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Message from the Chair

Thomas J. Hall

Greetings! As I write this, summer has come to an end, the fall is upon us and, as I am sure is the case with many of you, the pace of the day-to-day practice of law seems to ratchet up a few notches.

The Real Property Law Section had a fantastic Summer Meeting at the Water's Edge Resort and Spa in Westbrook, Connecticut. It was great to re-connect with old friends and it was also wonderful to meet many new people who were first-time attendees. As usual, we enjoyed excellent CLE programs covering a wide range of topics including insurance issues in construction contracts, the reduction or elimination of real estate taxes as a result of tax exemptions and environmental issues, the use of trusts in real estate, and many other topics. Many thanks to our program Chair Jerry Antetomasso for putting together an outstanding program. Thanks also to our sponsors, First American Title Insurance Company and the Katsky, Korins Law Firm.

Coming next will be the Real Property Law Section Meeting at the NYSBA Annual Meeting, which will be held at the New York Hilton Midtown. The Real Property Law Section General CLE program will be on January 17, 2019—which is a week earlier than usual—so please mark your calendars and keep your eyes open for upcoming notices. In addition to another great CLE program, numerous committees (such as Condos and Co-Ops, Title and Transfer, Construction, Real Estate Financing and Liens; Not-for-Profit and more) will also be meeting. Not only do these Committee meetings provide invaluable insight on timely legal issues, many of these Committee meetings also provide additional opportunities for CLE credit.

Finally, as I write this, there was recent news that the City of New York commenced lawsuits against a number of mortgage lenders and servicers for allegedly failing to maintain houses that are in foreclosure, resulting in so-called Zombie homes. These lawsuits rely on legislation that our Section's Zombie Homes Task Force was actively involved in. This is a great example of the types of issues that our Section often gets involved in, by providing legislators with a broad array of expertise in commenting on legislation based on the practical knowledge of our "dirt lawyers" who are in the trenches. Whatever your views are on the issue, the point is that active participation in our Section can provide numerous opportunities to help shape important public policies on real estate issues that are of critical importance to our society.

I look forward to seeing you at the Annual Meeting in January!

Thomas J. Hall

Table of Contents

Thank you for being a NYSBA and a Real Property Law Section member!

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NEW YORK STATE BAR ASSOCIATION

Family Ties: Eviction Proceedings Against Family Members, Spouses and Domestic Partners

Appellate Term Rejects Application of "Familial Exception" to Summary Proceeding Against Licensee

By Anthony R. Filosa

Anthony R. Filosa

What do your couch surfing brother-in-law, your adult child who enjoys the trappings of the family home too much to finally leave the nest, and your live-in (unmarried) significant other have in common? When it comes to their residing in your home, the law regards them as a licensee—one who enters your home with your express—albeit revocable—permission to reside there. When these inhabitants overstay their welcome, RPAPL § 713(7) provides a relatively quick procedure for their removal—a licensee eviction summary proceeding. However, a line of cases that had their roots in the general prohibition of summary eviction proceedings against spouses seemingly rejected the ability to maintain summary eviction proceedings against not only spouses, but also other family members and persons with whom the homeowner resided while holding themselves out as family. The result of this so-called "familial exception" to the maintenance of a summary eviction proceeding against a licensee was that the owner had to resort to the much lengthier and costlier remedy of a plenary action for ejectment. However, in *Heckman v. Heckman*,[1] a recent Appellate Term decision concerning an eviction proceeding between sisters-in-law, the court rejected the notion of any "familial exception" to the maintenance of a licensee eviction proceeding. Rather, the court clarified that those persons who are exempt from a summary eviction proceeding—for instance, a spouse or minor child—are not exempt as a result of any "familial exception" but because, as a person for whom the law imposes an obligation to support, they do not meet the definition of a "licensee," i.e., one who enters upon real property with the (revocable) permission of the owner. On the other hand, it would appear that a person for whom no obligation exists on the part of the owner to support—think your couch surfing brother-in-law, or your ex-boyfriend—may be evicted as a licensee by means of a summary proceeding.

