LANDLORD TENANT MINEFIELDS

HOW TO AVOID THE PITFALLS OF LANDLORD/ TENANT LAW

Presented by:
Evelyn Kalenscher, Esq., Chair
Hon. James Darcy
Veronica Ebhuoma-Abumere, Esq.
S. Robert Kroll, Esq.
Roberta D. Scoll, 3sq.
Andrew M. Thaler, Esq.
Domenick J. Pesce, 2 L
Lucas Rock, 2L
Jennifer Trinkwald, 3L

THEODODRE ROOSEVELT AMERICAN INN OF COURT

THE PITFALLS OF LANDLORD/TENANT LAW

Time:

5 Min. Introduction of Panel and Program
Evelyn Kalenscher, Esq.

10 Min. Discussion about RPAPL Article 7; RPAPL §711 and RPAPL §713; Jurisdiction of Court; who has standing to bring a Landlord/Tenant Summary Proceeding; what must be included in the Notice of Petition and Petition.
Roberta D. Scoll, Esq.

5 Min. Skits 1 and 2:

Nassau County District Court, Landlord/tenant Part. The Hon. James Darcy presiding:

Case No. 101 called: Petitioner, Pro-Se Landlord v. Holdover Tenant, Respondent represented by the Volunteer Lawyer's Project. HOLDOVER PROCEEDING

Case No. 102 called: Pro-se Landlord, petitioner, v. Non-paying tenant, Respondent represented by Volunteer Lawyer's Project. NON-PAYMENT PROCEEDING

5 Min. Explanation of the statutory requirements for service of the Notice of Petition and Petition pursuant to RPAPL §733 (1), and the filing of the affidavit of service pursuant to RPAPL §735(2).
Hon. James Darcy

15 Min. Skit 3: Attorney meets with Landlord regarding renting his property

Discussion about getting rent for an illegal apartment, necessity for rental permits in the various municipalities. Handling of security deposits (Gen. Ob. Law §7-103); violating terms of lease –notice and time to cure; how to get tenant out. Discussion about unconscionable lease provisions including excessive late fees.
S. Robert Kroll, Esq.

5 Min. Skit 4: Attorneys negotiate a settlement agreement where the landlord has accepted rent from the tenant after a proper notice to terminate took effect and before a holdover proceeding was initiated. The importance of working out settlements in a Summary Proceeding.
Veronica Ebhuoma-Abumere, Esq. and S. Robert Kroll, Esq.

15 Min.	Skit 5: Tenant meets with attorney after being served with a Notice of Petition and Petition for eviction after the rented premises was sold after a foreclosure action. Discussion about post foreclosure eviction of a bona fide tenant who has time remaining on his lease versus former owner remaining in possession of the premises after the sale. Notice requirements. Requirement to exhibit the deed with conflicting case law regarding what "exhibit" means. Veronica Ebhuoma-Abumere, Esq.
10 Min.	Skit 6: Attorney meets with Tenant who was served with a non-payment petition. Tenant maintains that there are numerous habitability problems in the premises. Discussion about habitability defenses and abatement of rent. Roberta D. Scoll, Esq.
10 Min.	Skit 7: Attorney meets with client who has received a Notice of Petition and Petition to evict her as a licensee despite the fact they have a children together. Discussion about what is the Family Member exception to jurisdiction in a landlord/tenant proceeding. Evelyn Kalenscher, Esq.
10 Min.	Discussion of Section 8 tenancies. Domenick J. Pesce, 2L; Lucas Rock, 2L; Jennifer Trinkwald, 3L
10 Min.	Discussion of the effects of a bankruptcy on the proceeding in the landlord/tenant court. Andrew M. Thaler, Esq.
	Questions and Answers

EVELYN KALENSCHER, ESQ.

Since 2010 Evelyn Kalenscher has worked two days a week for the Volunteer Lawyer Project, Landlord/Tenant Attorney of the Day Program, representing indigent tenants facing eviction. For her efforts on behalf of her clients, Ms. Kalenscher was named Pro Bono Attorney of the Month by the Nassau County Bar Association in April, 2011, and received the Nassau County Bar Association Pro Bono Attorney of the Year award in 2012. She also was chosen as an Access to Justice Champion in 2013, by the Nassau County Bar Association, was the recipient of the New York State Bar Association President's Pro Bono Award for the Tenth Judicial District in 2014, and received the Legal Services Corporation Pro Bono Service Award in 2014. In May of 2017 she was recognized for her participation in the New York State Attorney Emeritus Program providing at least sixty hours of pro bono legal services dedicated to low-income New Yorkers over a two year period.

Ms. Kalenscher received a B.B.A. from Hofstra University in 1966, and a J.D. from Hofstra Law School in 1989, and was admitted to practice law in the courts of the State of New York that same year. She is also admitted to practice in the United States District Court for the Eastern District and the United States Supreme Court. She was a partner in Genoa, Kalenscher & Noto, P.C. where her practice concentrated in matrimonial and real estate law. In 1995, she retired from private practice to spend more time with her family.

Ms. Kalenscher is on the Executive Committee of the Theodore Roosevelt American Inn of Court as Program Coordinator, she is an active member of the Nassau County Bar Association, where she is a member of the District Court Committee and was a member of the Ethics Committee, acting as Vice Chair from 2008 to 2010 and Committee Chair from 2010 to 2012. She was also a member of the Bar's House Domus Committee which she chaired from 2012 to 2014. Currently, Ms. Kalenscher is a member of the New York State Bar Association, where she is on the Real Property Committee and a board member and treasurer of Yashar, the Attorney's and Judge's Chapter of Hadassah.

In addition to her legal affiliations, Ms. Kalenscher is active in her community. She has been a member of the Board of Managers in her condominium community for the past fifteen years, and President of that body since 2009.

Hon. James M. Darcy
Bio Info

James M. Darcy has served as Nassau County District Court Judge since January, 2015. Before taking the bench, Judge Darcy was a solo practitioner for nearly 35 years with a local neighborhood general practice initially in Woodside, NY (1980-1995) and then in Valley Stream, NY (1996-2015). In addition, he has served as Village Prosecutor/Compliance Officer for the Inc. Village of Valley Stream and as Village Prosecutor for the Inc. Village of Lynbrook.

Judge Darcy is a graduate of Fordham University (BA), S.U.N.Y. Brockport (MA) and St. John's University School of Law (JD).

VERONICA EBHUOMA-ABUMERE, ESQ.

VERONICA EBHUOMA-ABUMERE has been in private practice with the Law Offices of Vernita Charles for 11 years. The firm represents clients in a variety of civil matters, including appeals. Veronica's focus is in the areas of Family law, Foreclosure Defense, Probate/Estate Administration, and Landlord/Tenant. In addition, she researches and drafts the firm's appellate briefs.

Veronica also serves as a Community Liaison for New York State Assemblyman Edward P. Ra. Assemblyman Ra represents the 19th Assembly District which encompasses the areas of Albertson, Brookville, Carle Place, Franklin Square, Garden City, Glen Head, Mineola, New Hyde Park, West Hempstead, Westbury, East Williston and Williston Park. As Community Liaison, Veronica plays an integral role in the management of constituent affairs.

Prior to entering into private practice, Veronica served as Counsel to the New York State Assembly Codes Committee for nearly five years. The Assembly Codes Committee reviews all proposed legislation regarding the Penal law, CPLR, and other areas of law that would impose or change any fines, terms of imprisonment, forfeiture of rights, other types of penal sanctions, and the procedures related thereto. In this capacity, Veronica had the privilege of not only reviewing and drafting legislation, but also seeing many pieces of legislation that she helped to draft become law in New York State. She also counseled Codes Committee Members regarding the legality, potential impact, and sagacity of proposed legislation.

Veronica received her B.A. (magna cum laude) from the State University of New York at Albany and her J.D. from Boston University School of Law. Veronica is currently a member of the Theodore Roosevelt American Inn of Court and the New York State Bar Association.

RESUME

S. ROBERT KROLL, ESQ.
25 Merrick Avenue, 2nd floor Merrick, New York 11566
(516) 378-3051

EDUCATION

B.A. Degree, Hofstra College, Hempstead, New York; June, 1955
LLB Degree, Brooklyn Law School, Brooklyn, New York; June, 1958
Participation in programs of continuing legal education as required to maintain good standing status.

PROFESSIONAL CREDENTIALS

Admitted to the Bar, New York State, Appellate Division, Second Department, December, 1958 Term
Admitted to practice Law in Florida, 1982
Admitted to practice in the following Federal Courts: United States District Courts for the Eastern, Southern and Northern Districts of New York, Circuit Court of Appeals for the Second Circuit and the United States Supreme Court
Member of the following professional organizations:

- Bar Association of Nassau County, Inc.
- New York State Bar Association
- Nassau Lawyers Association
- Jewish Lawyers Association
- Member, Theodore Roosevelt American Inn of Court

PROFESSION

General practice of law since admission to the bar
March, 1969 to 1982 - partner in the firm of Medowar & Kroll, Esqs.
Arbitrator for the program presently administered in Nassau County (District Court litigation as well as a volunteer arbitrator in Small Claims); have participated therein as a sole arbitrator as well as on panel of three arbitrators.

GOVERNMENTAL AND PUBLIC SERVICE

June, 2011 to present: appointed by Governor Andrew Cuomo to the MTA Inspector General Management Advisory Board; serve without compensation
March, 1993 to December 1998: District Counsel to New York State Senator James J. Lack (Second Senatorial District)
In November, 1988: appointed by the Governor, appointment ratified by the Senate, and served for a term as a member of the New York State Public Transportation Safety Board; term expired April 30, 1993; served without compensation.
June, 1983 to November, 1988: on the staff of New York State Senator Norman J. Levy, Eighth Senatorial District, as aide and counsel.

ACTIVITIES, POLITICAL

Republican Committeeman, Nassau County, 19th Ad, 49th Ed, 1982 to 2004
Past Vice President, Merrick Republican Club
Past treasurer of various political candidates
Currently treasurer for Receiver of Taxes, Town of Hempstead- Donald Clavin.

ACTIVITIES, PROFESSIONAL AND COMMUNITY

Merrick Chamber of Commerce - Past Director
Bar Association of Nassau County - Past Director, Board of Directors; Past Chair of Community Relations and Public Education Committee and Past Chair of the Real Property Committee, Current Vice-chair of District Court Committee
New York State Bar Association - Member
Nassau Lawyers Association - Member
Jewish Lawyers Association - Member
Merrick Jewish Centre - Past President and Director
Sunrise-Laurelton Lodge # 1069, F & A.M (Now Spartan Lodge) (Masons) – Past Master
Rotary Club of Merrick-Bellmore - Past President
Kiwanis Club of Merrick – Member
Rapport - Past Director
W.C. Mepham Alumni Association - Member and Former Counsel

RELATED EXPERIENCE

A. Research, assistance and suggestions to Hon. Douglas F. Young, author of YOUNG'S UNIFORM CIVIL, CITY AND DISTRICT COURTS PRACTICE, published in 1965

B. Participation as a principal speaker, Bar Association of Nassau County, program on the subject FROM THEORY TO PRACTICE, REAL ESTATE TRANSACTIONS, October 8, 1997.

C. Participation as a principal speaker, Bar Association of Nassau County, program 10/30/69 and 11/1/69, subject: CREDITOR, DEBTORS AND BANKRUPTS; copy of subjects covered in my outline available upon request; same covered trial, trial preparation, discovery, motions, commercial preferences, jury and non-jury procedures, trial procedures, evidence, witnesses, court fees, enforcement of money judgments. This seminar was sponsored by the then Continuing Education Committee under the chairmanship of the then Joseph Goldstein, Esq.; other participants in the program supplied upon request.

D. Currently Arbitrator, District Court, both for regular civil cases and as a volunteer for Small Claims and landlord-tenant mediator. Participated in panel, mandated course for District Court Arbitrators, jointly sponsored by the District Court Committee and Academy of Law.

VOLUNTEER OR PRO BONO PARTICIPATION

A. Volunteer arbitrator, Nassau County Small Claims
B. Volunteer services, Nassau-Suffolk Law Services Committee, Landlord Tenant Nassau County District Court
C. Volunteer mediator, Landlord-Tenant cases Nassau County District Court
D. Volunteer, Hofstra Law School, Veteran's Law Clinic
E. Volunteer, New York State Bar Association Lawyer Referral & Information Service

ROBERTA D. SCOLL, ESQ.

Roberta D. Scoll, Esq. joined the Nassau/Suffolk Law Services Committee, Inc., as Staff Attorney and has served as coordinator of the Landlord/Tenant sector of the Volunteer Lawyers Project for the past 10 years. For almost a year before taking on her new responsibilities at NSLS, Ms. Scoll was a volunteer attorney herself at NSLS's Islandia office.

Since graduation from law school, Ms. Scoll has practiced matrimonial, personal injury, trademark and copyright law. For many years she had commuted to Washington, DC as a legal consultant to the film industry's trade association and in December 2003, Ms. Scoll was instrumental during the development and start-up of Friends of the Global Fight Against AIDS, Tuberculosis and Malaria, a 501 (c)(3) non-profit corporation in Washington, DC. She was the Executive Attaché for the organizations' first President, Jack Valenti (Former President, Motion Picture Association of America, Inc.,) in addition to her duties as office manager.

She received her Juris Doctorate in 1996, from City University of New York School of Law, with a keen focus and interest in public service and public interest law. In 1997 Ms. Scoll was admitted to practice in New York State, the United States District Court for the Southern and Eastern Districts of New York, and in 2002 she was admitted to the United States Supreme Court, the United States Court of Federal Claims, United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for the Armed Forces.

In her current position at the Law Services, Ms. Scoll works with attorneys from both sides of the table and thanks those volunteer attorneys who have helped to keep the program going. She also warmly welcomes new attorneys to join in the experience as a Volunteer attorney representing tenants any Monday through Thursday morning in District Court at 99 Main Street, Hempstead. She invites you to join her in room 277 or to call to schedule a date certain, at 516 292-8100, extension 3115.

ANDREW M. THALER ESQ.

Mr. Thaler is founding partner of the Westbury N.Y. law practice Thaler Law Firm PLLC. He has been a Panel Chapter 7 Bankruptcy Trustee in the Eastern District of New York since 1990.

Mr. Thaler graduated Magna Cum Laude from the State University of New York at Albany in 1979. He attended Buffalo Law School and received his law degree in 1983. Mr. Thaler was admitted to the New York State Bar in 1984 and is admitted to practice in the Courts of the State of New York, United States District Court for the Eastern District and Southern District Court of New York. He is also admitted to the United States Supreme Court.

Mr. Thaler has handled Bankruptcy and Insolvency matters since his admission to the Bar. He has represented both Creditors and Debtors in Chapter 7, 11 and 13 cases, and all aspects of bankruptcy including fraudulent conveyance and preference litigation, motions to vacate the automatic stay, objections to discharge, negotiations, claims objections and related contested matters. He is a member of various legal organizations, including the Nassau County Bar Association (Bankruptcy Committee Chair 1990-1992) (Nassau Academy of Law Dean 2001-2002) (Board of Directors 2002-2005); New York City Bar Association (Committee on Bankruptcy & Corporate Reorganization (2011-2015); Theodore Roosevelt American Inn of Court (President 2010-2011); National Association of Bankruptcy Trustees, Nassau Lawyers Association of Long Island, Inc., American Bankruptcy Institute, Association of Boutique Law Firms, Inc. and Attorney Roundtable (past Treasurer and Program Committee).

He has lectured on bankruptcy matters for numerous organizations including The New York State Society of Certified Public Accountants (Nassau Chapter); First American Title Insurance Company of New York; St. John's University Metropolitan College Tax Institute; the Nassau Academy of Law; Sterling Educational Services, Interchange Credit Association; Lorman Education Services; Theodore Roosevelt American Inn of Court; and National Business Institute on Bankruptcy related topics. He has written articles and appeared on multiple occasions as a cable television and radio talk show guest on bankruptcy matters.

Mr Thaler serves as a Neutral/Mediator and has been appointed to the Mediation

Register - US Bankruptcy Court, Eastern District (2004- present) and the Mediation Panel - Commercial Division of Nassau County Supreme Court (2003-present). Mr. Thaler also serves as an Arbitrator under the New York State Part 137 Attorneys Client Fee Dispute Resolution Program (ADR). He has served as Chair of the Nassau County Bar Association Alternative Dispute Resolution Committee (2009-2010).

Mr. Thaler helped organize and continues to serve on the Pro Bono Panel at the Nassau County Bar Association. Mr. Thaler was awarded the Honor of Pro Bono Attorney of the year in 1991 by the Nassau County Bar Association. In May 2002 he was recognized by the Nassau County Bar Association for Pro Bono Service to the Community through the Volunteer Lawyers Project. He was a Co-Recipient of Nassau Suffolk Law Services Partner's In Justice Award (2003) for pro bono work. In 2010 he served on a committee that assisted the Honorable Alan S. Trust, United States Bankruptcy Court Judge E.D.N.Y. in developing a Pro Bono Mediation Pilot Program

He has served as a member of numerous additional Nassau County Bar Association Committees including Real Estate and Development (2002 -present), Grievance (2002 - present) and Nominating Committees (2005-2006). He has also served as a member of the Nassau County Bar Association's Finance, By-Laws, Long Range Planning, and Pro Bono Committees.

Mr. Thaler has been assigned Martindale Hubbell's highest "AV" rating. In 2010 he was named one of Long Island's "Top Legal Eagles" by Pulse Magazine. Mr. Thaler has been named to the New York -Metro "Super Lawyers" list as one of the top attorneys in New York for New York State each year since 2012 in Bankruptcy & Creditor/Debtor Rights. No more than 5 percent of the lawyers in the state are selected for "Super Lawyers".

Domenick J. Pesce – Bio

Domenick J. Pesce graduated from Hofstra University where he majored in Political Science with minors in Philosophy of Law, Rhetorical Studies, and Italian. Prior to law school, he worked as a law clerk at Cassisi & Cassisi, P.C., primarily handling matters of personal injury plaintiff litigation. He also has several years of experience working for Apple Inc. as a certified technician and trainer. At Hofstra Law, Domenick is a Junior Staff Member of the *Hofstra Labor & Employment Law Journal* and researcher of the *Research Laboratory for Law, Logic and Technology (LLT Lab)*. He is also the Public Relations Coordinator of the Federal Bar Association – Hofstra Law Division, a student member of the Theodore Roosevelt American Inn of Court, Phi Alpha Delta Law Fraternity, and the Hofstra Intellectual Property Law Association. During the summer of 2017, he interned for the Honorable Helene F. Gugerty. Domenick is interested in intellectual property, cybersecurity, technology, and criminal law.

Lucas Rock – Bio

Lucas graduated from Stony Brook University where he double majored in Business Management and Political Science. While attending Stony Brook, he was also a four-year member of the Men's Lacrosse Team and a two-time captain. At Hofstra Law, Lucas is a Staff Member of the *Hofstra Law Review*. Lucas is also a student member of the Theodore Roosevelt American Inn of Court. During the summer of 2017, he interned with Yitzhak & Epstein PC, in Great Neck, New York. Lucas is interested in corporate governance, sports and entertainment law, and cybersecurity.

JENNIFER TRINKWALD

Jennifer Trinkwald is in her 3rd year at the Maurice A. Deane School of Law at Hofstra University. Jennifer is a member of the Hofstra Labor and Employment Law Journal where she holds a position as an Articles Editor. Jennifer is also a Health Fellow with Hofstra's Gitenstein Institute for Health Law and Policy. Jennifer currently works as a Law Clerk at Genser Dubow Genser & Cona, LLP and she previously interned with the Health Care Bureau of the New York State Office of the Attorney General. Prior to attending Hofstra Law, Jennifer was a licensed Master of Social Work and worked in Suffolk County's Division of Mental Hygiene where she was responsible for developing policies and procedures and ensuring the programs complied with applicable law and regulations. Jennifer decided to pursue her law degree with the hopes of making more of an impact in the area of Health Law and Policy.

INN OF COURT LANDLORD/TENANT PRESENTATION

Landlord Tenant cases are brought by a Special Proceeding and governed mostly by the Real Property Action Proceedings Law or as it is affectionately known as RPAPL – Article 7

For the purpose of this discussion tonight, we will be focusing on residential property in Nassau County.

Bear in mind that not all jurisdictions have the same rules…one of which I will get to shortly.

There are two types of cases brought by a Petitioner against a Respondent

Non-Payment & Holdover

RPAPL 711(1) discusses who can bring an action when there is a Landlord/Tenant relationship in a holdover action.

For example: The Petitioner is someone, or entity that has a possessory interest in the property…. An owner or even a tenant trying to evict a subtenant

RPAPL 711(2) The petitioner must have the same possessory interest only here the petitioner is seeking money in a non-payment proceeding

RPAPL 713 Lists the grounds for which a summary proceeding is commenced where there is no Landlord Tenant relationship

For example: evicting a squatter, a licensee or in a post-foreclosure action.

A non-payment action is brought when the tenant, obviously, has failed to pay the rent either by a written rental agreement, a lease, or an oral agreement.

A Holdover, on the other hand, is just that, the tenant has stayed beyond the agreed upon vacate date, as per the lease (oral or written), or has become a month to month tenant if the landlord has accepted rent after the agreed upon vacate date, or if there is a violation of a lease provision – but there should be a time to cure first.

Both non-payment and holdover actions require a predicate notice before the action can be brought to court.

In a non-payment action the Tenant must be served with no less than a 3 day rent demand stating clearly what is owed and for what period of time and when it must be paid by. And, if it is not paid on time, the demand must also state what the consequences of not paying will be.... Namely, that the tenant will be brought to Court.

The time period for the demand can be more than the 3 days if it is agreed to in a written rental agreement. The demand could be oral or written and the manner in which it was served must be alleged in the petition.

A good practice would be to serve the demand in writing so there will be proof of service if the case goes to trial and to avoid a he/said/she/said

scenario. And if in writing, it must be served the same way as the Notice of Petition and Petition.

In a holdover, the predicate notice must also be given to the tenant. It can be oral or in writing, but, I cannot stress this enough, it is always wise to put it in writing, again to avoid the he/said she/said scenario.

The predicate notice is known as a 30 day notice or Notice to terminate the tenancy. The notice must specify what the termination date is with clarity, must have the tenants named who are to vacate, have the correct address of the premises (in case the sheriff has to evict), must state what will happen if the tenant does not vacate timely (namely he/she will be brought to court.

In NYC, the notice goes by the 30 day rule, regardless of what date the rent is due. Outside NYC the notice to terminate the tenancy begins with a months' notice, not necessarily 30 days.

For example, if the landlord wants a tenant to vacate by March 31st, in Nassau County, the termination notice must be served no later than February 28th or 29th in a leap year. This gives the tenant a full month's notice. By the same logic, if the landlord wants the tenant to leave by Feb 28th or 29th if it's a leap year, the notice has to be served no later than January 31st. Even though February does not have 30 days, the landlord is still giving the tenant the required month's notice.

If, on the other hand the lease begins, and rent is due on the 15th of the month, then the landlord can give a termination notice to vacate the 14th of the month but must serve the notice before the 15th of the previous month.

Now, if a lease provides that a tenant should get more than a months notice, say for example, the lease states that the landlord must give the tenant a 45 day notice, the lease term prevails.

The notice must be signed by the owner or person who has the possessory interest in the property. If a lawyer is given the task of signing the termination notice without having any prior contact with the tenant, then the termination notice will fail unless there is a written authorization from the Petitioner stating that the attorney has the authority to act on behalf of the petitioner and can sign the notice.

Landlord/Tenant Law is highly technical. The landlord risks the dismissal of the action if the predicate notices and/or the petition

is not correctly completed.

Mistakes usually occur, more times than not when a landlord decides to begin the action on their own, rather than go to an attorney.

Errors in the predicate notices & if in writing, was it attached to the petition together with affidavit of service.

Incomplete information or inaccurate information in the Petition,

67 Misc.2d 468 (1971)

Michael Margolies, Petitioner,

v.

Mal Lawrence, Respondent.

Civil Court of the City of New York, Trial Term, New York County.

August 31, 1971

Barry Kessler for petitioner. *Harold W. Grubart* for respondent.

IRVING YOUNGER, J.

Once again, a point of practice which landlord-tenant lawyers seem to take for granted turns out, upon examination, to be obscure in origin and troublesome in application.

Petitioner here is the prime tenant of an apartment in New York City. Respondent is his subtenant. The tenancy was month-to-month. Wishing to recover possession of the apartment, petitioner served upon respondent a one-month notice to quit, and, when respondent failed to vacate, commenced this holdover proceeding. The petition, on the usual printed form, recites that respondent "was served in the manner provided for by law with a notice [to quit] in writing, a copy of which with proof of service is hereto annexed." By oversight, no copy of the notice to quit was
469 attached to or included with the copy of *469 the petition served upon respondent. A copy of the notice to quit was attached to the original petition filed with the court.

On these facts, respondent moved prior to trial to dismiss the petition. I granted the motion, explaining my decision orally and extemporaneously. Because the matter may possess some general interest, I am now filing this more accessible version of my opinion.

1. The paper which must be served upon respondent is the "petition." (Real Property Actions and Proceedings Law, §§ 731, 735.) In this case, the paper served upon respondent lacked a copy of the notice to quit. If that omission renders the paper something less than a valid petition, it is obviously not a "petition." That the paper filed with the court included a copy of the notice to quit is irrelevant, for the question is whether the paper served upon respondent is a petition, not whether the paper filed with the court is a petition.

2. There is no statute which requires that a copy of the notice to quit be attached to the petition. But that does not solve the problem; it complicates it.

3. A month-to-month tenancy is terminated in New York City by serving upon the tenant, "in the

same manner in which a notice of petition in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy". (Real Property Law, § 232-a.) Should the tenant thereafter fail to remove, the landlord may commence a summary proceeding to evict him. *Ibid.*

4. Summary proceedings are governed by article 7 of the Real Property Actions and Proceedings Law. Subdivision 1 of section 711, among other things, authorizes a summary proceeding to evict a month-to-month tenant who fails to remove after service of the one-month notice to quit.

5. Such a summary proceeding is commenced by service of a notice of petition and petition. (Real Property Actions and Proceedings Law, §§, 731, 735.) The contents of the petition are prescribed by section 741 of the Real Property Actions and Proceedings Law and must include a statement of "the facts upon which the special proceeding is based." (Real Property Actions and Proceedings Law, § 741, subd. 4.)

6. Among those facts in this case is compliance with section 232-a of the Real Property Law. The petition, therefore, must allege it. (See *November v. Binges*, 186 N. Y. S. 605.)

7. For the petition merely to allege, as here, that a notice "was served in the manner provided for by
470 law" is insufficient, *470 for subdivision 4 of section 741 of the Real Property Actions and Proceedings Law requires that "facts," not conclusions, be stated. (See *Witherbee, Sherman & Co. v. Wykes*, 159 App. Div. 24; *Smith v. Scott*, 190 Misc. 600; *Lutzker v. King*, 190 Misc. 670.)

8. In order to demonstrate compliance with section 232-a of the Real Property Law, then, the petition must allege not only that a one-month notice to quit has been served, but also how it was served. Thus the respondent will be able to tell whether or not the petitioner has complied with section 232-a.

9. Since no special form of words is required for this allegation, the petitioner may, alternatively, attach to his petition a copy of the one-month notice to quit together with a copy of the affidavit of service. This too will enable the respondent to tell whether or not the petitioner has complied with section 232-a.

To summarize, the petition in a hold-over proceeding based upon section 232-a of the Real Property Law must either specifically state how the one-month notice to quit was served, or must include a copy of the notice and affidavit of service.

The petition in this case did neither. Accordingly, it was dismissed.

- District Court, Nassau County, L&T Part
- LT-001636-16
- Judge Scott Fairgrieve
- For Plaintiff: Attorneys for Petitioner: Ezratty, Ezratty & Levine.
- For Defendant: Attorneys for Respondents: Nassau/Suffolk Law Services, Committee Inc.

Cite as: 102 West Hudson, LLC v. Cordero, LT-001636-16, NYLJ 1202777491823, at *1 (Dist., NA, Decided January 17, 2017)

CASENAME

102 West Hudson, LLC, Petitioner(s) v. Charlene Cordero, Mitchell Bliss-Fila, "John & Jane Doe", Respondent(s)

LT-001636-16

Judge Scott Fairgrieve

Read Summary of Decision

Decided: January 17, 2017

ATTORNEYS

Attorneys for Petitioner: Ezratty, Ezratty & Levine.

Attorneys for Respondents: Nassau/Suffolk Law Services, Committee Inc.

The following named papers numbered 1 to 3 submitted on this Motion Vacate on December 7, 2016

papers numbered

Notice of Motion and Supporting Documents

Order to Show Cause and Supporting Documents 1

Opposition to Motion 2

Reply Papers to Motion 3

*1

Respondent Charlene Cordero moves by Order to Show Cause to vacate the stipulation entered into between the parties on April 12, 2016, and to dismiss the judgment and warrant issued against Respondents. A 72 hour Notice dated October 18, 2016, has been served on Respondents.

A summary non payment proceeding was commenced against Respondents by service of the Notice of Petition and Petition, both dated March 29, 2016, concerning the premises located at 102 West Hudson Street, Apt. 3A, Long Beach, New York. The Petition contains the following allegations.

(a) Respondents were required to pay rent of $1,700 per month.

(b) There was due Petitioner total rent arrears of $6,005.56 computed as set forth in paragraph #6, as follows:

"Pursuant to said agreement there was due to the landlord from Respondents-Tenants as follows: $1,700.00 March 2016 Rent; $1,700.00 February 2016 Rent; $785.00 January 2016 Rent balance; $50.00 March 2016 Rent late fee; $50.00 February 2016 Rent late fee; $50.00 January 2016 Rent late fee; $1,442.01 Flood damage and $228.55 Electric. Respondents-Tenants has defaulted in the payments thereof,

*2

and the total rent in arrears of $6,005.56."

(c) Oral and written demands were made upon Respondents for the rent arrears. The written demand dated March 9, 2016 (attached to the Petition) states the following is owed:

"TAKE NOTICE that you are justly indebted to 102 West Hudson Street, LLC, Landlord of the above-described Premises, in the sum of $5,888.87 for rent/added rent of said Premises as follows: $1,700.00 March 2016 Rent; $1,700.00 February 2016 Rent; $785.00 January 2016 Rent balance; $50.00 March 2016 Rent late fee; $50.00 February 2016 Rent late fee; $50.00 January 2016 Rent late fee; $1,442.01 Flood damage and $111.86 Electric."

This matter was settled by the Stipulation of Settlement, dated April 12, 2016. Respondent was not

represented by an attorney upon agreeing to and signing the Stipulation. The Stipulation provided that Respondent Charlene Cordero owed $7,872.25 of rent and additional rent through April of 2016. The Stipulation provides that Petitioner to cooperate with DSS and Section 8 regarding payments.

Respondent Charlene Cordero submits her Affidavit, sworn to October 24, 2016 with the Order to Show Cause. Respondent states that she resides at Apt. 3A with her son Mitchell Bliss-Fila. She participates in the Section 8 Housing Choice Voucher Program through the Long Beach Housing Authority.

Respondent took possession of Apt. 3A on November 1, 2015, pursuant to a one year lease. The monthly rent was $1,700.00. Respondent's share of rent between November 1, 2015, and February, 2016 was $785.00 per month.

Respondent states that she paid November 2015 and January 2016 rent of $785.00; U.S. Postal Service receipts are provided to prove this allegation.

Respondent writes that she didn't owe $1,700.00 for February of 2016 because her share was only $785.00 and she can't be held liable for Section 8 payments. Furthermore, Respondent refers to the Affirmation of her attorney that the Long Beach Housing Authority has been paying her rent subsidy since November 2015.

In March of 2016, Respondent sets forth that her share of monthly rent was reduced to $288.00 and Long Beach Housing Authority paid the balance.

Respondent submits the Letter dated April 6, 2016 from the Long Beach Housing Authority addressed to Petitioner. The Letter states that Tenant's share of the rent is $288.00 and the HAP payment would be $1,412.00. Significantly, the Letter states that

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Landlord cannot collect any amounts in excess of the $288.00.

"NO OTHER AMOUNT SHOULD BE GIVEN TO THE LANDLORD BY THE TENANT."

Respondent attacks the Petition on the grounds that non-rent items were included, such as late fees, legal fees, utility charges, and water damage charges. Respondent contends that these non-rent items cannot be a basis for a judgment of possession or money.

Respondent further alleges that the Demand for Rent attached to the Petition, is defective because the demand includes non-rent items.

Respondent attacks the Stipulation of Settlement on the following grounds:

"I did not know I had all of the above defenses to this proceeding until I received a 72 hour notice and consulted an attorney at Law Services. In this nonpayment proceeding, on April 12, 2016, I signed a stipulation without benefit of counsel because I believed the landlord would never take advantage of me (Exhibit G). I now know better. The stipulation indicated that I had to pay $7872.25 by May 12, 2016. My attorney states that even if I had not paid a dime of rent from the inception of

my tenancy through April 2016, I would only owe $3716. As Exhibit E demonstrates, I paid rent for November 2015 and January 2016. Thus all I owed was $785 for each of December 2015 and February 2016, plus $288 for each of March and April 2016, for total arrears of $2146 through April 2016."

Respondent also states that she received the accounting for the alleged water damage and what the damage was.

Respondent attaches receipts showing the following payments:

May 2016 — $408 ($288 for rent and $14 for damage)

June 2016 — $408 ($288 for rent and balance for damage)

July 2016 — $288 for rent

August 2016 — $288 for rent

September 2016 — $288 for rent

October 2016 — $338 ($288 for rent and $50 for a late charge)

Respondent went to Nassau County Department of Social Services for assistance which paid $4,166.50 and $864.00 which went to Petitioner for a total of $5,030.50.

Respondent's attorney submits her Affirmation, affirmed October 24, 2016. She states that Long Beach Housing Authority confirmed that it has paid to Petitioner the Respondent's subsidy since the inception of Respondent's tenancy.

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Respondent's counsel writes that the Demand and Petition are defective because same require Respondent to pay the Section 8 share of rent and non-rent items. Respondent's attorneys posits that the Stipulation of Settlement must be vacated because Respondent just owed $2,146.00 for rent and not $7,872.72 as set forth in the Stipulation.

Petitioner's attorney submits his Affirmation in Opposition, affirmed November 23, 2016. Counsel states that the Respondent's signature on the Stipulation was not procured through trickery, deceit or error. Respondent partially performed the terms of the Stipulation and waited 6 months to move to vacate the Stipulation.

Petitioner's counsel states that Respondent waived all defenses to the summary proceeding and states in paragraphs 6, 7 and 8 of his Affirmation the following:

"6. At paragraph 1 of the Stipulation, Respondents waived all defenses to this action. Such defenses would include that Respondent's portion of the rent was paid and that the only monies remaining unpaid were Section 8's responsibility, and added rent charges. However, Respondents did not present or preserve any such defenses, presumably because they did not apply.

7. At paragraph 2 of the Stipulation, Respondents admitted that they owed $7,872.25 in rent and added rent through April 2016 and the Petition clearly spelled out that some of these monies were for late fees, flood damage and utilities.

8. Notably, the Stipulation provides that Petitioner would accept payment from DSS and would cooperate with Respondent's efforts to obtain financial assistance from DSS and Section 8. In other words, it was always assumed that Respondents would obtain assistance from DSS."

Petitioner states that Respondent's failure to pay the full $7,872.25 under the Stipulation constituted a default. Petitioner further argues that the Lease (paragraph 3) provides that late fees, legal fees and the obligation to pay for electricity constitute additional rent and are recoverable.

"3. RENT, ADDED RENT: The rent payment for each month must be paid on the first day of that month at the Landlord's address. Landlord need not give notice to pay the rent. If any rent payment is more than 5 days late, Tenant shall pay an additional fifty ($50) dollars as added rent. Rent must be paid in full and no amount subtracted from it. The first month's rent is to be paid when the Tenant signs this Lease. Tenant may be required to pay other charges to Landlord under the terms of this Lease as Added Rent. This added rent is payable as rent together with the next monthly rent due. If Tenant fails to pay the added rent on time, Landlord shall have the same

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rights against Tenant as if Tenant failed to pay rent. Payment of rents in Installments is for the Tenant's convenience only. If Tenant defaults, Landlord may give notice to Tenant that Tenant may no longer pay in installments. The entire rent for the remaining part of the Term will then be immediately due and payable."

Petitioner states that even if the additional charges cannot be the basis of an eviction, Respondent's failure to pay the rent owed provides the basis for eviction.

Respondent's counsel submits her Reply Affirmation, affirmed November 30, 2016. She states it was improper to include non-rent items in the Petition and Stipulation. Respondent's attorney posits that based upon the foregoing, the Stipulation should be vacated and the proceeding should be dismissed.

Decision

The court holds that the Stipulation of Settlement is vacated and the action is dismissed. In Inland Diversified Real Estate Service, LLC v. Keiko New York, Inc., 51 Misc 3d 139(A), 36 NYS3d, 407 (Table), 2016 WL 1590763 (App Term, 9 & 10 Jud Dists 2016), the petitioner sought to evict a commercial tenant to recover the following:

Inland Diversified Real Estate Service, LLC (petitioner) commenced this nonpayment proceeding on behalf of Inland Diversified White Plains City Center, LLC (landlord) against landlord's commercial tenant seeking to recover possession and items described as 'minimum rent' and 'additional rent' (which consisted of electricity, gas, quadlogic meter and common area maintenance charges)."

Both parties represented by attorneys entered into a so-ordered stipulation of settlement wherein respondent agreed to pay $136,371.31. The stipulation also provided for a judgment of possession with the warrant stayed until January 8, 2014.

In Inland, Respondent obtained new counsel and moved to vacate the final judgment and stipulation of settlement. Respondent claimed that the stipulation was entered into by the attorney without settlement authority and by mistake because respondent would never have agreed to vacate the leasehold. Respondent claimed it wanted the opportunity to pay any legitimate amounts but refused to pay the utility charges claimed to be exorbitant and for which bills were not provided. Respondent argued that the utility charges were not additional rent and not recoverable in a summary proceeding.

The petitioner in Inland, supra, submitted opposition wherein it claimed that the utility charges were additional rent and tenant concurred that the utility charges were owed after reviewing the payment history. Petitioner also stated that respondent had consented to a money judgment with the warrant stayed until January 8, 2014 because it couldn't afford to pay the rent and additional rent.

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The Appellate Term found that the petitioner had to prove that it actually paid for the electric, quadlogic meter and gas to be indemnified from respondent as additional rent. Petitioner failed to show that utility bills were submitted to respondent demonstrating payment which would bring these items into the clarification as additional rent. Based upon this scenario, petitioner was barred from recovering these utility items in a summary proceeding because the Civil Court could only award a money judgment for rent or additional rent.

The Appellate Term also dismissed the summary proceeding because of the large discrepancy between the amount of rent or additional rent actually owed and the amounts of rent or additional asserted by petitioner as actually owed:

"Furthermore, upon a review of the pleadings and papers herein (see CPLR 409 [b]), we find that, in light of the magnitude of the discrepancy between the amount of rent upon which this proceeding may properly be maintained and the amounts actually asserted (and incorporated into the stipulation of settlement), tenant may have been prejudiced in its 'ability to respond to the demand, formulate defenses, and avoid litigation or eviction' (Midwood LLC v. Hyacinth, 2003 N.Y. Slip Op 50789[U], [App Term, 2d Dept, 2d & 11th Jud Dists 2003]). As a result, the petition should be dismissed. We further note that petitioner is the agent of the landlord, and RPAPL 721 does not permit an agent to maintain a nonpayment proceeding (see Key Bank of NY v. Becker, 88 N.Y.2d 899, 900 [1990]; Poughkeepsie Sav. Bank v. Sloanne Mfg. Co., 84 A.D.2d 212, 215 [1981]; Suderov v. Ogle, 149 Misc.2d 906, 908 [App Term, 2d Dept, 2d & 11th Jud Dists 1991]).

Accordingly, the order is reversed, tenant's motion to vacate the stipulation of settlement, final judgment and warrant of eviction is granted, and the matter is remitted to the City Court for the entry of a final judgment dismissing the petition."

In 1466 Holding Co. v. Sanchez, 40 Misc 3d 138(A), 980 NYS2d 277 (Table), 2013 WL 4525172 (App Term, 1st Dept 2013), the Court vacated the stipulation of settlement involving a Section 8 tenant

who entered into a so-ordered settlement without counsel, which obligated the tenant to pay the Section 8 portion of the rent:

"While a stipulation is essentially a contract and should not be lightly set aside, the court possesses the discretionary power to relieve parties from the consequences of a stipulation 'if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it' (1420 Concourse Corp. v. Cruz, 135 A.D.2d 371, 373 [1987], appeal dismissed 73 N.Y.2d 868 [1989], citing Matter of Frutiger, 29 N.Y.2d 143, 150 [1971]). In the circumstances here present, Civil Court appropriately

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exercised its discretion in relieving tenant of her uncounseled decision to assume responsibility for rent arrears that she was not obligated to pay under controlling case law.. The court went too far, however, in dismissing the nonpayment petition outright, since the landlord's facially meritorious claim to recover the unsubsidized portion of the rent remains unresolved."

In Dawkins v. Ruff, 10 Misc 3d 88, 810 NYS2d 783, 2005 NY Slip Op 25538 (App Term, 2nd & 11th Jud Dists 2005), the Court vacated the stipulation of settlement and income execution where the tenant obligated herself to pay the Section 8 portion of the rent.

In the leading case of Matter of Binghamton Hous. Auth. v. Douglas, 217 AD2d 897, 630 NYS2d 144 (3d Dept, 1995), the petitioner sought to recover rent and additional rent of late fees, utility fees, and maintenance fees. The central issue in this case was whether the claim for additional rent encompassing late fees, utility fees, and maintenance fees could be the subject of a summary judgment allowing for a possessory judgment. The Third Department held that the additional rent items could not be pursued in a summary proceeding but had to be brought in a plenary action:

"The property at issue is part of the Federal public housing program which places limitations on the amount of rent which can be charged (see, 42 USC §1437a [hereinafter the Brooke Amendment]). According to the Brooke Amendment, monthly rent is limited to the highest of 30 percent of the family's monthly adjusted income, 10 percent of the family's monthly income or an amount established by the public agency which grants welfare payments to the tenant (see, 42 USC §1437a [a] [1]). Pursuant to regulations, petitioner is further allowed to add certain fees to cover excess utility use, late payments and maintenance charges, if appropriate (see, 24 CFR 913.107, 966.4 [b] [1]-[3]; [f] [10]). Based upon these regulations, we find that County Court correctly recognized that petitioner has the right to collect these additional charges.

The issue thus becomes whether such charges are deemed 'rent' and can therefore be collected through a summary proceeding. Noting that through such a proceeding a landlord may typically seek judgment for money owed as rent, but not other charges (see, RPAPL 741 [5]; Cotignola v. Lieber, 34 AD2d 700; 2 Rasch, New York Landlord and Tenant — Summary Proceedings §32.9, at 509-510 [3d ed]) unless such additional charges are clearly and expressly designated as 'rent' in the governing document (see, Perrotta v. Western Regional Off-Track Betting Corp., 98 AD2d 1; Matter of Petrakakis v. Crown Hotels, 3 AD2d 635), we find that petitioner may not recover these charges through this proceeding by defining them as 'added rent' in its lease with respondent.

Despite the clear lease provisions, the property at issue is governed by standards different from those applicable to private landlord/tenant relations.

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Pursuant to the Brooke Amendment, as implemented by the public housing regulations, the total tenant payment allowable as rent is only that amount designated by the guidelines therein (see, 24 CFR 913.107 [a]) and does not include 'charges for excess utility consumption or other miscellaneous charges' (24 CFR 913.102; see generally, 24 CFR 966.4). Accordingly, since the Federal regulations fully govern the amount that petitioner may charge as rent, we find that City Court, affirmed by County Court, correctly determined that the regulations, rather than the lease provisions, constitute the governing document. Accordingly, City Court properly limited petitioner's judgment to past due 'rent'.

As to petitioner's contention that it would be precluded from instituting a separate proceeding to collect such amounts deemed 'added rent' pursuant to the doctrine of collateral estoppel (see, e.g., Liss v. Trans Auto Sys., 68 NY2d 15, 22), we find no merit. Petitioner's monetary recovery in the summary proceeding is limited to those amounts statutorily defined as rent and, therefore, the recovery of the miscellaneous charges is not allowed (see, 24 CFR 913.107, 966.4 [b] [1] [3]; [f] [10]). Accordingly, the institution of a separate proceeding for the recovery of such charges would not be barred."

In Community Properties v. McCloud, 2003 WL 21730080, 2003 NY Slip Op 51088(U), (App Term, 9th & 10th Jud Dists 2003), the Court refused to allow recovery for attorney fees in a summary proceeding involving a Section 8 tenant:

"However, the attorney's fees award was improper. As a general rule, whatever the prior agreement between the parties, a landlord may not collect costs, penalties and other non-rent items as 'added rent' from a Section 8 benefits recipient unless specifically provided in the Section 8 lease (Matter of Binghamton Hous. Auth. v. Douglas, 217 A.D.2d 897, 898, 630 N.Y.S.2d 144; Port Chester Hous. Auth. v. Turner, 189 Misc.2d 603, 734 N.Y.S.2d 805 [App Term, 9th & 10th Jud Dists])."

See also, Douglas v. Nole, 20 Misc 3d 1119(A), 867 NYS2d 16 (Table), 2008 WL 2736662 (NY Dist Ct 2008), holding that legal fees cannot be the basis for eviction in a summary proceeding involving a Section 8 Tenant.

In Port Chester Housing Authority v. Turner, 189 Misc 2d 603, 734, NYS2d 805, 2001 NY Slip Op 21481 (App Term, 2nd Dept 2001), the Court held that it was error to include in the default judgment involving the Federal public housing program, non-rent items "even though characterized as 'additional rent' in the agreement between the parties (see, Matter of Binghamton Hous. Auth. v. Douglas, 217 A.D.2d 897, 898, 630 N.Y.S.2d 144)."

It is based upon the foregoing, that this court vacates the Stipulation of Settlement

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executed by Respondent Charlene Cordero. The Stipulation of Settlement contains items which cannot be the basis for a possessory judgment in a summary proceeding. The Petition inappropriately demands payments of $1,700.00 for March of 2016, which means that Petitioner is attempting to recover $1,412.00 from Respondent which sum represents the subsidy that the Long Beach Housing Authority pays and for which Respondent is not liable. Likewise, Respondent is being requested to pay $1,700.00 for February of 2016 rent when her only responsibility was $785.00. The Petition also seeks non-possessory items of late fees, flood damage and electric charges.

Thus, as such, it is clear that the Stipulation of Settlement must be vacated. This court notes that the April 6, 2016 Letter from Long Beach Housing Authority, addressed to Petitioner, states that Petitioner cannot recover from Respondent any sum other than the $288.00 tenant portion of the rent. Clearly, Petitioner violated this directive. It is against public policy for a landlord to attempt to collect by a rent demand and/or summary proceeding, amounts in a summary proceeding for which the tenant is not responsible and cannot be disposed. The fact that the Nassau County Department of Social Services may have paid $5,030.80 does not validate a stipulation of settlement which is against public policy. Also, the waiver of all defenses provides no grounds to validate and justify a stipulation of settlement which violates Federal law and public policy.

Should this court dismiss this summary proceeding? The answer to the question is in the affirmative based upon the Appellate Term holding in Inland Diversified Real Estate Service, LLC, which dismissed the summary proceeding because of the prejudice that the tenant may have incurred due to the difference "of the discrepancy between the amount of rent upon which this proceeding may properly be maintained and the amounts actually asserted (and incorporated in the stipulation of settlement)..."

In the case at bar, the unrepresented Respondent was prejudiced by the inclusion of additional rent items which may not be included in a summary proceeding.

This court is aware of the ruling in Rippy v.Kyer, 23 Misc 3d 130(A), 885 NYS2d 713 (Table), 2009 WL 996303 (App Term, 9th & 10th Jud Dists 2009), wherein the Court refused to dismiss the summary proceeding even though there was a discrepancy in this Section 8 housing case between the rent demanded and the amount owed because good faith was found:

"However, we reject tenant's further claim that the petition should have been dismissed because it improperly sought the full contract rent rather than only the tenant's share of the rent. Although landlord was not entitled to collect the full contract rent in a nonpayment proceeding, there is nothing to indicate that his pro se demand for that rent was made other than in good faith. A 'substantive dispute over the amount of rent arrears and other charges actually owed [does not implicate] the legal sufficiency of the underlying rent demand' (501 Seventh Ave. Assoc., LLC v. 501 Seventh Ave. Bake Corp., 7 Misc.3d 137 [A], 2005 N.Y. Slip Op 50799[U] [App Term,

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1st Dept 2005]; see 402 Nostrand Ave. Corp. v. Smith, 19 Misc.3d 44 [App Term, 2d & 11th Jud Dists 2008] [a landlord's demand for the full regulated rent where only a preferential rent was owed did

not invalidate the demand and petition]; but see New Hempstead Terrace LLC v. Reeves, 18 Misc.3d 1113[A], 2008 N.Y. Slip Op 50018[U] [Dist Ct, Nassau County 2008] [a nonpayment petition which improperly demands the Section 8 portion of the rent must be dismissed]; cf. Matter of Rockaway One Co. v. Wiggins, 35 AD3d 36, 43 [2d Dept 2006] [a demand for rent based on an unjustified individual apartment improvement increase 'cannot be the basis for a determination that the tenant is in default of his or her obligation to pay the lawful regulated rent'])."

The court in 1466 Holding,Inc., supra, also declined to dismiss the summary proceeding even though there was a discrepancy between the sums actually owed and demanded.

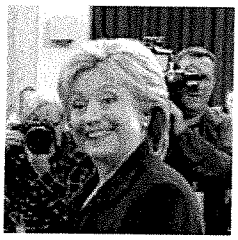
In the case at bar, this court finds that the Petitioner was informed by the Long Beach Housing Authority not to collect any other amount from Respondent other than the $288.00. Petitioner violated this directive and sought sums as outlined herein. Petitioner also sought sums clearly not owed in a summary proceeding and included same in the Stipulation of Settlement.

This court has difficulty reconciling the holdings in Rippy and 1466 Holding, Inc., from that in Inland. This court believes that the holdings in Rippy and 1466 Holding, Inc., may cause havoc if followed and encourage improper demands being made on tenants of limited means and legal education. The holding in Inland will encourage the law being followed if landlords know that stipulations of settlement will be vacated and summary proceedings dismissed if improper money demands are made and sought from Section 8 tenants.

Additionally, another ground for dismissal is the fact that Petitioner collected money from the Nassau County Department of Social Services in the amount of $5,030.50 which is greater than the amount for which Respondent may be held liable in a summary proceeding. Therefore, it appears that Petitioner does not have a basis to bring a summary proceeding because all sums that could be collected in a summary proceeding against Respondent have been paid.

