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Federal Supreme Court decision on non-use of official form for new leases

Contributed by **Pestalozzi Attorneys at Law**

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Pursuant to Article 270(2) of the Code of Obligations, in the event of a housing shortage, the cantons may make it obligatory, in all or part of their territory, for a landlord to use an official cantonal form when contracting a new lease which indicates, among other things, the rent paid by the previous tenant. Several cantons have introduced such an obligation, particularly Geneva and more recently Zurich.

In a recent decision the Federal Supreme Court⁽¹⁾ reaffirmed its case law on the nullity of an initial rent if a landlord fails to use the official form required by the canton for new lease contracts. In this case, following the termination of a lease contract for a Geneva apartment, the landlord and tenants disputed who had to cover costs to remedy defects. The tenants stated that they had not been informed about the initial rent through the official form and initiated rent-reduction proceedings pursuant to Article 270(1) of the code.

The court confirmed a previous landmark decision,⁽²⁾ pursuant to which a failure to use the official form does not lead to the nullity of a lease contract as a whole, but only to the nullity of the rent fixed in the lease. In such a case, a tenant can request that the court fix a new rent and claim for restitution of the overpaid sum based on unjust enrichment. A one-year time limit from the date on which the tenant learns of this restitution right is applicable in case of unjust enrichment. It is irrelevant whether the lease contract has been fulfilled or whether the rent has been paid.

The landlord's right to raise an objection based on an abuse of rights remains. In this respect, in previous cases the court has rendered several decisions admitting an abuse of rights. For instance, it held that a refund of overpaid rent is out of the question if the tenant is aware of the landlord's obligation to provide the official form, but refrains from requesting it in order to profit from it later; or if the tenant explicitly and knowingly refuses to accept the official form and fulfils the contract.

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Endnotes

(1) Federal Supreme Court, 4A_168/2014, October 30 2014.

(2) BGE 120 II 341.

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