RPAPL § 713(7) provides, in part, that "after a ten day notice to quit has been served," a summary eviction proceeding may be brought against 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."[2] While not defined in RPAPL § 713(7), 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."[3] In *Rosentiel*, a husband sought to evict his wife from the residence they once shared as their marital home.[4] The husband moved out of the home and while an action to annul the marriage was pending, no decree had been entered or agreement reached regarding the termination of the marriage or the occupancy of the marital home.[5] The Appellate Division reversed the judgment of the Supreme Court granting the husband a judgment of possession, reasoning that as a person for whom a legal obligation to support existed, a wife was not a licensee who acquired her right to reside in the premises solely by the revocable permission of her husband.[6] As long as the marital relationship was not annulled or modified by decree or agreement, a husband maintained the obligation to support his wife, and providing housing was a basic element of that obligation.[7]

In 1987, the New York City Civil Court in *Minors v. Tyler*[8] extended the holding of *Rosentiel* to rule that a licensee eviction proceeding could not be maintained against the longtime cohabiting partner of the owner, thus giving birth to the "family member exception" to licensee eviction proceedings. The *Minors* court commanded that "[s]ocial realities require the courts to recognize that 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."[9]

> *"A summary eviction proceeding is a creation of statute and thus there must be strict compliance with the statutory requirements in order to be entitled to any relief."*

The wake of *Rosentiel* (decided in 1963) coincided with the rise in so-called "non-traditional" families and living relationships—persons cohabiting prior to marriage, persons having children together without marrying. *Rosentiel* began to be cited as authority by no doubt well-intentioned courts for the proposition that other family members—not simply spouses (or persons who held

themselves out as such)—were not subject to eviction by a licensee summary proceeding.[10]

In *Heckman v. Heckman*,[11] a licensee eviction proceeding brought against the petitioner's sister-in-law, the Appellate Term held there is no "familial exception" bar to the maintenance of a summary proceeding where the respondent otherwise meets the definition of a licensee or other person subject to a summary eviction proceeding. The court analyzed *Rosentiel*, explaining that its holding had its roots in the existence of a legal support obligation which precluded a finding that the respondent was a licensee whose right to reside in the home was revocable at the will of the owner. The court reasoned that several lower court cases—including a number of those referenced above—which extended *Rosentiel* to bar a summary eviction proceeding against family members for whom no legal support obligation existed were not supported by *Rosentiel* since it "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."[12] As support for this proposition, the court cited a number of appellate cases—decided after *Rosentiel*—which permitted the maintenance of a summary eviction proceeding against a spouse or other family member for whom no legal support obligation existed or where that obligation had been discharged.[13]

A summary eviction proceeding is a creation of statute and thus there must be strict compliance with the statutory requirements in order to be entitled to any relief.[14] Thus, petitioners like the husband in *Rosentiel*, or the father in *DeJesus*,[15] were always trying to fit a square peg in a round hole. No landlord-tenant relationship typically exists between married spouses or between a parent and a minor child, so no grounds existed under RPAPL § 711 (which supports the maintenance of a summary proceeding where a landlord-tenant relationship exists) to maintain the proceeding. Nor could such a proceeding be maintained under RPAPL § 713 (which supports the maintenance of a summary proceeding in specified instances where no landlord-tenant relationship exists) since a spouse or minor child (or any other person for which a legal obligation to support exists) is not a "licensee" within the meaning of RPAPL § 713(7). Viewed from this perspective, *Heckman* is consistent with *Rosentiel*. However, a family member or other intimate relation for which no legal obligation to support exists would appear to be subject to eviction by a summary proceeding under *Heckman*.