So Ordered:

Dated: January 17, 2017

- 

  Williams & Connolly Argues to Block Clinton from Questioning

  The National Law Journal

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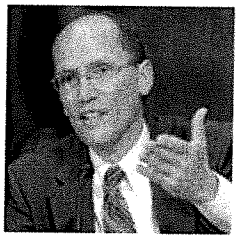
  Daily Report

- 

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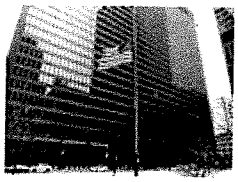
- 

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  The National Law Journal

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SIEGEL v. KENTUCKY FRIED CHICKEN OF LONG ISLAND, INC.

67 N.Y.2d 792 (1986)

Aaron L. Siegel, Appellant, v. Kentucky Fried Chicken of Long Island, Inc., Respondent.

Court of Appeals of the State of New York.

Argued February 5, 1986.

Decided March 18, 1986.

Attorney(s) appearing for the Case

Bruce D. Mencher for appellant.

Eugene I. Farber and Steven T. Lowe for respondent.

Chief Judge WACHTLER and Judges MEYER, SIMONS, KAYE, ALEXANDER and HANCOCK, JR., concur; Judge TITONE taking no part.

[67 N.Y.2d 793]

MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs.

The lease contains four printed provisions referring to the "Landlord or Landlord's agent," but in its default provision refers only to "the Landlord serving a written five (5) days' notice upon Tenant" to be followed by "Landlord [serving] a written three (3) days' notice of cancellation". Its printed provisions defined the term "Landlord" to mean "only the owner, or mortgagee in possession, for the time being". It also contained a rider consisting of 44 typewritten paragraphs, three of which referred to a named attorney as escrowee, but none of which specified that notice of default or of termination

[67 N.Y.2d 794]

which, as noted, was to be given by the landlord, could be given by the landlord's agent or by an attorney, or otherwise modified the printed definition of the term "Landlord."

Under such a lease notices of default and of termination signed not by the owner or the attorney named in the lease, but by another attorney with whom the tenant had never previously dealt, were insufficient and the tenant was entitled to ignore them as not in compliance with the lease provisions concerning notice (*cf. Mann Theatres Corp. v Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 474; *see, Reeder v Sayre*, 70 N.Y. 180, 188).

Order affirmed, with costs, in a memorandum.

At a term of the Appellate Term of the Supreme Court
of the State of New York for the 9th & 10th Judicial Districts

AOT

DEC 21 2012

HECTOR D. LaSALLE, J.P.
DENISE F. MOLIA
ANGELA G. IANNACCI, JJ.

OCTOBER 26, 2012 TERM
2011-01657 S C

TINO TRICARICHI,

Appellant,

-against-

Lower Court #
BALT 40-11

ALISON MORAN, CHRISTOPHER MAUER,
"JOHN DOE" and "JANE DOE",

Respondents.

The above named appellant having appealed to this court from a **FINAL JUDGMENT** of the **DISTRICT COURT OF SUFFOLK COUNTY, SECOND DISTRICT** entered on **JULY 25, 2011** and the said appeal having been **submitted** by **JOHN A. RENO, ESQ.** counsel for the appellant and **submitted** by **MARISSA LUCHS KINDLER, ESQ.** counsel for the respondents and due deliberation having been had thereon; it is hereby,

ORDERED AND ADJUDGED that, on the court's own motion, the notice of appeal from the oral order is deemed to be a premature notice of appeal from the final judgment; and it is further,

ORDERED AND ADJUDGED that the final judgment is reversed, without costs, the oral order is vacated, and the tenants' oral motion to dismiss the petition is denied.

LaSalle, J.P., Molia and Iannacci, JJ., concur.

JOHN A. RENO, ESQ.
1913 DEER PARK AVENUE
DEER PARK, N.Y. 11729

ENTER:

MARISSA LUCHS KINDLER, ESQ.
NASSAU/SUFFOLK LAW SERVICES
1757 VETERANS MEMORIAL HIGHWAY, STE. 50
ISLANDIA, N.Y. 11749

PAUL KENNY
CHIEF CLERK
APPELLATE TERM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 9th & 10th JUDICIAL DISTRICTS

PRESENT : LaSALLE, J.P., MOLIA and IANNACCI, JJ.

TINO TRICARICHI,

Appellant,

DEC 21 2012

-against-

NO. 2011-1657 S C

DECIDED

ALISON MORAN, CHRISTOPHER MAUER, "JOHN DOE" and "JANE DOE",

Respondents.

Appeal from a final judgment of the District Court of Suffolk County, Second District (Stephen L. Ukeily, J.), entered July 25, 2011. The final judgment, entered pursuant to an oral order of the same court made February 8, 2011 granting tenants' oral motion to dismiss the petition in a nonpayment summary proceeding, dismissed the petition.

ORDERED that, on the court's own motion, the notice of appeal from the oral order is deemed to be a premature notice of appeal from the final judgment (see CPLR 5520 [c]); and it is further,

RE: TINO TRICARICHI v ALISON MORAN, CHRISTOPHER MAUER, "JOHN DOE" and "JANE DOE"
NO. 2011-1657 S C

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ORDERED that the final judgment is reversed, without costs, the oral order is vacated, and tenants' oral motion to dismiss the petition is denied.

When this nonpayment summary proceeding came on for trial, tenants' attorney stated that tenants were surrendering possession, and moved to dismiss the petition, arguing that the tenancy was month-to-month, as the lease had expired, and that a nonpayment proceeding cannot be maintained against month-to-month tenants. Landlord's attorney disputed the contention that the written lease, which he claimed was for a month-to-month tenancy, had expired, and argued that the rent had continued on a month-to-month basis. Without holding a trial, the District Court orally granted tenants' motion to dismiss, on the ground that possession was not in issue. A final judgment was subsequently entered, from which we deem landlord's appeal from the oral order to have been taken (see CPLR 5520 [c]).

Contrary to the District Court's ruling, the fact that tenants had surrendered possession was not a basis to dismiss the petition. While a surrender of possession after the commencement of a summary proceeding terminates the tenancy (see Patchogue Assoc. v Sears, Roebuck & Co., 37 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2012]), it does not divest the court of jurisdiction over the proceeding (Sowalsky v MacDonald Stamp Co., 31 AD2d 582 [1968]; Bahamonde v Grabel, 34 Misc 3d 58, 62

see

RE: TINO TRICARICHI v ALISON MORAN, CHRISTOPHER MAUER, "JOHN DOE" and "JANE DOE"
NO. 2011-1657 S C

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[App Term, 9th & 10th Jud Dists 2011]; Lido Realty, LLC v Thompson 19 Misc 3d 144[A], 2008 NY Slip Op 51105[U] [App Term, 2d & 11th Jud Dists 2008]).

The petition states that tenants are in possession pursuant to a written agreement, and landlord claimed that the agreement remained in effect. The fact that landlord did not submit the lease is of no consequence, as the court dismissed the petition without giving landlord an opportunity to introduce evidence. Contrary to tenants' contention, there is no requirement that the lease be appended to the petition.

In any event, tenants' contention that a nonpayment proceeding cannot be maintained against them because they are month-to-month tenants is not correct. In the leading case relied upon by tenants, 1400 Broadway Assoc. v Lee & Co. of N.Y., (161 Misc 2d 497 [Civ Ct, NY County 1994]), the Civil Court reasoned that a month-to-month tenancy "is renewable by the parties' conduct, i.e., by continued payments and acceptance of agreed-upon amounts each month" (161 Misc 2d at 499). It further stated that to permit a landlord "to maintain a nonpayment proceeding against a month-to-month tenant who fails to pay rent] seeking payment at the lease rate would permit a landlord unilaterally to bind a tenant to payment predicated on a continuing agreement, even though there was no longer a meeting of the minds. Such a result would violate the intent of Real Property Law 232-c." We do not agree with this reasoning.

RE: TINO TRICARICHI v ALISON MORAN, CHRISTOPHER MAUER, "JOHN DOE" and "JANE DOE"
NO. 2011-1657 S C

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Real Property Law § 232-c provides:

> "Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

This statute was enacted "to change, in the case of tenants whose term is longer than one month, the common law rule that a holdover tenant may be held as tenant for a new term" (1959 Leg. Doc. 65 [D] [Law Revision Commission Report] ' 43; see United Mut. Life Ins. Co. v ICBC Corp., 64 AD3d 506, 508 [1978]). However, Real Property Law § 232-c is inapplicable to month-to-month tenants, since the term of a month-to-month tenancy is not "longer than one month" (see Bleecker St. Tenants Corp. v Bleeker Jones LLC, 65 AD3d 240, 245 [2009] [each month of a month-to-month holdover tenancy "that results by operation of law when a lease expires . . . is a new term for a new period, each a separate and new contract"], revd on other grounds 16 NY3d 272 [2011]). Thus, Real Property Law § 232-c did not abolish a landlord's right to elect to hold a month-to-month tenant for a new term solely by virtue of his holding over.

RE: TINO TRICARICHI v ALISON MORAN, CHRISTOPHER MAUER, "JOHN DOE" and "JANE DOE"
NO. 2011-1657 S C

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Indeed, the requirement of Real Property Law § 232-b—that both a landlord and a tenant wishing to terminate a month-to-month tenancy must give a month's notice—remains unaffected by the subsequent enactment of Real Property Law § 232-c. Here, both the making of a rent demand by landlord and the commencement of a nonpayment proceeding constitute an election by landlord to treat the holdover tenants as tenants for a new term and not as trespassers (see Friedman on Leases § 18:4). Their month-to-month tenancy continues on the same terms as were in the expired lease, if, in fact, the lease has expired (see City of New York v Pennsylvania R.R. Co., 37 NY2d 298, 300 [1975]). Consequently, even if the lease has expired, as tenants claim, this nonpayment proceeding should not have been dismissed.

Accordingly, the final judgment is reversed, the oral order granting tenants' oral motion to dismiss is vacated, and tenants' motion is denied.

LaSalle, J.P., Molia and Iannacci, JJ., concur.

SM-5

136 Misc.2d 860 (1987)

Morris Gilman, on Behalf of Randy Manheim and Another, Petitioner,

v.

Judi Kipp, Respondent.

City Court of Syracuse.

August 28, 1987

Morris Gilman, petitioner pro se. Judi Kipp, respondent pro se.

ANTHONY J. GIGLIOTTI, J.

861 This action, pursuant to RPAPL 711, for possession and rent *861 allegedly demanded and unpaid was commenced by petitioner, Morris Gilman, in his capacity as attorney-in-fact for the owners of the premises in question. The caption of the notice of petition and petition reads as follows: Morris Gilman (POA) for Randy and Michele Manheim against Judi Kipp. The petition was both executed and verified by Gilman. The owners, who apparently live out of State, previously executed the statutory short-form power of attorney as defined by General Obligations Law § 5-1502H in favor of Gilman. That document authorizes Gilman to, among other things, accept service of process and appear for the principal, assert any cause of action against any individual, and settle any claim by or against the principal.

The instant case raises the apparent conflicts among various provisions of the Real Property Actions and Proceedings Law and Judiciary Law, and the General Obligations Law referred to above. Section 721 of the RPAPL delineates an exclusive list of those persons entitled to be petitioners in summary proceedings. The State Legislature specifically removed agents, legal representatives, and attorneys from that list by statutory amendment in 1977. Sections 478 and 484 of the Judiciary Law preclude persons from appearing as an attorney-at-law for a person other than himself or herself in any court of record unless that person has been licensed and admitted to the practice of law. General Obligations Law § 5-1502H, in addition to the responsibilities stated above, authorizes an attorney-in-fact to hire, discharge and pay an attorney.

In *Rosenberg v Suares* (105 Misc 2d 611 [Civ Ct, NY County 1980]), Judge Gallet acknowledged the conflict between the General Obligations Law and the RPAPL as raised by the instant case. Contrary to the opinion of this court, Gallet concluded that the "agent", excluded from being a petitioner by RPAPL 721, should not include those persons acting pursuant to a general power of attorney because such persons are more than "mere agents".

We find nothing in the post-1977 version of RPAPL 721 or its legislative history to evidence an intent to except any agency relationship from the limitations provided for. Rules of statutory construction dictate that a rule relating to the practice in a specific court be followed when it appears to conflict with one having more general application. In this case, the General Obligations
862 Law defines the general scope of powers of attorney. The RPAPL has, however, strictly limited *862
those person who are entitled to request the expeditious remedies afforded by summary proceedings. Those persons authorized by RPAPL 721 to bring a summary proceeding do not include individuals holding a general power of attorney.

An additional consideration argues against the rationale found in the *Rosenberg* case (*supra*). The court (at 613) refers to an attorney-in-fact as the "alter ego of his principal" and therefore concludes he may act as petitioner in a summary proceeding. The effect of this reasoning would allow the nonattorney, managing real estate agent to draft and file legal documents, appear on behalf of petitioners in courts of record, and fashion legal, as well as factual, arguments on behalf of property owners upon the mere execution of revocable power of attorney documents. The inherent right of a person to appear *"pro se"* in legal proceedings cannot be assigned to another by executing the power of attorney. To hold otherwise would invite the unauthorized practice of law.

This court reaches the same conclusion as Judge Williams in *Matter of Stokes v Village of Wurtsboro* (123 Misc 2d 694, 695 [Sup Ct, Sullivan County 1984]) "that the attorney-in-fact may not represent the principal as legal counsel in a court of record." Another court has similarly interpreted the power of attorney as not providing a lay person with the "authority to proceed *pro se* on behalf of his principal in the instant proceeding" (*Matter of Friedman*, 126 Misc 2d 344, 345 [Sur Ct, Bronx County 1984]).

Indeed, since 1977 the role of agents in assisting landlords to enforce their rights in summary proceedings has been strictly limited. Section 741 of the RPAPL incorporates CPLR 3020 (d) and thereby defines the limited circumstances when an agent, including an attorney-in-fact, may verify petitions in summary proceedings. An attorney-at-law is the only person who may appear, in absence of the petitioner, to argue points of law in a summary proceeding.

Based upon the preceding, this court, on its own motion, here determines that Morris Gilman, an attorney-in-fact, is not a person who may maintain a summary proceeding for the rightful owners and therefore dismisses the instant petition.

ART. 7 SUMMARY PROCEEDING DEFENSE CHECKLIST

	REAL PROPERTY ACTIONS/PROCEEDINGS GUIDELINES		
FILING & PLEADING INADEQUACIES	**GENERAL**	**REF/RPAPL §**	**CHECKLIST**
WHEN WAS CLIENT SERVED?	No more than 12 days, no less than 5 days from return date.	§ 733(1)	
HOW WAS CLIENT SERVED?	Personally, OR suitable age and discretion or copy on premises AND within one day copy mailed by regular and certified mail. **(NB: If not personal service and no appearance - no money judgment.)**	§ 735(1)	
IS AFFIDAVIT OF SERVICE COMPLETE?	Check description, date of mailing, authorized person, filed within 3 days of service.	§ 735(2) (also CPLR § 306(a))	
IS OWNER OR OWNER'S ATTORNEY PRESENT?	Agents, managers, etc. may not appear on owners' behalf. (authorized to practice law)	See, Gilman v. Kipp, 519 NYS 2d 314 (1987).	
WHO ISSUED CLIENT'S PETITION?	May only be issued by attorney, judge or clerk. **(NB: T's copy of the petition, not simply filed copy, must meet requirements of RPAPL. See, Margolies v. Lawrence, 324 NYS 2d 418 (1971).)**	§ 731(1)	
IS PETITIONER OWNER?	Only owner can be named petitioner. (Agents, Attorneys, etc. with actual knowledge can verify.) Call City Tax Assessors for property owner info- 851-5733.	§ 721	
WHO VERIFIED PETITION?	If not petitioner, must have actual knowledge and must so state on petition. If LL dom. Corp., certify by officer. If verified by attorney, affd. Must state personal knowledge or party not in county where atty has office.	§§ 721, 741, (also CPLR §§ 3020(d) and 3021).	
IS LL PROCEEDING UNDER BOTH NONPAYMENT AND HOLDOVER?	Requires that petition be dismissed: allegations necessary to support each are **mutually exclusive.**	§§ 711(1) & 711(2).	
DOES PETITION INCLUDE DESCRIPTION OF PREMISES, INTEREST OF PETITIONER AND RESPONDENT?	Petition must state facts upon which proceeding is based. **(NB: T's copy of petition, not simply filed copy, must meet requirements of the RPAPL. See, Margolies, Supra.)**	§ 741	
IS TENANT IN POSSESSION?	T's continued possession or claim to possession at time of commencement of proceeding is an essential jurisdictional fact.	See, Estate of Fishel v. Baronelli Ltd., 463 NYS2d 1009 (1983).	

ART. 7 SUMMARY PROCEEDING DEFENSE CHECKLIST

FILING & PLEADING INADEQUACIES	HOLDOVER PROCEEDINGS	REFERENCES/RPAPL §	CHECKLIST
Is termination notice clear and unequivocal?	Must be definite.	See, 28 Mott St. Co. v. Summit Import Corp., 316 NYS2d 259.	
Did LL provide timely notice?	see lease - or, if month to month, one full calendar month. If foreclosure, then 10-day notice. See, § 713	§§ 711(1), 713 and RPL § 232-b	
Is termination from someone other than owner?	Arguably, unless lease provides that agent is authorized to provide notice, notice must be from LL.	See, Siegel v. Kentuckey Fried Chicken, 501 NYS2d 317 (1986)	
Is proceeding premature?	was petition filed before date of termination?	§ 711(1) and RPL 232-b	
Did LL accept rent after lease termination date, but before petition served?	Acceptance of rent after date of termination and before commencement of holdover waives termination notice. (Service of Petition)	§ 711(1)	
Is this a subsidized tenancy? (section 8, public housing, etc.)	If so, lease generally renews automatically and cannot be terminated without good cause. (hearing)	§ 711(lease term. Has expired)	
Did Client contact City or Health Dept. prior to receiving termination notice?	LL may not retaliate against a Tenant for actions to enforce rights under laws designed to insure health and safety or to regulate property. Six month presumption. (hearing)	RPL § 223-b	
Is LL proceeding under "illegal use"?	30-day notice not required - but must be some continuity of illegal use and must involve violation of statutory law involving health, morals or safety of public.	§ 711(5)	
Is LL terminating tenancy for unlawful reason?	If no lease - LL does not need reason, but can't be discriminatory, retaliatory, because additional household member added, etc.	See, RPL §§ 235-f, 236. Exec. Law §§ 290 et seq.	

ART. 7 SUMMARY PROCEEDING DEFENSE CHECKLIST

FILING & PLEADING INADEQUACIES	NON-PAYMENT PROCEEDING	REFERENCES/RPAPL §	CHECKLIST
Does Client have all the rent?	Generally courts will order LL to accept payment of rent and dismiss petition. Technically, T is entitled to termination of proceeding if T deposits with court rent due plus statutory costs (approximately $35-45) before warrant issues.	§ 751(1); costs-UCCA §§ 1906-(a) and 1911(a)(11)	
Is Landlord demanding rent only?	Can't include late fees, security deposit, etc. unless written lease provides that these items will be construed as added rent if not paid.	§ 711	
Is amount due and period for which rent is owed clearly stated?	petition must state facts upon which proceeding is based.	§ 741, See, Goldman Bros, 309 NYS2d 694	
Did LL demand rent either orally or in writing?	LL must demand rent or provide 3-day "pay or quit." (Demand must give T notice of amount due and period for which claim is made. See, Swartz v. Weiss-Newell, 386 NYS2d 191 (1976).)	§ 711(2)	
If written pay or quit notice, was it properly served?	Must be served like petition; either personally, OR, suitable age and discretion or copy on door, AND registered and certified mail.	§§ 711(2) and 735.	
If written lease- was notice given or provided for in lease?	See Lease.		
Is proceeding premature?	Was petition filed before pay or quit ran out or before rent was due?	§ 711(2)	
Is LL asking or renting more than 3 months overdue?	Some judges accept a laches agreement. Equitable defenses may be raised in a summary proceeding.	§ 743 (equitable defenses).	
Is LL attempting to collect rent increase?	A Tenant may not be evicted in a nonpayment proceeding for failure to pay a rent increase which the LL has unilaterally imposed and which the T has not agreed to nor ever paid.	See, Industrial Funding Corp. v. Megna, 384 NYS2d 955 (1976).	
Is LL trying to collect excessive late fees per lease agreement?	A lease clause is unenforceable where it provides for late fees that are grossly disproportionate to the probable loss. (Calculate late charge as annual interest rate.)	See, Spring Valley Gardens Assc. V. Earle, 447 NYS2d 629 (1982).	
Did C not pay rent because LL refused to provide receipt?	LL is required to provide receipt where payment made by any form other than personal check. (Where LL fails to provide receipt, dispute in testimony should be resolved against LL. See, Brinkman v. Cahill, 543 NYS2d 636.)	RPL § 235-e	
Are there conditions which affect C's life, health or safety?	Warranty of hospitability defense. (hearing)	RPL § 735-b	
If building has 3 or more units, is there a valid certificate of occupancy?	Owner may not collect rent if no valid certificate of occupancy. Also, Cert. of Occupancy must be displayed. (Hint: May not be one if C is complaining of bad conditions. Call 851 4933 to find out.)	Multiple Dwelling Law § 302-a	
Why didn't C pay rent?	If C does not have money and WOULD BE eligible for public assistance (doesn't have to be currently on PA)- try to adjourn and send Client to DSS at 60 Charles Lindbergh Blvd. Uniondale, NY 11553.		

Landlord recovering rent for an illegal apartment

Rental of part of premises in one family home
Rental of part of one family home without a certificate of occupancy for same is generally not a bar to collection of rent. The Court should apply equitable principals.

See The Bench Guide to Landlord & Tenant Disputes in New York, page72.

See also: All Season Awning Corporation vs Hartofelis, Appellate Term, Second Dept., 51 Misc.3rd 132(A)): (K6-9)

> "While there are cases barring recovery by a home improvement contractor where the contractor fails to fully comply with consumer protection legislation (*see Frank v. Feiss,* 266 A.D.2d 825 [1999]; *Harter v. Krause,* 250 A.D.2d 984 [1998]), this case falls within the cases that have carved out an exception to the rule requiring full compliance with General Business Law § 771 (*see Porter v. Bryant,* 256 A.D.2d 395 [1998]; ***Wowaka & Sons, Inc. v. Pardell,* 242 A.D.2d 1 [1998]**; *Island Wide Heating & Air Conditioning v. Sachs,* 189 Misc.2d 355 [App Term, 2d Dept, 9th & 10th Jud Dists 2001]; *see also Lloyd Capital Corp. v. Pat Henchar, Inc.,* 80 N.Y.2d 124 [1992]). Insofar as the loss of judicial recourse in this case is out of proportion to the requirements of public policy (*see* ***Wowaka & Sons, Inc.,* 242 A.D.2d at 6**), plaintiff's failure to fully comply with the statute should not bar its recovery."

See: 24th Street Holding LLC vs Martinez, 43 Misc.3rd 8, 983 N.Y.S. 2d 391, Appellate Term, First Department, wherein the Court's conclusion was: (K10-11)

> "On this record, the appropriate remedy for any such violation lies with the enforcement arm of the Buildings Department, and not a court-sanctioned windfall to the tenant in the form of a rent moratorium."

Rental of a basement apartment

Rental in location where statute prohibits same with or without penalty of rent forfeiture does not forfeit rent. Rental where statute expressly prohibits collection of rent if no rental permit obtained bars rent recovery.

See excellent attached article published in the October, 2016 issue of the Nassau Lawyer, authored by Michael A. Markowitz, Esq., reprinted with permission. (K12)

(A copy of the cited material appears following this outline on the numbered page, preceded by the letter K.)

Tenant rental permits

See attached list of just some of the jurisdictions that have renal restrictions (K13-19)

Local ordinance of Village of Hempstead attached (K20-22)
Rent permit application of Village of Hempstead attached (K23-24)
Local ordinance of Town of North Hempstead attached (K125-36)
Rent permit application of Village of North Hempstead Attached (K37-39)
Local ordinance of Town of Hempstead attached (K40-58)

Question: Can landlord recover rent when premises leased without required rental permit?

Town of North Hempstead: Section 2-103:
"It shall be unlawful and a violation of this article and an offense within the meaning of the Penal Law…"

Town of North Hempstead: Section 2-115:
Collection of rent: A prerequisite to rent collection is the issuance and the filing of a rental occupancy permit.

Town of Hempstead Code 99-13:
"It shall be unlawful and a violation …rent… without first having obtained a valid rental occupancy permit…"
Violation (rental without permit is unlawful but no statutory prohibition against collection of rent.

Security deposits (GOL 7-103) (K59-67)

See GOL 7-101 Money deposited or advanced for rental
See GOL 7-103 Money advanced for security
See GOL 7-105 Landlord's failure to return or assign security
See GOL 7-107Money advanced for installation of certain installations
See GOL 7-107 Liability of grantee or assignee for rent in stabilized security deposits
See GOL 7-108 Liability of grantee or assignee for rent in non-stabilized security deposits
See GOL 7-109 Attorney General can action or proceeding to compel compliance

Summation on security deposits: It's not your money (at the outset) until appropriately disbursed.

Violating terms of lease; Notice and time to cure

The lease terms will generally provide for the landlord's remedy for a tenant's breach (other than non-payment, which remedy is statutory). Terms will generally require the tenant to cure the breach within a requisite time or suffer lease termination. Absent fraud or other unusual circumstances, once the lease is cancelled it is over and the landlord has the right to repossession using lawful process.

The Yellowstone Injunction concept is one originally developed by the Courts in a commercial setting: elements:
1. The tenant having a valid and existing lease
2. Tenant's receipt of a notice to terminate absent the curing of a claimed breach
3. Commencement of action to enjoin and application for an injunction staying the termination, both commenced before the lease termination date
4. The tenant expressing the ability and desire to cure any alleged violations

See: GRAUBARD MOLLEN HOROWITZ POMERANZ & SHAPIRO vs. 600 THIRD AVENUE ASSOCIATES, 93 N.Y.2d 508, 715 N.E.2d 117, 693 N.Y.S.2d 91, 1999 N.Y. Slip Op. 05333 for an excellent analysis of the Yellowstone Injunction concept. (K68-73)

Yellowstone Injunction applies to residential leases: see Hopp vs Raimondi, Appellate Division, Second Department, 51 A.D. 3rd 726, 858 N.Y.S.2d 300 (K74-78)

> "The purpose of a ***Yellowstone*** **injunction** is to allow a tenant confronted by a threat of termination of the **lease** to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (*see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 715 N.E.2d 117; *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125). Although ***Yellowstone*** **injunctions** are more commonly sought to protect a tenant's interest in a commercial **lease** (*see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 693 N.Y.S.2d 91, 715 N.E.2d 117), ***Yellowstone*** relief also has been granted to **residential** tenants (*see Post v. 120 E. End Avenue Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125; *Kuttas v. Condon*, 290 A.D.2d 492, 736 N.Y.S.2d 402; *Cohn v. White Oak Coop. Hous. Corp.*, 243 A.D.2d 440, 663 N.Y.S.2d 62; *Somekh v. Ipswich House*, 81 A.D.2d 662, 438 N.Y.S.2d 362; *Wuertz v. Cowne*, 65 A.D.2d 528, 409 N.Y.S.2d 232)."

How to get tenant out

Landlord-tenant proceedings are technical and expensive; consider structuring a "deal" with tenant to vacate and forego some rent due or make a relocation payment

If proceedings are to be brought, predicate notice(s) as discussed by Roberta Scoll

non-payment and holdover distinctions, if not previously commented upon

issuance, post card procedure, time for service

Procedure in Court

ejectment

Civil Court of the City of New York [CCA 203(j)]: can bring ejectment if assessed value at time of commencement not in excess of $25,000 (Just closed a residential property in Flushing, N.Y. at a price of $970,000 where the assessed value was $35,830) (K79-80)

Supreme Court

Cases:

*Rosenstiel vs Rosenstiel, 20 A.D. 2D 71, 245 N.Y.S. 2d 395, Appellate Division, Second Department: a matrimonial case wherein a summary proceeding was removed and consolidated; holds that a wife, who moved into residence owned by husband, was not such a licensee as could take advantage of summary proceedings statute.

*Heckman vs Heckman, 55 Misc.3rd 80, 2017 N.Y. Slip Op. 27122 Supreme Court, Appellate Term, Second Department; holding: summary proceeding is allowable between family members provided support between them is not an issue

*Both cited by Evelyn Kalencher earlier

Rinis vs Toliou, 56 Misc. 3rd 1211(A), 2017 N.Y. Slip Op. 50964(U), NYC Civil Court recognizes Heckman but determines there may be support issues yet to be decided (K81-83)

Usurious late fees

Late fees are not interest and thus not subject to usury.
If authorized by lease, must be reasonable.
While District Court does not have "equity" jurisdiction, equitable principals apply.

Unconscionable lease terms

Unconscionable lease terms are unenforceable.

See: Park Haven, LLC vs Robinson, Appellate Division, Second Department, 43 Misc. 3d 129(A), 3 N.Y.S.3rd 286, N.Y. Slip Op. 51540(U); wherein the lease provided for almost double rent to be paid if rent late; Court held this was "nothing more than an unconscionable late charge and penalty, in that the increase is excessive and grossly disproportionate to any damages that could be sustained as a result of…" tenant's timely rent payment. (K84-85)

See also: Diversified Equities, LLC vs Russell, Appellate Division, Second Department, 50 Misc. 3d 140(A), 31 N.Y.S. 3rd 920, 2016 N.Y. Slip Op. 50177(U) (same basic concept as 1 Park Haven, LLC; here 13% late charge held excessive and grossly disproportionate to any damages. (K86-87)

See also: 560-568 Audubon Realty Inc. vs Rodriguez, Civil Court, New York County, 54 Misc.3rd 1226(A), 55 N.Y.S. 3rd 692; granting tenant relief where landlord overcharged rent in rent stabilized premises and other rent registration violations occurred. (K88-92)

Misc.

Alert: Pending amendment to GOL 5-1501 concerning powers of attorney:

format basically the same
gifts up to $5,000 OK instead of $500
third parties must honor or state grounds for
rejecting same; age of poa not a basis to reject
authorizes action to force acceptance of POA and
authorizes recovery of actual damages and attorneys fees
Senate bill S6501A pending in Rules Committee
Assembly bill A8120B passes in Assembly 6/21/17

Alert: Pending bill in Assembly A08684; no same as in Senate; would require officer executing eviction warrant to check the property of respondent for presence of a companion animal and coordinate the safe removal of such companion animal. (Companion animal is as defined in the Agricultural and Markets Law 350(5): " 5. "Companion animal" or "pet" means any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. "Pet" or "companion animal" shall not include a "farm animal" as defined in this section." (K93-95)

Legal Fees Caveat:

RPL 234 provides that in a residential lease containing attorney's fee provision for successful landlord, it is implied that there is a mutual provision in favor of a successful tenant. (K-96)

References:

The Bench Guide to Landlord & Tenant Disputes in New York, Hon. Stephen L. Ukeiley, Judge, District Court Suffolk County

New York Residential Landlord-Tenant Procedure, New York State Bar Association, authors Hon. Gerald Lebovits, Damon P. Howard and Michael B. Terk

Rasch's Landlord Tenant

51 Misc.3d 132(A)

Unreported Disposition

(The decision is referenced in the New York Supplement.)

Supreme Court, Appellate Term,

Second Dept.,

9 and 10 Judicial Dist.

ALL SEASON AWNING CORPORATION, Respondent,

v.

Michael X. HARTOFELIS, Appellant.

No. 2014–1364SC.

March 2, 2016.

Present: MARANO, P.J., IANNACCI and GARGUILO, JJ.

Opinion

*1 Appeal from a judgment of the District Court of Suffolk County, Fifth District (Vincent J. Martorana, J.), entered March 3, 2014. The judgment, after a nonjury trial, upon finding in favor of plaintiff in the principal sum of $3,959 on its cause of action and in favor of defendant in the principal sum of $200 on his counterclaim, awarded plaintiff the net principal sum of $3,759.

ORDERED that the judgment is affirmed, without costs.

Plaintiff commenced this small claims action seeking to recover the principal sum of $3,959, representing the amount allegedly due for installing an aluminum awning pursuant to a written contract entered into with defendant. Defendant subsequently commenced a separate small claims action against plaintiff for the return of his $3,000 deposit, alleging that plaintiff had breached the contract. At trial, the actions were consolidated under plaintiff's index number, and defendant's action was deemed a counterclaim. Following the trial, the District Court, upon finding in favor of plaintiff in the principal sum of $3,959 on its cause of action and in favor of defendant in the principal sum of $200 on the counterclaim, awarded plaintiff the net principal sum of $3,759. On appeal, defendant argues, among other things, that plaintiff should not have been permitted to recover under the contract since the contract violated General Business Law § 771 by not "containing essential statutory provisions" and that, in any event, the judgment did not provide substantial justice.

General Business Law § 771(1) provides that "[e]very home improvement contract subject to the provisions of this article, and all amendments thereto, shall be evidenced by a writing and shall be signed by all the parties to the contract." The writing shall contain, among other things, the name,

K 6

address, telephone number and license number of the contractor, a notice to the owner regarding liens by contractors and subcontractors, and a notice to the owner regarding the deposit of payments into escrow accounts. General Business Law § 770(6) defines a "home improvement contract" as "an agreement for the performance of home improvement, between a home improvement contractor and an owner, and where the aggregate contract price specified in one or more home improvement contracts, including all labor, services and materials to be furnished by the home improvement contractor, exceeds five hundred dollars." Thus, as it is undisputed that plaintiff is a home improvement contractor (*see* General Business Law § 770[5]), the installation of the awning involved herein is a home improvement subject to General Business Law article 36–A. In addition, there is no dispute that plaintiff's contract failed to fully comply with the provisions of General Business Law § 771(1).

While there are cases barring recovery by a home improvement contractor where the contractor fails to fully comply with consumer protection legislation (*see Frank v. Feiss,* 266 A.D.2d 825 [1999]; *Harter v. Krause,* 250 A.D.2d 984 [1998]), this case falls within the cases that have carved out an exception to the rule requiring full compliance with General Business Law § 771 (*see Porter v. Bryant,* 256 A.D.2d 395 [1998]; ***Wowaka & Sons, Inc. v. Pardell,* 242 A.D.2d 1 [1998]**; *Island Wide Heating & Air Conditioning v. Sachs,* 189 Misc.2d 355 [App Term, 2d Dept, 9th & 10th Jud Dists 2001]; *see also Lloyd Capital Corp. v. Pat Henchar, Inc.,* 80 N.Y.2d 124 [1992]). Insofar as the loss of judicial recourse in this case is out of proportion to the requirements of public policy (*see* ***Wowaka & Sons, Inc.,* 242 A.D.2d at 6**), plaintiff's failure to fully comply with the statute should not bar its recovery.

*2 In a small claims action, our review is limited to a determination of whether "substantial justice has ... been done between the parties according to the rules and principles of substantive law" (UDCA 1807; *see* UDCA 1804; *Ross v. Friedman,* 269 A.D.2d 584 [2000]; *Williams v. Roper,* 269 A.D.2d 125 [2000]). Furthermore, the determination of a trier of fact as to issues of credibility is given substantial deference, as a trial court's opportunity to observe and evaluate the testimony and demeanor of the witnesses affords it a better perspective from which to assess their credibility (*see Vizzari v. State of New York,* 184 A.D.2d 564 [1992]; *Kincade v. Kincade,* 178 A.D.2d 510, 511 [1991]). This deference applies with greater force to judgments rendered in the Small Claims Part of the court (*see Williams v. Roper,* 269 A.D.2d at 126). Upon a review of the record, we find that there is ample support for the District Court's determination and, thus, that substantial justice was done between the parties according to the rules and principles of substantive law (*see* UDCA 1804, 1807; *Ross v. Friedman,* 269 A.D.2d at 126).

Defendant's remaining contentions are either unpreserved for appellate review or without merit. Accordingly, the judgment is affirmed.

Supreme Court, Appellate Term, First Department, New York.

24TH STREET HOLDING LLC, Petitioner–Landlord–Appellant,

v.

Michael MARTINEZ, Respondent–Tenant–Respondent.

Dec. 24, 2013.

43 Misc.3d 8, 983 N.Y.S.2d 391, 2013 N.Y. Slip Op. 23440

Synopsis

Background: In nonpayment summary proceeding, the Civil Court of the City of New York, New York County, Jean T. Schneider, J., granted tenant's motion to dismiss the petition, and denied landlord's motion to reargue and renew. Landlord appealed.

Holding: The Supreme Court, Appellate Term, held that rent forfeiture provision of unlawful occupation statute was not complete defense to landlord's facially viable rent claim.

Reversed.

Opinion

PER CURIAM.

*9 Order (Jean T. Schneider, J.), dated August 10, 2012, insofar as appealed from, reversed, with $10 costs, tenant's motion **392 denied, and petition reinstated. Appeal from order (Jean T. Schneider, J.), dated October 17, 2012, insofar as appealable, dismissed, without costs, as academic.

The underlying nonpayment proceeding is not ripe for summary dismissal, in view of tenant's failure to establish, as a matter of law, the applicability of the rent forfeiture provisions of Multiple Dwelling Law § 302 as a complete defense to the landlord's facially viable rent claim. The building premises here involved were constructed at the turn of the twentieth century, at a time when no certificate of occupancy was required (*see* Administrative Code of City of N.Y. § 27–215), and the existing record is bereft of evidence that the 1981 alteration work undertaken in the building's cellar area by the predecessor owner adversely affected the habitability of the structure or rendered tenant's occupancy of his first-floor apartment criminal or illegal (*see* ***Coulston v. Teliscope Prods.*, 85 Misc.2d 339, 340, 378 N.Y.S.2d 553 [1975]**; *see also Arnav Indus. Inc. v. Pitari*, 82 A.D.3d 557, 558, 918 N.Y.S.2d 479 [2011], *lv. dismissed* 19 N.Y.3d 1021, 951 N.Y.S.2d 717, 976 N.E.2d 246 [2012]). In the absence of any such showing of illegality or a habitability impairing condition, it does not avail tenant that the Buildings Department has determined that the cellar alterations necessitated the issuance of a certificate of occupancy for the building premises or that no such certificate has yet

K 8

been issued (*see Hakim v. Von *10 Walstrom,* 198 A.D.2d 139, 604 N.Y.S.2d 733 [1993], *revg.* N.Y.L.J. July 29, 1992, at 21, col. 5 [App. Term, 1st Dept. 1992], for reasons stated by Mark H. Spires, J. at Civil Court, N.Y.L.J. Jan. 31, 1991, at 27, col. 5 [Civ. Ct., N.Y. County 1991]). On this record, the appropriate remedy for any such violation lies with the enforcement arm of the Buildings Department, and not a court-sanctioned windfall to the tenant in the form of a rent moratorium.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

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43 Misc.3d 8, 983 N.Y.S.2d 391, 2013 N.Y. Slip Op. 23440

**1 24th Street Holding LLC, Appellant

v

Michael Martinez, Respondent.

Supreme Court, Appellate Term, First Department
December 24, 2013

CITE TITLE AS: 24th St. Holding LLC v Martinez

SUMMARY

Appeal from orders of the Civil Court of the City of New York, New York County (Jean T. Schneider, J.), dated August 10, 2012 and October 17, 2012. The order dated August 10, 2012, insofar as appealed from, granted respondent's motion to dismiss the petition in a nonpayment summary proceeding. The order dated October 17, 2012 denied petitioner's motion to reargue and renew the order dated August 10, 2012.

HEADNOTE

Landlord and Tenant
Rent
Rent Forfeiture for Failure to Acquire Certificate of Occupancy—Summary Dismissal of Nonpayment Proceeding

A nonpayment proceeding was not ripe for summary dismissal as respondent tenant failed to establish, as a matter of law, the applicability of the rent forfeiture provisions of Multiple Dwelling Law § 302, relating to the failure of the owner of a multiple dwelling to acquire a certificate of occupancy therefor, as a complete defense to petitioner landlord's facially viable rent claim. Given that the building premises were constructed at a time when no certificate of occupancy was required, in the absence of any showing that the alteration work undertaken in the building's cellar area by the predecessor owner adversely affected the habitability of the structure or rendered respondent's occupancy of his first-floor apartment criminal or illegal, it did not avail respondent that the Buildings Department had determined that the cellar alterations necessitated the issuance of a certificate of occupancy for the building premises or that no such certificate had yet been issued. The appropriate remedy for any such violation lay with the enforcement arm of the Buildings Department and not a court-sanctioned windfall to respondent in the form of a rent moratorium.

RESEARCH REFERENCES

Am Jur 2d, Landlord and Tenant §§ 853, 857.

Carmody-Wait 2d, Summary Proceedings to Recover Possession of Real Property §§ 90:14, 90:38, 90:159.

Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (4th ed) §§ 32:1, 43:27.

McKinney's, Multiple Dwelling Law § 302.

NY Jur 2d, Landlord and Tenant §§ 362, 364; NY Jur 2d, Real Property—Possessory and Related Actions § 102.

*9 New York Real Property Service §§ 76:62, 79:22–79:24.

ANNOTATION REFERENCE

See ALR Index under Certificates of Occupancy; Landlord and Tenant; Rent.

FIND SIMILAR CASES ON WESTLAW

K 10

Database: NY-ORCS

Query: nonpayment & certificate /3 occupancy /p rent /4 forfeit!

APPEARANCES OF COUNSEL

Sweeney, Gallo, Reich & Bolz, LLP, Rego Park (*David Gallo* of counsel), for appellant.
Sokolski & Zekaria, P.C., New York City (*Robert E. Sokolski* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

Order dated August 10, 2012, insofar as appealed from, reversed, with $10 costs, tenant's motion denied, and petition reinstated. Appeal from order dated October 17, 2012, insofar as appealable, dismissed, without costs, as academic.

The underlying nonpayment proceeding is not ripe for summary dismissal, in view of tenant's failure to establish, as a matter of law, the applicability of the rent forfeiture provisions of Multiple Dwelling Law § 302 as a complete defense to the landlord's facially viable rent claim. The building premises here involved were constructed at the turn of the twentieth century, at a time when no certificate of occupancy was required (*see* former Administrative Code of City of NY § 27-215), and the existing record is bereft of evidence that the 1981 alteration work undertaken in the building's cellar area by the predecessor owner adversely affected the habitability of the structure or rendered tenant's occupancy of his first-floor apartment criminal or illegal (*see Coulston v Teliscope Prods.*, 85 Misc 2d 339, 340 [1975]; *see also Arnav Indus., Inc. v Pitari*, 82 AD3d 557, 558 [2011], *lv dismissed* 19 NY3d 1021 [2012]). In the absence of any such showing of illegality or a habitability impairing condition, it does not avail tenant that the Buildings Department has determined that the cellar alterations necessitated the issuance of a certificate of occupancy for the building premises or that no such certificate has yet been issued *10 (*see Hakim v Von Walstrom*, 198 AD2d 139 [1993], *revg* NYLJ, July 29, 1992 at 21, col 5 [App Term, 1st Dept 1992], *for reasons stated by Spires, J.*, NYLJ, Jan. 31, 1991 at 27, col 5 [Civ Ct, NY County 1991]). On this record, the appropriate remedy for any such violation lies with the enforcement arm of the Buildings Department, and not a court-sanctioned windfall to the tenant in the form of a rent moratorium.**2

Hunter, Jr., J.P., Schoenfeld and Shulman, JJ., concur.

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Should a Landlord Receive Rent from an Illegal Apartment?

New York State courts struggle with a tenant's failure to pay a landlord who does not have a valid certificate of occupancy. The court wants to protect the tenant (and the public) from the landlord who ignores the law and repeatedly rents an illegal apartment. The court also wants to protect the landlord from the "professional" tenant who remains in possession without paying rent. This article examines how courts have balanced the rights of the landlord and the tenant and suggests what practitioners should anticipate in the future.

Michael A. Markowitz

The Acute Shortage of Affordable Rental Apartments

There is an acute need for affordable rental apartments on Long Island. A 2013 report by the Regional Plan Association, *Long Island's Rental Housing Crisis*, concluded that, "there are thousands of people who live illegally in basement and garage apartments, subdivided homes and other living quarters throughout Nassau and Suffolk." Pursuant to the report, "[i]n 1989, the Long Island Regional Planning Board estimated that 90,000 illegal apartments were created in the 1980s alone. And it is certain that many more have been created since then as population has increased even as the number of new legal rental homes has lagged."[1]

In 1977, *Corbin v. Harris*[2] addressed the issue regarding a landlord's claim for nonpayment of rent, despite the illegal nature of the apartment. In *Corbin*, a tenant, capitalizing on the landlords violation of certificate of occupancy, remained in possession of an illegal basement apartment for over six years without having to pay rent or utilities. The landlords were unable to evict the tenant in a holdover proceeding because of "the inflexibility of statutory technicalities."[3] The landlords, senior citizens who were in an intolerable situation, cut off all services, except for heat. The tenant commenced an action in Supreme Court. In support of her application for a permanent injunction, the tenant claimed, "that she was entitled to occupy the apartment rent free because it was a statutorily illegal premises."[4]

The Supreme Court held that, "the landlords have been punished far in excess of the 'crime'" and, in the interest of justice, ordered the tenants to vacate the illegal apartment. Significantly, the court denied the landlord's request for a money judgment for use and occupancy despite the tenant taking gross advantage and being unjustly enriched.[5]

The exact opposite occurred in *Bartolomeo v. Runco*.[6] There, the tenant entered into a one-year lease agreement for a cellar apartment in a two family house. Before the tenant took possession, the landlords expressly told the tenant that the apartment was "legal." Within six months of moving in, the tenant discovered that the apartment was illegal and vacated.[7]

The court balanced the need "to discourage landlords who would ignore building restrictions and offer an illegal apartment to an unsuspecting tenant" with a tenant taking monetary advantage of a landlord.[8] Contrary to the demonic renter in *Cobrin*, this tenant paid rent until she vacated the apartment six months before the end of the lease.[9] The court awarded the tenant damages for moving expenses, violation of the covenant of quiet enjoyment and punitive damages "to deter other landlords from renting illegal apartments and willfully violating [the law] ... [and to] discourage the defendants from misrepresenting the legal status of the apartments they may rent to the general public."[10]

If the tenant in *Bartolomeo* remained in possession of an illegal apartment without paying rent, would the court have awarded the landlord money for use and occupancy? Although the answer would be no if the court followed the holding in *Corbin*, by 2002 there seemed to be a different opinion, as demonstrated in *Carter v. Saunders*[11]

Use and Occupancy for an Illegal Rental

In *Carter*, the Nassau County District Court relied on the law set forth in *Bartolomeo*: no use and occupancy for a landlord who rented an illegal apartment. In *Carter*, the landlord rented a second floor garage apartment without a certificate of occupancy, violating the Town of Hempstead building code. The landlord requested use and occupancy for the period when the tenant occupied the apartment without paying rent. Denying a monetary award, the court explained, "[i]n the case at bar, the Town of Hempstead was attempting to enforce its rules and regulations against illegal housing. To allow recovery of rent in such a circumstance would be contrary to law and a slap in the face of the municipality seeking to enforce its laws."[12] Subsequent decisions (*Realty Grp. of Long Island Inc. v. Acosta*; [13] *Criveau v. Conlon*; [14] *Leva v. Kramer*[15]) followed the holding in *Carter*.

Carter had an effect on the manner by which a tenant litigated a summary proceeding. There is no monetary incentive to vacate an illegal apartment if a tenant is not responsible for use and occupancy.

Compared to Nassau County, other jurisdictions arrived at a different conclusion concerning rent for an illegal apartment.[16] In *Corbin v. Briley*,[17] the Appellate Term overruled *Bartolomeo*. The court held that in Yonkers, the absence of a certificate of occupancy for the subject property does not preclude the commencement of a nonpayment proceeding.[18] The courts in *Tuzel v. Reilert*,[19] *Rose v. Leverich*,[20] and *Corsini v. Gottschalk*[21] held that a certificate of occupancy for a one-family dwelling rather than a two-family does not bar recovery of rent by the landlord.

In *Pickering v. Chappe*,[22] the tenant commenced an action seeking return of the security deposit. The landlords counterclaimed for unpaid rent. The court held that unless there was a statutory exception, "there is no bar to the recovery of rent when a dwelling that has a certificate of occupancy as a one-family dwelling contains an illegal apartment," and the court did not preclude the landlords from recovering rent for the months in which the tenant resided in the apartment.[23] Similarly, in *Thomas v. Brown*, the Appellate Term for the First Department held that a settlement stipulation for rent from an illegal apartment does not violate rent forfeiture provisions of the Multiple Dwelling Law.[24]

Change of Direction in Nassau County

In 2012, the Nassau County District Court abandoned the holding in *Carter* and progeny in favor of a tenant being held responsible for rent or use and occupancy prior to vacating an illegal apartment.

In *Sinclair v. Ramnarace*,[25] the landlord alleged that tenants "had leased the premises from [the landlords] for $1,400 a month; that after learning that the rental unit was an illegal apartment, [tenants] had terminated the lease; and that, over a 10-month period, [tenants] had not paid rent or use and occupancy...."[26] The issue in *Madden v. Juillet*[27] was whether the tenant was responsible "for April 2012 rent because the premises was an illegal basement apartment and because [landlord] breached the warranty of habitability."[28] In both actions, the Appellate Term followed the holding in *Pickering, Tuzel, Rose,* and *Corsini,* and without reference to *Carter*, holding, "[t]here is no bar to the recovery of rent where a one-family home is used as a two-family."[29]

The Impact of Local Statutes

Courts do not award money damages when a statute specifically denies a landlord's right of use and occupancy for an illegal apartment.[30] The issue in *Caldwell v. American Package Company, Inc.*,[31] concerned application of Multiple Dwelling Law § 302 to an illegal rental agreement. Pursuant to the statute, if a multiple dwelling (as defined in Multiple Dwelling Law § 4) is illegally occupied, "b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent."

In *Caldwell*, the tenants lived in a multi-unit commercial building that had no residential certificate of occupancy. The owner sought to enforce the tenants' obligations to pay rent. The court concluded that there was no exception to the statutory prohibition on allowing the landlord to collect rent.[32]

The Nassau County District Court should apply the same rationale: no exception to a statutory prohibition on collecting rent. For example, the Town of North Hempstead enacted the Rental Dwelling Ordinance ("RDO") found in Article VI of the Code of the Town of North Hempstead. Pursuant to RDO § 2-115, issuance of a rental occupancy permit, filing of a rental registration form and tendering of a written receipt in exchange for any cash rent payment "shall be conditions precedent to the collection of rent for the use and occupancy of any dwelling unit." Pursuant to RDO § 2-104, the application for a rental occupancy permit must include a "copy of the certificate of occupancy or certificate of existing use. No application will be accepted without the submission of a valid certificate of occupancy or certificate of existing use." [33]

In conclusion, it is anticipated that the courts in Nassau County will continue to follow the holding in *Sinclair* and *Madden* (absence of a certificate of occupancy for an illegal apartment does not bar the recovery of rent) until local municipalities regulate illegal apartments through statutory restrictions.

