landlord has been prejudiced because the tenant or record did not timely alert landlord to the potential succession claim.

Mr. Pederson's landlord argued that the execution of one renewal lease in 2011, after Mr. Hyers left, should be fatal to Mr. Pederson's succession rights. In opposition, the tenant argued that there were several cases holding that where there was only one renewal lease signed and there was no discernible prejudice, then succession rights are not forfeited. This line of cases is particularly applicable to long-term cotenancies. In Mr. Pederson's case, there was no dispute about the long-term emotional and financial commitment between the parties and the fact that they plainly satisfied the standards to prove a non-traditional family relationship.

EQUAL PROTECTION

On July 4, 2011, New York enacted the Marriage Equality Act which gave the right of all couples, whether the same or opposite sex, to marry. Had the statute been in force in 1993, when Mr. Pederson and Mr.

Hyers had their domestic certificate ceremony, Mr. Pederson would have been added to the lease as a spouse. Mr. Pederson argued that the Marriage Equality Act should be applied retroactively, since it was a remedial statute.

Mr. Pederson also relied on New York Executive Law Section 296 2-a, which prohibits discrimination based on sexual orientation in publically assisted housing. The court of appeals ruled in 2014 that rent regulated housing is a public assistance benefit, thus prohibiting the landlord from discriminating against Mr. Pederson based on sexual orientation. Thus the landlord's refusal to add Mr. Pederson to the lease when he made his 2000 request was discriminatory because the denial was based on his sexual orientation; had he and Mr. Hyers been an opposite-sex couple, they would have been married, and landlord would have been required to add him to the lease. See *Santiago-Montaverde v. Pereira*, 2014 WL6473698, 2014 NY Slip Op 08051 (Ct. App. 2014).

THE COURT'S DECISION

The court found that Mr. Hyers did vacate the apartment permanently in 2009 when he left to pursue another relationship. Mr.

Hyers' return to the apartment was "only a temporary accommodation, for a limited duration, and Mr. Pederson's succession rights vested after the definitive departure of Mr. Hyers in 2009." Thus, Mr. Pederson had lawful succession rights.

Citing to *Obergefell, supra*, the court also found that Mr. Hyers and Mr. Pederson "were unconstitutionally denied their right to marry, which would have entitled Mr. Pederson to be added to the lease and relieve him of any obligation to prove succession rights." Accordingly, Mr. Pederson prevailed on this ground also.

CONCLUSION

For landlords who bought buildings with rent-regulated tenants and paid a price that reflected a rent-regulated rent roll, getting back a vacancy that can lead to deregulation is often a material monetary gain. If *Obergefell* is to assure the constitutional promise of liberty and equal rights to same-sex couples on the same terms and conditions as marriages between persons of the opposite sex, then the *Pederson* decision should stand as upholding that promise for one's home.

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