The shift towards "non-traditional" living arrangements will only make these issues more prevalent. As marriage rates decline, the number of adults cohabiting with a partner continues to rise, with an increasing number of adults ages 50 and older involved in cohabiting relationships.[16] More young adults (ages 18-34) are living at home for longer periods—in some cases because they never left, in others because they returned to the nest after living on their own.[17] A more cynical, result-oriented view of *Heckman* would suggest that its lack of compellingly sympathetic facts made its outcome more palatable. After all, the case involved two adult in-laws and not individuals who lived together in an intimate relationship for any extended period of time or who shared a child.[18]

Heckman left the door open for familial relationships that will often prevent an occupant from fitting into a category of respondent subject to eviction pursuant to RPAPL § 713.[19] No legal support relation exists between adults who cohabitate together as partners regardless of the duration of the relationship. Should a cohabiting life partner be subject to eviction on the same amount of notice—10 days, absent an agreement to the contrary—as the operator of your average mall kiosk (which is typically structured as a license agreement)? One wonders how a present day appellate court would reconcile the *Minors* court's command that evolving social norms require the recognition of rights in favor of non-traditional couples[20] with the Court of Appeals' statement that "cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation"[21] with the Court of Appeals' later plea—in a case involving rent-control succession rights of a unmarried same-sex life partner—that members of so-called non-traditional families should be protected from sudden eviction much the same as persons related by blood or marriage.[22] Perhaps legislative action is required to enlarge the notice required to terminate a license for those persons for whom no legal support obligation exists but who nonetheless have maintained a familial relationship which gave rise to their occupancy in the home.

Endnotes

1. 55 Misc. 3d 86, 90, 50 N.Y.S.3d 793, 796 (Sup. Ct. App. T. 2d Dep't 2017).
2. N.Y. Real Prop. Law § 713(7) (McKinney 2010).
3. *Rosenstiel v. Rosenstiel*, 20 A.D.2d 71, 245 N.Y.S.2d 395 (1st Dep't 1963).
4. *Id.* at 71.
5. *Id.* at 73.
6. *Id.* at 77-78.
7. *Id.* 76-77.
8 137 Misc. 2d 505, 507, 521 N.Y.S.2d 380 (Civ. Ct., Bronx County 1987).
9. *Id.* (citing *Concourse Vil. v. Bilotti*, 133 Misc. 2d 973).
10. *Kakwani v. Kakwani*, 40 Misc. 3d 627, 629-630, 967 N.Y.S.2d 827 (Dist. Ct., Nassau County 2013) (sister-in-law); *Williams v. Williams*, 13 Misc. 3d 395, 397, 399-400, 822 N.Y.S.2d 415 (Civ. Ct., New York County 2006) (adult grandchildren); *Sirota v. Sirota*, 164 Misc. 2d 966, 967-68, 626 N.Y.S.2d 672 (Civ. Ct., Kings County 1995) (adult children); *Nauth v. Nauth*, 42 Misc. 3d 672, 674-75, 981 N.Y.S.2d 266 (Civ. Ct., Bronx County 2013) (ex-wife); *Saoidoh v Saoidoh*, 49 Misc. 3d 1216(A), 26 N.Y.S.S.3d 727 (Civ. Ct., Bronx County 2015) (ex-wife and 19 year-old daughter of petitioner).
11. 55 Misc. 3d at 87, 89-90.
12. *See Heckman*, 55 Misc. 3d at 89.
13. *See Heckman*, 55 Misc. 3d at 88 (*citing Halaby v. Halaby*, 44 A.D.2d 495, 500, 355 N.Y.S.2d 671 (4th Dep't 1974) (holding summary eviction proceeding maintainable against wife who had obtained

support order against husband in Family Court proceeding; support order constituted husband's entire legal obligation for support); *Tausik v. Tausik,* 11 A.D.2d 144, 144-145, 202 N.Y.S.2d 82 (1st Dep't 1960), *aff'd,* 9 N.Y.2d 664, 212 N.Y.S.2d 76 (1961) (holding husband permitted to maintain eviction proceeding against wife from whom he was separated where by agreement husband permitted wife to use apartment owned by husband as temporary abode following separation); *Young v. Carruth*, 89 A.D.2d 466, 469, 455 N.Y.S.2d 776 (1st Dep't 1982) (holding decedent's daughter, as administratrix of decedent's estate, could maintain summary eviction proceeding against decedent's cohabiting partner).