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1. *Long Island's Rental Housing Crisis*, Regional Plan Association of the Long Island Affordable and Fair Housing (Sept. 2013) Initiative Advisory Group. http://www.licf.org/Portals/0/Uploads/Documents/Long-Islands-Rental-Housing-Crisis.pdf.
2. *Corbin v. Harris*, 92 Misc2d 480 (Sup. Ct. Kings Cty. 1977).
3. *Id.* at at 482.
4. *Id.* at 483.
5. *Id.* at 484.
6. *Bartolomeo v. Runco*, 162 Misc2d 485 (Yonkers City Ct. 1994).
7. *Id.* at 486.
8. *Id.* at 487.
9. *Id.* at 488.
10. *Id.* at 491-92. Note that several years prior the same court held in *Brown v. Williams*, 132 Misc.2d 438 (Yonkers City Ct. 1986) that a landlord was not precluded from maintaining an action for nonpayment of rent despite landlord's failure to possess a certificate of occupancy for a multi-unit structure.
11. *Carter v. Saunders*, 2002 NY Slip Op 50400(U) (Dist. Ct. 2002).
12. *Id.* at 5.
13. *Realty Grp. of Long Island Inc. v. Acosta*, 4 Misc. 3d 1022(A) (Dist. Ct. 2004).
14. *Criveau v. Conlon*, 6 Misc. 3d 1016(A) (Dist. Ct. 2005).
15. *Leva v. Kramer*, 24 Misc. 3d 1213(A) (Dist. Ct. 2009).
16. *Hamblin v. Bachman*, 23 Misc3d 116(A) (Rochester City Ct. 2009); *Schweighofer v. Straub*, 23 Misc3d 132(A) (App. Term 2009) (Orange County).
17. *Corbin v. Briley*, 192 Misc. 2d 503 (App. Term 2002).
18. *Id.*
19. *Tuzel v. Reilert*, N.Y.L.J., Dec. 3, 1996, at 26, col. 3 (App. Term 2d Dep't 10th & 11th Jud. Dists.).
20. *Rose v. Leverich*, N.Y.L.J., June 9, 1997, at 32, col. 1 (App. Term 2d Dep't 9th & 10th Jud. Dists.).
21. *Corsini v. Gottschalk*, N.Y.L.J., Dec. 20, 1999, at 32, col. 2 (App. Term 2d Dep't 9th & 10th Jud. Dists.).
22. *Pickering v. Chappe*, 29 Misc. 3d 6 (App. Term 2010).
23. *Id.* at 8.
24. *Thomas v. Brown*, 50 Misc.3d 130(A)(App. Term 1st Dept. 2015).
25. *Sinclair v. Ramnarace*, 36 Misc. 3d 150(A) (App. Term 2012).
26 *Sinclair* at 1.
27. *Madden v. Juillet*, 46 Misc. 3d 146(A) (N.Y. App. Term. 2015)
28. *Madden* at 1.
29. *Sinclair* at 2.
30. *Caldwell v. American Pachage Company, Inc.*, 57 AD3d 15(2nd Dept. 2008). Note that the First Department declined to join the Second Department in its holding (*Acevedo v. Piano Bldg. LLC*, 70 A.D.3d 124 [1st Dept. 2009]).
31. *Id.*
32. *Caldwell* at 25.
33. See also, Village of Hempstead RDO §106-12; Village of Mineola RDO § 414-16; Village of Stewart Manor RDO § 201-16; Village of Williston Park RDO § 98-116 (rental permit condition precedent for collection of rent).

K 12

93 N.Y.2d 508

Court of Appeals of New York.

GRAUBARD MOLLEN HOROWITZ POMERANZ & SHAPIRO, Respondent,

v.

600 THIRD AVENUE ASSOCIATES, Appellant.

June 10, 1999.

In connection with rental dispute, *Yellowstone* injunction was issued under which disputed rent payments were deposited into interest-bearing joint escrow account. The Supreme Court, New York County, Elliott Wilk, J., entered partial summary judgment in favor of landlord and awarded landlord interest on escrowed funds at rate provided in underlying commercial lease for late rent payments. Tenant appealed. The Supreme Court, Appellate Division, 252 A.D.2d 453, 675 N.Y.S.2d 599, reversed and remanded. Leave to appeal was granted and a question was certified. The Court of Appeals, Wesley, J., held that the deposit of rent payments into the interest-bearing joint escrow account did not relieve tenant from the obligation to pay interest on the rent arrears pursuant to and at the interest rate specified by the commercial lease.

Order of Appellate Division reversed; order of Supreme Court reinstated; certified question answered.

Attorneys and Law Firms

***92 *509 **117 Borah, Goldstein, Altschuler & Schwartz, P. C., New York City (Jeffrey R. Metz and Steven L. Schultz of counsel), for appellant.

Graubard Mollen & Miller, New York City (C. Daniel Chill, Elaine M. Reich and Scott E. Mollen of counsel), respondent pro se.

***510 **118 OPINION OF THE COURT**

WESLEY, J.

This appeal, which arises from a protracted landlord-tenant dispute, asks us to re-examine the nature, scope and effect of a *Yellowstone* injunction. Plaintiff is a law firm located in New York City. The firm's predecessor entered into a commercial lease in July 1984 with defendant (Associates), the owner of a building located at 600 Third Avenue in Manhattan. Paragraph 45 of the lease states: "If any monies owing by Tenant under this Lease are paid more than ten (10) days after the date such monies are payable pursuant to the provisions of this Lease, Tenant shall pay Landlord interest thereon, at the then maximum legal rate, for the period from the date such monies were payable to the date such monies are paid."

The parties modified several provisions of the lease in January 1992 to provide for an adjustment in rent. The firm additionally *511 negotiated a provision to the effect that neither it nor any of its individual partners could be held liable to Associates for any money judgment obtained against the firm in connection with its tenancy. Concomitantly, the parties added a lease provision that requires the firm to maintain a letter of credit in the amount of $1,000,000 and to replenish the letter of credit when necessary.

Associates undertook an elevator renovation project in 1992. In March 1993 the firm began to withhold its monthly rent because of the alleged failure of Associates to repair and maintain the building elevators. The firm contended that the elevator service restricted its access to the building and that it was therefore partially evicted from its space.

Associates satisfied the firm's rent obligations by drawing on the $1,000,000 letter of credit on November 19, 1993, and again on February 18, 1994. Despite the lease provision requiring the firm to maintain the $1,000,000 security balance and Associate's notification to the firm of this obligation, it failed to do so. By Notice to Cure dated February 24, 1994, Associates advised the firm that it was in default of its leasehold obligations by failing to maintain the required security.

Shortly thereafter the firm commenced an action in Supreme Court and sought a declaration that its obligation to pay rent was suspended due to the partial eviction, and that by drawing down on the letter of credit Associates had exhausted its remedies under the lease. Associates answered and interposed several counterclaims. Associates contended that the firm was, and continued to be, obligated to pay rent under the terms of the amended lease and that interest accrued on late rent payments pursuant to the lease.

***93 The firm simultaneously made a motion for a *Yellowstone* injunction. During oral argument on the motion, the court explored with counsel the problems associated with issuing a *Yellowstone* injunction, the firm's obligation to pay rent under the lease and Associates' entitlement to interest on late rent payments. Counsel for Associates also expressed concern about the prospect of a long and drawn out lawsuit during which his client would not receive any rent. The court ultimately granted the *Yellowstone* injunction, directed that the firm deposit its accrued arrears in a jointly held escrow account and ordered that the firm deposit monthly a sum equal to the rent into the account.

For the next two years Associates received no rental payments from the firm; the escrow account grew to more than *512 $3,000,000. In May 1996 Supreme Court ordered the firm to pay Associates 75% of the rent invoiced for May 1996 and to deposit the remainder in the escrow account. In July 1996 the court ordered the same payments for June and prospectively throughout the course of the litigation. The court also directed that $109,000 be released to Associates from the escrow account for June 1996 and each successive calendar month while the case was litigated.

The firm appealed to the Appellate Division, arguing that Associates could not receive any rental payment during the litigation due to "an open court stipulation." The Appellate Division rejected that

argument, holding that Supreme Court properly exercised its discretion in modifying a condition **119 upon which plaintiff was granted a *Yellowstone* injunction (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 234 A.D.2d 49, 650 N.Y.S.2d 207). The firm's attempt to appeal that decision to this Court was dismissed as nonfinal (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 89 N.Y.2d 1086, 659 N.Y.S.2d 860, 681 N.E.2d 1307).

In July 1996, in response to another motion by the firm, Associates cross-moved for summary judgment dismissing several causes of action in the amended complaint. Supreme Court dismissed the firm's partial eviction claim and held that it was required to replenish the letter of credit. The court noted that Associates was justified in drawing on the letter of credit due to the firm's failure to make timely rental payments. The firm again appealed, and the Appellate Division again affirmed, noting that "plaintiff's obligation to pay rent was never suspended" (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 240 A.D.2d 161, 658 N.Y.S.2d 272).

While that appeal was pending before the Appellate Division, Associates moved in Supreme Court for summary judgment on several of its counterclaims, for vacatur of the *Yellowstone* injunction, and for release of the escrow account. At that time, the outstanding rental arrears through October 31, 1996 totaled $3,213,661.60 and interest due under paragraph 45 of the lease totaled $514,947.62.[1] Associates argued that once the issue of the default was fully litigated and decided adversely to the firm, the *Yellowstone* injunction was no longer necessary. Associates took the position that the firm risked the consequences *513 of the applicable lease clause (and mandated statutory provisions for an award of interest) by making a purposeful decision to withhold rent payments. The firm countered that its liability was limited to the undertaking required by the court as a condition of the injunction. The trial court rejected the firm's arguments. It concluded that since the parties had litigated the propriety of the Notice to Cure, there was no basis to continue the *Yellowstone* injunction and granted Associates' ***94 requested relief—both rent and interest owed under the lease.

The firm appealed to the Appellate Division, solely on the issue of interest. The Appellate Division, with one Justice dissenting, reversed the order and vacated the award of interest granted by Supreme Court (252 A.D.2d 453, 675 N.Y.S.2d 599). The majority determined that the *Yellowstone* escrow condition nullified the lease provision requiring the timely payment of rent and its consequences. The dissenting Justice concluded that the majority misapplied the *Yellowstone* doctrine and improperly deprived Associates of monetary damages provided to it by the lease in the event of default.

Associates moved before the Appellate Division for reargument and/or for leave to appeal to this Court. The Appellate Division denied reargument, but certified the following question to this Court: "Was the order * * * which reversed the order and judgment * * * of the Supreme Court, properly made?" We answer that in the negative, and reverse the order below.

K70

Analysis

In order to properly understand the nature and scope of a *Yellowstone* injunction we revisit the decision that gave it life. *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868, involved a controversy between a landlord and a commercial tenant over who was to bear the expense of a sprinkler system required by the New York City Fire Department. The landlord contended that the cost properly belonged to the tenant. When the tenant did not comply with the Fire Department order, the landlord gave the tenant written notice to cure pursuant to the lease. On the last day of the cure period the tenant commenced an action for a declaratory judgment, but did not obtain a temporary restraining order. Thus the lease terminated long before the dispute was resolved. This Court held that it was powerless to revive **120 the expired lease under the circumstances presented (*see generally, First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868; *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 24–25, 475 N.Y.S.2d 821, 464 N.E.2d 125).

*514 While seemingly unremarkable, the *Yellowstone* case ushered in a new era of commercial landlord-tenant law in New York State. As a result of this decision, tenants developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be resolved in court (*Post v 120 E. End Ave. Corp., supra,* at 25, 475 N.Y.S.2d 821, 464 N.E.2d 125). These injunctions have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant's substantial interest in the leasehold premises (*id.*). *Yellowstone* gave rise to a creative remedy for tenants when confronted with a tangible threat of lease termination.

1 A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture. The party requesting a *Yellowstone* injunction must demonstrate that:

"(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (*225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420, 421, 621 N.Y.S.2d 302).

These standards reflect and reinforce the limited purpose of a *Yellowstone* injunction: to stop the running of the applicable cure period (*Post v 120 E. End Ave. Corp., ***95 supra,* at 25, 475 N.Y.S.2d 821, 464 N.E.2d 125).

The firm contends (and the Appellate Division majority apparently agreed) that the rent deposits at issue were paid by the tenant pursuant to the terms of the court order, not the lease, and therefore

the lease provision is inapposite. That argument misses the point. Contrary to the firm's characterization of the escrow fund, a monthly sum *equal to* all rent due under the lease was deposited. Rental payments were not made and Associates was denied the use of the money for over two years.

2 In *Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs.*, 85 N.Y.2d 600, 627 N.Y.S.2d 298, 650 N.E.2d 1299, we examined the nature of the parties' rights under a *Yellowstone* injunction. We reiterated that a *Yellowstone* injunction stays only the landlord's termination of a leasehold *515 while the propriety of the underlying default is litigated. Significantly, a *Yellowstone* injunction does not nullify the remedies to which a landlord is otherwise entitled under the parties' contract: "The *Yellowstone* injunction only served to forestall defendant from prematurely canceling the lease during its initial term * * * The injunction could not, in and of itself, relieve plaintiff of the necessity of complying with the condition precedent to renewal set forth in the lease" (85 N.Y.2d, at 606, 627 N.Y.S.2d 298, 650 N.E.2d 1299).

34 *Waldbaum* clearly indicates that the firm *always* was obligated to comply with the provisions of the lease, despite the court order. Conditions placed upon the grant of a *Yellowstone* injunction do not, contrary to the Appellate Division's reasoning, alter the rights and obligations of the parties.[2] The point of reference for defining the rights of the parties is not the court order; rather, it is the lease itself. The *Yellowstone* injunction at issue here did not supersede the lease provision calling for interest on rent arrears in the event of a default. The *Yellowstone* injunction protected the firm from eviction; it did not rewrite the lease.

Although *Yellowstone* injunctions historically have been used to protect tenants from **121 eviction, they provide a modicum of protection to landlords as well. The escrow account was simply a condition of the *Yellowstone* injunction, much like a bond, to ensure that Associates was paid when the day of reckoning finally arrived in this protracted litigation. A condition imposed along with a *Yellowstone* injunction has no bearing on the underlying rights of the parties.

The firm's reliance on *City of Yonkers v. Federal Sugar Ref. Co.*, 221 N.Y. 206, 116 N.E. 998, is misplaced. In that case the Court held that damages caused by an improvidently granted preliminary injunction are limited to the amount of the undertaking. The plaintiff had sought a preliminary injunction to enjoin a public nuisance. Its liability for injury caused by the preliminary injunction was limited to "such damages, not exceeding a sum, specified in the undertaking" pursuant to section 620 of the former Code of Civil Procedure. In this case, there is no statutory mandate limiting Associates' recovery. Moreover, the damages *516 in *Yonkers* resulted from the issuance of the injunction, while here, the monies owed to Associates arise out of non-payment of accrued rent. Fairness dictates that Associates receive the interest due under the terms of the lease. To rule otherwise would place Associates in an unenviable position. Though victorious in this litigation, it would nevertheless suffer a substantial monetary loss. In addition to not receiving rental monies

***96 to which it was entitled for almost two years, Associates would forfeit interest due under the terms of the lease. Equity takes a dim view of such a result. When Associates prevailed, it was entitled to interest as agreed to by the parties in their lease.

Accordingly, the order of the Appellate Division should be reversed, with costs, the order of Supreme Court, New York County, reinstated and the certified question answered in the negative.

Judges SMITH, LEVINE, CIPARICK and ROSENBLATT concur; Chief Judge KAYE and Judge BELLACOSA taking no part.

Order reversed, etc.

All Citations

93 N.Y.2d 508, 715 N.E.2d 117, 693 N.Y.S.2d 91, 1999 N.Y. Slip Op. 05333

Footnotes

1
Interest grew to $526,650.68 by the time of entry of the order and judgment of the Supreme Court. The parties do not dispute the amount of arrears or interest due on arrears under the lease.

2
Indeed, the Appellate Division recognized that "plaintiff's obligation to pay rent was never suspended" by the *Yellowstone* injunction in the firm's second appeal (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 240 A.D.2d 161, 658 N.Y.S.2d 272, *supra*).

51 A.D.3d 726

Supreme Court, Appellate Division, Second Department, New York.

Susan I. HOPP, appellant,

v.

Michael RAIMONDI, respondent.

May 13, 2008.

Synopsis

Background: Tenant brought action against landlord, inter alia, for a judgment declaring she had not violated the terms of her **residential lease**. The Supreme Court, Westchester County, Smith, J., denied tenant's motion for a ***Yellowstone* injunction**. Tenant appealed.

Holding: The Supreme Court, Appellate Division, held that tenant was entitled to ***Yellowstone* injunction**.

Reversed and remitted.

West Headnotes (4)Collapse West Headnotes

Change View

1**Injunction**

Landlord and tenant

The purpose of a ***Yellowstone* injunction** is to allow a tenant confronted by a threat of termination of the **lease** to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold.

3 Cases that cite this headnote

212**Injunction**

212IVParticular Subjects of Relief

212IV(D)Property in General

212k1235Landlord and tenant

(Formerly 233k299)

2**Landlord and Tenant**

Notice to cure violation

K74

Since statute affording losing **residential** tenants a 10–day period to cure **lease** violations before being subject to removal applies only in New York City, elsewhere in the state the only time available to a **residential** tenant within which a **lease** violation may be cured is the time provided in the notice to cure. McKinney's RPAPL § 753(4).

2 Cases that cite this headnote

233Landlord and Tenant

233IXRegulated Rents

233IX(D)Recovery of Possession

233IX(D)5Procedure

233k2011Notice

233k2013Notice to cure violation

(Formerly 233k278.9(5))

3**Injunction**

Landlord and tenant

Outside the City of New York, the only means to extend a tenant's time to cure is **injunctive** relief, which relief must be sought within, and must operate to toll, the cure period provided by **lease** provision or predicate notice before this period runs and the **lease** terminates; otherwise, the courts are powerless to revive the expired **lease**.

4 Cases that cite this headnote

212**Injunction**

212IVParticular Subjects of Relief

212IV(D)Property in General

212k1235Landlord and tenant

(Formerly 233k299)

4**Injunction**

Landlord and tenant

Rent-controlled tenant was entitled to ***Yellowstone*** **injunction**, staying tolling of running of cure period for tenants confronted by threat of **lease** termination, after landlord served her with combined notice to cure and surrender possession, alleging she had violated her **lease** by changing her lock

K75

and failing to provide him with a key, even though she was a **residential** tenant who did not own the shares designated for her cooperative unit.

2 Cases that cite this headnote

212**Injunction**

212IVParticular Subjects of Relief

212IV(D)Property in General

212k1235Landlord and tenant

(Formerly 233k299)

Attorneys and Law Firms

**301 Murray Shactman, New York, N.Y., for appellant.

Andrew M. Romano, Yonkers, N.Y. (Marc J. Bagan of counsel), for respondent.

ROBERT A. LIFSON, J.P., HOWARD MILLER, MARK C. DILLON, and RANDALL T. ENG, JJ.

Opinion

*726 In an action, inter alia, for a judgment declaring that the plaintiff has not violated the terms of a **residential lease**, the plaintiff appeals from an order of the Supreme Court, Westchester County (Smith, J.), dated August 28, 2007, which denied her motion for a ***Yellowstone* injunction** (*see First Natl. Stores v.* ***Yellowstone*** *Shopping Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868).

ORDERED that the order is reversed, on the law, with costs, the plaintiff's motion for a ***Yellowstone* injunction** is granted, and the matter is remitted to the Supreme Court, Westchester County, to set an appropriate undertaking.

The plaintiff has resided in a rent-controlled apartment in Bronxville since 1967. When the plaintiff's building was converted to cooperative ownership in the mid–1980's, she did not purchase the shares designated for her unit, and remained *727 in residence as a rent-controlled tenant. In January 2003 the defendant purchased the shares and proprietary **lease** to the plaintiff's apartment. A dispute subsequently arose between the parties as to whether the **lease** required the plaintiff to provide the defendant with the key to the lock on her apartment door, which the plaintiff claims is the same lock that was present when she moved in more than 40 years ago.

On or about June 29, 2007, the defendant served the plaintiff with a combined notice to cure and surrender possession, alleging that she had violated her **lease** by changing her lock and failing to provide him with a key. Prior to the expiration of the cure period, the plaintiff commenced this action seeking, inter alia, a judgment declaring that she had not violated the terms of the **lease**. Upon

K76

commencement of the action, the plaintiff also moved, by order to show cause, for a ***Yellowstone*** **302 **injunction** (*see First Natl. Stores v.* ***Yellowstone*** *Shopping Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868). After the Supreme Court (Nastasi, J.) refused to grant the plaintiff a temporary restraining order staying the defendant from terminating her tenancy and tolling her time to cure the alleged default pending the hearing and determination of the motion, the requested temporary restraining order was granted by this Court. In the order appealed from, the Supreme Court (Smith, J.) subsequently denied the plaintiff's motion for a ***Yellowstone*** **injunction**, concluding that such relief was available only to commercial tenants, or to **residential** tenants who also own the shares designated for their cooperative units. We reverse.

1 The purpose of a ***Yellowstone*** **injunction** is to allow a tenant confronted by a threat of termination of the **lease** to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (*see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 715 N.E.2d 117; *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125). Although ***Yellowstone*** **injunctions** are more commonly sought to protect a tenant's interest in a commercial **lease** (*see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 693 N.Y.S.2d 91, 715 N.E.2d 117), ***Yellowstone*** relief also has been granted to **residential** tenants (*see Post v. 120 E. End Avenue Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125; *Kuttas v. Condon,* 290 A.D.2d 492, 736 N.Y.S.2d 402; *Cohn v. White Oak Coop. Hous. Corp.*, 243 A.D.2d 440, 663 N.Y.S.2d 62; *Somekh v. Ipswich House,* 81 A.D.2d 662, 438 N.Y.S.2d 362; *Wuertz v. Cowne,* 65 A.D.2d 528, 409 N.Y.S.2d 232).

23 The 1982 enactment of RPAPL 753(4), which affords a losing **residential** tenant a 10–day period to cure **lease** violations before *728 being subject to removal, has largely eliminated the need for ***Yellowstone*** **injunctions** in New York City (*see Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125; *Brodsky v. 163–35 Ninth Ave. Corp.*, 103 A.D.2d 105, 478 N.Y.S.2d 1017). However, since RPAPL 753(4) applies only in New York City, elsewhere in the State "the only time available to a **residential** tenant within which a **lease** violation may be cured is the time provided in the notice to cure" (*Landmark Props. v. Olivo,* 10 Misc.3d 1, 2, 805 N.Y.S.2d 774). Thus, "[o]utside the City of New York, the only means to extend the time to cure is **injunctive** relief ... which relief must be sought within, and must operate to toll, the cure period provided by **lease** provision or predicate notice (depending on the type of tenancy at issue) before this period runs and the **lease** terminates. Otherwise, the courts are powerless to revive the expired **lease**" (*id.*).

4 Since the subject apartment is located outside of New York City and the plaintiff is thus not entitled to the protection of RPAPL 753(4), the defendant's service upon her of the combined notice to cure and surrender possession necessitated the commencement of this declaratory judgment action and the application for ***Yellowstone*** relief in order to toll the running of the cure period and avoid a

forfeiture of her leasehold in the event of an adverse determination (*see Kuttas v. Condon,* 290 A.D.2d 492, 736 N.Y.S.2d 402). Furthermore, contrary to the Supreme Court's determination, neither the Court of Appeals' decision in *Post v. 120 E. End Ave. Corp.,* 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125, nor our decision in **303 *Cohn v. White Oak Coop.*

Hous. Corp., 243 A.D.2d 440, 663 N.Y.S.2d 62, limits the availability of ***Yellowstone* injunctions** only to those **residential** tenants who also own the shares designated for their cooperative units. Accordingly, the Supreme Court should have granted the plaintiff's motion for a ***Yellowstone* injunction** in order to preserve the plaintiff's right to cure in the event it is determined that she violated the **lease** (*see Post v. 120 E. End Ave. Corp.,* 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125; *Kuttas v. Condon,* 290 A.D.2d 492, 736 N.Y.S.2d 402; *Cohn v. White Oak Coop. Hous. Corp.,* 243 A.D.2d 440, 663 N.Y.S.2d 62; *Somekh v. Ipswich House,* 81 A.D.2d 662, 438 N.Y.S.2d 362; *Wuertz v. Cowne,* 65 A.D.2d 528, 409 N.Y.S.2d 232). We thus grant the plaintiff's motion, and remit the matter to the Supreme Court, Westchester County, to set an appropriate undertaking (*see Marathon Outdoor v. Patent Constr. Sys. Div. of Harsco Corp.,* 306 A.D.2d 254, 760 N.Y.S.2d 528; *Cohn v. White Oak Coop. Hous. Corp.,* 243 A.D.2d 440, 663 N.Y.S.2d 62; *Sportsplex of Middletown v. Catskill Regional Off–Track Betting Corp.,* 221 A.D.2d 428, 633 N.Y.S.2d 588; *Somekh v. Ipswich House,* 81 A.D.2d 662, 438 N.Y.S.2d 362).

All Citations

51 A.D.3d 726, 858 N.Y.S.2d 300, 2008 N.Y. Slip Op. 04472

Unreported Disposition

Slip Copy, 56 Misc.3d 1211(A), 2017 WL 3240098 (Table), 2017 N.Y. Slip Op. 50964(U)

*1 Nikolaos Rinis et al., Petitioners,

v.

Eleni Toliou et al., Respondents.

Civil Court of the City of New York, Kings County

52162/16

Decided on July 27, 2017

CITE TITLE AS: Rinis v Toliou

ABSTRACT

Landlord and Tenant

Summary Proceedings

Subject Matter Jurisdiction of Housing Part—Issue whether subject premises were part of marital domicile could not be decided in summary proceeding.

Courts

New York City Civil Court

Subject Matter Jurisdiction of Housing Part to Determine Issues of Marital Domicile

Rinis v Toliou, 2017 NY Slip Op 50964(U). Landlord and Tenant—Summary Proceedings—Subject Matter Jurisdiction of Housing Part—Issue whether subject premises were part of marital domicile could not be decided in summary proceeding. Courts—New York City Civil Court—Subject Matter Jurisdiction of Housing Part to Determine Issues of Marital Domicile. (Civ Ct, Kings County, July 27, 2017, Marton, J.)

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OPINION OF THE COURT

Gary F. Marton, J.

K81

After considering the testimony and the other evidence at the trial of this alleged "lease expiration" holdover proceeding, the court makes the following findings of fact, reaches the following conclusions of law, and grants respondents a judgment dismissing the proceeding. Respondents shall serve forthwith upon petitioners a copy of the judgment with notice of entry.

The premises at issue is the second-floor apartment in a building ("the property") with two apartments, one on the first floor and the other on the second floor. The property was owned by Haritini Rinis and John Rinis as tenants by the entirety; they lived in the first-floor apartment. Haritini Rinis died in 2008 and by operation of law John Rinis became the property's sole owner.

At some point in 2009 John Rinis rented the second floor apartment either to Eleni Toliou alone or to both Eleni Toliou and her adult daughter Sofia Toliou. A year or so later, John Rinis and Eleni Toliou entered into a prenuptial agreement dated September 2, 2010. They married each other later that year.

Five years later, by a deed dated October 14, 2015, John Rinis conveyed the property to his three adult children (Nikolaos Rinis, Anastasia Rinis, and Konstantina Rinis-Dibello), i.e., the instant petitioners, but he retained a life estate for himself. Five months later, by a summons and complaint dated March 15, *2 2016, John Rinis (under the name of Ioannis Rinis) sued in Supreme Court, Kings County, index number 51230/2016, for a divorce from Eleni Toliou. That action is still pending.

By counsel[1], petitioners served a 30-day predicate notice of termination dated November 19, 2015 purporting to terminate as of December 31, 2015 respondents' alleged month-to-month tenancy made pursuant to an oral agreement. Thereafter petitioners began this proceeding. Respondents joined issue and moved for, among other things, summary judgment. By a decision and order dated October 7, 2016 the court (Fitzpatrick, J.) denied that relief "because petitioner raises issues of fact as to whether the subject building is marital property and whether the subject unit was a marital domicile or not."

At the trial herein, petitioners insisted that the premises was neither the marital domicile nor part of the marital domicile. In support John Rinis testified that he never lived in the second floor apartment, that he never slept or ate meals there, and that he went there only on afternoons to drink coffee or tea with his wife. The foregoing may be true. However, the court notes that John Rinis and Eleni Toliou filed from the same address joint income tax returns in 2012 and 2013, and also that in a sworn statement bearing the dates of October 17, 2012 and October 26, 2012 and submitted to Federal immigration authorities, John Rinis certified that he lived at the property with his wife. In pertinent part, the statement provides: "The home is two floors and it is my ownership [sic]. I certify that my wife Eleni's [sic] Toliou daughter, Sofia Toliou lives with us with her husband Dennis Rodriguez at the address 1858 67th Street, Brooklyn, NY, 11204."

This court may not review the ruling dated October 7, 2016 by a judge of coordinate jurisdiction that there is a question of fact as to whether "the subject building is marital property and whether the

subject unit was a marital domicile or not." However, this court holds that subject matter jurisdiction to decide that issue lies elsewhere. See, e.g., *Rosenstiel v Rosenstiel*, 20 AD2d 71, 73 (1st Dep't, 1963), where the court held that that a summary proceeding might not be maintained "to evict a wife whose rights as such have not been annulled or modified by any court decree or special agreement." Here, Eleni Toliou's rights as a wife have not been annulled or modified by any court decree or special agreement; the issue of whether the premises is part of the marital domicile may not be decided in the instant proceeding.

Petitioners argue that *Rosenstiel* and its progeny, e.g., *3 *Billips v Billips*, 189 Misc 2d 144 (Civ Ct, NY Co, 2001) (Acosta, J.), are inapposite because those proceedings were between spouses while the instant proceeding is not between spouses but instead is between a stepmother and stepchildren who have no obligation to support one another. Especially in view of John Rinis' having retained a life interest in the property, the court holds that this argument exalts form over substance and that its acceptance here might permit John Rinis to evade responsibilities either undertaken in the prenuptial agreement or else imposed by law.

Finally, the court notes that *Heckman v Heckman*, 55 Misc 3d 86 (App Term, 9th & 10th Jud Dists, 2017) is not to the contrary. The ruling there, even read broadly, holds no more than that the housing part of the Civil Court has subject matter jurisdiction to entertain disputes between family members over the possession of real property as long as the family members are adults and the disputes do not include issues of support. Here there very well may be issues of support.

The court will mail copies of this decision and order to the parties along with their exhibits.

Dated: Brooklyn, NY

July 27, 2017

_____

Gary F. Marton

Unreported Disposition

45 Misc.3d 129(A), 3 N.Y.S.3d 286 (Table), 2014 WL 5431174 (N.Y.Sup.App.Term), 2014 N.Y. Slip Op. 51540(U)

*1 Park Haven, LLC, Respondent,

v.

Terry Robinson, Appellant.

2013-1069 Q C

Supreme Court, Appellate Term, Second Department, 2d, 11th And 13th Judicial Districts

Decided on October 3, 2014

CITE TITLE AS: Park Haven, LLC v Robinson

ABSTRACT

Landlord and Tenant

Lease

Late Charge Provision in Residential Lease Found Unconscionable and Void

Park Haven, LLC v Robinson, 2014 NY Slip Op 51540(U). Landlord and Tenant—Lease—Late Charge Provision in Residential Lease Found Unconscionable and Void. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Oct. 3, 2014)

PRESENT: : PESCE, P.J., ALIOTTA and ELLIOT, JJ.

Appeal from an order of the Civil Court of the City of New York, Queens County (Anne Katz, J.), dated May 15, 2013. The order denied tenant's motion to vacate a default final judgment in a nonpayment summary proceeding.

OPINION OF THE COURT

ORDERED that the order is reversed, without costs, tenant's motion to vacate the default final judgment is granted, and the matter is remitted to the Civil Court for all further proceedings.

In this nonpayment proceeding, tenant pro se appeals from an order denying her motion to vacate a default final judgment awarding landlord possession and the sum of $11,150.45, and dismissing tenant's counterclaims.

In support of her motion to vacate the default final judgment, tenant asserted, among other things, that her rent was $1,449 per month and that the award to landlord of the sum of $11,150.45 was predicated on a lease provision which improperly allowed landlord to charge her an alleged "legal regulated rent" of $2,509 if she failed to timely pay her rent by the fifth of the month. The Civil Court denied tenant's motion, noting, among other things, that tenant admitted owing $2,096 and that tenant did not have the $2,096.

In our view, the Civil Court improvidently exercised its discretion in allowing the default final judgment in the amount of $11,150.45 to stand, as the lease's rent "discount" scheme provides for an increase that is, in fact, nothing more than an unconscionable late charge and penalty, in that the increase is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time (*cf. Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1 [2000]; *943 Lexington Ave. v Niarchos*, 83 Misc 2d 803 [App Term, 1st Dept 1975]; *VP Vil. Park, LLC v Victor*, 40 Misc 3d 1233[A], 2013 NY Slip Op 51418[U] [Pleasant Valley Just Ct 2013]; *see also Millenium Envtl., Inc. v City of Long Beach of State of NY*, 35 AD3d 408 [2006]; *contra 190 Washington Ave. Assoc., Inc v Velasquez*, 10 Misc 3d 1060 [A], 2005 NY Slip Op 52038[U] [Nassau Dist Ct 2005]; *Clinton Realty, LLC v Beazer*, 195 Misc 2d 786 [Nassau Dist Ct 2001]).

Accordingly, the order is reversed, tenant's motion to vacate the default final judgment is granted "for sufficient reason and in the interests of substantial justice" *(Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]) and the matter is remitted to the Civil Court for all further proceedings.

Pesce, P.J., Aliotta and Elliot, JJ., concur.

Decision Date: October 03, 2014

K.85

Unreported Disposition

50 Misc.3d 140(A), 31 N.Y.S.3d 920 (Table), 2016 WL 685999 (N.Y.Sup.App.Term), 2016 N.Y. Slip Op. 50177(U)

*1 Diversified Equities, LLC, Appellant,

v.

Tamika Russell, Respondent.

Supreme Court, Appellate Term, Second Department, 2d, 11th And 13th Judicial Districts

2014-2813 Q C

Decided on February 10, 2016

CITE TITLE AS: Diversified Equities, LLC v Russell

ABSTRACT

Landlord and Tenant

Lease

Lease and Rent-Concession Rider—Excessive and Grossly Disproportionate Late Monthly Charge *Diversified Equities, LLC v Russell*, 2016 NY Slip Op 50177(U). Landlord and Tenant—Lease—Lease and Rent-Concession Rider—Excessive and Grossly Disproportionate Late Monthly Charge. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 10, 2016)

PRESENT: : PESCE, P.J., WESTON and ALIOTTA, JJ.

Appeal from an order of the Civil Court of the City of New York, Queens County (Ronni Dale Birnbaum, J.), dated August 19, 2014. The order granted tenant's motion to vacate a default final judgment and warrant to the extent of staying the execution of the warrant for payment of $1,566.45 in a nonpayment summary proceeding.

OPINION OF THE COURT

ORDERED that the order is affirmed, without costs.

In this nonpayment proceeding, upon tenant's motion to vacate a default final judgment awarding landlord possession and the warrant issued pursuant thereto, the issue determined by the Civil Court, pursuant to a stipulation of the parties, concerned the effect to be given a "rent concession rider." The lease states that the legal regulated monthly rent is $1,339.33 and that a reduced rent of $1,185.25 would be charged pursuant to an attached agreement. The rider provides that tenant could pay the discounted rent of $1,185.25 if she timely paid her rent by the fifth of the month. The court granted tenant's motion to the extent of staying the execution of the warrant for the payment of $1,566.45, implicitly holding that the rent concession is to be considered a preferential rent and, apparently, that a preferential rent cannot fluctuate monthly (citing *Hillside Place, LLC v Nguma*, NYLJ 1202666526999, *1 [Civ Ct, Queens County 2014]).

In our view, the lease and rent-concession rider provide, in effect, for a late monthly charge of 13%, which is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time, and, thus, the collectible rent is the discounted rent set forth in the lease and the rider (*see Park Haven, LLC v Robinson*, 45 Misc 3d 129 [A], 2014 NY Slip Op 51540[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]; *Lal Little Italy MGMT. Co., LLC v Aldrete*, NYLJ 1202737081842, *1 [Civ Ct, Bronx County 2015] ["discount" rent scheme resulted in impermissible 13% monthly late fee]; *see also Wilsdorf v Fairfield Northport Harbor, LLC*, 34 Misc 3d 146[A], 2012 NY Slip Op 50163[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2012] [monthly late fee of 10% is an unenforceable penalty]). Accordingly, the order is affirmed.

Pesce, P.J., Weston and Aliotta, JJ., concur.

Decision Date: February 10, 2016

54 Misc.3d 1226(A)

Unreported Disposition

(The decision is referenced in the New York Supplement.)

Civil Court, City of New York,

New York County.

560–568 AUDUBON REALTY INC., Petitioner,

v.

Yris RODRIGUEZ, Respondents.

No. 81002/2016.

Feb. 27, 2017.

Attorneys and Law Firms

Horing, Welikson and Rosen, by Jeremy Poland, for Petitioner.

Northern Manhattan Improvement Corporation, by Matthew Chachere, for Respondent.

Opinion

JACK STOLLER, J.

*1 Recitation, as required by CPLR §§ 2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Order To Show Cause and Supplemental Affidavit and Affirmation Annexed	1, 2, 3
Affirmation In Opposition	4
Reply Affirmation	5

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

560–568 Audubon Realty LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Yris Rodriguez, the respondent in this proceeding ("Respondent"), seeking a money judgment and possession of 560 Audubon Avenue No.4B, New York, New York ("the subject premises") on the basis of nonpayment of rent. Respondent consented to a final judgment by a stipulation ("the Stipulation"). Respondent now moves to vacate the Stipulation, for leave to interpose an amended answer, for a stay of this proceeding, and to transfer this proceeding to Supreme Court.

The petition in this matter pleads that the subject premises is subject to the Rent Stabilization Law, although Respondent's lease states that the subject premises is not subject to the Rent Stabilization

YC88

Law. Respondent's lease states that the monthly rent for the subject premises is $4,280.00 but will only be $1,080.00 if Respondent pays the rent timely. Respondent, while unrepresented, executed the Stipulation in open Court on July 21, 2016. The Stipulation awarded Petitioner a final judgment in the amount of $5,960.00 and stayed execution of the warrant to enable her to pay the judgment amount. Now that Respondent has retained counsel, she moves to vacate the Stipulation on the ground of rent overcharge.

The record on this motion practice shows that Petitioner registered the subject premises with the New York State Division of Housing and Community Renewal ("DHCR"). The history **2 of registrations ("the registration history") shows that Petitioner registered the subject premises with a rent of $632.08 in 2005 and 2006; $840.00 for a vacancy lease in 2007; $875.00 for a renewal lease in 2008; $1,000.00 for a vacancy lease in 2009; $1,442.20 for a vacancy lease in 2010; $2,678.66 for a vacancy lease in 2011; $3,120.64 for a vacancy lease in 2012; $3,635 .55 for a vacancy lease in 2013; and $4,280.74 for a vacancy lease with Respondent in 2014.

If a landlord of a rent-stabilized apartment wished to evade the Rent Stabilization Law, one way to do so would be to register rents higher than otherwise allowed while only charging tenants a lower "preferential" rent so that a tenant would have no incentive to challenge the rent. *See 656 Realty, LLC v. Cabrera,* 27 Misc.3d 1225(A) n.5 (Civ.Ct. N.Y. Co.2009), *aff'd,* 27 Misc.3d 138(A)(App. Term 1st Dept.2010)(underscoring how a preferential rent could be used as such to evade Rent Stabilization). This potential for abuse underscores the importance of registering rents a landlord deems "preferential" as well as rents a landlord deems to be a legal regulated rent. 9 N.Y.C.R.R. §§ 2528.3(a)(registration of rents with DHCR "shall contain[ ] the current rent)." Leases annexed to the motion practice show rents that Petitioner characterizes as "preferential" rents of $995.00 from a lease in 2011 and $1,150.00 from a lease in 2012. The registration history does not include these "preferential" rents. A registration at DHCR that does not include preferential rents as such is defective. *Compare Jazilek v. Abart Holdings, LLC,* 72 AD3d 529, 531 (1st Dept.2010).

*2 In addition to registering "legal regulated rents" much higher than actual, "preferential" rents charged, leases for Respondent and two tenants prior to Respondent, executed between 2011 and 2014, all state that the subject premises had undergone a major renovation, clearly in advancement of the proposition that the legal rent for the subject premises was $2,678.66, $3,120.64, and $4,280.74, respectively. In evaluating evidence, the Court should not discard common sense. *People v. Garafolo,* 44 A.D.2d 86, 88 (2nd Dept.1974). Common sense and the lessons of human experience should not be strangers to the decision-making process. *People v. Jones,* 19 Misc.3d 1143(A) (S.Ct. N.Y. Co.2008). Common sense tells the Court that three renovations of the scale necessary to warrant such rent increases in four years are unlikely enough to raise an issue about its veracity.

In addition to the failure to register preferential rents and the allegation of three renovations in four years, as noted above, Respondent's lease does not render her rent $1,080.00 as a preferential rent as much as a rent she may pay if she pays it timely. The lease provides that Petitioner may collect a rent of $4,280.00 if Respondent paid the rent in an untimely fashion. Such a scheme amounts to an unconscionable late charge and penalty that is excessive and grossly disproportionate to any damages that could be sustained as a result of Respondent's failure to pay rent on time. *Diversified Equities, LLC v. Russell,* 50 Misc.3d 140(A)(App. Term 2nd Dept.2016), ***Park Haven, LLC v. Robinson,* 45 Misc.3d 129(A)(App. Term 2nd Dept.2014).**

To the extent that Petitioner did not properly register rent with DHCR as noted above, Petitioner may not collect any rent higher than the rents in effect before Petitioner started increasing the rent with the use of preferential rents or otherwise impermissibly, which goes back to the increase from $632.08 in 2006 to $840.00 in 2007 for a one-year vacancy lease. On a one-year vacancy lease, Petitioner was entitled to a rent increase of twenty percent less the difference between an increase for a one-year and a two-year renewal for the previous lease. 9 N.Y.C.R.R. §§ 2522.8(a)(2). Under N.Y.C. Admin. Code §§ 26–510(b), the Rent Guidelines Board **3 ("RGB") establishes rent adjustments for the units subject to Rent Stabilization. The difference between the adjustments for a one- and two-year renewal lease for the previous lease was three percent. RGB Order 35. Twenty percent less three percent is seventeen percent. An increase of seventeen percent over the prior rent of $632.08 yields a rent of $739.53, $100 less than the rent Petitioner registered.

Of course, to consider rent increases this far back, the Court must consider increases more than four years prior to the interposition of the rent overcharge defense, which the Court can do if it finds that Petitioner has been engaging in a scheme to avoid coverage of the Rent Stabilization Law. *Matter of Grimm v. State of New York Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 (2010), *Thornton v. Baron,* 5 NY3d 175, 181 (2005). Factors that warrant an investigation regarding the legality of the rent in effect four years prior to the interposition of the claim are: (1) the tenant alleges circumstances that indicate the landlord's violation of the Rent Stabilization Law and Rent Stabilization Code in addition to charging an illegal rent; (2) the evidence indicates a fraudulent scheme to remove the rental unit from rent regulation; and/or (3) the rent registration history is inconsistent with the lease history. *Matter of Pehrson v. Division of Hous. & Community Renewal of the State of NY,* 34 Misc.3d 1220(A)(S. Ct. N.Y. Co.2011). The use of preferential rents, the suspect citation of multiple renovations, the failure to register preferential rents, and the use of a higher rent as a penalty for late payment all evince indicia warranting an examination of the rent history for more than four years prior to the interposition of the claim.

*3 Petitioner correctly points out that the judgment amount against Respondent is based on the preferential rent and not the higher amount of rent that Petitioner deems to be the legal regulated rent. However, if Petitioner failed to properly and timely comply with rent registration requirements of

the Rent Stabilization Code, Petitioner may not collect any rents in excess of the last amount prior to the last proper registration. 9 N.Y.C.R.R. §§ 2528.4(a), *Bradbury v. 342 W. 30th St. Corp.*, 84 AD3d 681, 683–684 (1st Dept.2011), *Ernest & Maryanna Jeremias Family Partnership, LP v. Matas*, 39 Misc.3d 1206(A)(Civ. Ct. N.Y. Co.2013). As of this posture of the litigation, Respondent has not proven by, say, the standards of a summary judgment that this is the case. However, the standard the Court applies on a motion by a newly-represented party to vacate a stipulation the party executed while pro se on the basis of rent overcharge is whether the party submits documentary evidence which shows the existence of an arguably meritorious rent overcharge claim. *Clermont York Assoc. LLC v. Zgodny*, 42 Misc.3d 143(A)(App. Term 1st Dept.2014). To be repetitive, the use of preferential rents as Petitioner does here, the failure to register those preferential rents, the claims to implausibly large numbers of renovations in a short time frame, and the use of unconscionable punitive late rent payment penalties show an "arguably meritorious" rent overcharge cause of action. Accordingly, the Court grants Respondent's motion to vacate the Stipulation and, with it, the judgment and warrant contained therein.

As Respondent has just retained counsel and as the vacatur of the Stipulation restores this proceeding to a trial posture, the Court grants Respondent's motion to amend her answer, *Harlem Restoration Project v. Alexander*, N.Y.L.J. July 5, 1995 at 27:2 (Civ.Ct. N.Y. Co.), and deems the answer annexed as Exhibit 4 to Respondent's motion to be her new amended answer.

Respondent moves to have this Court transfer this matter to Supreme Court, where there **4 is a pending lawsuit by several tenants of the building in which Respondent against Petitioner. As this proceeding and the other action are pending in different Courts, CPLR §§ 602(b) applies. CPLR §§ 602(b) permits "the supreme court" or "the county court" to "remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court." New York City Civil Court is not "the supreme court," nor is it a "county court." *Arvelo by Arvelo v. City of New York*, 182 Misc.2d 101, 104 (Civ.Ct. N.Y. Co.1999). Respondent does not otherwise cite statutory (or other) authority giving the Housing Court the jurisdiction to remove from itself cases to Supreme Court. New York City Civil Court Act §§ 110(b) empowers the Housing Court to consolidate cases, but by its text, the statute only applies to proceedings "pending in *such part* ...." (emphasis added), meaning the Housing Part of the Civil Court of the City of New York. The cases are not directly on point, but an instructive example of the limitations on the Civil Court to remove and consolidate cases pending in other courts is found in *In re Daniel*, 181 Misc.2d 941, 955 (Civ.Ct. Bronx Co.1999), *Mallardi v. District Council 37 Health & Sec. Plan Trust*, 128 Misc.2d 696, 699 (Civ.Ct. Kings Co.1985)(the Civil Court, unlike the Supreme Court, lacks the power to remove and consolidate an action pending in the Supreme Court with an action pending in the Civil Court). Accordingly, the Court denies Respondent's motion to order this

proceeding removed with an action pending in Supreme Court, without prejudice to Respondent's remedies in Supreme Court.

*4 Respondent also moves for a stay of this proceeding pending the outcome of the action in Supreme Court. However, Civil Court is the preferred forum for landlord-tenant disputes. *Langotsky v. 537 Greenwich LLC,* 45 AD3d 405 (1st Dept.2007). Only where Civil Court is without authority to grant the relief sought should the prosecution of a summary proceeding be stayed. *Scheff v. 230 E. 73rd Owners Corp.,* 203 A.D.2d 151, 152 (1st Dept.1994). The Housing Court has jurisdiction, even if it is concurrent jurisdiction, to adjudicate a cause of action sounding in rent overcharge. *Lirakis v. 180 Seventh Ave. Assoc. LLC,* 10 Misc.3d 131(A) (App. Term 1st Dept.2005), *Vazquez v. Sichel,* 12 Misc.3d 604, 605 (Civ.Ct. N.Y. Co.2005). Accordingly, the Court may hear Respondent's rent overcharge defense in this Court and the Court denies Respondent's motion to stay this proceeding, without prejudice to relief that Respondent may seek in Supreme Court.

This matter is now in a trial-ready posture. The Court calendars the matter for trial on April 3, 2017 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

All Citations

54 Misc.3d 1226(A), 55 N.Y.S.3d 692 (Table), 2017 WL 1037584, 2017 N.Y. Slip Op. 50323(U)

K92

A08684 Summary:

BILL NO A08684

SAME AS No Same As

SPONSOR Rosenthal

COSPNSR

MLTSPNSR

Amd §749, RPAP L

Relates to the presence of a companion animal when executing a warrant for eviction or dispossession of property and directs the executing officer to make arrangements for the safe removal of such animal.

K93

A08684 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A8684

SPONSOR: Rosenthal

TITLE OF BILL: An act to amend the real property actions and proceedings law, in relation to the presence of a companion animal when executing a warrant for eviction or dispossession of property

PURPOSE:

This bill requires officers executing a warrant of eviction to check the property for companion animals and to coordinate the safe removal of such animals with the evictee.

SUMMARY OF SPECIFIC PROVISIONS:

Section one amends subdivision two of section 740 of the real property actions and proceedings law.

Section two sets forth the effective date.

JUSTIFICATION:

A marshal executing an order of eviction against a Brooklyn family locked the family out of the apartment when they were not home, leaving their possessions and two-year-old pit bull trapped inside. The innocent animal was locked inside a small cage in the apartment for two days until the caregiver won a court order to enter the apartment and rescue his dog. The dog, which had been rescued from an abusive home, had no food, only a small water bowl and no place to relieve herself.

When a marshal executes an eviction order and takes legal possession of the property located within the evictee's premises, the marshal is required to prepare a written inventory of all items inside, store the items for a specified amount of time, and allow the evicted tenant to later retrieve their belongings. Since animals are considered property under the law, there is no distinction between how a couch and an animal is treated. Unlike couches, animals are living sentient beings, and need food, water, air and affection to survive. They cannot be treated like other property. This bill would ensure that the safety and wellbeing of an animal is not compromised when a tenant is evicted.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

None to the State.

EFFECTIVE DATE:
This act shall take effect immediately.

K94

A08684 Text:

STATE OF NEW YORK

8684

2017-2018 Regular Sessions

IN ASSEMBLY

September 25, 2017

Introduced by M. of A. ROSENTHAL -- read once and referred to the Committee on Judiciary

AN ACT to amend the real property actions and proceedings law, in relation to the presence of a companion animal when executing a warrant for eviction or dispossession of property

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 749 of the real property actions and proceedings law, as amended by chapter 256 of the laws of 2009, is amended to read as follows:

2. (a) The officer to whom the warrant is directed and delivered shall give at least seventy-two hours notice, excluding any period which occurs on a Saturday, Sunday or a public holiday, in writing and in the manner prescribed in this article for the service of a notice of petition, to the person or persons to be evicted or dispossessed and shall execute the warrant between the hours of sunrise and sunset.