14. *See Clark v. Wallace Oil Co.*, 284 A.D.2d 492, 493, 727 N.Y.S.2d 139 (2d Dep't 2001).
15. *DeJesus v. Rodriguez*, 196 Misc. 881, 885, 768 N.Y.S.2d 126 (Civ. Ct., Richmond County 2003) (dismissing summary eviction proceeding commenced against ex-girlfriend, who resided at premises with petitioner's two minor children).
16. *See Renee Stepler, Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, Pew Research Center, April 6, 2017, http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/.
17. See Drew Desilver, *In the U.S. and Abroad, More Young Adults Are Living with Their Parents*, Pew Research Center, May 24, 2016, http://www.pewresearch.org/fact-tank/2016/05/24/in-the-u-sand-abroad-more-young-adults-are-living-with-their-parents/.
18. The law imposes an obligation to support one's minor children, which includes the obligation to provide housing. See N.Y. Family Law § 413, § 513 (McKinney 2016); *Sferrazza v. Bergdorf Goodman*, 213 A.D.2d 44, 48, 629 N.Y.S.2d 281 (2d Dep't 1995) (holding a parent's child-support obligation includes an obligation to provide shelter). In order to be consistent with *Rosentiel* and *Heckman*, summary proceedings involving both persons for whom no legal support obligation exists (for instance, the petitioner's girlfriend) and those for whom such an obligation does exist (for instance, the petitioner's minor child with his girlfriend) may require a rather nuanced adjudication. Presumably, the summary proceeding may be maintained against the girlfriend, with the execution of any eventual warrant of eviction stayed pending the determination of a Family Court support proceeding concerning the provision of housing for the minor children, since the execution of a warrant of eviction which would result in the eviction of one's minor child is not countenanced by the law. *See Sears v. Okin*, 6 Misc. 3d 127(A), 800 N.Y.S.2d 357 (App. Term 2004) (holding if owner prevailed in summary proceeding against former domestic partner, "it may well be inappropriate to allow landlord to execute a warrant that will have the effect of evicting his two minor children"); *Landry v. Harris*, 18 Misc. 3d 1123(A), 856 N.Y.S.2d 498 (Civ. Ct., New York County 2008) (holding if owner prevailed in summary proceeding against ex-girlfriend with whom he fathered a minor child, the execution of the warrant of eviction must be stayed pending resolution by Family Court of custody and support issues affecting where and with whom minor child will live).
19. *See Heckman*, 55 Misc. 3d at 90.
20. *Minors v. Tyler,* 137 Misc. 2d 505, 507, 521 N.Y.S.2d 380 (Civ. Ct., Bronx County 1987).
21. *Morone v. Morone*, 50 N.Y.2d 481, 486, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).
22. *Braschi v. Stahl Asssociates Company*, 74 N.Y.2d 201, 212, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

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Housing Court Reforms: Back to the Future?

By Sateesh Nori

> The halls were jammed with people clutching eviction notices and the volume was headache-inducing: babies wailing, court officers yelling out cases, and landlords' lawyers and tenants negotiating rents in full cry in the stairwells.[1]
>
> Each borough has a housing court, but Brooklyn's stands apart. It isn't a courthouse, but a repurposed commercial building whose better days have long been forgotten. There's inadequate space. Balky elevators. Grimy bathrooms. No privacy. Judges squeeze into the same elevators as everyone else, sometimes skipping a car if a litigant they've ruled against is inside.[2]

The first snapshot was taken 24 years ago; the second was taken a few months ago, after some of the most fundamental reforms in the court's history have been adopted. As Yogi Berra once said, "It's déjà vu all over again." New York City's Housing Court is both in continuous flux and tragically constant. The city's most notorious court has been poked, prodded, and dissected by the media, by politicians, and by judicial commissions, but it has been unyielding to positive change.