(b) Such officer shall check such property for the presence of a companion animal prior to executing such warrant and coordinate with such person or persons to be evicted or dispossessed for the safe removal of such companion animal. "Companion animal," as used in this paragraph, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD13519-01-7

1-95

§ 234. Tenants' right to recover attorneys' fees in actions or summary proceedings arising out of leases of residential property

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

Home Loan Servs., Inc. v Moskowitz

Supreme Court of New York, Appellate Term, Second Department

February 14, 2011, Decided

2009-1851 K C.

Reporter
31 Misc. 3d 37 *; 920 N.Y.S.2d 569 **; 2011 N.Y. Misc. LEXIS 367 ***; 2011 NY Slip Op 21051 ****

[**1]** Home Loan Services, Inc., Successor by Merger to National City Home Loan Services, Respondent, v Frances Moskowitz et al., Respondents, and Jacob Markowitz et al., Appellants.

Prior History: Appeal from an order of the Civil Court of the City of New York, Kings County (Inez Hoyos, J.), dated June 5, 2009. The order denied a motion by occupants Jacob Markowitz and Sarah Markowitz to dismiss the petition as against them in a proceeding brought pursuant to RPAPL 713 (5).

Headnotes/Syllabus

Headnotes

Landlord and Tenant -- Summary Proceedings -- Property Sold in Foreclosure -- Exhibition of Deed

In a postforeclosure summary proceeding brought by petitioner owner against respondent occupants, attachment of a certified copy of the referee's deed to a 10-day notice to quit served by "nail and mail" was insufficient to satisfy the requirement that a deed be "exhibited" to the respondent pursuant to RPAPL 713 (5), and respondents were thus entitled to dismissal of the petition.

Counsel: *Clair & Gjertsen*, Scarsdale (*Ira S. Clair* of counsel), for Jacob Markowitz and another, appellants. *Knuckles, Komosinski & Elliott, LLP*, Elmsford (*Jordan J. Manfro* and *Robert T. Yusko* of counsel), for Home Loan Services, Inc., respondent.

Judges: **[***1]** PRESENT: PESCE, P.J., WESTON and RIOS, JJ. Pesce, P.J., Weston and Rios, JJ., concur.

Opinion

[570]** **[*38]** Ordered that the order is reversed, without costs, and the motion by occupants Jacob Markowitz and Sarah Markowitz to dismiss the petition as against them is granted.

Prior to commencing this summary proceeding, petitioner served a 10-day notice to quit upon occupants, together with a certified copy of the referee's deed, by "nail and mail" service, after four attempts at personal service had been made at different times on different days. Occupants Jacob Markowitz and Sarah Markowitz (appellants) moved to dismiss the petition as against them on the ground that attaching a copy of the referee's deed to a 10-day notice to quit served by "nail and mail" is not sufficient to satisfy the requirement of RPAPL 713 (5) that a **[****2]** deed be "exhibited" to the respondent. The Civil Court denied appellants' motion. We reverse.

RPAPL 713 **[***2]** provides in pertinent part:

> "A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds: . . .

> "5. . . . [T]he property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him."

While this statute provides that a notice to quit may be served in the same manner as a notice of petition and petition, it does not make the same provision for the referee's deed. Instead, the statute specifically requires that the deed be "exhibited" to the respondent. In our view, and in light of the strong policy **[*39]** prohibiting unlawful evictions (*see generally* Bill Jacket, L 1981, ch 467), attaching a copy of the referee's deed to a 10-day notice to quit served by "nail and mail" was insufficient to satisfy the requirement of exhibition of the deed pursuant to *RPAPL 713 (5)* (*see Colony Mtge. Bankersv Mercado, 192 Misc 2d 704, 747 NYS2d 303 [Sup Ct. Westchester County 2002]*; *but see Novastar Mtge., Inc. v LaForge, 12 Misc 3d 1179[A], 2006 NY Slip Op 51306[U], 824 NYS2d 764 [Sup Ct, Greene County 2006]* **[***3]** [discussing a writ of assistance]; ***Deutsche Bank Natl. Trust Co. v Resnik, 24 Misc 3d 1238[A], 2009 NY Slip Op 51793[U], 899 NYS2d 58 [Nassau Dist Ct 2009]***; *GRP/AG REO 2004-1, LLC v Friedman, 8 Misc 3d 317, 318-319, 792 NYS2d 819 [Just Ct, Town of Ramapo, Rockland County 2005]*). Accordingly, the order is reversed and appellants' motion to dismiss the petition as against them is granted.

Pesce, P.J., Weston and Rios, JJ., concur.

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DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT L&T PART

---x

BANK OF AMERICA, N.A., Successor by Merger to BAC Home Loans Servicing, LP, F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,

Petitioner(s)

against

VANESSA LILLY; INAYA DAVIS; MARY DAVIS; RODNEY BOONE; JANE SMITH - Name Refused; JOHN DOE; and JANE DOE,

Respondent(s)

---x

INDEX NO. LT-005187-16

Present:
Hon. Scott Fairgrieve

The following named papers numbered 1 to 2 submitted on this Motion to Vacate on February 24, 2017

	papers numbered
Notice of Motion and Supporting Documents	
Order to Show Cause and Supporting Documents	1
Opposition to Motion	2
Reply Papers to Motion	

Petitioner moves, pursuant to CPLR 2221(d), for leave to reargue this court's order, dated December 9, 2016, dismissing the herein summary proceeding.

This holdover summary proceeding was commenced against Vanessa Lilly, the former owner of 415 Champlain Avenue, West Hempstead, New York. The additional Respondents, Inaya Davis, Mary Davis, Rodney Boone, Jane Smith - name refused, John Doe and Jane Doe, allegedly reside at the premises with permission from the former owner.

Paragraph 4(a) of the verified petition states that:

"A foreclosure sale was held pursuant to the Judgment of Foreclosure and Sale signed on October 28, 2009 and entered in the Nassau County Clerk's office on or about November 9, 2009. A copy of the said judgment is annexed hereto as **Exhibit 'A'**."

Paragraph 4(b) of the verified petition asserts that:

"On October 14, 2014, the sale of the premises described hereto was duly held and the premises were purchased by the Petitioner, Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing, LP. A certified Referee's Deed to the Petitioner is annexed hereto as **Exhibit 'B'**."

Paragraph 4(c) of the verified petition contends that:

"The Petitioner, Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing, LP, is now the owner of the premises located at 415 Champlain Avenue, West Hempstead, NY 11522."

Paragraph 4(d) of the verified petition states that Respondent Vanessa Lilly continues to reside at the premises even though the judgment of foreclosure and sale

provides that "purchaser" be let into possession of the subject premises upon production of the referee's deed.

Petitioner alleges the following in Paragraphs 5 & 6 of the verified petition:

"All Respondents in this action were duly served with Ten Day Notices to Quit, as appears from the Affidavits of Service annexed hereto as **Exhibit 'C'**.

A Certified copy of the Referee's deed was exhibited, to the respondent(s) in this action, as appears from the Affidavits of service annexed hereto as **Exhibit 'C'**."

The affidavit of service demonstrates that Respondent Rodney Boone was served on October 17, 2016 by substituted service as follows:

"On 10/17/2016 at 1:00 PM, I served the within HOLDOVER NOTICE OF PETITION AND HOLDOVER PETITION Bearing Index Number LT-005187-16 and date of filing of 10/7/2016 on RODNEY BOONE at 415 CHAMPLAIN AVENUE, WEST HEMPSTEAD, NY 11552 in the manner indicated below:

SUITABLE AGE: By delivering a true copy of said documents to JANE SMITH NAME REFUSED, CO-OCCUPANT, a person of suitable age and discretion. Said premises is respondent's place of residence within the state."

This court dismissed the prior proceeding because the certified deed was exhibited to Respondent Rodney Boone via substituted service upon "Jane Smith - Name Refused, Co-Occupant".

This court held that the certified deed must be exhibited personally to each Respondent and not by substituted service, as required by *Home Loan Services, Inc. v. Moskowitz*, 31 Misc 3d 17, 920 NYS2d 569 (App Term, 2d, 11th & 13th Jud Dists, 2011).

Petitioner argues that this "Court has misapprehended the central holding of *Home Loan Services, Inc. v. Moskowitz* in relation to how exhibition of the referee's deed was completed in this case."

Petitioner contends that service in *Home Loan Service* was invalidated because same was done by nail and mail which is not the equivalent of personally exhibiting the certified deed. Petitioner asserts that exhibiting the certified deed by substituted service to "Jane Smith" satisfies RPAPL Sections 713(5) and 735.

Petitioner cites the cases of *Hudson City Sav. Bank v. Lorenz*, 39 Misc 3d 538 (NY Dist Ct, 2013) and *1644 Broadway LLC v. Jimenez*, 51 Misc 3d 887 (Civ Ct, 2016) for the proposition that substituted service satisfies the statutory criteria of personally exhibiting the certified deed to a respondent.

Respondent Rodney Boone's attorney submits his affirmation in opposition, dated February 23, 2017. Counsel argues therein that a jurisdictional defect exists because Rodney Boone was identified in the proceeding as a "John Doe" despite Petitioner knowing his name from a prior proceeding. Specifically, the order of Hon. James Darcy dated July 26, 2016, indicated in the prior proceeding that "John Doe" is Rodney Boone. Regardless, this court rejects such argument because Rodney Boone was identified by his real name when service was made.

Furthermore, Respondent insists that service is defective because same was not done in compliance with RPAPL Section 735. Respondent contends that service upon "Jane Smith - Name Refused, Co-Occupant" and identified as an occupant is jurisdictionally defective. Respondent asserts that RPAPL Section 735 requires service upon a person who resides at the premises and that service upon an occupant doesn't satisfy this criteria.

Respondent argues that "merely being an occupant is insufficient as the person so served could have been merely a guest, a visitor, etc."

Also, Respondent states that the court's prior reliance upon *Home Loan Service v. Moskowitz* was correct, since that Appellate Term decision has not been overruled.

Decision

This court disagrees with Respondent's assertion that service upon an Occupant was insufficient. The term occupant is equivalent to tenant. Thus, service upon "Jane Smith - Name Refused, Co-Occupant" is sufficient under RPAPL Section 735. In *Alex & Gregory, Inc. v. Nick La Vista's Glen Cove Service Station, Inc.*, 124 Misc 2d 257, 475 NYS2d 1015 (Sup Ct, Nassau County, 1984), the Court held that the word occupant is the equivalent of being a tenant:

> " 'To occupy' means 'to take and hold possession of or 'have in possession and use' (*Thieme v. Niagara Fire Insurance Co.,* 100 App. Div. 278, 91 N.Y.S. 499) and an 'occupant' is one who holds possession and exercises dominion (*G.M.G. Realty Co., Inc. v. Spring*, 191 Misc. 334, 77 N.Y.S. 732). 'To occupy' is also defined to mean 'to tenant', 'to reside', 'to inhabit' (67 C.J.S. Occupy, p. 197) and, in landlord-tenant law at least, connotes a possessory interest whereby the occupant will hold or use for more than brief periods of time (see *Mihil Co., Inc. v. Paradiso*, 107 Misc.2d 867, 436 N.Y.S.2d 115)."

Moreover, this court is constrained to follow the holding of *Home Loan Services, Inc. v. Moskowitz*, 31 Misc 3d 37, 920 NYS2d 569 (App Term, 2nd, 11th & 10th Jud Dists, 2011), which requires the referee's deed to be "exhibited to Respondent". This means that personally exhibiting the referee's deed is required, and that substituted service or service by "nail and mail" is insufficient.

Home Loan Services relies upon *Colony Mtg. Bankers v. Mercado*, 192 Misc 2d 704, 747 NYS2d 303 (Sup Ct, Westchester Co, 2012). In *Colony*, the purchaser of residential premises at a foreclosure sale applied for a writ of assistance. The 10 day notice to quit along with the certified copy of the deed was served personally on defendant *Mercado* and by substituted service upon the other defendants. The Court held that substituted service was invalid service:

> "The judgment of foreclosure requires 'production' of the referee's deed. 'Production' means the act of exhibiting. Webster's Third New International Dictionary, p. 1810. Section 713(5) of the RPAPL provides that a special proceeding to recover possession of property may be instituted after a ten-day notice to quit has been served where the property was sold in foreclosure and a certified copy of the deed 'exhibited' to the person in possession. Absent exhibition, the writ of assistance may not issue. *Lincoln Sav. Bank v. Warren*, 156 A.D.2d 510, 548 N.Y.S.2d 783 (2d Dep't 1989).

To exhibit connotes actual presentation to view the document, Black's Law Dictionary (6th ed.), p. 573; 15A Words & Phrases. Exhibit et seq. pp. 365-67; Webster's Third New International Dictionary, p. 796. Exhibit is derived from the Latin and means to hold out. The New Oxford American Dictionary, p. 595.

At bar, it is clear that a certified copy of the deed has not been exhibited, as that word is commonly used and understood, to the occupants who received substitute service. Therefore, the plaintiff has not yet met the statutory requirements for issuance of a writ of assistance. Plaintiff's motion is denied."

The *Colony Mortgage Bankers* court relied upon *Lincoln Sav. Bank v. Warren*, 156 AD3d 510, 548 NYS2d 783 (2d Dept 1989). In *Lincoln*, the Court held that a writ of assistance application required that the referee's deed should have been previously exhibited to defendants:

"The defendants, who lost title to the subject premises by judgment in this foreclosure action which directs that the purchaser at the foreclosure sale be let into possession on production of the referee's deed, correctly assert that the order appealed from is in the nature of a writ of assistance (*cf.*, RPAPL 221). Prior to the issuance of such a writ, the referee's deed

should have been exhibited to and possession demanded from them (*see, Kilpatrick v. Argyle Co., Inc.*, 199 App.Div. 753, 192 N.Y.S. 98; *cf.*, RPAPL 713 [5].

Although it was proper for the purchaser's assignee to seek possession by application to Supreme Court in this action (*see, Lincoln First Bank v. Polishuk,* 86 A.D.2d 652, 446 N.Y.S.2d 399), annexing the deed to the order to show cause which authorized service of the moving papers on the defendant's attorney was inadequate (*see, Lincoln First Bank v. Polishuk, supra*). Moreover, the application to direct the Sheriff to put the purchaser's assignee in possession does not constitute an appropriate demand that the defendants vacate the premises. Thus, the Supreme Court should not have granted the application on the basis of the papers then before it (*cf., Lincoln First Bank v. Polishuk, supra*; RPAPL 221)."

In Rasch's New York Landlord and Tenant Including Summary Proceedings, § 35:8 (4th ed.), Judge Dolan writes:

"One who has purchased real property at a sale thereof under a foreclosure of a mortgage thereon can maintain summary proceedings under the Real Property Actions and Proceedings Law to dispossess the mortgagor personally, or any person in possession under the mortgagor,

upon alleging and proving the following elements of this ground for dispossession: (a) that the foreclosed mortgage, which had been executed by the owner of the real property, was valid and enforceable; (b) that the mortgage was validly foreclosed; (c) that the property was validly sold under such foreclosure; (d) that the petitioner's title to such property under such sale has been perfected; (e) that the occupant's right of possession, if such occupant is not the mortgage, was acquired from the mortgagor subsequently to the giving of the mortgage; (f) that either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the CPLR, has been exhibited to the persons sought to be removed; (g) that the statutory ten days' notice to quit was given to the occupants prior to the commencement of the proceeding in the manner prescribed by Real Property Actions and Proceedings Law § 735; and (h) that the persons sought to be removed nevertheless hold over and continue in possession of the property.

The giving of the statutory ten days' notice to quit in the manner prescribed is a condition precedent to the right to maintain the foreclosure sale summary proceeding, and must be alleged and proved."

Based upon the above, substituted service to "exhibit" the referee's deed does not meet the statutory criteria as interpreted.

This court is very empathetic to the holdings of *Hudson City Sav. Bank v. Lorenz*, *supra*, and *1644 Broadway LLC v. Jimenez, supra*, that substituted service of the referee's deed was valid.

The Legislature needs to address this situation. It is suggested that both substituted service and "nail and mail" be authorized. There is no valid reason to set such a high standard for service of the referee's deed when service of the notice of petition and petition is allowed by personal service, substituted service, or "nail and mail". Money judgments are issued upon substituted service. *Avgush v. Berrahu*, 17 Misc 3d 85, 847 NYS2d 343 (App Term, 9th & 10th Jud Dists, 2007); *O'Connell v. Singletary*, 31 Misc 3d 126(A), 926 NYS2d 345 (Table) (App Term, 9th & 10th Jud Dists, 2011).

Conclusion

For the reasons set forth herein, this court adheres to dismissal in the case at bar.

So Ordered:

DISTRICT COURT JUDGE

Dated: 3-28-17

cc: William D. Friedman, Esq., attorney for Respondent Rodney Boone
Shapiro, Dicaro & Barak, LLC, attorneys for Petitioner
Vanessa Lilly, Respondent
Inaya Davis, Respondent
Mary Davis, Respondent
Jane Smith - Name Refused, Respondent
John Doe & Jane Doe

SF/mp

11DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: LANDLORD/TENANT PART

LEVI KUSHNIR,

Petitioner(s)

-against-

ROBIN B. HARTMAN, MICHAEL HARTMAN, "JOHN DOE", "JANE DOE".

Respondents-Occupants

HON. JAMES DARCY

DECISION

Index No. LT-005958-16/NA

Petitioner commenced this holdover summary proceeding pursuant to RPAPL. A hearing was held on February 1, 2017 before this court, and continued on February 2, 2017 and February 6, 2017. Thereafter, with the court's consent, the parties submitted briefs on February 14, 2017 and this matter was marked submitted for a decision.

At the hearing, Petitioner tried to establish his ownership of the subject premises with a copy of the deed to the subject premises and by his testimony. Petitioner further proffered, through his testimony and through the filed affidavits of service, that the Notice of Petition and Petition, as well as the required Ten (10) Day Notice to Quit with attached certified copy of the Referee's Deed were properly given to the Respondents. Finally, he offered testimony in which he claimed that the respondents had failed to vacate the premises pursuant to the aforesaid Notice to Quit and further offered that, in his opinion as a real estate professional, market rent/use and occupancy for the subject premises would be between $3,000 and $4,000 per month for each month that the respondents "held-over" in the subject premises.

In opposition, the respondents argued that this court lacked jurisdiction over the matter at hand as a result of: 1) a total lack of service of the underlying notice to quit upon the respondents; 2) a fatal defect in the notice to quit in that the copy of the deed alleged to have been served with it was not properly certified; and 3) that the petitioner failed to comply with the requirement of RPAPL § 713(5) that a certified copy of the referee's deed was duly "exhibited" to respondents. It is noted by this court that respondents, in their answer, raised issues calling into question the validity of the underlying foreclosure action. This court will not address said issues as they are beyond the scope of this court's jurisdiction and as respondents did not offer any evidence with regard to said issues in the trial herein.

It is well-settled law that the Petitioner bears the burden of proving by a preponderance of the credible evidence that service was properly effectuated (*Frankel v. Schilling,* 149 A.D.2d 657). At the subject hearing herein, Petitioner attempted to meet said burden of proof through the testimony of its process server, Michael Weiner. Mr. Weiner, a professional process server for 17 years, testified at length with regard to the facts and circumstances surrounding the service of the Ten (10) Day Notice to Quit with a certified copy of the Referee's deed attached and "exhibited" on October 10, 2016 by "personal service" upon respondent, Michael Hartman, and by "substituted service" upon the other respondents by leaving the papers with the aforesaid Michael Hartman and by, thereafter (on October 11, 2016) mailing copies to all respondents by both regular first class mail and by certified mail.

Mr. Weiner further testified with regard to the facts and circumstances surrounding the service of the Notice of Petition and Petition on November 29, 2016 again by "personal service" upon respondent, Michael Hartman, and by "substituted service" upon the other respondents by leaving the papers with the aforesaid Michael

Hartman and by, thereafter (on November 29, 2016) mailing copies to all respondents by both regular first class mail and by certified mail. His testimony was bolstered by both the sworn affidavits of service submitted to this court and by the documentary evidence presented by petitioner at the trial, in particular Mr. Weiner's "work tickets." This court found Mr. Weiner's testimony to be candid, credible, consistent and convincing.

Respondents did not dispute the service of the Notice of Petition and Petition. Rather, they argued that this court lacked jurisdiction because there was a total lack of proper service of the underlying Ten (10) Day Notice to Quit, that the copy of the referee's deed attached to said notice was not "certified" and, most importantly, that the petitioner failed to comply with the dictates of RPAPL § 713(5) which require that in matters, such as the instant proceeding, where " . . . the property has been sold in foreclosure . . . either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to . . ." the respondents.

Respondents, Michael Hartman and Robin Hartman, both testified that at the day and time service of the Ten (10) Day Notice to Quit with deed attached is alleged to have been made they were not home. Rather, they claim that they were in Rhode Island visiting their son and his family. They both testified that they are the only individuals residing in the subject property. Mr. Hartman, in his testimony, called into question the validity of the process server's physical description of the individual allegedly served and claimed that said description does not fit him, alleging that he is approximately five inches taller and nearly 100 lbs. heavier than the individual alleged to have been served. Mr. Hartman further testified that he learned about this proceeding from ". . . the notices in the mail."

The court found respondents' testimony unconvincing, somewhat contrived and self-serving at best. They offered no documentary evidence to bolster their testimony - no toll receipts, no EZ Pass listings, no gas receipts, indeed, nothing to confirm their presence in Rhode Island. They offered no witnesses who could corroborate their story, despite being given an extra continuation day to do just that. Respondents' arguments with regard to the physical description of the person served and as to the certification of the deed in question are totally outweighed by the process server's highly credible testimony. It is the holding of this court that the service of both the Ten (10) Day Notice to Quit with certified deed attached and of the Notice of Petition and Petition herein was proper and, subject to determination of one final issue, that this court has both subject matter jurisdiction and *in personem* jurisdiction over the case at hand.

The final issue to be determined by this court deals with whether or not the referee's deed herein was properly "exhibited" to respondents, as required by RPAPL § 713(5). Both sides rely upon Home Loan Servs. Inc. v. Moskowitz, *920 N.Y.S.2d 569* and its progeny to make their respective arguments. Respondents argue that Moskowitz controls and binds this court by the doctrine of *stare decisis*. They further argue that "Moskowitz made it clear that anything less than personal in-hand 'exhibition' of the Referee's Deed is insufficient to comply with the exhibition requirement pursuant to RPAPL § 713(5)." They also argue that ". . . since the remedy of summary proceedings is entirely the creation of statute, strict compliance with all statutory provisions is required." They argue that RPAPL § 713(5), as interpreted in Moskowitz and its progeny, requires nothing short of personal in-hand delivery of the referee's deed to the respondents.

This court strongly disagrees with these arguments. Starting with a strict reading of the statute itself, it is clear that there is no language contained therein which would lead this court to determine that personal in-hand "exhibition" of the referee's deed is

required as a precondition to commencing a summary proceeding. (Hudson City Sav. Bank v. Lorenz, *959 N.Y.S.2d 844)* What is required is that, in addition to serving an appropriate Notice to Quit pursuant to RPAPL § 735, a copy of the referee's deed, certified as provided in the civil practice laws and rules, be "exhibited" to the respondents. The statute itself does not define the term "exhibited" , leaving each court presented with this issue to make a determination on a case by case basis. The question becomes, therefore, "what does "exhibited" mean?"

Black's Law Dictionary (6th edition) defines "exhibit" simply as *"To show or display; to offer or present for inspection."* Thereafter case law has attempted to narrow what is determined to be proper "exhibition" of a referee's deed and to address circumstances where exhibition is deemed proper or improper. Moskowitz has been seen by some to be a seminal decision in the discussion of this issue. The court therein ruled that " . . . attaching a copy of a referee's deed to a 10 day notice to quit **served by "nail and mail"** (emphasis added) was insufficient to satisfy the requirement of exhibition of the deed pursuant to RPAPL 713(5)." It does not, as claimed by respondents, rule " . . . that mere attachment of a copy of the referee's deed to a 10-day notice to quit served by substituted service or conspicuous service is insufficient to satisfy the exhibition requirement, but rather deals solely with "nail and mail"or conspicuous service. It is, therefore, easily distinguishable from the facts and circumstances of the matter currently before this court.

In Moskowitz the referee's deed simply was attached to the Notice to Quit, which, in turn, was simply affixed to the subject premises therein by conspicuous service. There was no "showing", no "offer for inspection", no "presenting for inspection" and, therefore no "exhibition." In the case at hand, it has clearly been established by the petitioner that the Notice to quit and a copy of the referee's deed, certified as provided in

the civil practice laws and rules, was properly delivered to respondent, Michael Hartman, by personal delivery. It has further been established that the Notice to Quit and a certified copy of the referee's deed was delivered to each of the remaining respondents by proper "substitute delivery" by personal delivery to Michael Hartman (a person of suitable age and discretion, and follow-up mailing by certified mail and regular first-class mail. It has long been held "that personal delivery and substitute service are on an equal footing and personal delivery need not be attempted before resort is made to substitute service. (Manhattan Embasy Co. v. Embassy Parking Corp., *164 Misc.2d 977)* This court finds, therefore, that there was a proper "offer and presentment for inspection", thus the copy of the referee's deed herein, "certified pursuant to the civil practice laws and rules" was properly "exhibited" to all respondents. [See: GRP/AG REO 2004-1, LLC v. Friedman, *792 N.Y.S.2d 819;* Deutsche Bank Nat'l Trust Co. V. Resnik, *24 Misc.3d 1238(A)]*

Accordingly, Petitioner is granted a final judgment of possession and warrant of eviction with no stay. Petitioner is also awarded a money judgment in the amount of $14,000.00 against the respondent, which this court determines to be appropriate "use & occupancy" for November and December, 2016 and January and February, 2017.

This constitutes the Decision and Order of the Court.

Dated: Hempstead, New York
March 31, 2017

JAMES DARCY
J.D.C.

cc: Clark & Amadio, PC, *Attorney for Petitioner*
Lester & Associates, PC, *Attorney for Respondents*

DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT : LANDLORD TENANT PART

----------X

IFS PROPERTIES LLC,

HON. ERIC BJORNEBY

Petitioner,

-against-

Index No. LT- 002031/14

BRIAN WILLINS, "JOHN DOE" , "JANE DOE",

Respondent.

----------X

Decision After Trial

Petitioner commenced this post-foreclosure holdover summary proceeding pursuant to RPAPL §713(5) to recover possession of the residential premises 769 Mott Avenue, A/K/A 769 Centennial Avenue, Baldwin, New York. A hearing was held on May 7, 2014. For the reasons set forth below, petitioner is awarded a judgment of possession, a warrant of eviction stayed to June 30, 2014, and a money judgment in the sum of $57,600.

THE FACTS

On September 23, 2008 the referee in foreclosure executed a deed on behalf of respondent, the former owner, to Countrywide Bank. Thereafter, on June 12, 2012 Countrywide deeded the property to petitioner IFS Properties, LLC. Commencing on September 16, 2013 petitioner made numerous efforts to serve respondent with a 10-day notice to quit with copies of the abovementioned certified deed copies attached. The process server, who the court found to be credible, made many attempts to serve respondent personally and exhibit the deeds to him. He was unable to do so and on one occasion was physically chased from the premises by an unknown individual. After a discussion with counsel, said efforts were suspended for the time being.

On February 28, 2014 the process server again attempted to serve the respondent and on March 8, 2014, (a Saturday) at 8:14 AM, he spoke with respondent who was in a second floor window. The court finds, as the process server testified, that he exhibited the certified deed copies to respondent, who refused to come down and receive process, and affixed the notice with attached deeds to the door. Thereafter, within one business day, on March 10, 2014, he mailed copies to the respondent pursuant to RPAPL §735. Respondent failed to quit the premises and the instant petition was filed on April 11,

2014. On April 14, 2014, after two prior attempts to serve the Notice of Petition and Petition, he affixed the papers to the door of the premises and mailed copies to the respondent pursuant to RPAPL §735. On the return date, April 22, 2014, the respondent appeared, declined counsel, and the matter was adjourned for trial to May 7, 2014.

At trial, the petitioner's process server and property manager testified credibly to the above facts and established their *prime facie* case. The fair value of use and occupancy was established to be $2400 per month and a money judgment in the sum of $57,600 was sought for use and occupancy from June 12, 2012 through the time of trial. The respondent testified in his defense and alleged the proceeding should be dismissed because there was no "docket sheet" showing the filing of the relevant papers, that the petitioner's property manager was without authority to testify, and that the deeds were never exhibited to him pursuant to RPAPL §713(5) and ***Home Loan Services, Inc. v. Moskowitz***, 31 Misc.3d 37.

THE LAW

Although a Respondent may assert both equitable and non-equitable defenses in a summary proceeding provided a good faith basis is demonstrated for the claim, the findings of the Supreme Court in the foreclosure proceeding may not be challenged in the Housing Part (*see* ***Nassau Homes Corp. v Shuster***, 33 Misc.3d 130) Real Property Actions and Proceedings Law §713 provides in relevant part:

> A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds:
> 5. Subject to the rights and obligations set forth in section thirteen hundred five of this chapter, the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him.

DISCUSSION

The respondent's first two objections are simply without merit. District Court does not utilize docket sheets and the respondent's property manager clearly established his authority to testify and identify exhibits.

The burden of proof regarding service is on the petitioner. (***Chaudry Const. Corp.***

v. James G. Kalpakis & Associates, 60 A.D.3d 544. In this matter, the court finds that the process server's testimony regarding service of the 10-day Notice to Quit and exhibition of the certified deed copies was highly credible and that the respondent's testimony on this subject was not credible. The Court further notes however that in its opinion, even if he had been unable to exhibit the deeds to respondent in the second floor window, service would have been proper. While the court is familiar with the *Moskowitz* case cited by respondent, for the reasons set forth by Judge Hackeling in ***Hudson City Savings bank v. Lorenz***, 39 Misc.2d 538 the Court believes that the exhibition requirement of RPAPL §713(5) should not be read to require personal exhibition. To rule otherwise would yield the absurd result that a former property owner who could not be found could, by his absence, thwart the attempts of a legitimate purchaser to gain possession of a foreclosed property because only personal service could effect the exhibition requirement of RPAPL §713(5) as interpreted by the *Moskowitz* court.

CONCLUSION

Accordingly, the Petitioner is granted a final judgment of possession and warrant of eviction stayed to June 30, 2014 and a money judgment in the sum of $57,600.

Petitioner's counsel to submit judgments and warrant.

This constitutes the Decision and Order of the Court.

ERIC BJORNEBY
J.D.C.

Dated: Hempstead, NY
May 27, 2014

cc: Sweeney, Gallo, Reich & Bolz, LLP
Brian Willins, *Pro Se*

1644 Broadway LLC v Jimenez

Civil Court of the City of New York, Kings County

May 2, 2016, Decided

No Number in Original

Reporter
51 Misc. 3d 887 *; 31 N.Y.S.3d 812 **; 2016 N.Y. Misc. LEXIS 2403 ***; 2016 NY Slip Op 26157 ****

[**1]** 1644 Broadway LLC, Petitioner, v Bienvenido Jimenez, Doing Business as Moca Deli Grocery, Respondent.

Prior History: 1644 Broadway LLC v Jimenez, 17 NYS3d 270, 2015 N.Y. Misc. LEXIS 3393 (2015)

Core Terms

deed, lease, notice, foreclosure, rent, occupancy, premises, exhibited, subject premises, foreclosure action, Deli, recorded, parties, witness testimony, pleadings, process server, new owner, referee's, Grocery, cashier, notary, tenant, affidavit of service, highest bidder, posttrial, receipts, register, notice to quit, court finds, young man

Headnotes/Syllabus

Headnotes

Landlord and Tenant — Summary Proceedings — Property Sold in Foreclosure — Exhibition of Deed

1. In a post foreclosure summary proceeding, the requirement that the referee's deed be "exhibited" to the respondent pursuant to RPAPL 713 (5) was satisfied not only when the petitioner owner visited the respondent tenant's store and left a copy of the deed with the tenant's son, but also when a process server later effectuated service of the 10-day notice to quit along with a copy of the deed by substituted service on the son. RPAPL 713 (5) does not require the deed to be personally delivered to the respondent; "personal exhibition" would create a higher standard of service for presentment of the deed than for the notice of petition and is not supported by legislative history. Substituted service was sufficient to sustain exhibition of the deed given the facts here, including the son's job as the cashier of the store and his relationship with the respondent, both of which indicated that he was granted actual and apparent authority to accept service of process on behalf of respondent.

Landlord and Tenant — Summary Proceedings — Property Obtained in Foreclosure — Validity of Preexisting Lease

2. In a post foreclosure summary proceeding, respondent tenant's preexisting 20-year commercial lease with a prior owner could not defeat petitioner owner's right to possession where the tenant was joined in the prior foreclosure action and thus bound to the judgment of foreclosure which extinguished the tenant's leasehold interest. A tenant who is not joined as a party to a foreclosure action is not bound by the judgment of foreclosure. Where, as here, the tenant was joined, entry of the judgment of foreclosure extinguishes the tenant's leasehold interest as a matter of fact and law, and the lease is deemed void as against a good faith purchaser for value. Here, a slight misspelling of the name of the respondent in the foreclosure action did not defeat the irrefutable evidence that respondent had been named and served, and was ignored pursuant to CPLR 2001. Moreover, in order for the 20-year lease to have been valid against petitioner, a subsequent purchaser, it was

required to be recorded in accordance with Real Property Law § 291. Since the lease was not recorded, it was void against petitioner.

Counsel: **[***1]** *Stern & Stern Law Offices*, Brooklyn (*Lawrence Stern* of counsel), for petitioner.

Peter J. Pruzan, New York City, for respondent.

Judges: Harriet L. Thompson, J.

Opinion by: Harriet L. Thompson

Opinion

[814]** **[*888]** Harriet L. Thompson, J.

By a decision and order of this court, dated May 5, 2014 (*1644 Broadway LLC v Jimenez, 43 Misc 3d 1229[A], 993 NYS2d 645, 2014 NY Slip Op 50859[U] [Civ Ct, Kings County 2014]*), after substantial motion practice, the court denied the respondent's motion to dismiss this proceeding as well as denied without prejudice the motion by the petitioner for use and occupancy pendente lite.

As described in the aforementioned decision and order of this court, the questions of law and issues of fact for trial were narrowly tailored based on the evidence presented and the evidence that was not presented by both parties (*see id.*). Specifically, the petitioner was required to produce the process server to offer testimony as to the facts and circumstances of service on "John Doe" at the premises; the nature and substance of the conversation, if any, between the process server and "John Doe" allegedly authorized to accept service; and the production of the evidence of all mailings that completed service pursuant to RPAPL 735. The burden then shifts to the respondent to produce evidence, including witnesses, if any, to rebut these contentions. **[***2]**

Moreover, this court is of the opinion that the petitioner was required to demonstrate that the respective deeds, namely, the referee's deed and the subsequent deed, were properly **[****2]** "exhibited" to the respondent. Provided sufficient evidence is presented **[*889]** that both deeds were, in fact, "exhibited" as described in the respective motion papers, it is the opinion of this court that the petitioner would have exceeded its statutory obligations and substituted service would be valid.

Additionally, one of the most important issue is whether the respondent was named and served as a necessary party in the foreclosure action, and as promulgated in statute and in case authority, whether the foreclosure action statutorily terminated the alleged written commercial lease agreement between the defaulting mortgagee/prior owner and the respondent. Suffice it to say, the hearing below was necessary because neither party during motion practice presented admissible evidence to prove whether the respondent was or was not named and served in the foreclosure action.

Lastly, if the above question is answered in the affirmative, the court need not go any further. The extinguishment of the leasehold interest establishes **[***3]** the petitioner's right to possession through either a licensee summary proceeding or a month to month tenancy, provided the petitioner accepted monthly rent from the respondent. Then, there are still questions of fact about the **[**815]** authenticity of the lease agreement between the predecessor owner and the respondent (*see infra* at 904). Further, neither party addressed the lack of recording of this lease and its impact on the rights of the petitioner as a good faith purchaser for value without notice of the leasehold interest.

At the conclusion of the trial, the respondent requested time to order transcripts of the bench trial and to prepare a posttrial memorandum of law instead of verbal summation. Counsel for the petitioner strongly objected to this time. The petitioner claimed that the alleged frivolous claims in this case about the lease and extensive court delays allegedly by the respondent are grounds for the court to deny this relief.

As of April 1, 2015, the respondent did not serve the petitioner with a copy of the transcript and/or the memorandum of law.

On April 1, 2015, the petitioner moved by notice of motion returnable on April 15, 2015 to deem the trial concluded and for this court to make **[***4]** a decision based on the evidence presented at trial.

On April 15, 2015, by the stipulation of the respective attorneys, the motion was granted to the extent that posttrial memoranda of law were waived and the case was submitted for a decision.

[*890] Trial Testimony

This bench trial, commenced on September 16, 2014 and concluded on December 16, 2014, revealed the following facts through oral testimony and real evidence.

The petitioner called Mohamed Ali, a member of the petitioner corporation, 1644 Broadway LLC, as its first witness. The witness testified that he obtained the subject property through a foreclosure sale; he was present at the closing and had personal knowledge of the facts. He testified that the deeds admitted into evidence as petitioner's 1 and petitioner's 2 were executed on the same day. The referee's deed was the first deed transferring the property from the foreclosing bank to highest bidder at the foreclosure sale. The second deed transferred the property from the highest bidder to the petitioner. He stated that both were signed and executed by the respective parties within an hour at closing.

He claimed that he received the original deeds the next business day. The deed **[***5]** admitted into evidence as petitioner's 1 is a certified bargain and sale deed with covenants against grantor's acts dated May 12, 2014 that transferred all rights, title and interest in the demised premises located at 1644 Broadway, Brooklyn, New York 11207 from Abdul Salem Mohamed **[****3]** Mused as the highest bidder at the foreclosure sale to the petitioner corporation, 1644 Broadway LLC.

Subsequently, the referee's deed was admitted into evidence, without objection, as petitioner's exhibit 2, a deed dated April 2, 2013 between Kenneth W. Richardson, Esq., as Referee, and Abdul Salem Mohamed Mused as the highest bidder. The content of the deed specifically states that

> "Eastern Savings Bank, FSB, as Plaintiff, against Keesha M. Fields, said defendants having addressed as set forth therein in a Supreme Court matter in the County of Kings under Index No. 12495/2008, foreclosing on a mortgage evidenced by a mortgage dated April 20, 2006, and recorded on December 5, 2006, which was assigned by JPMorgan Chase to Home Sales Inc. on February 1, 2007 and recorded on April 12, 2007, which was then transferred or assigned by Home Sales Inc. to Eastern Savings Bank FSB pursuant to an assignment of mortgage, **[***6]** dated May 20, 2008, and recorded in the registrar's office on April 8, 2008 pursuant to a judgment and foreclosure and sale, dated September 19, 2012, and **[*891]** entered in the foreclosure action **[**816]** on December 31, 2012 in consideration of the sum of $461,000.00, said being the highest sum bid at a public auction sale bid" by Mr. Abdul Salem Mohamed Mused.

This deed was certified on May 12, 2014 by the New York City Register. It should be noted here that both deeds were certified by the closing attorney at the closing pursuant to *CPLR 2105*.

Mr. Ali testified that on the following day, he went to the subject premises to speak to the tenant and to give the tenant a copy of the deed as required by law as proof that he is the new owner. He claimed that the individual in the store told him that he did not believe that he was the new owner. He insisted that he spoke with Mr. Jimenez and that Mr. Jimenez would not accept the papers.

He described the property as a small property with one store on the ground level and a one-bedroom apartment above.

Mr. Ali stated that he was the one who executed the legal documents in this case and as of the termination date of the notice to quit, dated April 4, 2013 effective on **[***7]** April 23, 2013, the respondent remained in the property, and he directed his attorneys to serve the notice of petition and petition. At the time of service, he claimed that there were three to four months due and that the monthly rent was $1,500. He testified that four months have been paid in the amount of $6,000 since the inception of his ownership, and the respondent now owes 18 months in rent arrears for a total sum of $27,000.

Mr. Ali testified that he has been in the real estate business for many years and owns 30 buildings. At least 22 to 24 of his buildings have commercial tenants. Mr. Ali testified that many of those properties had grocery stores like in this case. Some are occupied by large commercial tenants like Key Food and/or Associated Grocers chains. He stated that he owns properties in all five boroughs.

The 1644 Broadway property is located in Bushwick, anthat property. He did not bring that lease with him to court up-and-coming neighborhood. He says that based on theon the date of trial. 2057 Fulton Street's lease was gentrification of these neighborhoods, the rent for thenegotiated with a real estate broker.
commercial store in this case is well below market rent.

Additionally, the witness testified that he owned 1363 On voir dire, the witness testified that the BushwickFulton Street which was five to six blocks away, but did property was a good property because it contains anot bring a copy of that lease as evidence. He testified grocery store. It is between 1,300 to 1,400 **[***8]** squarethat the rent for that property was $4,100, was not a feet and is on a corner lot. He claims that the commercialcorner property, and was approximately 1,500 square rent for this store should be at a minimum of $3,500, andfeet. He rented this space **[***10]** for between $1,400 he could get a much higher rent for this location and storeand $1,500 approximately seven years ago. Those type. He asserted that $63,000 in rental **[*892]** incomecomparables would be for that property and not the would be a fair and marketable yearly rate for the subjectsubject premises.
premises.

He testified that he visited the property prior to the Lastly, petitioner introduced into evidence as petitioner'spurchase. He saw the deli, looked at the property, but exhibit 5 a certified copy of the **[****4]** notice of sale inpaid little attention to the name on the property. After he the foreclosure proceeding, dated October 15, 2013,sued them, he paid more attention to the property.
which provides that "pursuant to a judgment of foreclosure and sale . . . the referee will sell at public **[*893]** He further testified that he went to the subject auction . . . on Thursday, February 21, 2013, at 2:30 p.m.,premises after the foreclosure and had both deeds at that the premises known as 1644 Broadway, Brooklyn, Newtime. He stated that he showed the individual who was at York 11207. The approximate amount of the liens isthe property copies of both deeds.
$474,131.29." This document contains the affidavits of On redirect, he testified that when he entered the store, service of all the junior lienholders including, but not he spoke to the cashier who was behind the counter. He limited to, Keesha M. Fields, Eric Michels, Moca Deli & told him he had purchased the property and that he was Grocery, Kenneth W. Richardson, as Referee, and Bruce the new owner. He stated that the young man was the F. Povan, Esq., as the guardian ad litem for Keesha M. son of the owner; he told him that they were not going to Fields.
pay the rent to him because many others have come to

On cross-examination, the witness acknowledged thatthe store claiming that they were the owners of the there were six payments but there was no record of thoseproperty too. Mr. Ali further stated that he showed him his payments. The respondent introduced into evidenceidentification, told him his name and produced his driver's respondent's exhibit A, **[***9]** a copy of the check madelicense to prove his identity. The son of the respondent payable to the owner, which was tendered by theresponded that he was not the owner, he did not believe respondent's attorney, Peter J. Pruzan, on August 17,him and would not take the deeds **[***11]** from him. After 2014. In addition, admitted into evidence as respondent'sthat, he stated that the young man would not talk to him, exhibit B were a letter and **[**817]** a copy of a check andso he put the copies of the deeds on the counter and left a letter dated September 9, 2014, showing an additionalthem. While in the store, he said that he read the beer sum of money was paid to the petitioner in the sum oflicense and the certificate of authority posted in the $1,400.
property to get the real name of the respondent.

The witness also testified that he owned 2057 FultonMr. Ali further testified that after the sale, the highest Street, which was very similar to the property in this case.bidder, his cousin, Mr. Abdul Salem Mohamed Mused, He testified that the sum of $3,500 is the monthly rent fortransferred the property to the petitioner on the date of his that subject premises. He indicated that the commercialclosing. At the end of redirect, the case was adjourned.
store in this case was located seven to eight blocks from On November 10, 2014, the petitioner continued on its this other property and was approximately 550 to 650case-in-chief. At that time, the attorney for the respondent square feet. He also affirmed that there was a lease for

conducted re-cross of Mr. Ali. Mr. Ali testified that he went to the **[****5]** store six to eight times. It was a corner store; it looked like a triangle. It was off Broadway and McDonald, 35 to 45 square feet in width. He acknowledged that the tenant was in possession and had an ongoing business. He stated that the tenant changed his sign from Mora Deli to Ammco. Afterwards, the petitioner rested on its case-in-chief.

On the trial date of November 10, 2014, the respondent commenced its case-in-chief. The respondent called, as his first witness, Bienvenido Jimenez, who **[***12]** stated that his principal place of business was located at 1644 Broadway, Brooklyn, New York, ground floor.

The respondent's exhibit C, the alleged lease for the subject premises, dated September 1, 2003, with a term commencing on October 1, 2003 and **[**818]** terminating on September 30, 2023 at an annual rent of $16,800, was marked by the court. The witness testified that the previous owner, Harold Willis, and **[*894]** himself were the parties to the lease and were the only parties that were present during the execution of the lease before the notary public on September 10, 2003. The witness testified that he and Mr. Willis signed the lease on September 30, 2003 notwithstanding the fact that the lease is dated September 1, 2003. The witness affirmed that the lease was a three-page document. Notwithstanding the lease, the sale of the business took place on September 29, 2003.

On voir dire of the document by the petitioner's attorney, Mr. Bienvenido Jimenez stated that he and Mr. Willis signed the document before the notary as is his custom when he signs legal documents. It was Mr. Willis who had the notary public write the lease. According to the witness, the notary's office was on Knickerbocker Avenue **[***13]** between Cornelia and Jefferson Avenues.

The respondent's exhibit D, which is a copy of a property search from the New York City Department of Finance, Office of the City Register, was admitted into evidence with no objection.

Additionally, respondent's exhibit E, also a search of the New York City Department of Finance, Office of the City Register, shows various mortgages and satisfactions of mortgages for the subject property and was admitted into evidence without any objection.

The witness further testified that he purchased the store and inventory on September 29, 2003. He produced respondent's exhibit G, a bill of sale, as evidence that the store and inventory were transferred from Demetro Torres, also known as Demetro Torres-Rodriguez, to Bienvenido Jimenez on September 29, 2003.

He stated that the parties had been engaged in discussions prior to the sale. He recognized the signature of Mr. Torres, the former owner of the business, since he signed the papers in his presence. Annexed to the document marked as respondent's exhibit G is a schedule of the bill of sale which included all of the machinery, fixtures, equipment, merchandise, stock, inventory and leasehold improvements to **[***14]** the property listed as 1 through 14. The witness stated the seller made no guarantees on the performance of the refrigerators and made no representations about the merchandise. He further stated that he paid $35,000 for the sale of the business; he gave part of the money up front and the balance was paid over time.

[*895] On voir dire, the petitioner's attorney objected to the introduction of a document based upon the fact that it was a photocopy but after further testimony, respondent's exhibit G was admitted into evidence with no objection.

Moreover, the witness testified and admitted into evidence various rent receipts in the **[****6]** form of canceled checks, front and back, from June 15, 2009 through and including December 17, 2012 as respondent's exhibit I. Commencing on or about April 1, 2005, Keesha Fields, the granddaughter of the original owner, signed and deposited these various checks on behalf of the owner. The witness stated that sometimes the rent was paid by check and sometimes in cash payments. He alleged that at the time, Mr. Willis did provide receipts but sometimes did not sign some of the receipts. He further claimed that he sometimes wrote the rent receipts and Keesha Fields, the **[***15]** former owner's granddaughter, would sign the receipts. So, some of these receipts are in his handwriting and some are in the handwriting of Mr. Willis and/or Keesha Fields.

After voir dire, the documents marked as respondent's **[**819]** exhibit H were admitted into evidence.

In addition, admitted into evidence as exhibit I are copies of 24 checks, as proof of rent payments for the store.

Mr. Jimenez further testified that on April 3, 2013, contrary to the contentions by the petitioner, he was not in the store and did not have any conversation with Mr. Ali. He claims that he was in the Dominican Republic and produced a United States passport, admitted into evidence as respondent's exhibit J, to substantiate that he was in the Dominican Republic from March 1, 2013 to May 16, 2013. The witness further testified that he was not served with any of the foreclosure papers and that the petitioner's member, Mohamed Ali, did not give or show the deeds to him.

On cross-examination, the witness was presented with respondent's exhibit C, the lease, specifically paragraph 43 of the rider. He claimed that he could not read the lease because he cannot read English. He said that he had no attorney when he signed **[***16]** the lease. It was Gustovo, Mr. Torres' attorney, who prepared the lease. Additionally, the witness specifically referred to paragraph 36 (d) where it was stated that the tenant would be responsible for 33½% of water effective 2007 and testified that he paid the charges from 2003 to 2007.

He claimed that he had paid the security but did not have a receipt for the security deposit. He acknowledged that the lease **[*896]** term was for 20 years and that there was no annual rent increases for 20 years. He also acknowledged that the lease had no insurance requirements and no payment of real estate taxes.

On redirect, the witness testified that at one point, this was an abandoned neighborhood. He stated that he had offered to buy the place from Mr. Willis to no avail. He stated that Mr. Torres owned the business and he was one of his employees. The business was in operation for 8 to 10 years. He stated that Mr. Torres solicited him to take over the business; it was not his idea to assume the business.

He further testified that Mr. Willis asked him to help him out with the water bill notwithstanding the provision in the lease regarding no water charge. When Mr. Torres and he went to the notary, it was **[***17]** the notary that prepared the lease; he did not know if the notary was an attorney or not. He did state that the notary gave him an explanation about the terms of the lease.

There was no re-cross and certainly no redirect.

This case was adjourned to December 16, 2014 for a continued trial.

On December 16, 2014, the respondent continued its case-in-chief. The respondent called, as a second witness, Hero Jimenez. He testified that he has worked at the deli since it first opened in 2003. He indicated that on April 8, 2013, he was at the cash register in the store. On that day, the owner, Mr. Jimenez, was in the Dominican Republic for a couple of days. He **[****7]** confirmed that the owner, or "someone," came into the property between 10:00 a.m. and 11:00 a.m. At first, he thought the new owner was a customer until he asked about the owner of the store. He said that he was told that he had bought the building and wanted them out of the store. He asked for proof of his ownership but he claimed that the owner never came back and while he was there, he was never shown any deed. He also asserts that the store was never served with any foreclosure papers.

[820]** The respondent's exhibits L1 through L3 are interior **[***18]** photographs of the store. He testified that he took the photographs before July 2014 and on the date of trial, the property looked the same. Many of the photographs show various angles of the subject premises.

On voir dire, the witness testified that the only change in the store was the outside valance which was installed four to seven **[*897]** years ago. All the photographs were admitted into evidence. The yellow sign that was in the photograph changed four to five years ago.

On cross-examination, the witness testified that the owner never showed him the deed and the property was substantially the same for the past five years.

The witness also testified that he is in the store from 7:30 a.m. to noon at the cash register and, his father takes over from noon to 1:00 p.m. His duties entail maintenance and control of the stock room, he purchases and receives all stock and merchandise, and cleans up the property. He is at the store seven days a week from 7:00 a.m. to 5:00 p.m. and makes a regular salary.