Chief Judge Janet DiFiore called for a "Special Commission on the Future of Housing Court," which released a report earlier this year.[3] And perhaps most significantly, the city passed a law almost exactly one year ago to fund the provision of lawyers for eligible tenants in Housing Court.[4] Still, even with these major changes, the question remains: can the institution meet the needs of its constituents?

"Judge Kaye made significant reforms to Housing Court in 1997, when the Rent Regulation Reform Act also made significant changes to the rent laws. She introduced 'modern case management' systems to Housing Court. Part 18 was eliminated and new 'resolution parts' and 'trial parts' were created."

There are elements unique to Housing Court which may explain why it is such problem for reformers: (1) many of its litigants are unrepresented; (2) its judges hear "summary" or expedited proceedings; and (3) it deals with a high volume of cases.

Housing Court was created by statute in 1972 with the objective of protecting the housing stock of the city. "The court, which will be a special part of Civil Court and will handle housing matters that are now scattered through several jurisdictions, was established to help retard the deterioration and abandonment of residential buildings in the city."[5] Before Housing Court, landlord-tenant disputes about repairs were heard in Criminal Court and eviction cases in Supreme Court, which proved time-consuming, expensive, and frustrating for all parties involved. The levees broke almost immediately and it became a place flooded by eviction cases.[6]

Sateesh Nori

Since then Housing Court has risen from its own ashes again and again. Between 1973 and 1997, Housing Court grew from 10 judges to 35. The court was defined by its massive Part 18- a general intake part in which litigants waited for hours for their cases to be called. Those cases not called were adjourned to future dates. Former Chief Judge Kaye described the Housing Court during this period:

> The combination of massive caseloads, litigants largely unfamiliar with the legal process, and limited judicial resources has resulted in an environment that more closely resembles a hospital emergency room than a court. Courthouse decorum is noticeably lacking, with facilities ill-equipped to accommodate the large number of litigants that appear daily.[7]

Judge Kaye made significant reforms to Housing Court in 1997, when the Rent Regulation Reform Act also made significant changes to the rent laws. She introduced "modern case management" systems to Housing Court. Part 18 was eliminated and new "resolution parts" and "trial parts" were created. Specialized parts were added for rent deposits, commercial cases, condos and coops, and for repair cases. These reforms were the most sweeping in scope in Housing Court's history. "Resolution Parts" were thought to bring order and efficiency by allowing negotiation before and settlement by court attorneys. In these parts, most cases could be resolved via motion practice or through settlement negotiations. However, without lawyers on both sides, some argued that such a system pushed unrepresented litigants into settlements in the interest of efficiency and economy.[8]

The Kaye report also called for a "Housing Court Mediation Program," allowing volunteer mediators to help resolve disputes between landlords and tenants. Although promising, this part of the reform program was never fully realized but would be revisited often in various forms.

In 2005, the New York County Lawyers' Association (NYCLA) took a long look at housing court at its conference "The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?" The conference, held in October 2004, focused on six areas: pre-adjudication steps in the Housing Court, the adjudicative process and the role of the Court, right to counsel, litigants of diminished capacity, preserving the housing stock, and social services and volunteer programs in the court.

One conclusion of the NYCLA conference was that Housing Court is a "largely one-sided eviction apparatus."[9] Moreover, it was viewed that Housing Court deprives many litigants of access to justice because of the high volume of cases and inaccessible facilities. Notable is that this report looked at the court almost a decade after the significant reforms of 1997 but still found the same problems of pre-reform Housing Court. The recommendations of the NYCLA conference were straightforward: more lawyers for tenants, better systems for litigants with diminished capacity[10] and a return of Housing Court to its original purpose of ensuring that repairs are addressed, through technology and access to information.[11]

"The right to counsel in Housing Court will be substantial and fundamental for equal justice, but it serves only as a foundation for complete reforms."