There was no re-cross and accordingly, no redirect.

At the close of his testimony, the respondent rested on its

case-in-chief.

On the same day, the petitioner began its rebuttal testimony. The petitioner **[***19]** called Mohamed Ali, once again. He repeated his prior testimony. He did state that after he closed, on the next day, he went to the premises to inform the respondent of his new ownership of the property. He claimed that he showed the young man at the cash register the deeds. The witness said that the young man shoved it back at him, and said that he did not want to accept the deeds. He left them on the counter and exited the store. He further stated that the young man said he did not want to talk to him. After this event, they had no further contact.

He claimed that he saw his father at the store, notwithstanding the claims by the father that he was in the Dominican Republic. He states that the man had black skin and was on the second floor. This individual is about 50 to 60 years old, and between 150 to 160 pounds. He stated that the young man told him that his father was not there but in the Dominican Republic.

He further stated, contrary to the contentions of the respondent, the sign with the new name of the business was not installed on the exterior of the premises until after he had come to court on September 16, 2014.

On cross-examination, the witness reiterated his former testimony. **[***20]**

On redirect, he rehashed the testimony about his actions prior to the purchase of the property. He further stated that **[*898]** after he obtained copies of the deeds, he went to the premises to "exhibit" them to the tenant but they were refused by the cashier. At the conclusion of his testimony, the trial ended.

On that same day, both of the attorneys presented their summations. The petitioner's attorney moved to strike the defense of a lease pursuant to Real Property Law § 291-c. The attorney asserted that the purported lease that is greater than three years constitutes a conveyance and that all conveyances must be recorded in accordance with article 9 of the Real Property Law. Due to statutory violations, the defense of the lease is invalid.

[**8]** The respondent did not elect to make any summation but wanted to submit a posttrial memorandum. The respondent agreed to order the transcripts of the trial. The parties agreed to hand deliver a copy of the transcript and any posttrial **[**821]** memorandum of law to chambers. As provided above, in a two-attorney stipulation after motion practice, the parties waived their rights to submit posttrial briefs and this case was submitted sub judice for a determination.

The court issued an order on the record **[***21]** that required the payment of use and occupancy pending a final determination.

Findings of Fact and Conclusions of Law

After a three-day bench trial, the court had ample opportunity to observe and assess the credibility of the witnesses based on their appearance, attitude, conduct, demeanor and temperament. After the assessment of the credibility of the witnesses and the documentary evidence submitted in support of their claims in the petition and the affirmative defenses in the respondent's answer, the court makes the following findings of fact and conclusions of law.

Contrary to the respondent's and petitioner's claims in this proceeding, there is conflicting authority about whether there is an absolute requirement that the deed be personally delivered to the respondent in a post foreclosure eviction proceeding. Although RPAPL 713 dictates that the notice to quit may be served in the like manner as the notice of petition and petition, the service of the certified or original deed may not be served in such a manner. For example, in this department, the Appellate Term made it clear in Home Loan Servs., Inc. v Moskowitz (31 Misc 3d 37, 920 NYS2d 569 [2011]), that service of the notice to quit with the accompanying certified referee's deed, **[*899]** by conspicuous place delivery, **[***22]** after four attempts at personal service, was insufficient as a matter of law to comply with the statutory requirements in RPAPL 713 (5) that the deed be "exhibited" to the respondents. (*See also Investec Bank PLC v Elite Intl. Fin., Ltd., 42 Misc 3d 1207[A], 984 NYS2d 632, 2014 NY Slip Op 50003[U] [Civ Ct, NY County 2014]* [granting a motion to dismiss by the respondent based on conspicuous place service of the referee's deed]; IFS Props. LLC v Willins, 41 Misc 3d 370, 970 NYS2d 865 [2013] [dismissing the petition for failure to exhibit the referee's deed but instead exhibited the

special/limited warranty deed]; *Rome v White, 82 Misc 2d 356, 369 NYS2d 609 [Civ Ct, NY County 1975]* [finding that service of a photostatic copy of the referee's deed was fatal]; *but see Hudson City Sav. Bank v Lorenz, 39 Misc 3d 538, 959 NYS2d 844 [Suffolk Dist Ct 2013]* [finding that nail and mail service of both the notice to quit and pleadings was deemed sufficient].)

For the purposes of this case, *U.S. Bank N.A. v Eichenholtz (37 Misc 3d 536, 950 NYS2d 475 [Yorktown Just Ct 2012])* determined that service of the deed and notice to quit by delivery to a person of suitable age and discretion was insufficient to meet the requirement of exhibiting deed pursuant to *RPAPL 713 (5)* (*Colony Mtge. Bankers v Mercado, 192 Misc 2d 704, 747 NYS2d 303 [Sup Ct, Westchester County 2002]* [holding substitute delivery insufficient to comply with the *RPAPL 713 (5)* requirement to exhibit the deed]).

Based on the rationale of District Court Judge Stephen Hackeling in *Hudson City Sav. Bank v Lorenz*, relying, inter alia, on Bergman, New York Mortgage Foreclosures (Matthew Bender & Co., Inc. 2006),

> "[t]o judicially determine that 'personal exhibition' is required as a precondition to commencing **[***23]** a summary proceeding would create a higher standard of service for the presentment of the deed than is needed for the notice of **[****9]** petition in an eviction proceeding. Such a requirement would enable foreclosed occupants to **[**822]** frustrate the court's judgment by simply making themselves unavailable for in hand service. Indeed, it appears illogical to conclude that foreclosed owners can be stripped of their ownership and equity of redemption via substituted service and yet cannot be removed from the premises unless all others owners [are] 'personally' exhibited a copy of the original deed" (*39 Misc 3d at 545* [citation omitted]).

[*900] He concludes that "[a]bsent language in the statute or its legislative history, a judicially created finding of a legislative determination to apply such a different standard to the service of these different documents is unsupportable. (*See* also *GRP/AG REO 2004-1, LLC v Friedman, 8 Misc 3d 317, 792 NYS2d 819 [Ramapo Just Ct 2005]*.)" (*Hudson City Sav. Bank v Lorenz, 39 Misc 3d at 545*.)

This court distinguishes the instant case from these above cases declining to accept substitute service under *RPAPL 735* as a basis for proper service of post foreclosure notices to quit in compliance with *RPAPL 713 (5)*. The facts here present ample justification to sustain service of the deeds by substituted service and this court declines to follow **[***24]** *U.S. Bank N.A. v Eichenholtz* and *Colony Mtge. Bankers v Mercado*, holding substitute delivery insufficient to comply with the *RPAPL 713 (5)* requirement to "exhibit" the deed.

Specifically, the court finds credible the testimony of Mohamed Ali, a real estate developer and property owner, that he properly "exhibited" a copy of the deed of foreclosure (referee's deed) and the subsequent deed from the highest bidder to the petitioner, to the respondent's employee, his son, Hero Jimenez, an authorized agent with apparent and actual authority to accept service on behalf of his father's business and his father individually. *CPLR 311 (a) (1)* as well as *RPAPL 735 (1) (b)* explicitly provide that a licensed process server may serve the officer, director, managing or general agent or cashier or assistant cashier or any other agent duly authorized by the corporation or the law in the State of New York (*see also Business Corporation Law §§ 306, 307*). In this case, although the petitioner did not produce the process server, the new owner, prior to the commencement of the proceeding, left copies of the deeds with Hero Jimenez at the cashier's counter. The court finds credible the testimony of Mr. Ali that Mr. Jimenez's son, Hero Jimenez, refused **[***25]** to give his name and refused to accept the deeds. Since Mr. Jimenez's son told him that there were others that claimed to have purchased the property since it was in foreclosure for years, his son's reactions would not be considered unreasonable; however, it was his obligation as the cashier and agent for the respondent, his father, to take the documents subject to verification. He did not believe that Mr. Ali was the new owner and his mistaken belief prompted him to not talk to Mr. Ali and not take the deeds.

Additionally, Mr. Ali affirmed that he obtained the name of the business operating at the subject premises from the license **[*901]** that is required to be displayed by any New York corporation authorized to dispense or serve food and/or alcoholic beverages. The court also finds this statement credible based on the fact that the exact name

of the store was misspelled in the foreclosure action. Mr. Ali needed the correct name of the respondent for the purposes of this special proceeding, where the name of the occupant in possession is essential to the recovery of possession.

The court did not find credible the testimony of the respondent's son that he was not "exhibited" the deeds. The witness, **[***26]** his son, is an interested party in this proceeding and his action demonstrates his inherent bias. He denied service to protect his father, the business and his own **[**823]** salary particularly since his father was out of the country on the date that Mr. Ali came to the property. Although the court did not find his testimony totally unbelievable, he was very defensive, somewhat evasive and not forthcoming with certain facts on the witness stand. The **[****10]** court can only presume that he was not cooperative with the petitioner because the petitioner told him outright that he "wanted them out."

In addition, the court compared the description of the individual stated in the affidavit of service by the process server and the respondent's son in court, and concludes that his son fits the description of the individual served by the licensed process server at the premises. The court observed his height, approximate weight, hair and skin color. The affidavit of service of both the notice of petition and petition, and the 10-day notice to quit explicitly states that the individual looked like the following: a male, brown skin, black hair, age 36 to 50, height five feet, four inches to five feet, seven inches **[***27]** and weighed approximately 100 to 130 pounds. The individual that appeared in the court closely and accurately fits the description of the individual described in the affidavits.

Of equal significance, he described all of his various duties that he performed at the subject premises on behalf of the business including, but not limited to, operating the cash register and the New York State Lottery machine, accepting receivables, paying for produce, and cleaning, when necessary, the exterior and interior of the demised premises. His job at the store and his relationship with the store owner lead this court to conclude that he was granted actual and apparent authority to accept service of process on behalf of his father and the corporation. Notwithstanding his refusal to accept the **[*902]** deeds, the acts by the new owner of leaving the deeds on the countertop constitute "exhibition" of the deeds to the respondent in conformity with *RPAPL 713 (5)*.

As to the testimony of Mr. Bienvenido Antonio Jimenez, the court finds that the passport admitted into evidence as respondent's exhibit J substantiates that he was not in the country on the dates alleged by the petitioner. The passport clearly demonstrates he was out **[***28]** of the country from March 1, 2013 to May 16, 2013. As the evidence shows in the record, the process server, Peter Stoute, license number 0971859, effectuated service of the notice of petition and petition on May 8, 2013; thus, his claim that he was out of the country at the time that the case was commenced is true.

It was proved by real evidence that the respondent was out of the country on the date of service of process. The petitioner should not be deprived of possession of the premises simply because he was unavailable to "exhibit" the certified deeds to Mr. Jimenez personally. To impose this burden on the petitioner would be onerous and unsupported by legislative history. (*Hudson City Sav. Bank v Lorenz.*)

[1] Therefore, in light of the above facts, the court finds that the deeds were exhibited to the respondent not only on the date that Mr. Ali came to the premises as the new owner and left them on the cashier counter after refusal by the owner's son to accept same, but also when the process server effectuated service of process on April 8, 2013 by substituted service on the identical individual, Hero Jimenez.

Notwithstanding the lack of proof of the certified mail receipts, the respondent **[***29]** did not object to the lack of this evidence and never raised that issue as a substantive defense in his pleading and therefore, any objection to the lack of this evidence is waived. The respondent merely denied receipt of the respective pleadings; he explicitly **[**824]** claimed no one at the premises was served as claimed in the affidavits of service. The answer states that there was no attempt to effectuate personal services at the premises, but the evidence completely refutes that claim. Not only did the evidence show that someone was actually served at the property, the above facts support the finding by the court that the individual served was the son of the store owner.

In sum, the deeds have been twice "exhibited" to the

respondent, and the court sustains **[****11]** service of process of all the pleadings.

[*903] Under New York law, an occupant who is not joined as a party to the foreclosure action is not bound by the judgment of foreclosure, and more significantly for this proceeding, the foreclosure action does not extinguish any leasehold interest of the occupant. *RPAPL* *1311* requires that the plaintiff in the foreclosure action join as a party defendant, any party "whose interest [has been] claimed to be **[***30]** subject and subordinate to the plaintiff's lien." Under the aforementioned statute, these necessary and vital parties include "[e]very person having an estate or interest in possession . . . in the property as tenant in fee, for life, by the curtesy, or for years," as well as all junior lienholders (*RPAPL 1311 [1]*, *[3]*). (For the other issues of law in the court's analysis of this particular provision of the statute see *1644 Broadway LLC v Jimenez [43 Misc 3d 1229(A), 993 NYS2d 645, 2014 NY Slip Op 50859(U), *9-10]*.)

The affidavits of service admitted into evidence as petitioner's exhibit 3, exhibit 4 and exhibit 5 prove that the deli in this proceeding, Moca Deli & Grocery, was served with the foreclosure summons and complaint, notice of pendency and notice of foreclosure in accordance with *RPAPL 1301*, *1303*, and *1331* and additionally, as shown in petitioner's exhibit 5, the respondent was also notified and served with the notice of sale of the subject premises on Thursday, February 21, 2013, at 2:30 p.m. in the Supreme Court of the State of New York in Kings County. As equally important, the individual served with the summons and complaint and notice of pendency, as described in the certified affidavits of service, matches the description of the individual that was served with the pleadings in this summary proceeding. **[***31]** The description accurately describes the respondent's son, the cashier and individual in the store on the date and time of service, Hero Jimenez.

[2] The evidence is irrefutable that the respondent was named and served in the foreclosure action and the law clearly provides that the entry of the judgment and foreclosure, under the facts and circumstances in this case, extinguishes any leasehold interest of any party in possession. Therefore, the petitioner having admitted certified evidence from the Kings County Clerk that the respondent was named and served in that foreclosure proper action, the lease agreement that was admitted into evidence as respondent's exhibit D is terminated as a matter of fact and law, is deemed void as against the good faith purchaser for value of these premises at the foreclosure sale, namely, the petitioner's predecessor in interest, Mr. Mused, and now the petitioner.

[*904] In addition, in the decision and order of this court, *Real Property Law § 291* mandates that in order for respondent's lease, which is in excess of three years, to be deemed valid against a good faith purchaser for value, the lease must have been recorded, thereby giving notice to all parties that the **[***32]** property is subject to their lien. In this instance, and as stated by the court in the aforementioned decision, the respondent never recorded this "sweetheart deal." **[**825]** Were this a valid conveyance, the respondent certainly should have recorded the lease not only to protect his interest but also to put the bank and all interested parties on notice that there was a lien that was in existence against the property. It is the opinion of this court that the bank had actual knowledge that the deli was in possession because its rights to possession were open and quite apparent since its name was clearly displayed on the exterior awning of the property. Based on that fact alone, and that the certificate of occupancy showed that there was a commercial occupant that probably had a lease in effect, the bank named and served the respondent with the underlying summons and complaint and notice of pendency. Therefore, in order for that lease to have been valid against any subsequent purchasers, it was required to be recorded, and since it was not recorded, it is void against the **[****12]** highest bidder and his successor, the petitioner.

As further described in the decision and order of this court, there is one **[***33]** exception: when a subsequent purchaser for value has actual notice of a tenancy, the failure to record the lease with a term of three or more years will neither impact the lease nor the tenancy. The rationale for such exception is that actual possession of the real estate is notice to all of the world of the existence of any right which the person in possession is able to establish. So, in this case, since the bank was on actual notice that the respondent was in possession, the bank named and served him in the foreclosure proceeding extinguishing the lease agreement as a matter of law. Accordingly, the court is not required to make any

determination of the authenticity of the lease.

The documentary evidence here also demonstrates, and was not contradicted by the respondent, that the name of the business is Moca Deli & Grocery and the court finds that the name of the business, as described in the affidavits of service here and the foreclosure action, as "Mora Deli and Groceries a/k/a John Doe No. 2," is a minor deviation in the spelling of the name of the respondent.

[*905] *CPLR 2001* maintains that "[a]t any stage of an action . . . the court may permit a mistake, omission, defect or irregularity . . . to **[***34]** be corrected, upon such terms as may be just." This section is supportive of the policy in this state that just determination shall be based on matters of substance, not form, and to the ultimate end of justice that slight mistakes or irregularities shall not invalidate proceedings.

As significant, there are other related provisions in the CPLR that should also be reviewed to this end. *CPLR 5512 (a)* and *5520* make express provision for similar relief in connection with omissions or defects in taking appeals. *CPLR 3026* expressly mandates that pleadings shall be liberally construed and that defects in pleadings shall be ignored if a substantial right of a party is not prejudiced. The reader should generally review the Practice Commentaries in the CPLR under these respective statutory provisions (*also see* Siegel, NY Prac § 6 *et seq.* [2d ed]). These statutes are routinely enforced by our courts and more recently, the Appellate Division, Second Department, reaffirmed the underlying policy of the Court in an election law case where the Court found that the Supreme Court properly amended a caption to designate an individual, who originally was denominated the respondent, as petitioner on the grounds that "[d]efects, mistakes, and **[***35]** irregularities in pleadings are to be ignored by the court absent a showing of **[**826]** prejudice." (*Matter of MacKay v Johnson, 54 AD3d 428, 430, 863 NYS2d 85 [2008]*; *Hoot Group, Inc. v Caplan, 9 AD3d 448, 779 NYS2d 922 [2004]* [finding in a case where the plaintiff properly commenced this action in the Supreme Court, Dutchess County and the summons and complaint incorrectly bore a "County Court, Dutchess County" caption, this ministerial error provided no basis for disturbing a money judgment granted for plaintiff by way of summary judgment].) "Defects, mistakes, and irregularities in pleadings are to be ignored by the court absent a showing of prejudice" (*First Wis. Trust Co. v Hakimian, 237 AD2d 249, 249, 654 NYS2d 808 [1997]* [where the defendant failed to demonstrate that he incurred any prejudice as a result of the incorrect caption on the summons and complaint. Indeed, he timely answered the complaint and opposed the motion for summary judgment]; *see CPLR 104, 2001, 2101 [f]; 3025 [c]; 3026*).

Pursuant to *CPLR 2001* and the above case authority, this court will ignore this slight misspelling in the name of the respondent (Mora Deli and Grocery in the Supreme Court action) and finds that the entity served in the Supreme Court action **[*906]** is the same entity that has been served in this summary **[****13]** proceeding, namely, Moca Deli & Grocery (see also the business check submitted by the respondent as exhibits A and I).

Notwithstanding **[***36]** the testimony by the petitioner as a real estate speculator and investor and some indicia of expertise on his behalf, the appropriate comparables for commercial rentals in the area were not presented to the court in proper form. Although the petitioner attempted to analogize a property that he owns at 2057 Fulton Street at a monthly rent of $3,500 to this property, there was no evidence presented to prove this claim. His testimony that this property is only seven to eight blocks away and was approximately the same size as the subject property is insufficient evidence to deem that testimony sufficient to warrant any payment in use and occupancy in excess of the amount that has been paid by the respondent during this tenancy. Accordingly, based on the facts above, the court determines that use and occupancy for the subject premises is the sum of $1,400 as described in the purported lease and rent payments. According to the certified copy of the deed, dated April 2, 2013, the petitioner is entitled to use and occupancy from April 3, 2013 through and including December 31, 2014 (21 months). The petitioner acknowledged that the respondent made four payments during the last 18 months for **[***37]** a total of $6,000. The respondent, on the other hand, did not produce any evidence of those payments. The respondent did produce copies, admitted into evidence as respondent's A and B, checks that were earmarked "August use and occupancy" and "September use and occupancy" in 2014. Therefore, the respondent's evidence did not substantiate the total payments, but the

landlord acknowledged payments in the sum of $6,000 and the court will grant the respondent credit for those payments.

Based on the above evidence and mathematics, the respondent owed the sum of $29,400 which represents the monthly use and occupancy in the sum of $1,400 from April 3, 2013 through and including December 31, 2014, less the payments of $6,000, which equals the sum of $23,400. Since the court has ordered the payment of use and occupancy posttrial and no motion being made to include posttrial use and occupancy, the court will only award monetary relief for this time frame.

[827]** For all the foregoing reasons, the court finds that the petitioner has sustained its burden of proof of proper service of process of the pleadings in these summary proceedings and the **[*907]** right to possession of the demised premises. Accordingly, **[***38]** the court grants the petitioner a final judgment of possession and a money judgment in the sum of $23,400, with the warrant to issue forthwith and the execution stayed six months for the respondent to wind down the business at the subject premises and relocate to an alternative property. As to the money judgment in the sum of $23,400, the court grants the respondent 30 days from the date of service of this decision and order with notice of entry to pay the judgment amount.

In the court's discretion, the respondent is granted the statutory six-month stay of the execution of the warrant of eviction based on the fact that the respondent has been a long-term tenant in occupancy of these premises from at least October 1, 2003 which was evidenced by the sales agreement between Demetro Torres and Mr. Bienvenido Jimenez, dated September 29, 2003. The respondent, based on his testimony, has invested an undisclosed amount into the subject property, and based on the fact that the respondent purchased the subject business for $32,500, the respondent should be given ample opportunity to wind down the business and to relocate.

As a condition to the stay of the execution of the warrant of eviction, **[***39]** the respondent is directed to pay the use and occupancy in the sum of $1,400 during the stay of the execution of the warrant of eviction. On the failure of the respondent to pay this sum, the warrant may **[****14]** execute after the simultaneous service of a notice of default to the respondent's attorney and a notice of eviction by the New York City Marshal.

End of Document

Hudson City Sav. Bank v. Lorenz

District Court of New York, Third District, Suffolk County

January 3, 2013, Decided

HULT 347-12

Reporter
39 Misc. 3d 538 *; 959 N.Y.S.2d 844 **; 2013 N.Y. Misc. LEXIS 513 ***; 2013 NY Slip Op 23040 ****; 2013 WL 512391

[**1]** Hudson City Savings Bank, Petitioner, v Robert Lorenz et al., Respondents.

Core Terms

notice, deed, mail, premises, referee's, exhibition, foreclosure, real property, eviction, resides, Quit, summary proceeding, dispossess, occupancy, requires

Case Summary

Overview

A judgment of foreclosure was entered which resulted in a sale and the execution of a Referee's Deed running to the benefit of the bank. The bank commenced the eviction proceeding after seven attempts at personal service at the foreclosed premises. The bank did not have notice of the entry of a "stay away" Order of Protection and that the foreclosed premises were no longer a husband's residence during the time of the service of the "Notice to Quit."

Outcome

The court granted the bank a judgment of possession and an immediate warrant of eviction.

LexisNexis® Headnotes

Family Law > ... > Property Distribution > Characterization > Marital Property

HN1[] **Characterization, Marital Property**

New York Domestic Relations Law recognizes a whole host of inchoate ownership/possession rights in the marital premises.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN2[] **Cohabitants & Spouses, Abuse, Endangerment & Neglect**

Orders of Protection are of limited duration and can be vacated or amended by the issuing Court for a myriad of reasons.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN3[] **Service of Process, Methods of Service**

Due Process in the context of civil litigation does not guarantee "in hand" service of process or even actual notice of suit. Premised thereon, the New York legislature has enacted alternative substitute manners of service of

process in both CPLR 308 and RPAPL 735, which have already been codified to pass constitutional muster, as they provide reasonable Notice of Suit. Unlike CPLR 308 which requires a due diligence standard of substituted service, RPAPL 735 requires a lesser standard of reasonable application.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN4[] **Service of Process, Methods of Service**

The relaxed standard of RPAPL 735, service may be utilized only in conjunction with the commencement of summary proceedings for the expedited recovery of real property.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN5[] **Service of Process, Methods of Service**

See RPAPL 735.

Real Property
Law > Financing > Foreclosures > General Overview

HN6[] **Financing, Foreclosures**

A condition precedent to a foreclosure sale purchaser's commencement of a "summary proceeding" to recover real property is the service of a ten day "Notice to Quit" and the exhibiting of a certified copy of the Referee's Deed. RPAPL 713(5) expressly provides that these documents must be served in the same manner as a Notice of Petition under RPAPL 735.

Real Property
Law > Financing > Foreclosures > General Overview

HN7[] **Financing, Foreclosures**

The prior production of a foreclosure Referee's Deed is a prerequisite to dispossessing a former owner which predates the enactment of New York's summary proceeding laws. Such an act was an integral component of a writ of assistance as presently defined in RPAPL 221. The requirement of exhibition of the foreclosure deed has been expressly included in RPAPL 713(5). The statute's requirements of exhibiting the Referee's Deed involves personal in hand service of an original deed. However, the statute contains no express requirement of personal exhibition of the Referee's Deed.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises

HN8[] **Tenant's Remedies & Rights, Possession of Premises**

See RPAPL 1305.

Governments > Courts > Judicial Precedent

HN9[] **Courts, Judicial Precedent**

The doctrine of stare decisis binds the District Court of New York, third District, to follow the rulings of its Appellate Term (9th & 10th Dists.); the Second Department Appellate Division and the New York Court of Appeals.

Headnotes/Syllabus

Headnotes

Landlord and Tenant — Summary Proceedings — Property Sold in Foreclosure — Standing to Defend

Real Property

Veronica Ebhuoma

against Eviction

1. In a summary proceeding by petitioner mortgagee to recover possession of real property after a foreclosure sale resulted in the execution of a referee's deed running to its benefit, respondent mortgagor retained standing to defend against eviction even though he did not actually reside at the premises when the proceeding was commenced due to an order of protection in favor of his wife, who resided there. The Domestic Relations Law recognizes a host of inchoate ownership and possessory rights in marital premises. Further, orders of protection are of limited duration and are often amended or vacated for myriad reasons. The order of protection did not change the character of respondent's interest in the premises with respect to petitioner. His interest was in conflict only with his wife's since, even with the order in effect, he could retake possession of the premises immediately upon her leaving it.

Landlord and Tenant — Summary Proceedings — Property Sold in Foreclosure — Nail and Mail Service

2. In a summary proceeding by petitioner mortgagee to recover possession of real property after a foreclosure sale resulted in the execution of a referee's deed running to its benefit, service of the notice to quit and, later, the notice of petition and petition were properly effected by affixing copies upon a conspicuous part of the premises sought to be recovered and mailing copies by certified and regular mail to respondent mortgagor at the premises, his last known residence, even though respondent did not reside there when the service took place. *RPAPL 713 (5)* provides that the notice to quit be served in the same manner as the notice of petition under *RPAPL 735*. *RPAPL 735* authorizes so-called nail and mail service when service by personal delivery at the premises sought to be recovered to a respondent or other person of suitable age and discretion cannot be effected, but copies need not be affixed to a respondent's actual residence if the petitioner does not have written notice of the respondent's new residence or place of employment. Petitioner made four attempts to personally deliver the notice to quit to respondent at the subject premises and seven attempts to so serve the notice and petition. Respondent left the premises due to an order of protection in favor of his wife, who also lived there, but petitioner did not have written notice of respondent's new residence or place of employment. Accordingly, petitioner properly resorted to nail and mail service and the subject premises were a proper place to mail process to respondent.

Landlord and Tenant — Summary Proceedings — Property Sold in Foreclosure — Exhibition of Deed

3. In a summary proceeding by petitioner mortgagee to recover possession of real property after a foreclosure sale resulted in the execution of a referee's deed running to its benefit, petitioner satisfied the condition precedent to the proceeding that the referee's deed be exhibited to respondent mortgagor when it attached a certified copy of the deed to the notice to quit that it properly served upon respondent by so-called nail and mail service under *RPAPL 735 (1) (a)*. *RPAPL 713 (5)* contains no express requirement of "personal" exhibition of the deed. To read that requirement into the statute would create a higher standard for exhibition of the deed than for service of the notice of petition, enabling foreclosed occupants to frustrate a court's judgment of foreclosure simply by making themselves unavailable for in-hand exhibition. Thus, a different standard for the service of the two documents was unsupportable and petitioner's exhibition of the deed by nail and mail service was proper.

Counsel: [*1]** *Cohn & Roth*, Mineola, for petitioner.

Grant Pudalov, P.C., Hicksville, for Robert Lorenz, respondent.

Judges: C. Stephen Hackeling, J.

Opinion by: C. Stephen Hackeling

Opinion

[*540] [845]** C. Stephen Hackeling, J.

The respondent Robert Lorenz has appeared individually[1] in the above captioned summary dispossession proceeding and agreed to a trial upon stipulated facts with the petitioner as follows:

[1] Madeleine Cooney and James Iona did not appear in this action and are in default.

The petitioner commenced a mortgage foreclosure proceeding in Suffolk County under index No. 38165 during 2009. The respondents appeared in the action. A judgment of foreclosure was entered which resulted in a sale and the execution of a referee's deed dated May 4, 2012 running to the benefit of petitioner/mortgagee Hudson City Savings Bank.

Prior to the issuance of the referee's deed, the respondent Madeleine J. Cooney obtained a "stay away" order of protection against respondent Robert Lorenz, her husband, on January 27, **[****2]** 2012. Said order resulted in Robert Lorenz having to move out and reside elsewhere thereafter.

On July 6, 2012, the petitioner served a "10 day Notice to Quit" together with a copy of a referee's **[***2]** deed, which included an attorney's certification that the deed was an exact duplicate of the referee's deed which was recorded with the County Clerk.[2] It also included a certification **[**846]** that Cohn & Roth were duly authorized agents of the petitioner for the purpose of bringing dispossess proceedings. Service on all the respondents was in the nature of "nail and regular mail and certified follow up mail" at the premises located at 16 Weathervane Way, Dix Hills, New York 11746. The "nail and mail" procedure was undertaken after four attempts at personal service at the residence.

Thereafter, the petitioner commenced the above captioned eviction proceeding via affixation together with regular and certified mail service on August 4, 2012 after seven attempts at personal service at the foreclosed premises.

The petitioner did not have actual or written notice of the entry of the "stay away" order of protection and that **[***3]** the foreclosed premises were no longer Robert Lorenz's residence during the time of the service of the "Notice to Quit" and the service of the above captioned petition.

[*541] Issue Presented

The issue presented by the parties for this court's resolution is whether substituted "nail and mail" service of a notice to quit, a referee's deed and a dispossess petition upon an individual who resides elsewhere by virtue of a court order meets the requirements of *RPAPL 713* and *735*?

Discussion

The court will summarily dispose of the threshold issue presented that the respondent Lorenz has no standing to defend this dispossess action as he is not a resident or occupant of the subject premises by virtue of his wife's order of protection. While technically accurate, such an order does not change the character of Lorenz's interest in the subject premises. Even if Lorenz was not a deed holder, *HN1*[↑] New York Domestic Relations Law recognizes a whole host of inchoate ownership/ possession rights in the marital premises. Additionally, *HN2*[↑] orders of protection are of limited duration and can be and often are vacated or amended by the issuing court for a myriad of reasons. Similarly, Lorenz's possession rights **[***4]** only conflict with his wife's and he could immediately and **[****3]** legally retake possession of the premises upon his wife's relocating from same.

Jurisdiction

Addressing the respondent's jurisdictional challenge, the court's analysis starts with the fundamental premise that *HN3*[↑] "Due Process" in the context of civil litigation does not guarantee "in hand" service of process or even actual notice of suit. (*See Bossuk v Steinberg, 58 NY2d 916, 447 NE2d 56, 460 NYS2d 509 [1983].*) Premised thereon, the New York Legislature has enacted alternative substitute manners of service of process in both section 308 of the Civil Practice Law and Rules and section 735 of the Real Property Actions and Proceedings Law, which have already been held to pass constitutional muster as they provide "reasonable Notice of Suit." (*See KMT E., LLC v Nischo, 31 Misc 3d 1215[A], 927 N.Y.S.2d 816, 2011 NY Slip Op 50682[U] [Suffolk Dist Ct 2011]*, citing *Raschel v Rish, 69 NY2d 694, 504 NE2d 389, 512 NYS2d 22 [1986].*) Unlike *CPLR 308* which requires "a

[2] It is the court's assumption that the parties stipulated that the certification of the referee's deed, which was exhibited, was an original. This stipulation obviated the need for the testimony of the process server who was present and ready to proceed at a traverse hearing.

due diligence" standard of substituted service, Section 735 requires a lesser standard of "reasonable application." (*See* Siegel, NY Prac § 575 [5th ed 2011].)

HN4[↑] The relaxed standard of section 735 service may be utilized only in conjunction with **[**847]** commencement of "summary proceedings" for the expedited recovery **[***5]** of real property. This section provides:

> HN5[↑] **[*542]** "Manner of service; filing; when service complete
>
> "1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, *if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door* of such premises; and in addition, within one day after such delivering to such suitable person or such affixing or placement, *by mailing to the respondent both by registered or certified mail and by regular first class mail,*
>
> "(a) if a natural person, as follows: at the property sought to be recovered, and if such property is not the place of residence of such person and if the petitioner shall have written information of the residence address of such person, at the last residence **[***6]** address as to which the petitioner has such information, or if the petitioner shall have no such information, but shall have written information of the place of business or employment of such person, to the last business or employment address as to which the petitioner has such information." (Emphasis added.)

HN6[↑] A condition precedent to a foreclosure sale purchaser's commencement of a "summary proceeding" to recover real property is the service of a 10-day "Notice to Quit" and the exhibiting of a certified copy of the referee's deed. Section 713 (5) of the RPAPL expressly **[****4]** provides that these documents must be served in the same manner as a notice of petition under section 735.

It is the respondent's contention that this petition is jurisdictionally defective by virtue of the fact that he was not a resident of the subject premises pursuant to the court order when nail and mail services were made of both the notice to quit and later the eviction petition. The court need not endeavor to undertake an exhaustive consideration of the import of a court order compelling a new residence and respondent to stay away from the premises. Unlike section 308 of the CPLR, **[*543]** "actual residence" is not a requirement **[***7]** of section 735 of the RPAPL if the petitioner does not have written notice of the respondent's new residence or place of employment. The justification for disregarding the actual residence criteria is that unlike plenary actions, "summary proceedings" involve expedited hearings concerning occupancy and possession rights of real property, i.e., a "res" as defined in the common-law legal vernacular. It is assumed that the legislature has deemed that posting of a petition challenging possession of a "res" at the site of the res, together with mailing same, gives adequate if not the best manner of notice of same if the respondent has not advised the petitioner of a new address in writing. (*See generally* Siegel, *supra* § 575.)

Exhibition of the Deed

The issue of the exhibition of the referee's deed is somewhat more problematic. HN7[↑] The prior production of a foreclosure **[**848]** referee's deed[3] is a prerequisite to dispossessing a former owner which predates the enactment of New York's summary proceeding laws. (*See* Lincoln Sav. Bank v Warren, 156 AD2d 510, 548 NYS2d 783 [2d Dept 1989].) Such an act was an integral component of a "writ of assistance" as presently defined in RPAPL 221. The requirement **[***8]** of exhibition of the foreclosure deed has been expressly included in section 713 (5) of the RPAPL. The

[3] The service of the notice to quit is not a prerequisite to obtaining a RPAPL 221 writ of assistance. (*See* ***Citibank, N.A. v Plagakis, 21 AD3d 393, 800 NYS2d 192 [2d Dept 2005]***.)

Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts of the Second Department has opined that the statute's requirement of "exhibiting" the referee's deed involves personal in hand service of an original deed. (*Home Loan Servs., Inc. v Moskowitz, 31 Misc 3d 37, 920 NYS2d 569, 2011 NY Slip Op 21051[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2011]*.) However, the statute contains no express requirement of "personal" exhibition of the referee's deed. (*See Novastar Mtge., Inc. v LaForge, 12 Misc 3d 1179[A], 824 NYS2d 764, 2006 NY Slip Op 51306[U] [Sup Ct, Greene County 2006]; Deutsche Bank Natl. Trust Co. v Resnik, 24 Misc 3d 1238[A], 899 NYS2d 58, 2009 NY Slip Op 51793[U] [Nassau Dist Ct 2009]*.) The justification given by the *Moskowitz* court for the enhanced service requirements was due to "the strong policy prohibiting unlawful evictions." (*31 Misc 3d at 38-39*, citing Bill Jacket, L 1981, ch 467.) The legislature enacted *RPAPL 1305*, which followed codification of the Federal Protecting Tenants at Foreclosure Act and granted tenants a plethora of rights such as the following: **[****5]**

> **[*544]** "*HN8*[↑] 2. **[***9]** Notwithstanding any other provision of law, a tenant of a unit not subject to rent control or rent stabilization shall have the right to remain in occupancy of the unit of the subject residential real property where he or she resides on the date of mailing of the notice required by subdivision three of this section for the greater of: (a) a period of ninety days from the date of the mailing of such notice; or (b) for the remainder of the lease term; provided that if a successor in interest who acquires title to such residential real property intends to occupy a single unit as his or her primary residence and the unit is not subject to a federal or state statutory system of subsidy or other federal or state statutory scheme, the successor may limit for one unit only, the tenant's right of occupancy to ninety days. . . .
>
> "3. Notwithstanding any other provision of law, and consistent with subdivision two of this section, a successor in interest of residential real property shall provide written notice to all tenants: (a) that they are entitled to remain in occupancy of such property for the remainder of the lease term, or a period of ninety days from the date of mailing of such notice, whichever **[***10]** is greater, on the same terms and conditions as were in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions as were in effect at the time of transfer of ownership of such property; and (b) of the name and address of the new owner. Any person or entity who or which becomes a successor in interest after the issuance of the ninety-day notice provided for in this subdivision, shall notify all tenants of its name and address and shall assume such interest **[**849]** subject to the right of the tenant to maintain possession as provided in this subdivision."

HN9[↑] The doctrine of stare decisis binds this court to follow the rulings of its Appellate Term (Ninth and Tenth Judicial Districts); the Appellate Division, Second Department; and the New York Court of Appeals. The respondent advances the argument that stare decisis requires it to adopt the Appellate Term decision in the absence of a Second Department or Court of Appeals decision. (*See Mountain View Coach Lines v Storms, 102 AD2d 663, 476 NYS2d 918 [2d Dept 1984]*.) While generally true, the legislature's intervention addressing the *Moskowitz* court's public policy concerns allows this court to **[***11]** determine that stare decisis does not bind it.

[*545] Clearly the legislature addressed the *Moskowitz* court's public policy concerns about unlawful evictions of bona fide tenants, and did so in a manner that did not call for "personal exhibition" of an original deed.[4] To judicially determine that "personal exhibition" is required as a precondition to commencing a summary proceeding would create a higher standard of service for the presentment of the deed than is needed for the notice of petition in an eviction proceeding. (*See* 3 *Bergman, New York Mortgage Foreclosures § 33.01 [2]* [Matthew Bender & Co., Inc. 2006].) Such a requirement would enable foreclosed occupants to frustrate the court's judgment by simply making themselves unavailable for in hand service. Indeed, it appears illogical to conclude that foreclosed owners can be stripped of their ownership and

[4] It is inconceivable that the *Moskowitz* court was seeking to include foreclosure former owners in its protective reach as they have already received a full measure of "Due Process" in their prior Supreme Court action.

equity of redemption via substituted **[****6]** service and yet cannot be removed from the premises unless all other owners can be "personally" exhibited a copy of the original deed. Absent language in the statute or its legislative history, a judicially created finding of a legislative determination to apply such a different standard to the **[***12]** service of these different documents is unsupportable. (*See also* *GRP/AG REO 2004-1, LLC v Friedman, 8 Misc 3d 317, 792 NYS2d 819, 2005 NY Slip Op 25117[U] (Ramapo J.Ct. 2005)*

Accordingly, the court grants the petitioner a judgment of possession and an immediate warrant of eviction.

End of Document

LANDLORD TENANT – WARRANTY OF HABITABILITY –
Real Property Law
RPL 235-b

There is an implied warranty of habitability asserted in non-payment proceedings and where the tenant is seeking an abatement of rent due to the conditions.

RPL 235-b provides in substance that in every rental for residential premises, the landlord shall be deemed to covenant a warrant that the premises (including areas used in common with others), are fit for human habitation and that the occupants shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

Warranty of habitability conditions cannot be waived or it would violate public policy.
An abatement will not be given if the landlord was never apprised of the problem or if the damage was caused by the tenant's actions.
Constructive eviction is a defense, not a counterclaim, and the tenant has moved out because the conditions are so bad.

Actual eviction is when a landlord, having no right to do so, takes possession of all or part of the premises to the exclusion of the tenant.

RPL 223-b – Retaliatory Eviction

1) Applies to residential premises except owner occupied dwellings with less than four units
2) No notice to quit may be served or summary proceeding commenced if retaliation for:

A complaint made to a government agency alleging

code violations or
The tenant has participated in a tenants organization

Heckman v Heckman

[*1] Heckman v Heckman 2017 NY Slip Op 27122 Decided on April 13, 2017 Appellate Term, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Miscellaneous Reports.

Decided on April 13, 2017
SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 9th and 10th JUDICIAL DISTRICTS
PRESENT: : ANTHONY MARANO, P.J., ANGELA G. IANNACCI, JERRY GARGUILO, JJ.
2015-2003 S C

Erica Heckman, as Trustee of the Catherine Mary Ann Heckman Trust-2014, Appellant,

against

Danielle Heckman, Respondent.

Carway & Flipse (Adrienne Flipse Hausch, Esq.), for appellant. Sunshine & Fernstein, LLP, for respondent (no brief filed).

Appeal from a decision of the District Court of Suffolk County, Second District (James F. Matthews, J.), dated May 8, 2015, deemed from a final judgment of the same court entered May 8, 2015 (see CPLR 5512 [a]). The final judgment, after a nonjury trial, dismissed the petition in a summary proceeding brought pursuant to, among other provisions, RPAPL 713 (7).

ORDERED that the final judgment is reversed, without costs, and the matter is remitted to the District Court for the entry of a final judgment awarding possession to petitioner.

Petitioner, the daughter of the deceased former owner of the subject premises and the trustee of a trust which the former owner had established and which is the current owner of the subject premises, brought this summary proceeding in her capacity as trustee, pursuant to, among other provisions, RPAPL 713 (7), alleging, insofar as relevant to this appeal, that occupant, the daughter-in-law of the deceased former owner, is a licensee whose license has been revoked. Following a nonjury trial, the District Court, finding that occupant is a licensee but that occupant had established the applicability of the so-called "familial exception" to eviction by summary proceeding, dismissed the petition.

A summary proceeding may be maintained only where authorized by statute (see Dulberg v Ebenhart, 68 AD2d 323, 328 [1979]). RPAPL 713 is the statutory source for summary proceedings where there is no landlord-tenant relationship between the parties (see Federal Natl. Mtge. Assn. v Simmons, 48 Misc 3d 24, 26 [App Term, 1st Dept 2015]). Insofar as is relevant here, RPAPL 713 (7) (b) permits the maintenance of a summary proceeding against persons who are in occupancy of real property pursuant to a license which has been revoked. Here, the District Court, while finding that occupant is a licensee, nevertheless refused to allow petitioner, in her capacity as trustee, to avail herself of this statutory remedy, invoking the so-called "familial exception." However, the relevant appellate case law provides no basis for a court, upon determining that an individual falls within a category of respondents that are subject to eviction pursuant to RPAPL 713 (or for that matter RPAPL 711), to dismiss the petition because of a "familial exception." Consequently, and for the reasons stated below, we reverse and grant a [*2]final judgment of possession to petitioner.

Analysis of this issue begins with Rosenstiel v Rosenstiel (20 AD2d 71, 76 [1963]), in which the Appellate Division held that a summary proceeding by a husband against a wife did not lie in a situation where "possession of the premises exists because of special rights incidental to the marriage contract and relationship," and not by virtue of a license or any other special arrangement with her husband. The court's determination that the respondent could not be found to be a licensee was based upon the existence of a support obligation (id. at 77), which obligation is recognized to extend to either spouse and to minor children (see generally Family Ct Act § 412). However, in situations in which such an obligation did not exist or had been fully satisfied, appellate courts have found the existence of a license and allowed the maintenance of summary proceedings by a husband against his wife (see Halaby v Halaby, 44 AD2d 495 [1974]; Tausik v Tausik, 11 AD2d 144 [1960], affd 9 NY2d 664 [1961]) and by a decedent's estate against the decedent's cohabitatant (see Young v Carruth, 89 AD2d 466

[1982]).

Despite these appellate cases, some lower courts began to rely on Rosenstiel, even in the absence of legal support obligations, to hold that a summary proceeding against an unmarried cohabitant did not lie because "unmarried occupants who reside together as husband and wife acquire some rights with respect to continued occupancy of the apartment they shared not unlike those acquired by a spouse" (Minors v Tyler, 137 Misc 2d 505, 507 [Civ Ct, Bronx County 1987]; but see Young, 89 AD2d at 469), thus creating what became known as the "familial exception" to the maintenance of a summary proceeding brought pursuant to RPAPL 713 (7).

In Braschi v Stahl Assoc. Co. (74 NY2d 201 [1989]), the Court of Appeals "interpreted a regulation [9 NYCRR 2204.6 (d)] prohibiting a landlord of a rent-controlled building from evicting a member of the deceased tenant's family' to include relationships which are not by blood or marriage" (Preferred Mut. Ins. Co. v Pine, 44 AD3d 636, 640 [2007]). Thereafter, some lower courts began to rely on Braschi to hold that individuals who fit within this expanded definition of "family" were protected, under Rosenstiel, from eviction by a "family" member via a summary proceeding (see e.g. Kakwani v Kakwani, 40 Misc 3d 627 [Nassau Dist Ct 2013]; Robinson v Holder, 24 Misc 3d 1232[A], 2009 NY Slip Op 51706[U] [Suffolk Dist Ct 2009]; Williams v Williams, 13 Misc 3d 395 [Civ Ct, NY County 2006]; DeJesus v Rodriguez, 196 Misc 2d 881 [Civ Ct, Richmond County 2003]; but see Piotrowski v Little, 30 Misc 3d 609 [Middletown City Ct 2010]; Drost v Hookey, 25 Misc 3d 210 [Suffolk Dist Ct 2009]; Lally v Fasano, 23 Misc 3d 938 [Nassau Dist Ct 2009]). However, since Rosenstiel does not provide a basis for the creation of a bar to the maintenance of summary proceedings in situations where there is no legal support obligation (see Young, 89 AD2d 466; Halaby, 44 AD2d 495; Tausik, 11 AD2d 144, affd 9 NY2d 664), there was no "familial exception" to expand pursuant to Braschi. In any event, Braschi merely expanded the statutory right to succeed to rent-controlled tenancies, which was already enjoyed by traditional family members, to individuals who were recognized as family members by society, and its holding has no bearing here (see Preferred Mut. Ins. Co., 44 AD3d at 640 ["The expansive definition of family set forth in Braschi . . . . has no bearing on interpreting different statutes with different statutory purposes" or on the interpretation of contractual provisions]).

In view of the foregoing, and in conformity with the decisions of the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts (see Pugliese v Pugliese, 51 Misc 3d

[*3]140[A], 2016 NY Slip Op 50614[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]; see also Odekhiran v Pearce, 54 Misc 3d 126[A], 2016 NY Slip Op 51779[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]) and with this court's own prior decisions implicitly holding that there is no bar to the maintenance of a licensee proceeding in situations in which the occupant can properly be held to be a licensee (see DiStasio v Macaluso, 47 Misc 3d 144[A], 2015 NY Slip Op 50694[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2015]; Rodriguez v Greco, 31 Misc 3d 136[A], 2011 NY Slip Op 50696[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2011]; cf. Sears v Okin, 6 Misc 3d 127[A], 2004 NY Slip Op 51691[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2004] [holding that a nonpayment proceeding was maintainable against a former domestic partner where the record supported the trial court's ruling that there was a landlord-tenant relationship between the petitioner and his former domestic partner]), while recognizing that there are familial relationships that will often prevent an occupant from fitting into a category of respondent subject to eviction pursuant to RPAPL 713 (or for that matter RPAPL 711), we explicitly hold that, where, as here, it is clear that an occupant does fit into one of the RPAPL 711 or 713 categories, there is no "familial exception" bar to the maintenance of a summary proceeding.

Accordingly, the final judgment is reversed and the matter is remitted to the District Court for the entry of a final judgment awarding possession to petitioner.

Marano, P.J., Iannacci and Garguilo, JJ., concur.

Decision Date: April 13, 2017

20 A.D.2d 71
Supreme Court, Appellate Division, First Department, New York.

Lewis S. ROSENSTIEL, Plaintiff,
v.
Susan L. ROSENSTIEL, Defendant. Annulment Action.
Susan L. ROSENSTIEL, Plaintiff,
v.
Lewis S. ROSENSTIEL, Defendant. Injunction Action.
Lewis S. ROSENSTIEL, Connecticut, Owner-Respondent,
v.
Susan L. ROSENSTIEL, New York, Licensee-Appellant.

Dec. 12, 1963.

Summary proceeding by owner to remove his alleged wife from premises formerly occupied as marital home. The Supreme Court, Special Term, Birdie Amsterdam, J., 39 Misc.2d 1044, 242 N.Y.S.2d 568, granted summary judgment for the plaintiff, and defendant appealed. The Supreme Court, Appellate Division, Eager, J., held that statute authorizing special proceeding to remove licensee from property is not applicable to authorize summary proceeding to evict wife whose rights as such have not been annulled or modified by decree or agreement.

Reversed; plaintiff's motion for summary judgment denied.

West Headnotes (9)

[1] **Judgment**
⇐ Hearing and determination

Pleading
⇐ Application and proceedings thereon

For purposes of disposition of motion to strike answer and defenses and to award plaintiff summary judgment, allegations of defendant were required to be accepted as true, and if there were bona fide issues with respect to truth of any of the allegations, trial was necessary.

Cases that cite this headnote

[2] **Forcible Entry and Detainer**
⇐ Inquisition or Other Summary Proceeding, and Review Thereof

Statute authorizing special proceeding to remove licensee from property is not applicable to authorize summary proceeding to evict wife whose rights as such have not been annulled or modified by decree or agreement. Real Property Actions and Proceedings Law, § 713, subd. 7.

10 Cases that cite this headnote

[3] **Forcible Entry and Detainer**
⇐ Statutory provisions

Intention of legislature, that "licensee" within summary proceeding for dispossession statute was to have the meaning generally ascribed thereto in law, would be assumed. Real Property Actions and Proceedings Law, § 713, subd. 7.

2 Cases that cite this headnote

[4] **Licenses**
⇐ Nature of license in general

Generally, in law of real property, "licensee" is one who enters upon or occupies lands by permission of owner or under personal, revocable, non-assignable privilege from owner without possessing any interest in the property and who becomes trespasser upon revocation of privilege.

18 Cases that cite this headnote

[5] **Husband and Wife**
⇐ Domicile

Husband and Wife
⇐ Support of family

As long as marriage relationship stands unabridged by decree or agreement, husband

must support and maintain wife, and maintenance of home or housing for wife is a basic and necessary element thereof.

10 Cases that cite this headnote

[6] **Licenses**
⇐ Mode of Creation

Wife is not "licensee" of husband in occupation of marital home.

2 Cases that cite this headnote

[7] **Divorce**
⇐ Injunction against interference with person or property

Where matrimonial action is pending between husband and wife, matter of occupancy and of possession of marital home should be determined by proper proceedings in the action. Domestic Relations Law, §§ 234, 236.