In 2013, the New York City Bar Association and NYU's Furman Center held a conference to commemorate the 40th anniversary of Housing Court.[12] The theme of this conference was to survey the past, present, and future of Housing Court through panels on access to justice, technology, and through a comparative analysis of courts in other jurisdictions. Matthew Desmond, future author of the acclaimed "Evicted," addressed attendees on his analysis of eviction data and its significant implications on families and communities. Again, the need for a right to counsel, the treatment of those with diminished capacity, and addressing repairs arose here.

In a 2013 report by the community group CASA called "Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court," similar observations were made about Housing Court. A primary concern was the lack of representation for tenants and in particular the barriers faced by those who did not speak English as their primary language. The CASA report paints a horrifying picture of Bronx Housing Court through surveys of more than 1,000 tenants who appeared there. One participant explained:

> You feel completely helpless in there. You don't know what is going on and no one tells you anything that you can do. There is no help at all…. I asked some people that are supposed to be there to help but they didn't help. They couldn't orient me in what I should do.[13]

In March 2014, Intro 214 was introduced to provide attorneys for tenants in Housing Court. The final bill that passed on August 11, 2017 states that all income-eligible tenants will be ensured an attorney when fighting their eviction in Housing Court, and that the implementation will be over a five-year period.[14] This law grants tenants who are over-income the right to a consultation with an attorney. It addresses one of the fundamental flaws of Housing Court: that tenants are largely unrepresented and therefore do not have an equal chance at justice.

In 2018, the Special Commission on the Future of Housing Court issued its "Report to the Chief Judge." This report was the culmination of meetings and focus groups with stakeholders and closely followed the early phases of the implementation of "universal access" to counsel. The Special Commission's report states that although "right to counsel" is a big step forward, "without careful planning, an already overcrowded docket could become even more slow and unmoving."[15] Its recommendations are in broad categories—new procedures before initial court appearances, new court structure and practices, alternative dispute resolution, e-filing and other technology, relocation and redesign of facilities, increased judicial staff and volunteers, improved interactions with government agencies, new training, help centers, and a standing task force.

Of the many recommendations in the report, several have already been tried. For example, "staggered calendars" have been implemented in some Housing Court parts throughout the city. While the commission acknowledged that there was "considerable debate" about this proposal, it now appears that it will be more widely applied.[16] Traditional housing court calendars scheduled cases for either 9:30 in the morning or at 2:00 in the afternoon. Now, in certain parts, there is a 9:30, 10:30, and 11:30 calendar to prevent overcrowding in the courtrooms and to allow court attorneys, judges, and landlords to more efficiently deal with cases. Should a party fail to appear during their window of time, they will be defaulted. This change seems to have significantly impacted practitioners from smaller law firms, who may not be able to meet the check-in requirements for various staggered calendars throughout a courthouse. And it has been piloted in such places as Queens Hous-

ing Court—in which there is ample space and no need to alleviate overcrowding.

Another significant reform, to reserve the afternoon calendars for "hearings, motion practice, and in-depth resolution of cases," has also been implemented. This change has had a major impact on the culture of Housing Court practice. In Queens, for example, practitioners have been directed to make all orders to show cause returnable at 2:00 in the afternoon. The idea that practitioners should be available to practice full days in court has been unpopular. Historically, Housing Court practitioners have leaned-in to heavy morning calendars and almost non-existent afternoon calendars. Most housing lawyers expected to be back at their offices after lunch. This practice seemed to be encouraged by judges, clerks, court attorneys, and court officers, who each expected a light afternoon every day. However, the inefficiency of this approach was plain to see. Mornings were grueling uphill sprints and afternoons were leisurely strolls in the park. While some litigants may be disadvantaged by these afternoon calendars because of childcare issues, most would prefer this system to the possibility of waiting all day in court. And for cases on which both sides are represented by counsel, this system presents a new efficiency: many of these cases are being resolved out of court or during other times in court.

As a result of the changes to the afternoon calendar, parts are now empty by noon, well before the 1:00 p.m. lunch break. Fewer litigants are being held over from the morning to the afternoon because their cases were not heard. Again, this system disadvantages smaller firms and solo-practitioners, who must now work more hours with no additional compensation. Still, it can be argued that the business model of the small firm or solo practitioner in Housing Court has always been premised on the idea that the litigants' time is less valuable than the lawyers' time. For many litigants, waiting for a lawyer in Housing Court has always been like waiting for the cable company for service during their 9-5 window of time. And there is little doubt that most of these litigants are tenants.