9 Cases that cite this headnote

[8] **Judgment**
⇐ Domestic relations

In view of issue as to validity of marriage of home owner and of surrounding circumstances, including failure of alleged wife of owner to seek temporary alimony or use of home pending owner's annulment action and fact that wife had vacated premises pursuant to order, summary judgment dismissing owner's summary dispossession proceeding against wife would not be granted. Real Property Actions and Proceedings Law, § 713, subd. 7.

4 Cases that cite this headnote

[9] **Judgment**
⇐ Hearing and determination

For purposes of disposition of motion to strike answer and defenses and to award plaintiff summary judgment, allegations of defendant were required to be accepted as true, and if there were bona fide issues with respect to truth of any of the allegations, trial way necessary.

Cases that cite this headnote

Attorneys and Law Firms

****396** ***71** Walter S. Beck, New York City, of counsel (Louis Nizer, Walter S. Beck and Simon Rose, New York City, on the brief, Phillips, Nizer, Benjamin, Krim & Ballon, New York City, attys.), for appellant.

Roy M. Cohn, New York City, of counsel (Joel S. Stern and John A. Vassallo, New York City, with him on the brief, Saxe, Bacon & O'Shea, New York City, attys.), for respondent.

Before BOTEIN, P. J., and BREITEL, RABIN, EAGER and STEUER, JJ.

Opinion

EAGER, Justice.

A summary proceeding, instituted by service of a copy of a precept and petition, was brought by the petitioner (plaintiff here in the consolidated action) in the Civil Court of the City of New York to remove his wife from the residence premises owned by him and formerly occupied by the parties as their marital home. The petition alleged that the plaintiff was the owner and in possession of the premises; that the plaintiff and respondent (defendant here) entered into a purported marriage; that the defendant entered into possession of the premises ***72** with the permission of the plaintiff; that the defendant has continuously refused and prevented the plaintiff, as owner, to have access to and possession of the said premises; that the plaintiff caused to be served upon defendant, as a licensee, a notice revoking her alleged license to occupy the premises and requiring her to quit and remove from said premises on a date ten ****397** days after service of the notice; and that the defendant holds over and continues in possession of said premises without permission of the plaintiff although the said notice to quit and remove had been served upon her according to law.

The defendant, by virtue of her denials and an affirmative defense, in her answer, alleged that she is the wife of the plaintiff; that the subject premises were occupied as their marital home; that in October, 1961, the plaintiff voluntarily abandoned the defendant, stating that he would never again return to that home; and that the statute does not authorize

the maintenance of a summary proceeding brought for the purpose of dispossessing a wife from the marital home.

By an order of Special Term, the summary proceeding was removed from the Civil Court and consolidated with an action brought by plaintiff in the Supreme Court for an annulment of the marriage. Thereafter, the plaintiff moved in the consolidated action to strike the answer of the defendant to the petition as sham and frivolous; for dismissal of the affirmative defenses; and for summary judgment to the plaintiff, pursuant to Rules 113 and 114 of the Rules of Civil Practice, for the relief demanded in the precept and petition. The position of the plaintiff was that subdivision 8 of section 1411 of article 83 of the Civil Practice Act (now Real Property Actions and Proceedings Law, § 713, subd. 7) expressly authorized the maintenance of this proceeding against the defendant as a 'licensee' whose license 'has been revoked'.

[1] In opposition to this motion for summary judgment, the defendant submits an affidavit that she and the plaintiff were married in the City of New York on November 30, 1956; that they thereafter resided in the subject premises; that in October, 1961, while they were still living there, the plaintiff, her husband, without just cause, left the house, announcing that he would never return. For the purposes of the disposition of this motion to strike the answer, to strike the defenses, and for summary judgment, these allegations of the defendant must be accepted as true. If there are bona fide issues with respect to the truth of any of the same, the motion must be denied and the matter remanded for trial.

*73 Special Term, relying principally on our decision in Tausik v. Tausik, 11 A.D.2d 144, 202 N.Y.S.2d 82, affd. 9 N.Y.2d 664, 212 N.Y.S.2d 76, 173 N.E.2d 51, held that the summary proceeding was authorized by the statute and that it was immaterial whether the defendant wife 'is validly married to the plaintiff-owner, whether the subject premises constituted their marital home during their cohabitation, [and] whether plaintiff rightfully or wrongfully abandoned defendant' (39 Misc.2d 1044, 1046, 242 N.Y.S.2d 568, 570).

Tausik v. Tausik (supra), is not however controlling here. There, the husband and wife had voluntarily separated and a written agreement signed by the wife was held to constitute 'a license to use the husband's property' (a cooperative apartment, the proprietary lease of which was **398 in his sole name); and we stated that '[a]ll that is decided here is that a valid agreement of license was made; and the license having expired, the husband may avail himself of the statutory remedy given by section 1411 subd. 8 of the Civil Practice Act, instead of suing in an action of ejectment.' (Tausik v. Tausik, supra, 11 A.D.2d at 145, 202 N.Y.S.2d at 83).

Here, as distinguished from the facts in Tausik v. Tausik (supra), the defendant wife, in her occupancy of the marital home, had not signed an agreement with reference to her use thereof. Lawfully in possession to begin with, as the wife of the plaintiff, she continued in possession, following alleged abandonment by her husband, not by virtue of any license or special arrangement with her husband, but solely on the basis of the existence of their marriage relationship.

[2] The question here is simply whether or not subdivision 8 (now subdivision 7 of section 713, Real Property Actions and Proceedings Law) may be applied to authorize the maintenance of summary proceedings to evict a wife whose rights as such have not been annulled or modified by any court decree or special agreement. Certainly, in view of the general legislative history and policy in the area of domestic relations, it would require a clear manifestation of legislative intent to render the statute so applicable. Statutory enactments purporting to cover certain rights and obligations of a husband and wife, one to the other, and the civil remedies available with respect thereto have been codified in the Domestic Relations Law, the CPLR and the Family Court Act, and thereby the general jurisdiction and responsibility in this field have been committed to the Supreme Court and the Family Court which are properly fitted and equipped to handle the myriad of problems which may arise out of a family relationship. The use and possession of the family home is so essentially a part of the jurisdiction and *74 responsibility of such courts in family matters that, had the legislature intended to confer upon other courts jurisdiction over such use and possession, it is clear that it would have made its intent in this regard plainly known. The construction of the statute to apply to authorize summary proceedings by a husband against his wife would confer jurisdiction upon the Civil Court of the City of New York and upon city courts, justices' courts and district courts throughout the State to remove one's family from the family residence. (See Real Property Actions and Proceedings Law, Section 701.) In fact, if the husband were so enabled to secure the physical removal of his wife and family from the marital home by means of a summary proceeding prosecuted by him, he could thereby in effect obtain in such courts of limited jurisdiction a separation from his wife without in any way submitting to the jurisdiction of the tribunals having general cognizance of family affairs. (See Marshall v. Marshall, 116 Misc. 249, 251, 190 N.Y.S. 318, 319; Cipperly v. Cipperly, 104 Misc. 434, 436, 172 N.Y.S. 351, 352; dissenting opinion, McNally, J., **399 Tausik v.

Tausik, supra, 11 A.D.2d p. 146, 202 N.Y.S.2d pp. 84–85.) It is inconceivable that the legislature would enact a law having this effect.

In any event, the legislative history underlying the adoption of subdivision 8, does clearly indicate that this particular enactment was not intended to apply under the circumstances here. Said subdivision was added by Chapter 273 of the Laws of 1951. It was enacted on the recommendation of the Law Revision Commission following a study and report by Professor Ralph D. Semerad of the Albany Law School (1951 Law Revision Commission Report, p. 55). The study noted that the statute as it then existed (sections 1410, 1411 of the Civil Practice Act) did not authorize summary relief in many cases where a landlord-tenant relationship did not exist and where, following an original entry upon premises which was lawful, the occupant later, on remaining in possession, became a trespasser. (Id., p. 61.) It was pointed out in the study that there 'are many cases in which trespassers had been held not to be subject to summary process under article 83, either because the entry was not unlawful or because none of the special statutory relationships existed between the party in possession and the party seeking to recover possession.' (idem, p. 61). The study then stated that 'Most of these cases tend to conform to a few patterns', namely, seven, which were reviewed, being designated as follows (idem, p. 61):

'(a) Licensee Holding Possession after License Revoked;

'(b) Lessee for Years of Life Tenant Who Dies Before End of Sub-Term;

*75 '(c) Defaulting Vendee in Possession;

'(d) Spouse of Family Holding Over after Death of Tenant or Owner;

'(e) Spouse Remaining on Premises after Separation or Divorce;

'(f) Tenant Holding Under Sublease Given in Violation of Statute or Covenant in Original Lease;

'(g) Lessee Removing Tenant Holding Over Under Prior Expired Lease.'

Upon basis of the said study and report of Professor Semerad, it is important to note that the Law Revision Commission, recommending the legislation, spoke only of the need for summary proceedings 'in the case of a recalcitrant licensee' and in the case of 'a subtenant of a life tenant, upon termination of the life tenancy'. (1951 Law Revision Commission Report, p. 50.) Thereupon, the legislation proposed by the Commission, namely, the additions of subdivisions 7 and 8 to section 1411 and subdivisions 1a and 5a to section 1414, purported by the wording thereof to cover only the two of the seven patterns or categories reviewed in the study by Professor Semerad, namely, (a) licensee holding possession after license revoked, and (b) lessee for years of life tenant **400 who dies before end of sub-term. The Commission's recommendation made no mention concerning the persons occupying the relationships mentioned in the five remaining categories of the study, in one of which is the alleged case at bar. So, it clearly appears that the legislation then adopted was only aimed at said categories (a–b); and that it was not intended thereby to generally cover persons included within the other five categories (c to g) of the Law Revision Commission study except, of course, as such persons, in a given situation, might also be licensees *per se*.

It is significant, too, that in Professor Semerad's study, under the category '(e) Spouse Remaining on Premises after Separation or Divorce', he does not refer to such a spouse as a 'licensee'. The following is his discussion under this category (1951 Law Revision Commission Report, p. 65):

'Commonly, realty occupied by married persons will be held in the name of one spouse. When the husband and wife separate, the spouse with the legal right to possession may be unable to induce the other to move from the house or apartment. The courts appear to be unswerving in their refusal to entertain summary proceedings against the refractory spouse, trespasser though he or she may be (citing Cipperly v. Cipperly, 104 Misc. 434, 172 N.Y.Supp. 351 (1918); Marshall v. Marshall, 116 Misc. 249, *76 190 N.Y.Supp. 318 (1921); Brooks v. Brooks, 146 Misc. 335, 261 N.Y.Supp. 211 (1932). In Mele v. Russo (168 Misc. 760, 9 N.Y.S.(2d) 203 (1938)), the same result was reached when the application was made by the grantee of the spouse owning the premises.'

Note, that the reference in the study is to the 'refractory spouse, trespasser though he or she may be'. Certainly, with this study before it, if the Law Revision Commission had intended to recommend that the proposed legislation cover the alleged 'refractory spouse' (as well as the persons coming within the other designated categories (c) to (g)), it would have so stated. Furthermore, the legislature, with this study before it, would have expressed itself more explicitly if it had

intended to broaden the law to include general coverage of cases against a spouse holding possession of property as such.

|3| |4| It is true that, in holding the statute applicable under the special circumstances present in Tausik v. Tausik (supra, 11 A.D.2d p. 144, 202 N.Y.S.2d p. 83), we stated that there is nothing therein which 'limits the term 'licensee' so as to exclude a spouse'. But it is to be assumed that the legislature, in the use of the particular term, intended that it have the meaning generally ascribed thereto in the law. (See McKinney's Cons.Laws of N. Y. Book 1, Statutes, § 232.) As generally understood in the law of real property, a licensee is one who enters **401 upon or occupies lands by permission, express or implied, of the owner, or under a personal, revocable, non-assignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission or privilege. (See Mumford v. Whitney, 15 Wend. 380, 393; Greenwood Lake & Port Jervis Railroad Co. v. New York & Greenwood Lake Railroad Co., 134 N.Y. 435, 440, 31 N.E. 874, 875; Trustees of Freeholders and Commonalty of Town of Southampton v. Jessup, 162 N.Y. 122, 126, 56 N.E. 538, 539; Clifford v. O'Neill, 12 App.Div. 17, 20, 42 N.Y.S. 607, 608; Caldwell v. Mitchell, Mun., (Johnson, J.) 158 N.Y.S.2d 868, 870; Clark, Covenants and Interests Running With Land [2d ed.], ch. II, pp. 13–64, and cases cited; Walsh, Law of Real Property [2d ed.], § 150; Tiffany, Real Property [3d ed.], §§ 829, 833.) This, as is fully apparent from the Law Revision Commission study and recommendation, is the sense in which the term was used in the statute.

|5| The occupation of the marital home by the wife as such is not, however, a possession existing by virtue of the 'permission' of her husband or under a 'personal' and 'revocable privilege' extended by him. On the contrary, her possession of the premises exists because of special rights incidental to the marriage contract and relationship. As long as the marriage relationship *77 stands, unabridged by court decree or valid agreement between the parties, the husband has the obligation by virtue thereof to support and maintain his wife. (See 16 N.Y.Jur., Domestic Relations, § 548, and cases cited.) The maintenance of a home or housing for the wife is a basic and necessary element of such support. (See 16 N.Y.Jur., Domestic Relations, § 657; Laumeier v. Laumeier, 237 N.Y. 357, 143 N.E. 219, 32 A.L.R. 654; Grandy v. Hadcock, 85 App.Div. 173, 83 N.Y.S. 90; Lanyon's Detective Agency v. Cochrane, City Ct., 199 N.Y.S. 482; Matter of Wickings' Estate, 162 Misc. 357, 362, 294 N.Y.S. 598, 603–604.)

In this connection, in McKaig v. McKaig (154 Misc. 257, 258–259, 276 N.Y.S. 829, 831), the court said:

> 'From the very beginnings of the common law the husband has been required to support and maintain his wife. This duty is based not on contract or statute but on status. Bacon's Abridgment [7th Ed. 1832], vol. I, Barone & Feme 713. A part of this duty is to provide a suitable home for her. It shocks one's sense of justice and of the fitness of things that a husband may in fulfillment of this duty provide such a home and later from willfulness or caprice or for no reason whatever turn her out of the home so established without providing a suitable place to live elsewhere. The law does not tolerate this.'

**402 |6| So, a wife, in her occupation of the marital home, would not ordinarily be considered to be using the same in the status of the 'licensee' of her husband. This statute is not applicable to her because she is not, in accordance with the wording thereof, a 'licensee' whose 'license' has 'expired' when she remains in occupation of the premises upon being abandoned by her husband; nor does she hold a 'license' which may be 'revoked' by a notice served upon her by her husband.

|7| |8| Finally, it should be emphasized that where a matrimonial action is pending between a husband and wife, then, ordinarily, the matter of the occupancy and possession of the marital home should be determined by proper proceedings in such action. (See McKinney's Cons.Laws of N.Y. Book 14, Domestic Relations Law, §§ 234, 236.) Here, notwithstanding there was pending between the parties an action for the annulment of their marriage, the defendant wife has not proceeded for temporary alimony, or as authorized by said sections for any order for use of the home pending the determination of the action; and she has now vacated the premises pursuant to the order below. Under the circumstances, and in view of the existence of the issue as to the validity of the marriage, we do not deem it proper to grant summary judgment to defendant dismissing the summary proceeding or to reinstate her into possession of the subject premises.

*78 The order appealed from should be reversed, on the law, with $20 costs and disbursements to the appellant, and plaintiff's motion for summary judgment denied, with $10 costs.

Order, entered on July 11, 1963, unanimously reversed, on the law, with $20 costs and disbursements to appellant and respondent's motion for summary judgment denied, with $10 costs. All concur except STEUER, J., who concurs in result in concurring opinion.

STEUER, Justice (concurring):

I concur in the result, namely, that by virtue of the proceedings the defendant wife is out of the apartment and she cannot get back in. Whether in this particular case this result is reached by affirming or reversing the order on the motion for summary judgment is of small moment.

However, I cannot go all the way with the reasons underlying the decision and expressed in the scholarly opinion of my brother Eager. A spouse does not have a right to occupy realty owned by the other spouse by virtue of the marital status, any more than a spouse has a right to the use of any other property owned by the other spouse. Granted that, absent other factors, there is a privilege for such use implied in that status. Of course, the courts are empowered to require the husband to support the wife and this includes providing a home for her. In most instances the practical and expedient method of requiring the husband to provide shelter is to allow the wife to occupy the premises previously used as the **403 marital home. But this is not to say that the court can compel the husband to allow the wife to use his property in that connection where other adequate provision is made for her.

Nor can I agree with the deductions drawn from the failure of the legislature to enact the more specific provisions recommended by Professor Semerad. It is just as reasonable, in my opinion, to conclude that the legislature acted upon the assumption that the situation created by the holdover of a spouse was already covered and that more specific provisions would only hamper the established procedures on provisions for support. The decision in Tausik v. Tausik, 11 A.D.2d 144, 202 N.Y.S.2d 82, while distinguishable in the particular aspect pointed out in the majority opinion, must of necessity rest on recognition of these basic principles.

All Citations

20 A.D.2d 71, 245 N.Y.S.2d 395

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74 N.Y.2d 201, 543 N.E.2d 49,
544 N.Y.S.2d 784, 58 USLW 2049

Miguel Braschi, Appellant,
v.
Stahl Associates Company, Respondent.

Court of Appeals of New York
Argued April 26, 1989;
decided July 6, 1989

CITE TITLE AS: Braschi v Stahl Assoc. Co.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered August 4, 1988, which (1) reversed, on the law, an order of the Supreme Court (Harold Baer, Jr., J.), entered in New York County, granting a motion by plaintiff for a preliminary injunction and enjoining defendant from evicting plaintiff from the apartment at which he currently resides, and (2) denied plaintiff's motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Braschi v Stahl Assocs. Co., 143 AD2d 44, reversed.

HEADNOTES

Landlord and Tenant
Rent Regulation
Noneviction Protection of Members of" Family" of Deceased Rent-Control Tenant--Permanent Life Partner of Deceased Tenant

([1]) In an action commenced by appellant, who resided with the now deceased tenant of record of a rent-controlled apartment as a permanent life partner, seeking to permanently enjoin his eviction and to declare his entitlement to occupy the apartment, an order of the Appellate Division, which reversed, on the law, a Supreme Court order granting appellant's motion and enjoining respondent landlord from evicting appellant until a court could determine whether he was a member of the deceased tenant's "family" within the meaning of New York City Rent and Eviction Regulations (9 NYCRR) § 2204.6 (d), and denied appellant's motion, is reversed, and the case is remitted to the Appellate Division for a consideration of undetermined questions. Appellant has demonstrated a likelihood of success on the merits, in that he is not excluded, as a matter of law, from seeking noneviction protection under 9 NYCRR 2204.6 (d).

Appeal
Matters Appealable
Appellate Division Order Denying Preliminary Injunction on Issue of Law Alone--Certified Question from Appellate Division

([2]) Although the determination of an application for a provisional remedy such as a preliminary injunction ordinarily involves the exercise of discretion, the denial of such relief presents a question of law reviewable by the Court of Appeals on an appeal brought pursuant to CPLR 5713 when the Appellate Division denies the relief on an issue of law alone, and makes clear that no question of fact or discretion entered into its decision. Accordingly, the Court of Appeals may entertain an appeal by permission of the Appellate Division on a certified question from an order of the Appellate Division which reversed, on the law, a Supreme Court order granting ***202** appellant's motion for a preliminary injunction enjoining respondent landlord from evicting appellant from a rent-controlled apartment, which he shared as a permanent life partner with the now deceased tenant of record, until a court could determine whether appellant was a member of the deceased tenant of record's "family " within the meaning of 9 NYCRR 2204.6 (d), and denied the motion; the Appellate Division's determination rested solely on its conclusion that as a matter of law appellant could not seek noneviction protection under 9 NYCRR 2204.6 (d) because of the absence of a "legally recognized" relationship with the deceased tenant.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

CLS, CPLR 5713.

NY Jur 2d, Landlord and Tenant, §575.

NY Real Prop Serv, § 74:227.

ANNOTATION REFERENCES

See Index to Annotations under Ejectment, Eviction, and Ouster.

POINTS OF COUNSEL

William B. Rubenstein, Owen Wincig, Nan D. Hunter and *Judith Levin* for appellant.

I. This court, the Legislature and the City Council have consistently used a functional approach to definitions of "family" in the housing context. *(City of White Plains v Ferraioli,* 34 NY2d 300; *Group House v Board of Zoning & Appeals,* 45 NY2d 266; *McMinn v Town of Oyster Bay,* 66 NY2d 544; *2-4 Realty Assocs. v Pittman,* 137 Misc 2d 898; *Zimmerman v Burton,* 107 Misc 2d 401; *420 E. 80th Co. v Chin,* 115 Misc 2d 195, 97 AD2d 390; *Avest Seventh Corp. v Ringelheim,* 116 Misc 2d 402; *New York City Hous. Auth. v Shephard,* 114 Misc 2d 873.) II. The New York State and United States Constitutions require that family be read functionally in this context so that similarly situated persons will be treated equally. *(People v Liberta,* 64 NY2d 152, 471 US 1020; *829 Seventh Ave. Co. v Reider,* 67 NY2d 930; *Matter of Robert Paul P.,* 63 NY2d 233; *Group House v Board of Zoning & Appeals,* 45 NY2d 266; *United States Dept. of Agric. v Moreno,* 413 US 528; *New Jersey Welfare Rights Org. v Cahill,* 411 US 619; *333 E. 53rd St. Assocs. v Mann,* 121 AD2d 289, 70 NY2d 660; *Dorsey v Stuyvesant Town Corp.,* 299 NY 512, 339 US 981; *Under 21 v City of New York,* 65 NY2d 344; *Matter of Esler v Walters,* 56 NY2d 306.) ***203**

Dean G. Yuzek, David A. Picon, Joan Walter and *Richard F. Czaja* for respondent.

I. Braschi has not demonstrated that, as the surviving gay life partner of a deceased tenant, he is a member of the decedent's family for the purposes of section 2204.6 (d) of the State's rent-control regulations and has a right to succeed to the decedent's rent-controlled apartment. *(Robinson v Jewett,* 116 NY 40; *McDonald v Fiss,* 54 AD2d 489; *East Four-Forty Assocs. v Ewell,* 138 Misc 2d 235; *Collins v Next W. Mgt.,* 137 Misc 2d 632; *Matter of Robert Paul P.,* 63 NY2d 233; *Bright Homes v Wright,* 8 NY2d 157; *Koppelman v O'Keeffe,* 140 Misc 2d 828; *Concourse Vil. v Bilotti,* 139 Misc 2d 886.) II. Section 2204.6 (d) is constitutional when construed using the traditional definition of the term "family". *(Bowen v Owens,* 476 US 340; *Western & S. Life Ins. Co. v Board of Equalization,* 451 US 648; *Matter of Doe v Coughlin,* 71 NY2d 48; *Elmwood-Utica Houses v Buffalo Sewer Auth.,* 65 NY2d 489; *Matter of Shattenkirk v Finnerty,* 97 AD2d 51; *Hodel v Indiana,* 452 US 314; *Poggi v City of New York,* 109 AD2d 265, 67 NY2d 794; *McGowan v Maryland,* 366 US 420; *Maresca v Cuomo,* 64 NY2d 242, 474 US 802; *Califano v Jobst,* 434 US 47.)

Peter L. Zimroth, Corporation Counsel (Leonard Koerner, Frederick P. Schaffer and *Phyllis Arnold* of counsel), for City of New York, *amicus curiae.*

Braschi should be found to be "some other member of the deceased tenant's family " within the meaning of the noneviction regulation and thus entitled to continue occupying his rent-controlled apartment. *(Matter of McNulty v New York State Tax Commn.,* 70 NY2d 788; *Matter of Jones v Berman,* 37 NY2d 42; *Matter of Capital Newspapers v Whalen,* 69 NY2d 246; *People v Eulo,* 63 NY2d 341; *2-4 Realty Assocs. v Pittman,* 137 Misc 2d 898; *Zimmerman v Burton,* 107 Misc 2d 401; *Dixon v Robbins,* 246 NY 169; *Williams v Williams,* 23 NY2d 592; *Matter of New York Life Ins. Co. v State Tax Commn.,* 80 AD2d 675, 55 NY2d 758.)

Arthur S. Leonard and *Jonathan Lang* for the Association of the Bar of the City of New York, *amicus curiae.*

Under principles enunciated by this court, section 2204.6 (d) cannot be construed to deny Mr. Braschi the legal protection afforded to a "member of the deceased tenant's family". *(McMinn v Town of Oyster Bay,* 66 NY2d 544; *Group House v Board of Zoning & Appeals,* 45 NY2d 266; *City of White Plains v Ferraioli,* 34 NY2d 300; *Matter of Robert Paul P.,* 63 NY2d 233.) ***204**

Ann Moynihan, Paris Baldacci, Douglass J. Seidman, Kalman Finkel, John E. Kirklin, Lynn M. Kelly, Mary Marsh Zulack and *Sandra R. Farber* for the Legal Aid Society of New York City, *amicus curiae.*

Protection of the rent-control laws is not limited to only those surviving cooccupants who are related by consanguinity or legal formality to the prime tenant, but includes functional family members as well. *(Sullivan v Brevard Assocs.,* 66 NY2d 489; *Matter of Herzog v Joy,* 74 AD2d 372, 53 NY2d 821; *829 Seventh Ave. Co. v Reider,* 67 NY2d 930; *2-4 Realty Assocs. v Pittman,* 137 Misc 2d 898; *McMinn v Town of Oyster Bay,* 66 NY2d 544; *Group House v Board of Zoning & Appeals,* 45 NY2d 266; *City of White Plains v Ferraioli,* 34 NY2d 300; *8200 Realty Corp. v Lindsay,* 27 NY2d 124.)

Christopher H. Lunding and *Jessica Sporn Tavakoli* for Community Action for Legal Services, Inc., *amicus curiae.*

The decision below should be reversed because the rent-control laws were intended to protect people who have lived permanently and continuously with a rent-controlled tenant as part of an integrated family unit. *(Sullivan v Brevard Assocs.,* 66 NY2d 489; *829 Seventh Ave. Co. v Reider,* 67 NY2d 930;

2-4 Realty Assocs. v Pittman, 137 Misc 2d 898; *Matter of Waitzman v McGoldrick*, 20 Misc 2d 1085; *Edwards v Habib*, 397 F2d 687; *Moore v East Cleveland*, 431 US 494; *McMinn v Town of Oyster Bay*, 66 NY2d 544; *City of White Plains v Ferraioli*, 34 NY2d 300; *Group House v Board of Zoning & Appeals*, 45 NY2d 266; *Matter of Adult Anonymous II*, 88 AD2d 30.)

William H. Gardner, *Thomas F. Coleman* and *Jay M. Kohorn* for Family Service America and others, *amici curiae*.

I. New York public policy requires flexibility in defining family. *(Town of Henrietta v Fairchild*, 53 Misc 2d 862; *Baddour v City of Long Beach*, 279 NY 167; *Group House v Board of Zoning & Appeals*, 45 NY2d 266; *City of White Plains v Ferraioli*, 34 NY2d 300; *Crane Neck Assn. v New York City/Long Is. County Servs. Group*, 61 NY2d 154; *McMinn v Town of Oyster Bay*, 66 NY2d 544; *New York City Hous. Auth. v Nesmith*, 100 Misc 2d 414; *New York City Hous. Auth. v Shephard*, 114 Misc 2d 873.) II. New York City demographics reflect great variety in the personal characteristics of city residents and tremendous diversity in their family relationships. III. By defining "family" in an inclusive manner within the rent-control context, this court can further legislative ***205** intent, advance public policy, remove constitutional doubts and avoid unjust consequences. *(Matter of Capital Newspapers v Whalen*, 69 NY2d 246; *Schultz v Boy Scouts*, 65 NY2d 189; *Kraut v Morgan & Brother Manhattan Stor. Co.*, 38 NY2d 445; *People v Groff*, 71 NY2d 101; *Matter of Lorie C.*, 49 NY2d 161; *Matter of Albano v Kirby*, 36 NY2d 526; *Matter of Pluto's Cave v State Liq. Auth.*, 68 NY2d 791; *Sullivan v Brevard Assocs.*, 66 NY2d 489; *Matter of Herzog v Joy*, 53 NY2d 821.) IV. A case-by-case approach, utilizing definitional criteria from zoning precedents, should be used to determine if nonrelatives are entitled to protection under the family survivor regulation. *(People v Hasse*, 57 Misc 2d 59; *Matter of Sabot v Lavine*, 42 NY2d 1068; *Matter of Park W. Vil. v Lewis*, 62 NY2d 431; *People v Harkins*, 49 Misc 2d 673; *Smith v Organization of Foster Families*, 431 US 816; *Matter of Spenser v Spenser*, 128 Misc 2d 298; *Morone v Morone*, 50 NY2d 481; *Brown v County of San Joaquin*, 601 F Supp 653; *Matter of Lorie C.*, 49 NY2d 161; *Roberts v United States Jaycees*, 468 US 609.)

James Briscoe West for the Gay Men's Health Crisis, Inc., and others, *amici curiae*.

I. AIDS continues to have a devastating impact upon the New York City housing market. II. The new category of eviction proceedings involving deaths from AIDS illustrates the scope of the problem. *(Yorkshire Towers Co. v Harpster*, 134 Misc 2d 384; *Collins v Next W. Mgt.*, 137 Misc 2d 632.)

Steven A. Rosen and *Paula L. Ettelbrick* for Lambda Legal Defense and Education Fund, Inc., *amicus curiae*.

I. The I.A.S. court correctly held that the New York Constitution requires recognition that plaintiff is a "member of the deceased tenant's family " entitled to continued occupancy of his rent-controlled apartment. *(City of White Plains v Ferraioli*, 34 NY2d 300; *Group House v Board of Zoning & Appeals*, 45 NY2d 266; *McMinn v Town of Oyster Bay*, 66 NY2d 544; *Zimmerman v Burton*, 107 Misc 2d 401; *Matter of Robert Paul P.*, 63 NY2d 233.) II. The public policy of the State and City of New York, as determined by their respective Legislatures, supports plaintiff's right to continued occupancy. *(Albemarle Paper Co. v Moody*, 422 US 405.)

OPINION OF THE COURT

Titone, J.

In this dispute over occupancy rights to a rent-controlled ***206** apartment, the central question to be resolved on this request for preliminary injunctive relief *(see*, CPLR 6301) is whether appellant has demonstrated a likelihood of success on the merits *(see, Grant Co. v Srogi*, 52 NY2d 496, 517) by showing that, as a matter of law, he is entitled to seek protection from eviction under New York City Rent and Eviction Regulations 9 NYCRR 2204.6 (d) (formerly New York City Rent and Eviction Regulations § 56 [d]). That regulation provides that upon the death of a rent-control tenant, the landlord may not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family* who has been living with the tenant" (emphasis supplied). Resolution of this question requires this court to determine the meaning of the term "family" as it is used in this context.

I.

Appellant, Miguel Braschi, was living with Leslie Blanchard in a rent-controlled apartment located at 405 East 54th Street from the summer of 1975 until Blanchard's death in September of 1986. In November of 1986, respondent, Stahl Associates Company, the owner of the apartment building, served a notice to cure on appellant contending that he was a mere licensee with no right to occupy the apartment since only Blanchard was the tenant of record. In December of 1986 respondent served appellant with a notice to terminate informing appellant that he had one month to vacate the apartment and that, if the apartment was not vacated, respondent would commence summary proceedings to evict him.

Appellant then initiated an action seeking a permanent injunction and a declaration of entitlement to occupy the apartment. By order to show cause appellant then moved for a preliminary injunction, pendente lite, enjoining respondent from evicting him until a court could determine whether he was a member of Blanchard's family within the meaning of 9 NYCRR 2204.6 (d). After examining the nature of the relationship between the two men, Supreme Court concluded that appellant was a "family member" within the meaning of the regulation and, accordingly, that a preliminary injunction should be issued. The court based this decision on its finding that the long-term interdependent nature of the 10-year relationship between appellant and Blanchard "fulfills any definitional criteria of the term 'family.' "

([1]) The Appellate Division reversed, concluding that ***207** section 2204.6 (d) provides noneviction protection only to "family members within traditional, legally recognized familial relationships" (143 AD2d 44, 45). Since appellant's and Blanchard's relationship was not one given formal recognition by the law, the court held that appellant could not seek the protection of the noneviction ordinance. After denying the motion for preliminary injunctive relief, the Appellate Division granted leave to appeal to this court, certifying the following question of law: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" We now reverse.

II.

([2]) As a threshold matter, although the determination of an application for a provisional remedy such as a preliminary injunction ordinarily involves the exercise of discretion, the denial of such relief presents a question of law reviewable by this court on an appeal brought pursuant to CPLR 5713 when " the Appellate Division denies [the] relief on an issue of law alone, and makes clear that no question of fact or discretion entered into its decision " *(Herzog Bros. Trucking v State Tax Commn.*, 69 NY2d 536, 540-541, *vacated* 487 US --, 108 S Ct 2861, *on remand* 72 NY2d 720; *see,* Cohen and Karger, Powers of the New York Court of Appeals § 88, at 377 [rev ed]; *Public Adm'r of County of N. Y. v Royal Bank,* 19 NY2d 127, 129-130). Here, the Appellate Division's determination rested solely on its conclusion that as a matter of law appellant could not seek noneviction protection because of the absence of a "legally recognized" relationship with Blanchard. Consequently, appellant's appeal may be entertained, and we may review the central question presented: whether, on his motion for a preliminary injunction, appellant failed to establish, as a matter of law, the requisite clear likelihood of success on the merits of his claim to the protection from eviction provided by section 2204.6 (d).

III.

It is fundamental that in construing the words of a statute "[t]he legislative intent is the great and controlling principle" *(People v Ryan,* 274 NY 149, 152; *see, Ferres v City of New Rochelle,* 68 NY2d 446, 451; *Matter of Petterson v Daystrom Corp.*, 17 NY2d 32, 38). Indeed, "the general purpose is a more important aid to the meaning than any rule which grammar ***208** or formal logic may lay down" *(United States v Whitridge,* 197 US 135, 143). Statutes are ordinarily interpreted so as to avoid objectionable consequences and to prevent hardship or injustice *(see, Zappone v Home Ins. Co.,* 55 NY2d 131; *Matter of Petterson v Daystrom Corp.*, 17 NY2d 32, 38, *supra;* McKinney's Cons Laws of NY, Book 1, Statutes §§ 141, 143, 146). Hence, where doubt exists as to the meaning of a term, and a choice between two constructions is afforded, the consequences that may result from the different interpretations should be considered *(see, Matter of Town Smithtown v Moore,* 11 NY2d 238, 244; *People v Ryan,* 274 NY 149, 152, *supra).* In addition, since rent-control laws are remedial in nature and designed to promote the public good, their provisions should be interpreted broadly to effectuate their purposes *(see, Matter of Park W. Vil. v Lewis,* 62 NY2d 431, 436-437; *Matter of Sommer v New York City Conciliation & Appeals Bd.*, 93 AD2d 481, *affd* 61 NY2d 973; McKinney's Cons Law of NY, Book 1, Statutes § 341). Finally, where a problem as to the meaning of a given term arises, a court's role is not to delve into the minds of legislators, but rather to effectuate the statute by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature *(see,* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum L Rev 527, 538-540).

The present dispute arises because the term "family" is not defined in the rent-control code and the legislative history is devoid of any specific reference to the noneviction provision. All that is known is the legislative purpose underlying the enactment of the rent-control laws as a whole.

Rent control was enacted to address a "serious public emergency" created by " an acute shortage in dwellings," which resulted in "speculative, unwarranted and abnormal increases in rents" (L 1946 ch 274, codified, as amended, at McKinney's Uncons Laws of NY § 8581 *et seq).* These measures were designed to regulate and control the housing market so as to "prevent exactions of unjust,

unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health * * * [and] to prevent uncertainty, hardship and dislocation" *(id.)*. Although initially designed as an emergency measure to alleviate the housing shortage attributable to the end of World War II, "a serious public emergency continues to exist in the housing of a considerable number of persons" *(id.)*. Consequently, the Legislature has found it necessary to continually reenact the rentcontrol ***209** laws, thereby providing continued protection to tenants.

To accomplish its goals, the Legislature recognized that not only would rents have to be controlled, but that evictions would have to be regulated and controlled as well *(id.)*. Hence, section 2204.6 of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6), which authorizes the issuance of a certificate for the eviction of persons occupying a rent-controlled apartment after the death of the named tenant, provides, in subdivision (d), noneviction protection to those occupants who are either the "surviving spouse of the deceased tenant or *some other member of the deceased tenant's family* who has been living with the tenant [of record]" (emphasis supplied). The manifest intent of this section is to restrict the landowners' ability to evict a narrow class of occupants other than the tenant of record. The question presented here concerns the scope of the protections provided. Juxtaposed against this intent favoring the protection of tenants, is the over-all objective of a gradual " transition from regulation to a normal market of free bargaining between landlord and tenant" *(see, e.g.,* Administrative Code of City of New York § 26-401). One way in which this goal is to be achieved is "vacancy decontrol, " which automatically makes rent-control units subject to the less rigorous provisions of rent stabilization upon the termination of the rent-control tenancy (9 NYCRR 2520.11 [a]; 2521.1 [a] [1]).

Emphasizing the latter objective, respondent argues that the term "family member" as used in 9 NYCRR 2204.6 (d) should be construed, consistent with this State's intestacy laws, to mean relationships of blood, consanguinity and adoption in order to effectuate the over-all goal of orderly succession to real property. Under this interpretation, only those entitled to inherit under the laws of intestacy would be afforded noneviction protection *(see,* EPTL 4-1.1). Further, as did the Appellate Division, respondent relies on our decision in *Matter of Robert Paul P.* (63 NY2d 233), arguing that since the relationship between appellant and Blanchard has not been accorded legal status by the Legislature, it is not entitled to the protections of section 2204.6 (d), which, according to the Appellate Division, applies only to "family members within traditional, legally recognized familial relationships" (143 AD2d 44, 45). Finally, respondent contends that our construction of the term " family member" should be guided by the recently enacted noneviction provision of the Rent Stabilization Code (***210** 9 NYCRR 2523.5 [a], [b] [1], [2]), which was passed in response to our decision in *Sullivan v Brevard Assocs.* (66 NY2d 489), and specifically enumerates the individuals who are entitled to noneviction protection under the listed circumstances (9 NYCRR 2520.6 [o]).

However, as we have continually noted, the rent-stabilization system is different from the rent-control system in that the former is a less onerous burden on the property owner, and thus the provisions of one cannot simply be imported into the other *(Sullivan v Brevard Assocs.,* 66 NY2d 489, 494, *supra; see, 8200 Realty Corp. v Lindsay,* 27 NY2d 124, 136-137). Respondent's reliance on *Matter of Robert Paul P. (supra)* is also misplaced, since that case, which held that one adult cannot adopt another where none of the incidents of a filial relationship is evidenced or even remotely intended, was based solely on the purposes of the adoption laws *(see,* Domestic Relations Law § 110) and has no bearing on the proper interpretation of a provision in the rent-control laws.

We also reject respondent's argument that the purpose of the noneviction provision of the rent-control laws is to control the orderly succession to real property in a manner similar to that which occurs under our State's intestacy laws (EPTL 4-1.1, 4-1.2). The noneviction provision does not concern succession to real property but rather is a means of protecting a certain class of occupants from the sudden loss of their homes. The regulation does not create an alienable property right that could be sold, assigned or otherwise disposed of and, hence, need not be construed as coextensive with the intestacy laws. Moreover, such a construction would be inconsistent with the purposes of the rent-control system as a whole, since it would afford protection to distant blood relatives who actually had but a superficial relationship with the deceased tenant while denying that protection to unmarried lifetime partners.

Finally, the dissent's reliance on *Hudson View Props. v Weiss* (59 NY2d 733) is misplaced. In that case we permitted the eviction of an unrelated occupant from a rent-controlled apartment under a lease explicitly restricting occupancy to

"immediate family". However, the tenant in *Hudson View* conceded "that an individual not part of her immediate family" occupied the apartment *(id.,* at 735), and, thus, the sole question before us was whether enforcement of the lease provision was violative of the State or City Human Rights ***211** Law. Whether respondent tenant was, in fact, an "immediate family" member was neither specifically addressed nor implicitly answered *(see,* dissenting opn, at 220).

Contrary to all of these arguments, we conclude that the term family, as used in 9 NYCRR 2204.6 (d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units *(see also, 829 Seventh Ave. Co. v Reider,* 67 NY2d 930, 931-932 [interpreting 9 NYCRR 2204.6 (d)'s additional "living with" requirement to mean living with the named tenant "in a *family unit,* which in turn connotes an arrangement, whatever its duration, bearing some indicia of permanence or continuity" (emphasis supplied)]). [1] In fact, Webster's Dictionary defines "family" *first* as " a group of people united by certain convictions or common affiliation " (Webster's Ninth New Collegiate Dictionary 448 [1984]; *see,* Ballantine's Law Dictionary 456 [3d ed 1969] ["family" defined as "(p)rimarily, the collective body of persons who live in one house and under one head or management "]; Black's Law Dictionary 543 [Special Deluxe 5th ed 1979]). Hence, it is reasonable to conclude that, in using the term "family," the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics. [2] Appellant Braschi should therefore be afforded the opportunity to prove that he and Blanchard had such a household. ***212**

This definition of "family" is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction. [3] This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates *(see,* Real Property Law § 235-f; *Yorkshire Towers Co. v Harpster,* 134 Misc 2d 384) or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death. [4]

The determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the ***213** reliance placed upon one another for daily family services *(see, e.g., Athineos v Thayer,* NYLJ, Mar. 25, 1987, at 14, col 4 [Civ Ct, Kings County], *affd* NYLJ, Feb. 9, 1988, at 15, col 4 [App Term, 2d Dept] [orphan never formally adopted but lived in family home for 34 years]; *2-4 Realty Assocs. v Pittman,* 137 Misc 2d 898, 902 [two men living in a "father-son " relationship for 25 years]; *Zimmerman v Burton,* 107 Misc 2d 401, 404 [unmarried heterosexual life partner]; *Rutar Co. v Yoshito, No. 53042/79 [Civ Ct, NY County] [unmarried heterosexual life partner]; Gelman v Castaneda,* NYLJ, Oct. 22, 1986, at 13, col 1 [Civ Ct, NY County] [male life partners]). These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control. Appellant's situation provides an example of how the rule should be applied.

Appellant and Blanchard lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men's families were aware of the nature of the relationship, and they regularly visited each other's families and attended family functions together, as a couple. Even today, appellant continues to maintain a relationship with Blanchard's niece, who considers him an uncle.

In addition to their interwoven social lives, appellant clearly considered the apartment his home. He lists the apartment as his address on his driver's license and passport, and receives all his mail at the apartment address. Moreover, appellant's tenancy was known to the building's superintendent and doormen, who viewed the two men as a couple.

Financially, the two men shared all obligations including a household budget. The two were authorized signatories of three safe-deposit boxes, they maintained joint checking and savings accounts, and joint credit cards. In fact, rent was often paid with a check from their joint checking account. Additionally, Blanchard executed a power of attorney in appellant's favor so that appellant could make necessary decisions--financial, medical and personal--for him during his illness. Finally, appellant was the named beneficiary of Blanchard's life insurance policy, as well as the primary legatee and coexecutor of Blanchard's estate. Hence, a court examining these facts could reasonably conclude that these men were much more than mere roommates. ***214**

Inasmuch as this case is before us on a certified question, we conclude only that appellant has demonstrated a likelihood of success on the merits, in that he is not excluded, as a matter of law, from seeking noneviction protection. Since all remaining issues are beyond this court's scope of review, we remit this case to the Appellate Division so that it may exercise its discretionary powers in accordance with this decision.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to that court for a consideration of undetermined questions. The certified question should be answered in the negative.

Bellacosa, J.

(Concurring).

My vote to reverse and remit rests on a narrower view of what must be decided in this case than the plurality and dissenting opinions deem necessary.

The issue is solely whether petitioner qualifies as a member of a "family", as that generic and broadly embracive word is used in the anti-eviction regulation of the rent-control apparatus. The particular anti-eviction public policy enactment is fulfilled by affording the remedial protection to this petitioner on the facts advanced on this record at this preliminary injunction stage. The competing public policy of eventually restoring rent-controlled apartments to decontrol, to stabilization and even to arm's length market relationships is eclipsed in this instance, in my view, by the more pertinently expressed and clearly applicable anti-eviction policy.

Courts, in circumstances as are presented here where legislative intent is completely indecipherable (Division of Housing and Community Renewal, the agency charged with administering the policy, is equally silent in this case and on this issue), are not empowered or expected to expand or to constrict the meaning of the legislatively chosen word "family," which could have been and still can be qualified or defined by the duly constituted enacting body in satisfying its separate branch responsibility and prerogative. Construing a regulation does not allow substitution of judicial views or preferences for those of the enacting body when the latter either fails or is unable or deliberately refuses to specify criteria or definitional limits for its selected umbrella word, "family", especially where the societal, governmental, policy and fiscal implications are so sweeping (Breitel, *The Lawmakers*, 65 Colum L Rev 749, 767-771; *see also, Boreali v Axelrod*, 71 NY2d 1, 11-12). For then, "the judicial function expands beyond the ***215** molecular movements, in Holmes' figure, into the molar" (Breitel, *op. cit.*, at 770).

The plurality opinion favors the petitioner's side by invoking the nomenclature of "nuclear"/"normal"/"genuine" family versus the "traditional "/"legally recognizable" family selected by the dissenting opinion in favor of the landlord. I eschew both polar camps because I see no valid reason for deciding so broadly; indeed, there are cogent reasons not to yaw towards either end of the spectrum.

The application of the governing word and statute to reach a decision in this case can be accomplished on a narrow and legitimate jurisprudential track. The enacting body has selected an unqualified word for a socially remedial statute, intended as a protection against one of the harshest decrees known to the law-- eviction from one's home. Traditionally, in such circumstances, generous construction is favored. Petitioner has made his shared home in the affected apartment for 10 years. The only other occupant of that rent-controlled apartment over that same extended period of time was the tenant-in-law who has now died, precipitating this battle for the apartment. The best guidance available to the regulatory agency for correctly applying the rule in such circumstances is that it would be irrational not to include this petitioner and it is a more reasonable reflection of the intention behind the

regulation to protect a person such as petitioner as within the regulation's class of " family ". In that respect, he qualifies as a tenant in fact for purposes of the interlocking provisions and policies of the rent-control law. Therefore, under CPLR 6301, there would unquestionably be irreparable harm by not upholding the preliminary relief Supreme Court has decreed; the likelihood of success seems quite good since four Judges of this court, albeit by different rationales, agree at least that petitioner fits under the beneficial umbrella of the regulation; and the balance of equities would appear to favor petitioner.

The reasons for my position in this case are as plain as the inappropriate criticism of the dissent that I have engaged in ipse dixit decision making. It should not be that difficult to appreciate my view that no more need be decided or said in this case under the traditional discipline of the judicial process. Interstitial adjudication, when a court cannot institutionally fashion a majoritarian rule of law either because it is fragmented or because it is not omnipotent, is quite respectable jurisprudence. We just do not know the answers or implications ***216** for an exponential number of varied fact situations, so we should do what courts are in the business of doing--deciding cases as best they fallibly can. Applying the unvarnished regulatory word, "family", as written, to the facts so far presented falls within a well-respected and long-accepted judicial method.

Simons, J.

(Dissenting).

I would affirm. The plurality has adopted a definition of family which extends the language of the regulation well beyond the implication of the words used in it. In doing so, it has expanded the class indefinitely to include anyone who can satisfy an administrator that he or she had an emotional and financial "commitment" to the statutory tenant. Its interpretation is inconsistent with the legislative scheme underlying rent regulation, goes well beyond the intended purposes of 9 NYCRR 2204.6 (d), and produces an unworkable test that is subject to abuse. The concurring opinion fails to address the problem. It merely decides, ipse dixit, that plaintiff should win.

Preliminarily, it will be helpful to briefly look at the legislative scheme underlying rent regulation.

Rent regulation in New York is implemented by rent control and rent stabilization. Rent control is the stricter of the two programs. In 1946 the first of many "temporary" rent-control measures was enacted to address a public emergency created by the shortage of residential accommodations after World War II. That statute, and the statutes and regulations which followed it, were designed to monitor the housing market to prevent unreasonable and oppressive rents. These laws regulate the terms and conditions of rent-controlled tenancies exclusively; owners can evict tenants or occupants only on limited specified grounds (9 NYCRR part 2104 [State]; 2204 [City of New York]) and only with the permission of the administrative agency.

The rent-stabilization system originated in 1969. It is a less onerous regulatory scheme, conceived as a compromise solution to permit regulation of an additional 400,000 previously uncontrolled properties but also to allow landlords reasonable latitude in controlling the use of the newly regulated properties. One of its principal purposes was to encourage new construction. As both the Rent Control Law and the Rent Stabilization Law make clear, the Legislature contemplated that eventually rent control would end as rent-controlled tenancies terminated, and thereafter became subject to rent ***217** stabilization *(see generally, Sullivan v Brevard Assocs.,* 66 NY2d 489, 494-495; *8200 Realty Corp. v Lindsay,* 27 NY2d 124, 136-137). These programs were adopted notwithstanding the Legislature's expressed sentiment that the "ultimate objective of state policy" was the "normal market of free bargaining between a landlord and tenant" *(compare,* legislative finding for Emergency Tenant Protection Act of 1974 [the enabling legislation for rent stabilization], L 1974, ch 576, § 4 [§ 2], McKinney's Uncons Laws of NY § 8622, *with* legislative finding for Local Emergency Housing Rent Control Act [the enabling legislation for the city Rent Control Law], L 1962, ch 21, § 1 [2], McKinney's Uncons Laws of NY § 8602). Manifestly, judicial decisions which permit the indefinite extension of rent-controlled tenancies run counter to the legislative goal of eventually eliminating rent control while maintaining some measure of stability in the residential housing market.

A limited exception to the general rule that rent-controlled properties, when vacated, become subject to rent stabilization is found in section 2204.6 (d). It provides that: "(d) No occupant of housing accommodations shall be evicted under this section where the occupant is either the *surviving spouse of the deceased tenant or some other member of the deceased tenant's family* who has been living with the tenant" (9 NYCRR 2204.6 [d] [emphasis added]).

Occupants who come within the terms of the section obtain a new statutory rent-controlled tenancy. Those eligible are identified by the italicized phrase but nowhere in the regulations or in the rent-control statutes is the phrase or the word "family" defined. Notably, however, family is linked with spouse, a word of clearly defined legal content. Thus, one would assume that the draftsman intended family to be given its ordinary and commonly accepted meaning related in some way to customary legal relationships established by birth, marriage or adoption. The plurality, however, holds that the exception provided in the regulation includes relationships outside the traditional family. In my view, it does not.

Analysis starts with the familiar rule that a validly enacted regulation has " the force and effect of law" *(see, Molina v Games Mgt. Servs.,* 58 NY2d 523, 529; *Matter of Bernstein v Toia,* 43 NY2d 437, 448); it should be interpreted no differently than a statute *(Matter of Cortland-Clinton, Inc. v New York State Dept. of Health,* 59 AD2d 228, 231). As such, the regulation should not be extended by construction beyond its ***218** express terms or the reasonable implications of its language (McKinney's Cons Laws of NY, Book 1, Statutes § 94) and absent further definition in the regulation or enabling statutes, the words of the section are to be construed according to their ordinary and popular significance *(People v Cruz,* 48 NY2d 419, 428).

Central to any interpretation of the regulatory language is a determination of its purpose. There can be little doubt that the purpose of section 2204.6 (d) was to create succession rights to a possessory interest in real property where the tenant of record has died or vacated the apartment *(Matter of Herzog v Joy,* 53 NY2d 821, *affg* 74 AD2d 372). It creates a new tenancy for every surviving family member living with decedent at the time of death who then becomes a new statutory tenant until death or until he or she vacates the apartment. The State concerns underlying this provision include the orderly and just succession of property interests (which includes protecting a deceased's spouse and family from loss of their longtime home) and the professed State objective that there be a gradual transition from government regulation to a normal market of free bargaining between landlord and tenant. Those objectives require a weighing of the interests of certain individuals living with the tenant of record at his or her death and the interests of the landlord in regaining possession of its property and rerenting it under the less onerous rent-stabilization laws. The interests are properly balanced if the regulation's exception is applied by using objectively verifiable relationships based on blood, marriage and adoption, as the State has historically done in the estate succession laws, family court acts and similar legislation *(see, Matter of Lalli,* 43 NY2d 65, 69-70, *affd* 439 US 259). The distinction is warranted because members of families, so defined, assume certain legal obligations to each other and to third persons, such as creditors, which are not imposed on unrelated individuals and this legal interdependency is worthy of consideration in determining which individuals are entitled to succeed to the interest of the statutory tenant in rent-controlled premises. Moreover, such an interpretation promotes certainty and consistency in the law and obviates the need for drawn out hearings and litigation focusing on such intangibles as the strength and duration of the relationship and the extent of the emotional and financial interdependency *(see, Morone v Morone,* 50 NY2d 481, 486; *People v Allen,* 27 NY2d 108, 112-113). So limited, the regulation may ***219** be viewed as a tempered response, balancing the rights of landlords with those of the tenant. To come within that protected class, individuals must comply with State laws relating to marriage or adoption. Plaintiff cannot avail himself of these institutions, of course, but that only points up the need for a legislative solution, not a judicial one *(see, Matter of Robert Paul P.,* 63 NY2d 233, 235, n 1; *Morone v Morone, supra,* at 489).

Aside from these general considerations, the language itself suggests the regulation should be construed along traditional lines. Significantly, although the problem of unrelated persons living with tenants in rent-controlled apartments has existed for as long as rent control, there has been no effort by the State Legislature, the New York City Council or the agency charged with enforcing the statutes to define the word "family" contained in 9 NYCRR 2204.6 (d) and its predecessors and we have no direct evidence of the term's intended scope. The plurality's response to this problem is to turn to the dictionary and select one definition, from the several found there, which gives the regulation the desired expansive construction.* I would search for the intended meaning by looking at what the Legislature and the Division of Housing and Community Renewal (DHCR), the agency charged with implementing rent control, have done in related areas. These sources produce persuasive evidence that both bodies intend the word family to be interpreted in the traditional sense.

The legislative view may be found in the "roommate" law enacted in 1983 (Real Property Law § 235-f, L 1983, ch 403). That statute granted rights to persons living with, but

unrelated to, the tenant of record. The statute was a response to our unanimous decision in *Hudson View Props. v Weiss* (59 NY2d 733; *see,* legislative findings to ch 403, set out as note ***220** after Real Property Law § 226-b, McKinney's Cons Laws of NY, Book 49, at 130). In *Hudson View* the landlord, by a provision in the lease, limited occupancy to the tenant of record and the tenant's "immediate family". When the landlord tried to evict the unmarried heterosexual partner of the named tenant of record, she defended the proceeding by claiming that the restrictive covenant in the lease violated provisions of the State and City Human Rights Laws prohibiting discrimination on the basis of marital status. We held that the exclusion had nothing to do with the tenants' unmarried status but depended on the lease's restriction of occupancy to the tenant and the tenant's "immediate family". Implicitly, we decided that the term "immediate family" did not include individuals who were unrelated by blood, marriage or adoption, notwithstanding "the close and loving relationship" of the parties.

The Legislature's response to *Weiss* was measured. It enacted Real Property Law § 235-f (3), (4) which provides that occupants of rent-controlled accommodations, whether related to the tenant of record or not, can continue living in rent-controlled and rent-stabilized apartments *as long as the tenant of record continues to reside there.* Lease provisions to the contrary are rendered void as against public policy (subd [2]). Significantly, the statute provides that no unrelated occupant "shall * * * acquire any right to continued occupancy in the event the tenant vacates the premises or acquire any other rights of tenancy" (subd [6]). Read against this background, the statute is evidence the Legislature does not contemplate that individuals unrelated to the tenant of record by blood, marriage or adoption should enjoy a right to remain in rent-controlled apartments after the death of the tenant *(see,* Rice, *The New Morality and Landlord-Tenant Law,* 55 NYS Bar J [No. 6] 33, 41 [postscript]).

There is similar evidence of how DHCR intends the section to operate. Manifestly, rent stabilization and rent control are closely related in purpose. Both recognize that, because of the serious ongoing public emergency with respect to housing in the City of New York, restrictions must be placed on residential housing. The DHCR promulgates the regulations for both rent-regulation systems, and the eviction regulations in rent control and the exceptions to them share a common purpose with the renewal requirements contained in the Rent Stabilization Code *(compare,* 9 NYCRR 2204.6 [d], *with* 9 NYCRR 2523.5 [b]). In the Rent Stabilization Code, the Division of ***221** Housing and Community Renewal has made it unmistakably clear that the definition of family includes only persons related by blood, marriage or adoption. Since the two statutes and the two regulations share a common purpose, it is appropriate to conclude that the definition of family in the rent-control regulations should be of similar scope.

Specifically, the rent-stabilization regulations provide under similar circumstances that the landlord must offer a renewal lease to "any member of such tenant's family * * * who has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship" (9 NYCRR 2523.5 [b] [1]; *see also,* 2523.5 [b] [2]). Family for purposes of these two provisions is defined in section 2520.6 (o) as: "A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant or permanent tenant".

All the enumerated relationships are traditional, legally recognized relationships based on blood, marriage or adoption. That being so, it would be anomalous, to say the least, were we to hold that the agency, having intentionally limited succession rights in rent-stabilized accommodations to those related by blood, marriage or adoption, intended a different result for rent-controlled accommodations; especially so when it is recognized that rent control was intended to give way to rent stabilization and that the broader the definition of family adopted, the longer rent-controlled tenancies will be perpetuated by sequentially created family members entitled to new tenancies. These expressions by the Legislature and the DHCR are far more probative of the regulation's intended meaning than the majority's selective use of a favored dictionary definition.

Finally, there are serious practical problems in adopting the plurality's interpretation of the statute. Any determination of rights under it would require first a determination of whether protection should be accorded the relationship (i.e., unmarrieds, nonadopted occupants, etc.) and then a subjective determination in each case of whether the relationship was genuine, and entitled to the protection of the law, or expedient, and an attempt to take advantage of the law. Plaintiff maintains that the machinery for such decisions is in place and that appropriate guidelines can be constructed. He refers ***222** particularly to a formulation outlined by

the court in *2-4 Realty Assocs. v Pittman* (137 Misc 2d 898, 902) which sets forth six different factors to be weighed. The plurality has essentially adopted his formulation. The enumeration of such factors, and the determination that they are controlling, is a matter best left to Legislatures because it involves the type of policy making the courts should avoid *(see, People v Allen,* 27 NY2d 108, 112-113, *supra),* but even if these considerations are appropriate and exclusive, the application of them cannot be made objectively and creates serious difficulties in determining who is entitled to the statutory benefit. Anyone is potentially eligible to succeed to the tenant's premises and thus, in each case, the agency will be required to make a determination of eligibility based solely on subjective factors such as the "level of emotional and financial commitment " and "the manner in which the parties have conducted their everyday lives and held themselves out to society" (plurality opn, at 212).

By way of contrast, a construction of the regulation limited to those related to the tenant by blood, marriage or adoption provides an objective basis for determining who is entitled to succeed to the premises. That definition is not, contrary to the claim of the plurality, "inconsistent with the purposes of the rent-control system" and it would not confer the benefit of the exception on " distant blood relatives" with only superficial relationships to the deceased (plurality opn, at 210). Certainly it does not "cast an even wider net" than does the plurality's definition (plurality opn, at 211, n 1). To qualify, occupants must not only be related to the tenant but must also "[have] been living with the tenant" *(see,* 22 NYCRR 2204.6 [d]). We applied the "living with" requirement in *829 Seventh Ave. Co. v Reider* (67 NY2d 930), when construing the predecessor to section 2204.6 (d), and refused to extend the exception to a woman who occupied an apartment for the five months before the death of her grandmother, the statutory tenant, because she was not "living with" her grandmother. We held that the granddaughter, to be entitled to the premises under the exception, was required to prove more than blood relationship and cooccupancy; she also had to prove an intention to make the premises her permanent home. Since she had failed to establish that intention, she was not entitled to succeed to her grandmother's tenancy. That ruling precludes the danger the plurality foresees that distant relatives will be enabled to take ***223** advantage of the exception contained in section 2204.6 (d) *(cf.,* 9 NYCRR 2523.5 [b] [1], [2]).

Rent control generally and section 2204.6, in particular, are in substantial derogation of property owners' rights. The court should not reach out and devise an expansive definition in this policy-laden area based upon limited experience and knowledge of the problems. The evidence available suggests that such a definition was not intended and that the ordinary and popular meaning of family in the traditional sense should be applied. If that construction is not favored, the Legislature or the agency can alter it as they did after our decisions in *Hudson View Props. v Weiss* (59 NY2d 733, *supra)* and *Sullivan v Brevard Assocs.* (66 NY2d 489, *supra).*

Accordingly, I would affirm the order of the Appellate Division.

Judges Kaye and Alexander concur with Judge Titone; Judge Bellacosa concurs in a separate opinion; Judge Simons dissents and votes to affirm in another opinion in which Judge Hancock, Jr., concurs; Chief Judge Wachtler taking no part.

Order reversed, with costs, and case remitted to the Appellate Division, First Department, for consideration of undetermined questions. Certified question answered in the negative. ***224**

Footnotes

1 Although the dissent suggests that our interpretation of "family " indefinitely expands the protections provided by section 2204.6 (d) (dissenting opn, at 216), its own proposed standard--legally recognized relationships based on blood, marriage or adoption--may cast an even wider net, since the number of blood relations an individual has will usually exceed the number of people who would qualify by our standard.

2 We note that the concurrer apparently agrees with our view of the purposes of the noneviction ordinance (concurring opn, at 215), and the impact this purpose should have on the way in which this and future cases should be decided.

3 We note, however, that the definition of family that we adopt here for purposes of the noneviction protection of the rent-control laws is completely unrelated to the concept of "functional family," as that term has developed under this court's decisions in the context of zoning ordinances *(see, Baer v Town of Brookhaven,* 73 NY2d 942; *McMinn v Town of Oyster Bay,* 66 NY2d 544; *Group House v Board of Zoning & Appeals,* 45 NY2d 266). Those decisions focus on a locality's power

to use its zoning powers in such a way as to impinge upon an individual's ability to live under the same roof with another individual. They have absolutely no bearing on the scope of noneviction protection provided by section 2204.6 (d).

4 Also unpersuasive is the dissent's interpretation of the "roommate " law which was passed in response to our decision in *Hudson View Props. v Weiss* (59 NY2d 733). That statute allows roommates to live with the named tenant by making lease provisions to the contrary void as against public policy (Real Property Law § 235-f [2]). The law also provides that " occupant's" (roommates) do not automatically acquire "any right to continued occupancy in the event that the tenant vacates the premises " (§ 235-f [6]). Occupant is defined as "a person, other than a tenant or a member of a tenant's immediate family " (§ 235-f [1] [b]). However, contrary to the dissent's assumption that this law contemplates a distinction between related and unrelated individuals, no such distinction is apparent from the Legislature's unexplained use of the term "immediate family."

* For example, the definitions found in Black's Law Dictionary 543 (Special Deluxe 5th ed) are: "Family. The meaning of word 'family' necessarily depends on field of law in which word is used, purpose intended to be accomplished by its use, and facts and circumstances of each case * * * Most commonly refers to group of persons consisting of parents and children; father, mother and their children; immediate kindred, constituting fundamental social unit in civilized society * * * A collective body of persons who live in one house and under one head or management. A group of blood-relatives; all the relations who descend from a common ancestor, or who spring from a common root. A group of kindred persons * * * Husband and wife and their children, wherever they may reside and whether they dwell together or not" (citations omitted). The term is similarly defined in the other dictionaries cited in the plurality opinion.

Negative Treatment

Negative Citing References (10)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Declined to Extend by	1. Matter of Estate of Lasek 545 N.Y.S.2d 668 , N.Y.Sur. After administrator sought a final accounting of an estate, a claimant sought to recover for practical nursing and household services she rendered before the decedent's death. ...	Sep. 12, 1989	Case		2 4 1 2 N.E.2d
Declined to Extend by	2. Matter of Cooper 592 N.Y.S.2d 797 , N.Y.A.D. 2 Dept. WILLS - Election. Survivor of homosexual relationship did not have right to elect against decedent's will.	Feb. 01, 1993	Case		4 6 1 2 N.E.2d
Declined to Extend by	3. Greenwald v. H & P 29th Street Associates 659 N.Y.S.2d 473 , N.Y.A.D. 1 Dept. CIVIL PROCEDURE - Witnesses. Privilege protecting confidential communications between husband and wife during marriage does not extend to homosexuals in "spousal relationship."	July 01, 1997	Case		2 1 N.E.2d
Declined to Extend by	4. Levin v. Yeshiva University 691 N.Y.S.2d 280 , N.Y.Sup. EDUCATION - Civil Rights. Lesbian medical students could not recover for denial of university housing to their partners.	Mar. 15, 1999	Case		4 1 2 N.E.2d
Declined to Extend by	5. Zagrosik v. New York State Div. of Housing and Community Renewal 817 N.Y.S.2d 486 , N.Y.Sup. REAL PROPERTY - Landlord and Tenant. Rent stabilized tenant did not have right to compel landlord to add his domestic partner's name to lease.	June 02, 2006	Case		4 6 1 2 N.E.2d
Declined to Extend by	6. Preferred Mut. Ins. Co. v. Pine MOST NEGATIVE 848 N.Y.S.2d 190 , N.Y.A.D. 2 Dept. REAL PROPERTY - Landlord and Tenant. Tenant was not liable for damage to residential property resulting from arson by her co-tenant boyfriend.	Oct. 02, 2007	Case		2 4 1 2 N.E.2d
Distinguished by	7. People v. Suarez 560 N.Y.S.2d 68 , N.Y.Sup. Defendant filed motion to preclude People from introducing statements made by him to cohabitant, alleged common-law spouse. The Supreme Court, New York County, Trial Term,...	June 29, 1990	Case		4 1 2 N.E.2d
Distinguished by	8. Raum v. Restaurant Associates, Inc. 675 N.Y.S.2d 343 , N.Y.A.D. 1 Dept. TORTS - Wrongful Death. Wrongful death statute, which did not allow individuals not married to decedent	July 09, 1998	Case		3 4 6 1 2

Treatment	Title	Date	Type	Depth	Headnote(s)
	to bring wrongful death action, did not discriminate against same-sex...				N.E.2d
Distinguished by	9. 518 West 134th Street Tenants Ass'n v. Calderon 694 N.Y.S.2d 890 , N.Y.Sup.App.Term REAL PROPERTY - Landlord and Tenant. Tenant's son did not have succession rights to premises occupied under "tenant interim lease" program.	July 14, 1999	Case		2 1 N.E.2d
Distinguished by	10. Golden Mountain Realty Inc. v. Severino 939 N.Y.S.2d 835 , N.Y.City Civ.Ct. REAL PROPERTY - Landlord and Tenant. Landlord failed to make out prima facie case in summary holdover proceeding for possession of rent control apartment.	Feb. 29, 2012	Case		5 1 N.E.2d

40 Misc.3d 627
District Court, Nassau County, New York.

Anjili KAKWANI, Petitioner
v.
Nisha KAKWANI, Respondent.

June 20, 2013.

Synopsis

Background: Owner of residence brought proceeding to evict her sister-in-law from the residence on the ground that she was a licensee whose license to reside at the premises, which was her marital residence, had been revoked.

[Holding:] The District Court, Nassau County, Eric Bjorneby, J., held that sister-in-law could not be summarily evicted as a mere licensee without the bringing of an ejectment action in the supreme court.

Petition dismissed.

West Headnotes (4)

[1] **Licenses**
⇐ Nature of license in general

As generally understood in the law of real property, a "licensee" is one who enters upon or occupies lands by permission, express or implied, of the owner, or under a personal, revocable, nonassignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission or privilege.

Cases that cite this headnote

[2] **Ejectment**
⇐ Grounds of action in general

With limited exceptions, a family member may not evict another family member in a summary proceeding; this is the case because where the occupancy of the subject premises arises out of the familial relationship, such as an adult child who has lived in the family home since birth, a summary proceeding may not be maintained. McKinney's RPAPL § 713(7).

2 Cases that cite this headnote

[3] **Licenses**
⇐ Right to revoke

The sister-in-law of the owner of a residence, who lived in the residence with her husband, who was the owner's brother, and also with the owner and her parents, could not be summarily evicted by the owner as a mere licensee without the bringing of an ejectment action in the supreme court; the sister-in-law's right to reside in what had been her marital residence for four years stemmed not merely from the owner's permission, but from a true family relationship. McKinney's RPAPL § 713(7).

Cases that cite this headnote

[4] **Licenses**
⇐ Notice before revocation

A family member may not be summarily evicted from the family home with a 10–day notice to quit; a more deliberate process is required. McKinney's RPAPL § 713(7).

Cases that cite this headnote

Attorneys and Law Firms

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ERIC BJORNEBY, J.

DECISION AFTER TRIAL

*628 Petitioner brings this proceeding pursuant to RPAPL § 713(7) to evict the respondent on the ground that she is a licensee whose license to reside at the premises, which is the respondent's marital residence, has been revoked.

Respondent's defense is that she is a "family member" who can not be evicted in a summary proceeding.

THE FACTS

The petitioner, her brother Amit **Kakwani**, and their parents, moved into the one family residence known as 355 Glen Cove Avenue in Carle Place, New York in 2004. Petitioner's mother, as trustee of a family trust, conveyed the home to the petitioner on December 8, 2006. There is no evidence as to what motivated this transfer and the only consideration recited in the deed is "Ten & other good and valuable consideration, lawful money of the United States, paid by the party of the second part..." In March 2008 Amit **Kakwani** traveled to India where, for the first time, he met his arranged bride-to-be, the respondent Nisha **Kakwani**. In September 2008 the petitioner and her brother, Amit, traveled to India where petitioner met the respondent for the first time. On or about November 29, 2008 the respondent moved by herself to the United States and into the **Kakwani** family home. On December 22, 2008 respondent and Amit **Kakwani** were married. They resided in the master bedroom of the family home, as husband and wife, until sometime in 2012 or early 2013 when Amit **Kakwani** moved out of the master bedroom and into another room in the house. He has not been named as a respondent in this proceeding and rent has never been sought or paid by him or the respondent.

On September 20, 2012 petitioner had respondent served with a 10–Day Notice to Quit and on January 17, 2013 petitioner had respondent served with the instant Notice of Petition and Petition seeking to evict the respondent alone pursuant to RPAPL § 713(7) on the grounds that she is a mere licensee whose license ***629** to occupy the premises has been revoked. The respondent alleges she is a family member not subject to eviction in a summary proceeding brought pursuant to RPAPL § 713(7). In Family Court on February 15, 2013 petitioner obtained a (refrain) order of protection against the respondent and the respondent obtained a similar order of protection against her husband, Amit **Kakwani**, the petitioner's brother. The matter was tried before this court on April 2, 2013 and the above facts established. On April 30, 2013 briefs were submitted and the case is now ready for decision.

THE LAW

RPAPL § 713 entitled "Grounds where no landlord-tenant relationship exists" provides in relevant part as follows:

> A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds:
>
> ****829** 7. He is a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or.....

The question presented in this matter is whether or not a person whose right to reside in what has been her marital residence for four years, and whose right to do so stems not merely from petitioner's permission, but from a true family relationship, can be summarily evicted as a mere licensee without the bringing of an ejectment action in Supreme Court. The Court concludes that this question must be answered in the negative.

The seminal case on whether or not a family member can be evicted as a mere licensee, decided fifty years ago, is *Rosenstiel v. Rosenstiel,* 20 A.D.2d 71, 245 N.Y.S.2d 395. In that case, a husband sought to evict his wife from what had been the marital residence, but which was owned in his name alone. In discussing the legislative intent behind RPAPL § 713(7), the Court noted that although the Law Revision Commission report upon which the legislation was based listed numerous categories of persons who could be summarily evicted in the absence of a landlord tenant relationship, including a spouse who remained upon the premises after separation or divorce, the legislature at that time adopted only two categories, a licensee who held over after revocation of the license and a lessee of a life tenant who died before the expiration of the lease term. The Court further noted that the ***630** Supreme Court and the Family Court were specifically empowered to deal with issues surrounding property and the break-up of a family, and went on to hold that a spouse's right to occupy the family residence stems not from her husband's permission, but from the very family relationship itself, and that she therefore could not be evicted as a mere licensee.

It must be noted that the statute itself contains no definition of a licensee. The *Rosenstiel* court, in observing that there is nothing in the statute to specifically exclude a spouse from the licensee category, stated:

> **[1]** But it is to be assumed that the Legislature, in the use of the particular term, intended that it have the meaning

generally ascribed thereto in the law. (See McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 232.) As generally understood in the law of real property, a licensee is one who enters upon or occupies lands by permission, express or implied, of the owner, or under a personal, revocable, nonassignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission or privilege. (See *Mumford v. Whitney*, 15 Wend. 380, 393; *Greenwood Lake & Port Jervis R.R. Co. v. New York & Greenwood Lake & R.R. Co.*, 134 N.Y. 435, 440, 31 N.E. 874; *Trustees of Southampton v. Jessup*, 162 N.Y. 122, 126, 56 N.E. 538; *Clifford v. O'Neill*, 12 App. Div. 17, 20, 42 N.Y.S. 607; *Caldwell v. Mitchell*, 158 N.Y.S.2d 868, 870 [Johnson, J.]; Clark, Covenants and Interests Running With Land [2d ed.], ch. II, pp. 13–64, and cases cited; Walsh, Law of Real Property [2d ed.], § 150; Tiffany, Real Property [3d ed.], §§ 829, 833.) This, as is fully apparent from the Law Revision Commission study and recommendation, is the sense in which the term was used in the statute.

Black's Law Dictionary defines a licensee as "[o]ne who has the owner's permission or passive consent to enter the owner's premises for one's own convenience, curiosity, or entertainment." It can not be disputed that a true family relationship, which includes a shared home, involves a ****830** far deeper and more permanent commitment than one based upon mere "convenience, curiosity, or convenience."

A year after *Rosenstiel*, the Westchester County Court decided *Matter of Brennecke v. Smith*, 42 Misc.2d 935, 249 N.Y.S.2d 602. In that ***631** case, respondent purchased what became the marital residence. At some point he deeded the home to his wife and they continued to reside there together with their four children. Thereafter, the wife left the marital residence and, as a result of financial difficulties, she in turn deeded the home to a friend, the petitioner herein, who brought this summary proceeding to evict the respondent as a licensee. The Court held that respondent could not be reduced to the status of a licensee simply because the respondent's wife vacated the marital residence, and denied the petition even though the respondent was not actually a member of the petitioner's family.

In 1987, what has come to be known as the "family exception" as to who may be deemed a licensee for summary eviction purposes was expanded in *Minors v. Tyler*, 137 Misc.2d 505, 521 N.Y.S.2d 380. In that case, the petitioner was the titled owner of a one-family home in which he lived with the respondent as husband and wife for a number of years, though the parties never legally married. Eventually, petitioner sought to have the respondent evicted as a licensee. Citing *Rosenstiel* and other cases, the Court denied the petitioner's motion for summary judgment holding that the respondent under these circumstances was not a licensee.

In *Nagle v. DiPaola*, 134 Misc.2d 753, 512 N.Y.S.2d 761, the Court was asked to consider whether petitioner, who owned what became the family home prior to his marriage to the respondents' mother, who in turn had custody of her two children, aged 15 and 17 from a prior marriage, could summarily evict his step children as licensees whose license he claimed to have revoked. The Court held that the step children were not licensees because there right to reside in the home flowed not from the petitioner's permission but from their relationship to their mother who was married to the petitioner.

In 1989 the Court of Appeals decided *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49. In construing the meaning of the statutory term "family" for purposes of determining succession rights to a rent-controlled apartment the court stated:

> The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized ***632** by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units (*see also, 829 Seventh Ave. Co. v. Reider*, 67 N.Y.2d 930, 931–932, 502 N.Y.S.2d 715, 493 N.E.2d 939 [interpreting 9 NYCRR 2204.6(d)'s additional "living with" requirement to mean living with the named tenant "in a family unit, which in turn connotes an arrangement, whatever its duration, bearing some indicia of permanence or continuity" (emphasis supplied)]).

In 1995, the case of *Sirota v. Sirota*, 164 Misc.2d 966, 626 N.Y.S.2d 672 was decided. In that case the adult respondents, aged 27 and 31 years, lived in the marital home with their mother and cared for her until she died. Upon her death, the petitioner father, who had previously vacated the ****831** family residence and whose divorce action was apparently abated by death of the respondents' mother, sought to evict the

respondents. Although this was not a licensee case but rather a landlord tenant case, in finding that the respondents were not tenants the Court held, reminiscent of *Brennecke,* that:

> This court finds that the premises in this case have been used as the family residence; in it respondents, now adults, have lived with petitioner, their father, and his wife, their mother, for nearly 30 years, making it their home. They continued to reside there in his absence, and there cared for their mother until her death. Under such circumstances, the petitioner could not, merely by walking out, constitute them tenants whom he may oust by summary proceeding.

Thus far, the law seemed clear that not only spouses, but other immediate family members as well, could not be evicted from the family home as mere licensees by way of a summary proceeding, and that a petitioner who wished to oust a family member had to proceed by way of the less abrupt vehicle of an ejectment action in the supreme court. Then, in 2001, the case of *Blake v. Stradford,* 188 Misc.2d 347, 725 N.Y.S.2d 189 was decided, which seemed to cast doubt on this principle. In that case, the Court decided that a petitioner could bring a summary proceeding against his ex-domestic partner on the theory that she was a mere licensee whose license had been revoked, although he could not also evict their children as their right to reside in the family home stemmed not from his permission previously given but ***633** from special rights incidental to the parent-child relationship. The court reached this conclusion in reliance upon *Morone v. Morone,* 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 which held, at page 486, that "cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation..." (Citations omitted) This court believes however that the *Blake* court's reliance upon *Morone* is misplaced because the above language is taken out of context. The *Morone* case was a " palimony" case in which the plaintiff sought compensation for domestic services performed, and upon an oral contract for maintenance and support, despite the absence of a marriage. It had nothing to do with an eviction from the family residence or summary proceedings under the RPAPL § 713.

In any event, in 2003 *DeJesus v. Rodriguez,* 196 Misc.2d 881, 768 N.Y.S.2d 126 was decided. In that case the titled petitioner sought to evict his former girlfriend and their two children, aged 5 and 8 years, as licensees, despite the petitioner and respondent having resided together in what was the family home for ten years. The Court held that "[m]odern life requires the courts to recognize that unmarried couples acquire rights similar to married occupants as it affects continued occupancy of the home they have shared" and further on in its decision stated "[w]hile respondent does not have the legal status of a wife, there is no question that she is more than a licensee." In 2006 the concept that RPAPL § 713(7) was net intended to allow family members to summarily evict each other was further made clear in *Williams v. Williams,* 13 Misc.3d 395, 822 N.Y.S.2d 415. In that case a grandmother was not permitted to maintain a licensee proceeding against her twin 24 year old grandchildren who had resided with her since they were 11 years old. After reviewing the case law involving licensee proceedings against various types of family members, the court held:

> These cases seemingly show that occupancy due to familial relationship does not constitute a licensee agreement as intended by RPAPL 713(7). There are ****832** various forms of family relationships ranging from spousal, parent and child, and even nonmarried couples. They are unique and thus should not be terminated through summary proceedings, which tend to be speedy. Instead, more appropriate avenues must be taken such as ejectment actions or proceedings in Family Court.

Finally, in dismissing the proceeding the court held, quoting from the *Braschi* case, that "[p]rotections against sudden eviction should ***634** not be determined by genetic history, but should instead be based on the reality of family life." The Appellate Term's decision in *Sears v. Okin,* 16 Misc.3d 134(A), 2007 WL 2253603 is clearly distinguishable because the court found that the respondent's right to occupy the premises had expired pursuant to the terms of a Family Court order. Likewise, the case of *Landry v. Harris,* 18 Misc.3d 1123(A), 2008 WL 253085 is also distinguishable from the case at bar. In that case, the respondent's motion to dismiss was denied as there were issues of fact as to whether in fact

the parties actually lived together as a "family." Nevertheless, the court went on to note:

> That said, the parties do not dispute a key, determinative fact: that Azlan is their minor son. Landry may not evict his son, because a party may not evict a family member in an RPAPL 713(7) summary licensee holdover proceeding. (See e.g. *Rosenstiel v. Rosenstiel,* 20 A.D.2d 71[, 245 N.Y.S.2d 395] [1st Dept. 1963] [spouse]; *Sears v. Okin,* [16 Misc.3d 134[A],] 2007 N.Y. Slip Op. 51510[U][, 2007 WL 2253603] [App. Term, 2d Dept., 9th & 10th Jud. Dists., July 26, 2007] [minor children]; *Sears v. Okin,* [6 Misc.3d 127[A],] 2004 N.Y. Slip Op. 51691[U] [, 2004 WL 2979721] [App. Term, 2d Dept., 9th & 10th Jud. Dists., Dec. 23, 2004] [minor children]; *Williams v. Williams,* 13 Misc.3d 395[, 822 N.Y.S.2d 415] [Hous. Part, Civ. Ct., N.Y. County, 2006] [adult grandchildren]; *Sirota v. Sirota,* 164 Misc.2d 966[, 626 N.Y.S.2d 672] [Hous. Part, Civ. Ct., Kings County 1995] [adult children], modified on other grounds 168 Misc.2d 123[, 644 N.Y.S.2d 950] [App. Term, 2d Dept., 2d & 11th Jud. Dists., 1996].)

As for the analysis regarding the existence of a "family relationship" the 2009 case of *Lally v. Fasano,* 23 Misc.3d 938, 875 N.Y.S.2d 750 is illustrative. In that case, the respondent lived with her husband in a "beach cottage" which was located on her father-in-law's property and which was owned by her father-in-law. Six years after the marriage, her husband left the marital residence and the petitioner father-in-law commenced this summary licensee proceeding with a 10–day notice to quit. In finding that respondent was a licensee and was not entitled to the protection provided by a "family relationship," and granting summary judgment to the petitioner, the court noted that the petitioner and respondent never lived together in the same home as a family unit and that the respondent was neither socially nor financially dependent upon the petitioner.

Then, in the 2009 case of *Drost v. Hookey,* 25 Misc.3d 210, 881 N.Y.S.2d 839, a judge of the Suffolk County District Court held that ***635** the prior case by case analysis in licensee proceedings as to whether or not a "family relationship" existed among the parties should be abandoned for a more bright line approach whereby all persons residing together in some sort of family relationship, without the benefit of a landlord tenant relationship, should be classified as licensees of the titled owner unless a specific statutory "opt-out" could be identified by the respondent. In that case, the respondent was the petitioner's former girlfriend with whom he had lived for approximately ****833** 3 years. No children were involved. The court, relying upon *Blake v. Stradford, supra,* and *Morone v. Morone, supra,* decided that respondent, whom petitioner had no legal obligation to support, was a licensee and, without a statutory "opt-out" such as a right to support from the petitioner, could be evicted as such via the vehicle of a RPAPL § 713(7) licensee proceeding.

This same approach was adopted by the court in *Piotrowski v. Little,* 30 Misc.3d 609, 911 N.Y.S.2d 583, a same-sex partner case from the Middletown City Court, where this "objective" analysis regarding the existence of a statutory opt-out from licensee status was preferred. This Court cannot agree. This Court prefers the analysis of Judge Stephen L. Ukeiley, author of *The Bench Guide To Landlord & Tenant Disputes in New York,* where at Page 39 he writes:

[2] With limited exceptions, a family member may *not* evict another family member in a summary proceeding. This is the case because where the occupancy of the subject premises arises out of the "familial relationship," such as an adult child who has lived in the family home since birth, a summary proceeding may not be maintained.

Judge Ukeiley applied this "family exception" in his decision in the 2009 licensee case of *Robinson v. Holder,* 24 Misc.3d 1232(A), 2009 WL 2413829. In that case, the petitioners, a mother and son, sought to evict the respondent, the son's girlfriend, and their child-in-common, from premises owned by the petitioner/grandmother and her son, and resided in only by the respondent, her child, and the petitioner/son when he was not incarcerated. After a careful review of the case law, and a discussion of whether or not persons involved in "familial" relationships were exempt from summary licensee proceedings, the court held that the respondent therein, due to her "familial" relationship with the petitioners, was not a licensee within the meaning of RPAPL § 713(7).

*636 DISCUSSION

While bright line rules such as the "statutory opt-out" certainly have their allure, the fact patterns which arise in this area of the law simply do not lend themselves to such mechanical analysis. Every family, traditional or non-traditional, is different, and each case must be carefully analyzed by the court on a case by case basis to determine whether or not the parties were involved in a true family relationship as opposed to mere friends or temporary live-in paramours. If in fact a family relationship exists, a titled family member should not be permitted to break up the family unit and evict another family member in summary fashion with a 10–day notice to quit. In some areas of the criminal law, such as search and seizure, ones home is cloaked with special protections (see *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639) Likewise, in the civil law the home is a special place from which, as discussed above, family members may not be summarily removed at the whim of the title holder.

If the only family members protected from summary eviction as licensees pursuant to a 10–day notice to quit were those who could identify a statutory right to support and shelter, then the Sirota children, who lived in the family home their entire lives and cared for their mother until the day she died, could have been evicted on 10 days notice. If the only family members protected from summary eviction as licensees pursuant to a 10–day notice to quit were those who could identify a statutory right to support and shelter, then the respondent Rodriguez, who lived with the petitioner for 10 years and bore him 2 children, could have been evicted on **834 10 days notice and left with the choice of leaving her children behind or taking them with her, effectively allowing them to be evicted by their father as well. If the only family members protected from summary eviction as licensees pursuant to a 10–day notice to quit were those who could identify a statutory right to support and shelter, then the Williams twins, aged 24, could have been evicted from the only home they had known since they were 11 years old on 10 days notice. If the only family members protected from summary eviction as licensees pursuant to a 10–day notice to quit were those who could identify a statutory right to support and shelter, then Ms. Holder could have been evicted from the only home she has known since giving birth to the petitioners' grandson/son.

[3] The arbitrariness and potential for extreme unfairness of a bright line rule such as the limited "statutory opt-out" from a *637 proceeding pursuant to RPAPL § 713(7), advocated in some of the above cited cases, is well illustrated by the facts in the instant case. The young respondent herein is an unemployed woman, born and raised in India, whose family arranged a marriage for her to the petitioner's brother. The petitioner's family brought her to this country just a month before her wedding and provided her with a marital residence, the only home she has known since her arrival in this country and her marriage to the petitioner's brother over four years ago. They have lived together as a true family with all the indicia of a common home, financial support, and emotional interdependence. Her right to reside in the instant premises arises not merely from the petitioner's consent but from her marriage into the family. Since, technically, the petitioner has no legal obligation to support the respondent, the respondent would not have the theoretical protection of a "statutory opt-out" analysis and would be subject to eviction as a licensee, accomplishing for her brother what he himself could not accomplish himself, namely to evict his wife from the marital residence without provision for shelter or a single dime for support. If the legislature ever intended such an unjust result, which this court seriously doubts, then it needed to spell it out when it enacted RPAPL § 713(7).

[4] This is not to say that a titled owner of a family residence, living with family members where the family relationship has broken down, has no remedy. As often noted in the above cited decisions, a supreme court ejectment action is available to obtain relief. All this court holds is that a family member may not be summarily evicted from the family home with a 10–day notice to quit. A more deliberate process is required and is readily available.

CONCLUSION

Accordingly, the instant petition is dismissed.

The foregoing constitutes the decision and order of the Court.

All Citations

40 Misc.3d 627, 967 N.Y.S.2d 827, 2013 N.Y. Slip Op. 23200

End of Document

Section 8 Housing

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Types of Section 8 Programs

Voucher Based

- Increase affordable housing choices for "very low income families"
- Families **choose** a privately owned rental housing that meet HUD's Housing Quality Standards and has "reasonable rent"
- The PHA pays the owner the difference between 30% of adjusted family income and a PHA determined payment standard or the gross rent of the unit, whichever is lower.
  - If a family chooses a unit with a higher rent than the payment standard, they may pay the owner the difference (not to exceed 40% of the family's monthly adjusted income).
- If the family moves out, the contract ends with that owner, however they can move and use the voucher at other qualified rental housing.

Project Based

- A Public Housing Agency (PHA) an attach up to 20% of its voucher assistance to specific housing units if:
  - The owner agrees to rehabilitate or construct the units OR
  - The owner agrees to set-aside a portion of the unites in an existing development.
- All units must meet HUD Housing Quality Standards.
- Owners select families after screening eligible families on the PHA's housing choice voucher waiting list.
- When a family moves out of a project-based unit, they do not have a right to continued housing unless they become eligible for a tenant based voucher.

Types of Summary Proceedings

Holdover Proceeding

- A **holdover case** is brought to evict a tenant or a person in the apartment or home who is not a tenant for reasons other than simple nonpayment of rent.
- **Law:** Under RPAPL § 711(1), a landlord may maintain a summary eviction proceeding against a tenant who continues to be in possession of a premises after the lease period without permission of the landlord.

Nonpayment Proceeding

- A **nonpayment case** is brought by a landlord against a tenant or a person in the apartment or home who has not paid his or her rent.
- **Law:** Under RPAPL § 711(2), a landlord may maintain a nonpayment eviction proceeding against a tenant who has defaulted in the payment of rent pursuant to the agreement under which the premises are held, and a demand of the rent has been made, or at least three days' notice in writing requiring in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section 735.

Holdover Proceedings

Rosina v. Parra
853 N.Y.S.2d 485 (2007)

- After the expiration of her initial lease, the tenant remained in possession of the leased premises as a month-to-month tenant. The court held that the month-to-month tenancy could be terminated by service of notice pursuant to Real Property Law § 232-a. The court rejected the tenant's argument that the landlord needed good cause to terminate the month-to-month tenancy after the initial lease.

Timothy v. Matison
District Court, Nassau Cty (2008)

- **Rule:** "If the landlord shall accept rent for any period subsequent to the expiration of such term, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month."
- **Application:** the parties' Lease Agreement called for a renewal of the lease for successive one year terms. The court held that when the landlord continued to accept Section 8 rental payments after the expiration of the initial lease period, the lease was renewed for a year. The court also held that since the lease was renewed, the lease could only be terminated for good cause.

Holdover Proceedings Cont'd.

Lamlon Development Corp. v. Owens
533 N.Y.S.2d 186 (1988)

Rule: In a Section 8 tenancy, the landlord must give notice, in writing, to the public housing authority of such termination at the same time that notice is given to the tenant (24 C.F.R. 882.215(c)(3)). Failure to to serve a copy of the termination notice on the public housing authority will preclude the maintenance of a summary proceeding.

- **Purpose of Notice Requirement**: Notice of termination of a Section 8 lease is essential because it informs the public housing authority to stop making subsidy payments and also allows the PHA to monitor actions of the landlord and intervene if necessary.

- **Holding**: The court dismissed the landlord's petition for failure to serve the public housing authority with timely notice of termination of the Section 8 tenancy.

Section 8 Nonpayment Proceedings

***New Hempstead Terrace LLC v. Reeves*, 18 Misc. 3d 1113(A) (2008)**

Rule: "[A] 'Section 8 tenant agrees in the Section 8 lease only to pay the tenant share of the rent. Absent a showing by [a] landlord of a new agreement . . . a Section 8 tenant does not become liable for the Section 8 share of the rent as rent' even after termination of the subsidy."

- **Holding**: A petitioner cannot maintain an action for Section 8 rent even if the pleading incorporates money owed for the tenant's portion of rent. This is not an affirmative defense to be pleaded and proved by the respondent/tenant.

42 U.S.C. § 1437a – Brooke Amendment:

Tenants are *only responsible for their portion* of the rent.

"Monthly rent is limited to the highest of 30% of the family's monthly adjusted income, 10% of the family's monthly income or an amount established by the public agency which grants welfare payments to the tenant."

Binghamton Housing Authority v. Douglas 3d Dep't – 1995

- Petitioner, Public Housing Authority, brought Summary Proceeding to evict tenant for failure to pay rent. Petition included "added rent" which consisted of late fees, utility fees, and maintenance fees.
- According to regulations, Petitioner is allowed to add certain fees to cover excess utility use, late payments, and maintenance charges, if appropriate, however, the **Court found** that these payments are **not deemed rent** and therefore <u>cannot be collected through a summary proceeding</u>.
  - Recovery in summary proceeding's is limited to "those amounts statutorily defined as rent and, therefore, the recovery of miscellaneous charges is not allowed."
    - In order to recover for these charges, Petitioner would need to bring a separate proceeding.

See Also…

- *Bedford Gardens Co. v. Silberstein*, 2d. Dep't (2000)
  - Held that summary nonpayment proceedings "may only be maintained to collect unpaid rent."
- *Douglas v. Nole*, Nassau Cty. District Court (2008)
  - Even when a tenant is terminated from Section 8 for violating HUD Regulations, they are not responsible to the landlord for the Section 8 portion of the rent.
    - "Well-established precedent holds that a 'Section 8 tenant agrees in the Section 8 lease only to pay the tenant share of the rent. Absent a showing by [a] landlord of a new agreement . . . a Section 8 tenant does not become liable for the Section 8 shares of the rent as rent, even after the termination of the subsidy.'"
  - Attorney's fees cannot be collected as "additional rent" and therefore cannot be collected in a summary proceeding as per *Binghamton Housing Authority*.

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141 Misc.2d 287
District Court, Nassau County, New York,
Second District, Hempstead Part.

LAMLON DEVELOPMENT CORP., Petitioner,
v.
Verma OWENS, Respondent.

Aug. 5, 1988.

Landlord commenced holdover proceeding. Tenant moved for order dismissing petition on grounds peculiar to tenancies under § 8 of the United States Housing Act. The District Court, Nassau County, Hempstead Part, Warshawsky, J., held that: (1) termination clause permitting landlord to terminate tenancy for good cause created "conditional limitation," rather than "condition" and therefore, summary holdover proceeding was maintainable; (2) notice given by landlord to public housing administration was not timely, and therefore, did not comply with notice provisions of § 8; (3) tenant had standing to raise issue of improper notice; and (4) good cause requirement for termination was not unenforceable on grounds of lack of mutuality.

Motion for order dismissing petition granted.

West Headnotes (7)

Attorneys and Law Firms

***187 *287** William D. Friedman, Hempstead, for petitioner.

Leonard S. Clark, Hempstead, for respondent.

Opinion

IRA B. WARSHAWSKY, Judge.

Petitioner commenced the instant holdover proceeding by service of a notice of petition and petition on or about January 7, 1988. Respondent now moves for an order dismissing the petition on grounds which are particular to tenancies entered into under Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f).

***288** The parties entered into a lease agreement on or about June 24, 1985 under the Section 8 Existing Housing Certificate Program, governed by regulations found at 24 C.F.R. Part 882 et seq. The lease agreement provides for a one year lease term, which is modified by the Lease Addendum providing that the lease term shall begin on July 1, 1985 and "shall continue until (1) a termination of the Lease by the Landlord in accordance with paragraph (H) of this section, (2) a termination of the Lease by the Tenant in accordance with the Lease or by mutual agreement during the term of the Lease, or (3) a termination of the contract by the PHA." (Exhibit C to the moving papers.) This provision follows the language set forth in the regulations at 24 C.F.R. 882.215(a)(1).

Paragraph (H) of the Lease Addendum, entitled "Termination of Tenancy," provides that the Landlord "shall not terminate the tenancy except for:

(i) Serious or repeated violation of the terms and conditions of the Lease;

(ii) Violation of Federal, State, or local law which imposes obligations on a tenant in connection with the occupancy or use of the dwelling unit and surrounding premises, or

(iii) Other good cause" (Lease Addendum, paragraph (H)(1).)

Examples of "other good cause" are set forth in paragraph (H), including "a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, desire to rent the unit at a higher rental)." (Lease Addendum, paragraph (H)(2)(v).)

Paragraph (H)(3) further provides that the Landlord "may evict the Tenant from the unit only by instituting a court action. The Landlord must notify the PHA in writing of the commencement of procedures for termination of tenancy, at the same time that the Landlord gives notice to the Tenant under State or local law. The notice to the PHA may be given by furnishing the PHA a copy of the notice to the Tenant." (Lease Addendum, paragraph (H)(3).) The foregoing provisions of paragraph (H) similarly follow the language of the regulations at 24 C.F.R. 882.215(c).

The petition alleges that petitioner served a proper notice of termination of tenancy upon respondent. The notice, a copy of which is annexed as Exhibit III to the opposing papers, is dated October 20, 1987 and states in part that the landlord "hereby elects to terminate your monthly tenancy of said premises as of the end of the day of November 30, 1987. YOU AND ALL other persons occupying said premises are hereby notified that you are required to quit the said premises and ***289*** surrender possession thereof to the undersigned on or before said expiration day of your tenancy. UNLESS you comply with this notice, the ****188*** undersigned will commence summary proceedings under the law to remove you from said premises for the holding over after the expiration of your term."

The notice further gives respondent the option to retain her leasehold if she agrees to an increase in rent, and states at the bottom: "NOTE: THIS NOTICE CONFORMS WITH PARAGRPHS (sic) 9 OF YOUR SECTION 8 LEASE AND H OF THE LEASE ADDENDUM THERETO AS GOOD CAUSE BEING THAT THE LANDLORD DESIRES TO RENT THE PREMISES FOR A HIGHER RENTAL THAN OFFERED BY SECTION 8."

The petitioner commenced the instant holdover proceeding on or about January 7, 1988. Respondent contends that the petition must be dismissed on the ground that a summary holdover proceeding is not maintainable in this Section 8 tenancy because the termination clause provides for a condition rather than a conditional limitation, and on the additional ground that the petition is defective because it fails to allege compliance with the provision set forth in paragraph (H)(3) of the lease addendum and with the corresponding Section 8 regulation requiring the landlord to notify the public housing authority in writing of the commencement of procedures for termination of the tenancy.

1 With respect to respondent's first argument, the courts have consistently recognized a distinction in the termination of a leasehold pursuant to a condition (or condition subsequent) and a conditional limitation. If a leasehold can be terminated because the tenant's breach of a condition of the lease gives the landlord the option to declare the lease at an end, thereby exercising his right of forfeiture, a condition exists pursuant to which the landlord must enforce the forfeiture by reentry in an action for ejectment. *Beach v. Nixon*, 9 N.Y. 35; *Perrotta v. Western Regional Off–Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504; 34 N.Y.Jur. Landlord & Tenant, Sec. 352, 376, (1987). If, however, the landlord has the option to terminate the lease by serving a notice fixing a time after the lapse of which the lease will automatically expire, a conditional limitation of the leasehold exists, pursuant to which a summary holdover proceeding will lie. *Fowler Court Tenants Inc. v. Young*, 119 Misc.2d 492, 463 N.Y.S.2d 686; *Miller v. Levi*, 44 N.Y. 489; *Perrotta v. Western Regional Off–Track Betting Corp.*, supra.

2 The distinction, however fictitious, permitting the maintenance ***290*** of a summary proceeding is based upon the lease expiring automatically so that nothing further need be done by the landlord to terminate the lease. If the tenant continues in possession after the automatic expiration of the lease, he is holding over and a summary proceeding is maintainable. *See, Besmanoff v. Allen*, 137 Misc.2d 706, 521

N.Y.S.2d 982; Rasch, New York Landlord & Tenant, 2d Ed., Sec. 747; RPAPL Sec. 711(1).

3 The term of the instant Section 8 lease is indefinite because it contains no set termination date, but continues on a monthly basis until termination either by the landlord for good cause, by the tenant without cause, or by the public housing authority through termination of the Section 8 contract. *See,* Lease Addendum, paragraphs (C), (H), (L); 24 C.F.R. 882.215(a)(1), (a)(5), (c). Respondent argues that the termination clause set forth in paragraph (H), permitting the landlord to terminate the tenancy for good cause, does not provide for any procedure whereby the lease automatically expires upon the mere occurrence of an event, and does not provide for any notice of termination. Consequently, respondent asserts that the termination clause creates a "condition" rather than a "conditional limitation", so that the instant holdover proceeding will not lie.

The Court disagrees. The termination clause in the lease and in the Section 8 regulations adopts the notice requirements of State or local laws, and provides that the landlord must terminate the tenancy for good cause by instituting a court action, giving such notice to the tenant as is required under State or local law. *See,* Lease Addendum, paragraphs (H), (J); 24 C.F.R. 882.215(c)(3). State law interprets the provisions of this tenancy as a month- ***189** to-month tenancy and requires the landlord to give the tenant thirty days notice in order to terminate such month-to-month tenancy, at the end of which period the lease automatically expires. RPL 232–b; *Besmanoff v. Allen,* supra, 521 N.Y.S.2d 982, 987. Upon expiration of the lease, a holdover proceeding is maintainable. RPAPL 711(1). The section 8 tenancy is distinguished only by the additional requirements that the landlord must have good cause for termination and must give notice to the public housing authority of such termination.

The respondent's position is untenable not only based upon State law, but also when viewed in the overall context of the Section 8 Existing Housing program which is designed to provide lower-income families with access to decent, economically mixed housing. 42 U.S.C. 1437f(a). To require a landlord to commence a more costly and time consuming Supreme ***291** Court action for ejectment in order to evict a Section 8 tenant, if not in direct contravention of legislative intent, would at the very least be counterproductive to the Section 8 program. Such a requirement would only serve to discourage landlords from joining the program, the success of which depends upon their voluntary participation. See, *Gallman v. Pierce,* N.D.Cal., 639 F.Supp. 472, infra.

The instant petition alleges that the petitioner served a proper notice of termination upon respondent in accordance with state law. The notice, a copy of which was submitted as Exhibit III to the opposing papers, stated a permissible ground for termination under the lease addendum and regulations, and clearly set forth the date on which the tenancy would automatically end.

Upon the lapse of the designated period of time, the tenancy ended automatically in accordance with the lease addendum and regulations providing for termination of the tenancy by giving notice under State or local law. Accordingly, the Court holds that the termination clause of the lease created a conditional limitation, pursuant to which a holdover proceeding is maintainable. *Accord, Maia v. Castro,* 139 Misc.2d 312, 527 N.Y.S.2d 154.

Respondent next asserts that the petition must be dismissed for failure to allege that the public housing authority (hereinafter "PHA") was notified of the commencement of the instant holdover proceeding, as required by paragraph (H)(3) of the lease addendum and the regulations governing Section 8 housing. In response, the petitioner raises several issues pertaining to the PHA notice provision on which there appear to be no published decisions.

As noted above, paragraph (H)(3), which closely follows the language of 24 C.F.R. 882.215(c)(3), requires the landlord to "notify the PHA in writing of the commencement of procedures for termination of tenancy, at the same time that the Landlord gives notice to the Tenant under State or local law. The notice to the PHA may

be given by furnishing the PHA a copy of the notice to the Tenant." (Lease Addendum, paragraph (H)(3).)

The petition fails to allege that any such notice was served upon the PHA. The opposing affidavit of petitioner's managing agent concedes that the only written notice given the PHA was pursuant to a letter dated June 17, 1987, approximately four months prior to service upon respondent of the notice to terminate. Said letter, annexed to the opposing papers as Exhibit A, states in pertinent part, "This is to inform you that ***292** we are unable to accept the $601.00 per month rent offered by Section 8 for Verma Owens of 10 Rosedale Ave. Freeport, N.Y. The market rent of that size apartment is $850.00 per month. Unless Ms. Owens signs our standard lease for $850.00 per month this is formal notification we will terminate the contract immediately."

Petitioner initially questions whether failure to plead compliance with the PHA notice requirement is a jurisdictional defect, and contends that the aforesaid letter, together with unspecified telephone calls to the PHA, gave adequate notice of the instant action and substantially complied with the notice provision. Petitioner further questions whether the tenant can raise ****190** this issue, arguing that the tenant is not prejudiced by failure to comply with the notice provision, the purpose of which, petitioner asserts, is to protect the Section 8 PHA.

Prior to October 1, 1981, there was no question that notice to the PHA was essential in order to maintain an eviction proceeding. This is because the statute then in effect governing the Section 8 program required agency involvement in all eviction proceedings, providing the public housing agency with "the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." *See,* 42 U.S.C. 1437f(d)(1)(B) (1977). The regulation implementing this section required the owner to obtain the PHA's authorization for any eviction proceeding by furnishing it with a copy of the written notice of proposed eviction given to the tenant, to which the tenant had ten days to respond. The PHA was required to review the grounds for eviction and the tenant's response and authorize the eviction if it found the grounds to be sufficient. 24 C.F.R. 882.215 (1981). This review was for the purpose of determining that good cause existed to terminate the tenancy, but did not require a hearing by the agency. *Swann v. Gastonia Housing Authority,* 4th Cir., 675 F.2d 1342, 1345.

In 1981 the statute was amended, effective for leases entered into on or after October 1, 1981, to permit the *landlord* to initiate proceedings to terminate the Section 8 tenancy, specifically requiring the landlord to have good cause for termination. In so amending the statute, Congress intended to "minimize disturbance of the private relationship under State law between the unit owner and the tenant," recognizing that the success of the Section 8 program "depends on voluntary participation by private owners of existing housing." ***293** The amendment was designed to "assure owners that the procedural and substantive rights of the assisted tenant are the same as those applicable to the non-subsidized tenants." *Gallman v. Pierce,* 639 F.Supp. 472, citing Senate Budget Comm., Omnibus Reconciliation Act of 1981, S.Rep. No. 139, 97th Cong., 1st Sess. 256, reprinted in 1981 U.S.Code Cong. & Ad.News 396, 552.

Implicit in the statutory amendment was the legislative intent to permit the State court, rather than the PHA, to make the determination as to whether the landlord has good cause to terminate the Section 8 tenancy.

4 However, PHA involvement in Section 8 eviction proceedings has not been entirely eliminated. While the regulation implementing the statute no longer requires the PHA to authorize evictions under leases entered into on or after October 1, 1981, the landlord still must give the PHA written notice of the commencement of eviction proceedings at the same time that notice is given to the tenant under State or local law. 24 C.F.R. 882.215(c)(3) (1985). The Court finds that the notice given the PHA in the case at bar was not timely and therefore did not comply with the aforesaid notice provision.

At issue before the Court is whether a landlord's failure to comply with the PHA notice requirement is fatal to the maintenance of eviction proceedings, in view of the fact that the statute and regulations, as revised, no longer require active PHA involvement in the termination of Section 8 tenancies entered into after October 1, 1981. This Court finds that it is.

The intent behind the regulation in effect for pre-October 1, 1981 Section 8 leases requiring PHA authorization for evictions was "to guard against casually or haphazardly commenced eviction proceedings against Section 8 tenants; to fully apprise a Section 8 tenant of the grounds for eviction prior to the institution of summary proceedings; and to give notice to the public housing agency administering Section 8 funding that the continued possession of occupants in whom it has a substantial interest is threatened." *Jennie Realty Co. v. Sandberg*, 125 Misc.2d 28, 30, 480 N.Y.S.2d 268, 270.

These concerns are no less applicable to Section 8 leases entered into on or after October 1, 1981, as is readily apparent ****191** from the revised regulation's requirement that the PHA be given written notice of the commencement of eviction proceedings ***294** *at the same time* that the tenant is given such notice. 24 C.F.R. 882.215(c)(3) (1985) (emphasis added). The PHA has a substantial interest in the Section 8 tenancy, since it is charged with the responsibility of making the housing subsidy payments directly to the landlord on behalf of the tenant and otherwise administering the Section 8 program with the participating owner. 42 U.S.C. 1437f(b)(1), (c), (d). It is essential that the PHA be given timely notice of the commencement of proceedings to terminate the tenancy, not only so that it does not continue to make housing subsidy payments on behalf of a tenant who is no longer in possession, but also to enable it to monitor the actions of the landlord and to afford it the opportunity to intervene if it deems it necessary to protect the interests of the Section 8 tenant.

5 The Court finds petitioner's argument that the tenant does not have standing to raise this issue to be without merit. The Section 8 program is designed to aid lower income families in obtaining a decent place to live and to promote economically mixed housing. 42 U.S.C. 1437f(a); *Greenwich Gardens Associates v. Pitt*, 126 Misc.2d 947, 484 N.Y.S.2d 439. The entire program is structured for the benefit of the Section 8 tenant. The issue of a landlord's compliance with the lease and regulations in practicality must be raised by the tenant as the potential for prejudice to the tenant is very real.

6 In light of the foregoing, the Court holds that a landlord seeking to terminate a Section 8 tenancy must serve a copy of the termination notice (or equivalent notice) on the public housing authority at the same time that such notice is served on the tenant. Failure to do so is a jurisdictional defect which precludes the maintenance of a summary proceeding. The notice should be sent to the public housing authority by certified mail and the return receipt attached to the petition, or in the alternative, an affidavit of service should be submitted with the petition.

The Court recognizes that it is not necessarily a jurisdictional requirement that the petition allege compliance with the PHA notice provision, as long as compliance is proven at trial. (Cf., *Olean Urban Renewal Agency v. Herman*, 50 A.D.2d 1081, 376 N.Y.S.2d 328, wherein the Appellate Division, Fourth Department held compliance with a federal regulation governing the tenancy in question need not be alleged in the petition in order for a summary proceeding to be maintainable but that such compliance must be proven at trial; *215–219 Union Ave. Ass'n v. Miller*, 134 Misc.2d 507, 511 N.Y.S.2d 489, wherein the court held it is not a ***295** jurisdictional requirement to allege in a petition that the tenant is a Section 8 tenant and that compliance with certain federal regulations has been met but, that such a recitation is preferable.) Such compliance nevertheless should be alleged in the petition, as failure to do so may result in dismissal for failure to state the facts upon which the special proceeding is based, as required by RPAPL 741(4).

7 Finally, the petitioner questions the enforceability under New York State law of the provision of the Section 8 lease setting forth the "good cause" requirement for termination, arguing that said provision is unenforceable for lack of mutuality because the landlord must have good cause to terminate the tenancy, whereas the tenant can terminate the tenancy without cause after the first year upon sixty days notice. (Lease Addendum, paragraph (L); 24 CFR 882.215(a)(5).)

The Court finds this argument to be entirely without merit. The petitioner voluntarily participated in the Section 8 program, the nature of which is heavily regulated. In return for compliance with the program's requirements, a landlord receives many benefits built into the program, not the least of which are the guaranteed monthly payment by the PHA of a substantial portion of the rent, and the guaranteed payment by the PHA of up to eighty percent of the rent for up to sixty days if the tenant vacates in violation of the lease. 24 C.F.R. 882.105(b); *see also* ***192** *Swann v. Gastonia Housing Authority,* supra, 675 F.2d 1342, 1346. The petitioner was aware of the "good cause" requirement for termination at the time it chose to participate in the Section 8 program in return for the program's benefits to landlords, and cannot now argue that the lease provision is unenforceable for lack of mutuality. Cf., *Rushie v. Berland,* 130 Misc.2d 816, 502 N.Y.S.2d 359, wherein the Appellate Term, First Department found the good cause provision of the Section 8 lease to be enforceable on other grounds.

In accordance with the foregoing, respondent's motion for an order dismissing the petition for failure to serve the PHA with timely notice of termination of the Section 8 tenancy is granted.

All Citations

141 Misc.2d 287, 533 N.Y.S.2d 186

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18 Misc.3d 12
Supreme Court, Appellate Term, New York.
9th and 10th Judicial Districts.

Joseph ROSINA and Margaret Rosina, Respondents,
v.
Annette PARRA, Appellant.

Nov. 29, 2007.

Synopsis

Background: Landlord brought holdover summary proceeding against tenant who received **Section 8** subsidy. The District Court, Suffolk County, Patrick J. Barton, J., awarded possession to landlord and tenant appealed.

Holding: The Supreme Court, Appellate Term, held that landlord was not required to prove existence of good cause to **terminate** month-to-month **lease** with tenant who received **Section 8** subsidy.

Affirmed.

West Headnotes (1)

Change View

1 **Landlord and Tenant**

Landlord was not required to prove existence of good cause to **terminate** month-to-month **lease** with tenant who received **Section 8** subsidy, where tenant remained in possession as month-to-month tenant after expiration of initial **lease** and addendum to **lease** required good cause to be shown when tenancy was **terminated** during term of **lease**. McKinney's Real Property Law § 232–a.

1 Case that cites this headnote

233	Landlord and Tenant
233X	Public and Publicly Subsidized Housing
233X(E)	**Termination** of Tenancy; Eviction
233k2071	Grounds for Recovery or Nonrecovery
233k2073	Violation of Tenancy
233k2073(1)	In general
	(Formerly 393k82(3.4))

Attorneys and Law Firms

***459** Nassau/Suffolk Law Services, Hempstead (Michael Wigutow of counsel), for appellant.

Kirschenbaum & Phillips, P.C., Mineola (Michael L. Kohl of counsel), for respondents.

Present: RUDOLPH, P.J., McCABE and TANENBAUM, JJ.

Opinion

Appeal from a final judgment of the District Court of Suffolk County, Second District (Patrick J. Barton, J.), entered May 24, 2006. The final judgment awarded possession to landlords in a holdover summary proceeding.

*13 Final judgment affirmed without costs.

In this holdover proceeding seeking to remove a tenant who receives a **Section 8** subsidy, landlords allege that tenant remained in possession as a month-to-month tenant after the expiration of her initial **lease**, and that they served a notice **terminating** her month-to-month tenancy. Tenant argues that, notwithstanding the expiration of the initial term of the **lease**, landlords were required to state in the notice, and to plead and prove, the existence of a good cause basis to **terminate** her **Section 8** tenancy.

The District Court properly ruled that when tenant remained in possession after the expiration of her **lease** on August 31, 2005, she did so as a month-to-month tenant (*see* Real Property Law § 232–c). While we agree with tenant that the terms of the **Section 8** tenancy addendum carried over into the month-to-month tenancy, it is clear that the language in paragraph 8(f) of the addendum, requiring that the owner give the tenant a notice that specifies the grounds for the **termination**, must be read in conjunction with that of paragraph 8(b), which provides that good cause must be shown when a tenancy is **terminated** "*[d]uring the term of the **lease***" (emphasis added). Indeed, following the 1988 amendment (Pub. L. 105–276, 112 U.S. Stat. 2461, 2607) to the ***14** federal statute (42 USC § 1437f [d][1][B][ii]), both the statute and the regulation which implements it (24 CFR 982.310[a]) only require a showing of good cause to **terminate** when the **termination** occurs "[d]uring the term of the **lease**." As the federal regulations mandate that the tenancy addendum be included in the **lease** (*see* 24 CFR 982.305[a][3]), the addendum must be read to comport with these regulations and with the federal statute. Consequently, we hold that landlords could **terminate** the month-to-month tenancy merely by service of a notice pursuant to Real Property Law § 232–a and were not required to state in the notice, or allege and establish at trial, good cause for the **termination**. Accordingly, ***460** the final judgment awarding possession to landlords is affirmed.

All Citations

18 Misc.3d 12, 853 N.Y.S.2d 458, 2007 N.Y. Slip Op. 27494

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18 Misc.3d 1113(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
District Court, Nassau County, New York,
First District.

NEW HEMPSTEAD TERRACE LLC, Petitioner(s)
v.
Margaret REEVES, "John Doe" and "Jane Doe," Respondent(s).

No. SP 2137/07.
Jan. 9, 2008.

Attorneys and Law Firms

William D. Friedman, Esq., Hempstead, Attorney for Petitioner.

Michael Wigutow, of Counsel, Jeffrey A. Seigel, Esq., Nassau/Suffolk Law Services, Committee, Inc., Hempstead, Attorneys for Respondent.

Opinion

SCOTT **FAIRGRIEVE**, J.

*1 This Court vacates the prior decision of October 12, 2007. The parties have requested this Court to clarify the issue of whether a pleading is jurisdictionally defective if it seeks to recover the **Section 8** portion of the rent, along with the tenant's portion, or whether the tenant must plead and prove as an affirmative defense that the tenant is not liable for the **Section 8** portion of the rent.

Petitioner has made a motion to reargue claiming that this Court made a mistake of law in dismissing the petition. This Court grants reargument, but adheres to its prior decision in dismissing this matter for the reasons set forth herein.

Petitioner New Hempstead Terrace, LLC commenced this summary proceeding against Respondent Margaret Reeves for nonpayment of rent concerning apartment A1 located at 115 Terrace Avenue, Hempstead, New York. Petitioner states in the petition, dated April 23, 2007, that a **Section 8** rental agreement was entered into between the parties, "wherein respondent promises to pay to petitioner as rent $752.00 in advance on the 1st day of each month. (Tenant's share of rent is $304.00)". The petitioner states that **Section 8** pays $448.00.

The rent payment schedule for apartment A1 seeks to collect arrears of $1,956.00 for the period commencing January 1, 2006 and ending April 1, 2007. The total of rent in arrears includes the portion of rent that the respondent is liable for and also the portion that **Section 8** covers.

This Court previously dismissed this proceeding because:

Absent a showing of a new agreement, tenant is not liable for the **Section 8** share of the rent as rent' even once the subsidy has **terminated**. *See, Prospect Place H.D.F.C. v. Gaildon,* 2005 N.Y. Slip Op 50232 [2nd Dept 2005]. Petitioner has failed to indicate that a new agreement between landlord and tenant has been created. Exhibit 2 offered in evidence fails to serve as a new agreement because it does not indicate that tenant will undoubtedly be responsible for the entire portion of the rent including $549. to be paid by **Section 8**.

Petitioner contends that this Court was mistaken in dismissing the petition because it is an affirmative defense that respondent is not responsible for the **Section 8** rent.

Petitioner has also submitted as an exhibit the letter dated March 30, 2007, from the County of Nassau Office of Housing and Intergovernmental Affairs Housing Services for the proposition that respondent could be held liable for the entire rent under certain circumstances if she continued to live in the premises effective May 1, 2007.

The said letter states that **Section 8** was **terminated** effective April 30, 2007, because the rental unit had violations which were not corrected by Petitioner. Petitioner contends in the motion to reargue that respondent may have caused the rental to lose its **Section 8** subsidy:

"It should be pointed out that according to her own exhibits at least one reason for the unit failed inspection is determined to be the tenant's fault".

DECISION

*2 Petitioner contends that respondent must assert as an affirmative defense that respondent is not liable for the **Section 8** rent. The Court rejects this argument. In *Vincenzi v. Strong*, WL 2296505 (N.Y. City Civ Ct, 2007), the court makes clear that under **Section 8 leases**, Landlords agree not to hold tenants liable for the **Section 8** subsidy unless there is a new agreement by the tenant to be responsible for the **Section 8** portion of the rent. Specifically, the court held:

Thus, a "**Section 8** tenant agrees in the **Section 8 lease** only to pay the tenant share of the rent. Absent a showing by [a] landlord of a new agreement ... a **Section 8** tenant does not become liable for the **Section 8** share of the rent as rent' even after **termination** of the subsidy." (*Prospect Place HDFC v. Gaildon*, 2005 N.Y. Slip Op 50232[U] [App term 1st Dept] *quoting Rainbow Assoc. v. Culkin*, 2003 N.Y. Slip Op 50771[U] [App Term 2d Dept]. *See also Dawkins v. Ruff*, 10 Misc.3d 88, 90 [App Term 2d Dept 2005]; and *Moshulu Assocs., LLC v. Cortes*, NYLJ, April 5, 2006, at 21, col. 3 [Hous Part, Civ Ct, Bx Co, Danzinger, J.].)

Petitioner cannot maintain the present proceeding against respondent for the **Section 8** subsidy absent an allegation of a new agreement which has not been done. This Court holds that petitioner cannot maintain a summary proceeding against respondent to recover in the first instance, absent a good faith allegation that a new agreement has been reached to make the tenant liable for the **Section 8** rent. Thus, this is not an affirmative defense to be pleaded by respondent.

Petitioner contends that respondent may be held liable if respondent's actions impeded petitioner's access to the apartment to effectuate repairs. The court in *Vincenzi*, declined to hold the respondent liable based upon the foregoing for the **Section 8** rent. Instead the court held that a holdover proceeding is the proper remedy to evict a tenant for a material breach of the **lease**:

Petitioner however invites this court to consider evidence allegedly showing that respondent impeded petitioner's access to the Apartment which he maintains caused the lapses in HQS and NYCHA's ensuing **termination** of respondent's subsidy. The court declines petitioner's invitation as it is without jurisdiction to review the propriety of NYCHA's determination. (*Bravo Realty Corp. v. Lewis*, NYLJ, March 24, 1999 at 26, col. 1 [App Term 1st Dept]; *Fieldbridge Assocs. v. Champion*, NYLJ, March 26, 1993, at 24, col. 5 [App Term 2d & 11th Jud Dists]. *cf. East Harlem Pilot Block Building 1 HDFC v. Cordero*, holding that the Civil Court has jurisdiction to review the propriety of the suspension of a *project based* **Section 8** subsidy.) Where a tenant breaches an obligation under the HAP contract and/or **Section 8** regulations, such as by failing to provide access to the premises for correction of HQS violations as alleged here, a landlord's remedy is to commence a holdover proceeding for material noncompliance with those provisions. (*See e.g.*, 24 CFR § 982.310 [a] [2], permitting owner **termination** of a tenancy for violation of federal, state or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises). A nonpayment proceeding to recover the **Section 8** portion of the rent from the tenant does not lie. (24 CFR § 982.451[b][4][iii]; 24 CFR § 982.310[b][1]. *See also McNeill v. New York City Housing Authority*, 719 F.Supp. 233, 255 [SDNY 1989].)

*3 In *Prospect Place HDFC v. Gaildon*, 6 Misc.3d 135, 800 NYS 355, (N.Y. Sup App Term, 2005), the court held that a tenant is not liable for the **Section 8** rent even after **termination** of the subsidy:

Neither the Federal regulations governing this **Section 8** tenancy (see 24 CFR § 982.310[b]) nor the parties' December 13, 2002 stipulation settling the underlying nonpayment proceeding obligates tenant to pay the full contract rent ($4,452.52) that ultimately was awarded to landlord below. "A **Section 8** tenant agrees in the **Section 8 lease** only to pay the tenant share of the rent. Absent a showing by landlord of a new agreement, and none was here shown, a **Section 8** tenant does not become liable for the **Section 8** share of the rent as 'rent' even after the **termination** of the subsidy" (*Rainbow Assocs. v. Culkin*, 2003 N.Y. Slip Op 50771[U] [App Term, 2d Dept]). We have modified the final judgment accordingly and, in view of the tenant's payment of funds exceeding the amount of the reduced judgment, have permanently stayed execution of the warrant.

In *7 Highland Management Corp. v. McCray*, 9 Misc.3d 129, 808 N.Y.S.2d 920, 2005 WL 2347662 (N.Y. Sup App Term, 2005), the court held:

... a nonpayment proceeding will not lie to recover the **Section 8** portion of the rent even after the subsidy has **terminated** ..."

In N.Y. Prac, Landlord and Tenant Practice in New York, Sec. 19:79, the following appears which indicates that no cause of action will lie absent a new agreement:

§ 19:79. "**Section 8**" housing program **Termination** of **Section 8** tenancies "Good cause" required Nonpayment by housing agency

The landlord may not **terminate** the **lease** for the government's nonpayment of the assistance component since such an omission does not violate the tenant's obligations under the **lease**.

24 C.F.R. § 982.310(b); *Prospect Place HDFC v. Gaildon*, 6 Misc.3d 135(A), 800 N.Y.S.2d 355 (App. Term 2005) ("A **Section 8** tenant agrees in the **Section 8 lease** only to pay the tenant share of the rent. Absent a showing by landlord of a new agreement, and none was here shown, a **Section 8** tenant does not become liable for the **Section 8** share of the rent as 'rent' even after the **termination** of the subsidy."); *see e.g., Licht v. Moses*, 11 Misc.3d 76, 813 N.Y.S.2d 849 (App. Term 2006) ("In the absence of a new agreement, after the **termination** of the subsidy, in which the tenant agrees to pay the nontenant share of the rent, a nonpayment proceeding will not lie to recover that portion of the rent, even in those instances in which the **section 8** subsidy has been properly **terminated**."); *7 Highland Management Corp. v. McCray*, 9 Misc.3d 129(A), 808 N.Y.S.2d 920 (App. Term 2005) ("[S]ince, under the **lease** as renewed, tenant did not agree to pay the **Section 8** portion of the rent, this nonpayment proceeding does not lie."); *Dawkins v. Ruff*, 10 Misc.3d 88, 810 N.Y.S.2d 783 (App. Term 2005); *Unity Assocs., LP v. Spicer*, N.Y.L.J., 6/6/00, p. 30, col. 1 (App. Term, 2d & 11th Jud. Dists.) ("Because landlord is a recipient of payments from FSS it was landlord and not tenant who knew or should have known that the payment checks were not being received.").

*4 *See also* N.Y. Residlt, Sec 5:134, which states:

§ 5:134. Rent setting in **Section 8** Existing Housing Program Tenant's share of the rent Tenant not responsible for HA portion

In the event the PHA does not pay its portion of the rent:

The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the HA.

24 C.F.R. § 982.310(b)(1); § 982.451(b)(4)(iii). This regulation codifies the holding in *McNeill v. New York City Housing Authority*, 719 F.Supp. 233 (S.D. N.Y.1989). *See*

also, Rainbow Associates v. Culkin, 2003 WL 2004427 (N.Y.App. Term 2003). (A **Section 8** tenant agrees in the **Section 8 lease** only to pay the tenant share of the rent. Absent a showing by the landlord of a new agreement, a **Section 8** tenant does not become liable for the subsidy portion of the rent as "rent" even after **termination** of the subsidy.)

CONCLUSION

Petitioner cannot maintain an action for **Section 8** rent even if the pleading incorporates money owed for the tenant's portion of rent. This is not an affirmative defense to be pleaded and proved by the respondent/tenant.

So Ordered.

All Citations

18 Misc.3d 1113(A), 856 N.Y.S.2d 500 (Table), 2008 WL 95779, 2008 N.Y. Slip Op. 50018(U)

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20 Misc.3d 1105(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
District Court, Nassau City.

Beverly TIMOTHY, Petitioner
v.
Michele MATISON, "John Doe" and "Jane Doe", Respondent(s).

No. SP1718/08.
June 23, 2008.

Attorneys and Law Firms

William D. Friedman, Esq., Hempstead, Attorney for Petitioner.

Nassau/Suffolk Law Services Committee, Inc., Hempstead, Attorney for Respondent.

SCOTT **FAIRGRIEVE**, J.

BACKGROUND

*1 Petitioner–Landlord, Beverly Timothy commenced this holdover proceeding to recover possession of the subject premises from Respondent–Tenant, Michele Matison. Respondent moves to dismiss the petition in lieu of answering upon the grounds of Landlord's failure to state the facts upon which the special proceeding is based, through defense of documentary evidence, and by lack of subject matter jurisdiction.

The parties at bar are subject to a written **lease** signed by the Petitioner's assignor, Victor Marmol, and the Respondent. The **lease** was assigned to the Petitioner in connection with her purchase of the subject property from Mr. Marmol at some time in 2006. The beginning of the term of the **lease** began on January 1, 2003 and was designated to end on December 31, 2003. The **Section 8 lease** clearly contains a provision that "the renewal term shall be for successive one-year terms." Since the original signing of the **lease**, the Respondent continues to maintain residency of the subject premise. Not until February 26, 2008 did Petitioner serve Respondent with notice of **termination** of the initial 2003 **lease**. Both parties agree that Petitioner has accepted rental payments made by Nassau County Department of Social Services, hereinafter referred to as, NCDSS, on behalf of Respondent well beyond the December 31, 2007 **termination** date.

DISCUSSION

The issue being considered by this Court is whether Petitioner is permitted to **terminate** the **lease** when she has continued to accept and retain rental payments from NCDSS well beyond the December 31, 2007 **termination** date of the subject **lease**.

Respondent contends that since the original **lease** was signed between Respondent and Assignor, Mr. Marmol, the parties have continued to renew the **lease** automatically through Mr. Marmol's and now Petitioner's acceptance of rent beyond the expiration term of the **lease**. Therefore, Respondent asserts that given the pattern of renewing the **lease** that has developed between the parties, Petitioner's acceptance of the 2008 payments constitutes a renewal of the Landlord–Tenant relationship. Respondent bases her argument on New York law which clearly states that when a tenant continues to maintain exclusive possession of the premise there is an implied continuance of tenancy subject to the same conditions and terms as the original **lease** between the Landlord and Tenant, *City of New York v. Penna. RR Co.*, 37 N.Y.2d 298, 300 [1975]; *State Farm Fire & Cas. Co., v. Firmstone*, 9 AD3d 812, [3rd Dept 2004]; *McClennan v. Brancato Iron and Fence Works*, 282 A.D.2d 722, 724 [2nd Dept 2001]; *New Country Dev'mt Group v. Demitasse*, 278 A.D.2d 728, [3rd Dept.2000]; *Lakeside Plaza, Inc. v.*

Impala Press, 237 A.D.2d 334, [2nd Dept 1997]; 1 Dolan, Rasch's *Landlord and Tenant–Summary Proceedings*, § 10:2, at 448 [4th Ed].

In addition, Respondent maintains that **Section 8** subsidy payments are considered payments of rent, thereby, Landlord's acceptance and retention of rent beyond the **termination** date of the **lease** is a waiver of the Landlord's rights to **terminate** the **lease**. (*Greenwich Gardens Associates v. Pitt*, 126 Misc.2d 947, 955 [Nassau Dist Ct 1984]; *Youth Action Homes II HDFC v. Ash*, 8/7/2002 N.Y.L.J 21, [col. 1]).

*2 In her defense, Petitioner argues that the subject **lease** is not an ETPA **lease** and therefore is not subject to an automatic renewal of the initial term of the **lease**. (*citing, Rosario v. Diagonal Realty, LLC*, 8 NY3d 755 [2007]). While, the Petitioner is correct that the subject **lease** is not an ETPA **lease**, it remains uncontested that Petitioner continued to accept and retain rental payments made by NCDSS well beyond the December 31, 2007 **termination** date. As established, such acts are considered an affirmative approval on behalf of the Landlord to renew the initial term of the **lease** given the renewal provision provided in the **lease**.

According to 1 Dolan, Rasch's *Landlord and Tenant–Summary Proceedings*, § 10:1, at 446 [4th Ed], "if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month...." Therefore, Petitioner's acceptance of Respondent's payments of rent beyond the **termination** date of December 31, 2007 is considered affirmative approval on part of the Petitioner of an extension of the initial **lease** for the year of 2008.

RPL § 232–c provides that a month-to-month tenancy is only created in the absence of either an express or implied agreement, when the landlord continues to accept rent from a holdover tenant for any period subsequent to the expiration of a **lease**. However, in the case at bar, the parties expressly agreed in the written **lease** that the renewal term for the **lease** shall be for successive one year terms. Furthermore, a **lease** that contains a provision for an automatic renewal does not convert into a month-to-month tenancy. The only way a Landlord can **terminate** such a **lease** is by proof of good cause, *Numme v. Lemon*, 191 Misc.2d 133 (N.Y. Sup App Term 2002). Therefore, as a result of the parties expressly providing in the **lease** for an automatic renewal of the **lease** for the duration of a year, as well as Petitioner's failure to provide good cause for **terminating** the subject **lease**, Petitioner's acceptance of Respondent's payment of rent created a term of years tenancy, not a month-to-month tenancy.

Furthermore, the written **lease** at bar is not subject to the Statute of Frauds because it can be performed to completion within one year from its creation date of January 1, 2008 to its **termination** date of December 31, 2008. Genl. Ob. Law § 5–701.

DECISION

This Court holds that Petitioner's acceptance of rental payments made on behalf of Respondent by NCDSS in the early part of 2008 constitutes as acceptance of rent and a waiver of Petitioner's rights to **terminate** the **lease**. As a result, Respondent's **lease** was renewed for the year of 2008.

Therefore, Respondent's motion is granted and the petition is dismissed.

So Ordered:

All Citations

20 Misc.3d 1105(A), 866 N.Y.S.2d 96 (Table), 2008 WL 2486354, 2008 N.Y. Slip Op. 51226(U)

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20 Misc.3d 1119(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
District Court, Nassau County, New York,
First District.

Verda DOUGLAS, Petitioner(s)
v.
Bernice NOLE, "John Doe," and "Jane Doe," Respondent(s).

No. SP001635.
July 15, 2008.

Attorneys and Law Firms

William D. Friedman, Esq., Michael Wigutow, of Counsel, Hempstead.

Jeffrey Seigel, Nassau Suffolk Law Services Committee, Inc., Hempstead.

Opinion

SCOTT **FAIRGRIEVE**, J.

*1 Petitioner–Landlord, Verda Douglas commenced this summary proceeding against Respondent–Tenant, Bernice Nole for non-payment of rent concerning 58 Prospect Place, Roosevelt, New York. Petitioner states in her petition, dated March 24, 2008, that a **Section 8** rental agreement was reached between the parties, agreeing on a monthly rent of $1,820, payable in advance of the first day of each month ($423 of which Respondent is directly responsible).

The issue concerning this Court is whether a **Section 8** tenant whose participation in the **Section 8** Voucher Program was **terminated** as a result of their own wrongdoing shall be held responsible for the full rental value of the **lease** (including the previous value of the **Section 8** subsidy) entered into by the parties after **termination** of the **Section 8 lease**. In the case at bar, Petitioner alleges that Respondent is responsible to pay rent owed on behalf of the Department of Housing and Urban Development, hereinafter "HUD", for the months of February and March of 2008 in the sum of $2,794, as well as, Respondents own rental arrears for February and March of 2008, amounting to $846 and legal fees listed as "additional rent" calculated at $475.

DISCUSSION

The Petitioner provided the court with evidence of a March 20, 2008 letter from the Town of Hempstead Department of Urban Renewal addressed to Respondent notifying her that her participation in the **Section 8** Voucher Program has been **terminated**. In their letter, the Town of Hempstead, asserted that Respondent had violated several HUD Regulations when she reported that her daughter and her two grandchildren were residing with her, meanwhile, the same parties were already collecting their own HUD Voucher in New York City. Accordingly, the letter clearly indicates that the Respondent has been **terminated** from **Section 8** by grounds of fraud and misrepresentation.

Respondent avers that she is not responsible for paying the portion of the rent covered by the Public Housing Authority, hereinafter "PHA", because Petitioner's acceptance of **Section 8** subsidy payments is a term and condition of the **lease**. Well-established precedent holds that a "**Section 8** tenant agrees in the **Section 8 lease** only to pay the tenant share of the rent. Absent a showing by [a] landlord of a new agreement ... a **Section 8** tenant does not become liable for the **Section 8** share of the rent as rent' even after **termination** of the subsidy." (*Vincenzi v. Strong*, 2007 N.Y. Slip Op 51534 [U]) [Civ Ct, Bx Co 2007] *quoting Prospect Place HDFC v. Gaildon*, 2005 N.Y. Slip Op 50232[U] [App Term 1st Dept] *quoting Rainbow Associates v. Culkin*, 2003 N.Y. Slip Op 50771[U] [App Term 2nd & 11th Jud Dists]; *see also Dawkins v. Ruff*, 10 Misc.3d

88, 90 [NY App Term 2nd Dept 2005]; and *Moshulu Associates, LLC v. Cortes*, NYLJ, April 5, 2006, at 21, col. 3 [Hous Part, Civ Ct, Bx Co, Danzinger, J.].). Accordingly, since their was no agreement stipulated between the parties transferring any responsibility upon the Respondent to pay the **Section 8** portion of the rent, the Respondent can only be held liable for her portion of the rent agreed to in the **lease** and not the delinquent amount owed by **Section 8** for their share of the rent agreed to in the **lease**. Petitioner's remedy is to commence a holdover proceeding to evict Respondent for violating the **Section 8 lease**, *(see Vincenzi*, 2007 N.Y. Slip Op 51534[U][Civ Ct, Bx Co 2007], *supra)*.

*2 Even though the Respondent cannot be held liable for the unpaid **Section 8** rent at dispute, the Respondent is responsible for paying the fair use and occupancy of the subject premise after **termination** of the **Section 8** subsidy. In *Zappala v. Caputo*, 2007 N.Y. Slip Op 51808(U), (App Term, 1st Dept 2007) the court established that "[A] **Section 8** tenant who holds over after the **termination** of the **Section 8** tenancy is responsible for the full amount of use and occupancy accruing in the period after the **termination** (*citing Community Properties v. McCloud*, 2003 N.Y. Slip Op 51088(U) [App Term, 9th & 10th Jud Dists]); *see also Schickler v. Thorpe*, 2002 N.Y. Slip Op 40106(U) [App Term, 9th & 10th Jud Dist]; and *Baldwin Merrick Associates v. Relles*, 2008 N.Y. Slip Op 51331(U) [Nassau Dist Ct].). Therefore, the March 20, 2008 letter from the Town of Hempstead clearly indicates that the Respondent was **terminated** from **Section 8** on that date. Accordingly, Respondent is responsible for the fair use and occupancy of the subject premises beyond March 20, 2008. However, since such fair use and occupancy is not sought in this nonpayment proceeding, this Court is unable to award such a remedy.

Accordingly, Respondent is liable in this nonpayment proceeding for the share of the rent which totals the sum of $846 for the months of February and March of 2008.

Finally, in her petition, the Petitioner requests reimbursement for legal fees as "additional rent." However, this Court finds that approval of attorney fees is improper. According to *Community Properties v. McCloud*, 2003 N.Y. Slip Op 51088(U)[App Term, 9th & 10th Jud Dists], *supra*); "[A] landlord may not collect costs, penalties and other non-rent items as "added rent" from a **Section 8** benefits recipient unless specifically provided in the **Section 8 lease**" (*citing Matter of Binghamton Hous. Auth. v. Douglas*, 217 A.D.2d 897, 898 [NY App.Div. 3rd Dept 1995]; *Porter v. Chester Hous. Auth. v. Turner*, 189 Misc.2d 603, 604 [NY App Term 2nd Dept 2001].).

CONCLUSION

Petitioner is awarded a money judgment of $846 which represents Respondent's share of rent owed with a judgment of possession and warrant stayed until August 15, 2008. Thereafter, Petitioner may proceed to evict Respondent forthwith.

Respondent is not liable for the **Section 8** rent for the months of February and March of 2008 absent a new agreement to be liable for same. Petitioner may commence a holdover proceeding against Respondent for violating the **Section 8 lease** and collect use and occupancy for the period after **termination** of the **Section 8 lease**.

So Ordered:

All Citations

20 Misc.3d 1119(A), 867 N.Y.S.2d 16 (Table), 2008 WL 2736662, 2008 N.Y. Slip Op. 51394(U)

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WHEN A TENANT OR LANDLORD FILES BANKRUPTCY[1]

A. Landlord and tenant bankruptcies; overview of rights of principal players

1. Tenant files bankruptcy

a) Tenant's rights

1) Tenant benefits from an automatic stay that stops commencement or continuation of eviction, collection, or other proceedings.[2]

2) Tenant has the right not to be evicted or have other action taken against it or the property without the landlord first making a motion in the bankruptcy court to lift the automatic stay.[3]

3) Tenant has the choice to assume, assume and assign, or reject the lease.[4]

4) Time periods for assumption and rejection gives the tenant time to attempt to successfully reorganize.[5]

5) Tenant's prior defaults are not a basis for the landlord to terminate the lease (i.e., ipso facto clauses are not enforceable in bankruptcy).[6]

b) Landlord's rights

1) Tenant is obligated to continue making rent payments under the lease until such time as the tenant rejects the lease.[7]

a. "Stub rent" is the term used for the rent due during the month the tenant filed its bankruptcy petition. The bankruptcy court may order that the rent due for that month must be prorated, entitling the landlord to administrative rent only for the portion of rent representing the time period between petition date and the end of the month.[8]

2) Rent accruing post-petition and pre-decision to assume or reject the lease is given priority as an administrative expense.[9]

3) Tenant is obligated to comply with non-monetary lease provisions.[10]

4) If the tenant assumes and later breaches a commercial real estate lease, the landlord is entitled to damages equal to the sum of all monetary obligations due, aside from penalties, for the two year period "following the later of the rejection date or the date of actual turnover of the premises."[11]

a. The landlord's claim for remaining sums due under the balance of the lease term are limited to the greater of rent for one year or 15% of three years of the remaining lease term.[12]

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[2] 11 U.S.C. § 362(a).

[3] 11 U.S.C. § 362(d).

[4] 11 U.S.C. § 365(a).

[5] 11 U.S.C. § 365(d).

[6] 11 U.S.C. § 365(e)(1).

[7] 11 U.S.C. § 365(d)(3).

[8] *See In re* Stone Barn Manhattan, LLC, 398 B.R. 359, 365–68. Not all Circuits follow the "stub rent" theory.

[9] 11 U.S.C. § 365(d)(3).

[10] 11 U.S.C. § 365(d)(3).

[11] 11 U.S.C. § 503(b)(7).

[12] 11 U.S.C. § 502(b)(6).

5) If the lease expires on its own terms, the landlord cannot be compelled, absent a provision in the lease, to renew or extend the lease.[13]

2. Landlord files bankruptcy
   a) Tenant's rights
      1) Tenant's security deposit held by the landlord-debtor is generally safe and does not become property of the bankruptcy estate.[14]
      2) If the landlord-debtor rejects the lease, and rejection amounts to a breach entitling the tenant to treat the lease as terminated under the terms of the agreement or applicable nonbankruptcy law, the tenant has two options:
         a. The tenant may treat the lease as terminated or, if the lease term has commenced, the tenant may retain its rights under the lease for the rest of the lease term and for any renewal or extension to the extent that such rights are enforceable under applicable nonbankruptcy law.[15]
            i. This provision in effect protects tenants from eviction in the case the landlord files bankruptcy.
         b. If the tenant elects to retain its rights under the lease or agreement it must continue to pay rent and fulfill other obligations required by the terms of the lease or agreement.[16]
            i. However, the tenant may offset against the rent it owes the value of any damage caused by the debtor's nonperformance after the date of rejection, but the tenant does not have any other rights against the debtor for any damages resulting from the debtor's nonperformance after rejection of the lease.[17]
               1. For example, the bankruptcy court may permit the tenant to offset from the amount of rent the tenant owes amounts the tenant expended to make repairs the landlord-debtor was required to make under the terms of the lease.[18]
   b) Landlord's rights
      1) Landlord has the choice to assume, assume and assign, or reject the lease, subject to the tenant's ability to retain its rights under the lease.[19]
      2) Landlord may, under certain circumstances, sell property free and clear of liens and other interests, including the interests of tenants.[20]
         a. This right is qualified by certain protections for the tenant in the Bankruptcy Code, such as limited grounds entitling the landlord to a free and clear sale and the right to adequate protection if such a sale proceeds.

B. Review of the automatic stay and assumption and/or rejection procedure and (commercial v. residential)
   1. Automatic stay

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[13] *In re* Kong, 162 B.R. 86, 90–91 (Bankr. E.D.N.Y. 1991).
[14] *In re* Trafalgar Associates, 53 B.R. 693, 695–96 (Bankr. S.D.N.Y. 1985).
[15] 11 U.S.C. §365(h)(1)(A).
[16] 11 U.S.C. §365(h)(1)(B).
[17] 11 U.S.C. §365(h)(1)(B).
[18] *In re* Flagstaff Realty Associates, 60 F.3d 1031, 1034–35 (3d Cir. 1995).
[19] 11 U.S.C. § 365(a); 11 U.S.C. §365(h)(1)(B).
[20] 11 U.S.C. § 363(f); *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 547–48 (7th Cir. 2003).

a) Prevents the landlord from taking any action against the tenant without first obtaining the bankruptcy court's permission.[21]
   1) Landlord must first make a motion in the bankruptcy court to lift the stay for cause (e.g., continuing damage to the property and lack of adequate protection).[22]
b) The landlord cannot commence or continue an action in landlord-tenant court for nonpayment of rent or to evict the tenant without first obtaining relief from the automatic stay.[23]
   1) Even if the landlord has already obtained a warrant of eviction, which terminates the landlord-tenant relationship under the lease, if the landlord has not yet executed the warrant of eviction, the landlord must first obtain relief from the automatic stay before proceeding against the tenant.[24] (See limitation below in residential cases where landlord has judgment for possession)
c) Landlord is not permitted to setoff a security deposit for unpaid rent without the bankruptcy court's permission.[25]

2. Assumption and rejection
   a) Generally
      1) Assumption
         a. In order to assume a lease, the tenant must cure any defaults and provide adequate assurance of future performance.[26]
            i. By assuming the lease, the tenant confirms its continuing obligation to pay rent to the landlord, and the landlord is obligated to continue to give the tenant possession of the premises.[27]
      2) Rejection
         a. After a tenant rejects a lease, the landlord can file a claim for damages, including damages for unpaid past and future rents.[28]
         b. Rejection does not result in automatic termination of the lease.[29]
            i. The landlord must take further action (i.e., obtain relief from the automatic stay) in order to effect a termination.[30]
   b) Commercial real estate leases
      1) In chapters 7 and 11, the tenant-debtor or trustee must determine within 120 days whether to assume or reject a commercial lease.[31]
         a. The court may extend the 120-day period by 90 days without the landlord's consent, but any further extensions of time require the landlord's consent.[32]

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[21] 11 U.S.C. § 362(a).
[22] 11 U.S.C. § 362(d).
[23] 11 U.S.C. § 362(a)(3).
[24] *In re* Eclair Bakery Ltd., 255 B.R. 121, 133–34 (Bankr. S.D.N.Y. 2000).
[25] 11 U.S.C. § 362(a)(7).
[26] 11 U.S.C. § 365(b)(1).
[27] *In re* Penn Traffic Co., 524 F.3d 373, 378 (2d Cir. 2008).
[28] *In re* Child World, Inc., 147 B.R. 847, 850 (Bankr. S.D.N.Y. 1991).
[29] 11 U.S.C. § 365(g).
[30] *In re* Lavigne, 114 F.3d 379, 386–87 (2d Cir. 1997).
[31] 11 U.S.C. § 365(d)(4)(A).

i. If the tenant-debtor or trustee fails to make a decision to assume or reject the commercial lease within the specified time period the lease is deemed rejected, and the tenant-debtor or trustee must immediately surrender the property to the landlord.[33]

c) Residential real estate leases

1) In chapter 7, the trustee must assume or reject a residential lease within 60 days.[34]

a. In the Eastern District of New York, if the trustee files a motion seeking to extend the time to assume or reject a residential lease that is returnable no more than 14 days after the expiration of the 60 days, the trustee must file with its motion a proposed order seeking an extension for cause to the date of the hearing on the motion, which the court may enter without further notice or a hearing.[35] In the Southern District of New York, the trustee need not submit a proposed order seeking an extension for cause to the date of the hearing on the motion, because the time to assume or reject is automatically extended until the entry of an order resolving motion.[36]

i. If the trustee fails to assume or reject the lease within the specified time the lease is deemed rejected.[37]

2) In chapters 11 and 13, the trustee may assume or reject a residential lease at any time prior to plan confirmation, but the court may order the trustee to assume or reject sooner upon request of a party to the residential lease.[38]

C. Limitation of the automatic stay for residential tenants in bankruptcy cases

1. If the landlord obtained a judgment for possession prior to the residential tenant's bankruptcy, the automatic stay will not prevent the landlord from enforcing the judgment immediately.[39]

a) But if the tenant files with his or her bankruptcy petition a certification that under state law the tenant may cure any default and the tenant deposits with the clerk any unpaid rent, the tenant will have 30 days to cure.[40]

2. If the landlord commenced an eviction action against the residential tenant for endangerment of the property or illegal use of controlled substances on the property prior to commencement of the bankruptcy case, the automatic stay will terminate 15 days after the tenant's bankruptcy filing unless the tenant objects to the landlord's certification within that time period.[41]

D. Treatment of leases and executory contracts under the Bankruptcy Code

1. *Nunc pro tunc* rejection

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[32] 11 U.S.C. § 365(d)(4)(B).
[33] 11 U.S.C. §365(d)(4)(A).
[34] 11 U.S.C. § 365(d)(1).
[35] E.D.N.Y. LBR 6006-1(a).
[36] S.D.N.Y. LBR 6006-1(b).
[37] 11 U.S.C. § 365(d)(1).
[38] 11 U.S.C. § 365(d)(2).
[39] 11 U.S.C. § 362(b)(22).
[40] 11 U.S.C. § 362(l).
[41] 11 U.S.C. § 362(b)(23); 11 U.S.C. § 362(m).

a) Tenant-debtor can reject lease retroactively, effectively causing the rejection to be deemed to have occurred as of the date of the motion.[42]
    1) If the date of the rejection motion is the same day as the petition date, by rejecting a lease *nunc pro tunc* the tenant might be able to avoid paying the landlord as an administrative expense rent that accrued post-petition but pre-rejection.
        a. In order for this to not be inequitable to the landlord, the debtor must have previously stated its unequivocal intent to reject the lease.[43]
b) Because retroactive rejection prevents the landlord from receiving administrative rent, bankruptcy courts consider the following factors in making the decision:
    1) Absence of delay on the part of the tenant in moving for an order to reject the lease.[44]
    2) The date when the tenant vacated the premises.[45]
    3) The landlord's motivation if opposing rejection of the lease *nunc pro tunc*.[46]
    4) Other factors of equity (e.g., prejudice to the estate).

2. Assignment
    a) A tenant with no intention to use a lease might choose to assume the lease for the purpose of assigning it to another party
        1) If the lease is below-market or otherwise valuable to a potential assignee, the tenant-debtor or trustee might sell the lease in order to obtain value for the bankruptcy estate, notwithstanding provisions in the lease and applicable law restricting assignment.[47]
            a. For example, a trustee could assume a debtor's apartment lease and assign the lease to the debtor's landlord in exchange for value.[48]
        2) Just as if the tenant were to assign the lease for itself, the proposed assignee takes the lease subject to its terms and must give the landlord adequate protection of its interest.[49]
        3) Assigning a lease relieves the tenant from any further liability for any breach occurring after assignment.[50]
3. Abandonment
    a) While rejection serves as a breach of the lease, it does not automatically terminate the lease.[51]

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[42] *In re* Fleming Cos., Inc., 304 B.R. 85, 96 (Bankr. D. Del. 2003).
[43] *Id.*
[44] *In re* Thinking Machines Corp., 67 F.3d 1021, 1028–29 (1st Cir. 1995).
[45] Adelphia Business Solutions, Inc. v. Abnos, 482 F.3d 602, 608 (2d Cir. 2007).
[46] *In re* Jamesway Corp., 179 B.R. 33, 38 (S.D.N.Y. 1995)
[47] 11 U.S.C. § 365(f); *In re* Ames Dept. Stores, Inc., 316 B.R. 772, 794–95 (Bankr. S.D.N.Y. 2004).
[48] But see Santiago-Monteverde v. Pereira 2015 WL 868307 (2d Cir. March 2, 2015) The Second Circuit upheld the decision of the New York Court of Appeals, holding that an interest in a rent-stabliized lease is a local public assistance benefit under New York State Debtor and Creditor Law Section 282(2) and therefor exempt from a bankruptcy estate.
[49] 11 U.S.C. § 365(f)(2).
[50] 11 U.S.C. § 365(k).
[51] 11 U.S.C. § 365(g); *see In re* Henderson, 245 B.R. 449, 453 (Bankr. S.D.N.Y. 2000).

b) A rejected lease thus remains estate property until the landlord takes affirmative action to terminate the lease or the trustee abandons the lease in one of the following ways:
   1) The trustee can affirmatively abandon the property during the pendency of the bankruptcy case.[52]
   2) A party an interest may seek an order compelling the trustee to abandon the property.[53]
   3) The trustee can take no action at all to administer the property, and the property is abandoned to the debtor at the closing of the case, so long as the debtor properly scheduled the property in its petition.[54]

[52] 11 U.S.C. § 554(a); *see In re Henderson*, 245 B.R. at 454.
[53] 11 U.S.C. § 554(b); *see In re Henderson*, 245 B.R. at 454.
[54] 11 U.S.C. § 554(c); *see In re Henderson*, 245 B.R. at 454.

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 362 – Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(l)(1) Except as otherwise provided in this subsection, subsection (b) (22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(m)(1) Except as otherwise provided in this subsection, subsection (b) (23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

11 U.S.C. § 365 – Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be
cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or

lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This

subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.
(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.
(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.