Other key recommendations of the Special Commission have not yet seen implementation. The recurring theme of a lack of access to justice in Housing Court is addressed in the report as solvable through technological fixes such as e-filing, email communication with city marshals about evictions, and the use of remote interpreters through video-conferencing. Currently, the eviction process is opaque and information is difficult to get. City marshals, who conduct evictions, are third-party actors who are regulated by the city's Department of Investigation. Eviction schedules are not public and notification of a pending eviction is done mostly through the regular mail. As such, many tenants are inadvertently evicted because they miss the notice of eviction, miscalculate the eviction date, or simply fail to take the appropriate steps to obtain judicial relief.

E-filing could be quickly implemented for HP proceedings which are most often commenced by unrepresented tenants seeking that conditions in their apartments be corrected by their landlords. The current system requires tenants to spend hours to file and serve papers and then to return to court multiple times for judges and the Department of Housing Preservation and Development to hear their case. Repair cases, which are often urgent and impact health and quality of life, should be heard and resolved quickly. E-filing of such cases would ease the process of commencing such cases and restore some of the original purpose of Housing Court as a place where such issues can be addressed efficiently.

E-filing should also be explored for ex-parte applications such as orders to show cause. Much of the backlog in the Housing Court clerk's offices relates to the filing and processing of these motions. Litigants—and in particular unrepresented tenants—must often spend hours waiting in line, filing papers, and awaiting consideration of these motions by judges. A simple e-filing process which addresses the issue of verifying the identity of movants could improve access to justice and ease congestion in the clerk's offices. Such a process will save litigants time away from work, ease burdens of finding child care, and benefit those who are unable to come to court because of illness or disability.

Also, that Housing Court staff and practitioners should undergo anti-bias, anti-harassment, and civility training is critical. Litigants in Housing Court represent all parts of New York City and therefore its staff and practitioners should be sensitive to all differences. This need also relates to the recommendation that Housing Court needs more interpreters. The Special Commission Report specifically calls for more interpreters to be assigned to the clerk's office to help litigants with orders to show cause and other emergency requests.[17] A participant in CASA's report stated: "The problem for me is the language, because I don't speak English…I was disoriented and I did not know what to do."[18]

In sum, as Housing Court is reincarnated again, we should be circumspect about its origins and its impact. The right to counsel in Housing Court will be substantial and fundamental for equal justice, but it serves only as a foundation for complete reforms. Fortunately, we have within our reach the will and the tools to fix this important place at its core. The Special Commission Report can be a blueprint for the success of Housing Court.

Endnotes

1. Jan Hoffman, *Chaos Presides in New York Housing Courts*, N.Y. Times, Dec. 28, 1994, at A1.
2. N. R. Kleinfield, *Unsheltered: Where Brooklyn Tenants Plead the Case for Keeping Their Homes*, N. Y. Times (May 20, 2018), https://

www.nytimes.com/interactive/2018/05/20/nyregion/landlord tenantdisputes-housing-court.html.

3. Special Commission on the Future of Housing Court: Report to the Chief Judge, January 2018, https://www.nycourts.gov/publications/housingreport2018.pdf [hereafter "Special Commission Report"].
4. 26 N.Y.C. Admin. Code §§ 26-1301 *et seq*., "Provision of Legal Services in Eviction Proceedings."
5. Carter B. Horsley, *New Housing Court Reviews City Code*, N.Y. Times (August 25, 1972), https://www.nytimes.com/1972/08/25/archives/new-housing-court-reviews-city-code.html.
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13. CASA Report, *supra* note 8 at 11.
14. *See* 26 N.Y.C. Admin. Code § 1302 (2018) ("Universal Access Law").
15. Special Commission Report, *supra* note 3, at 1.
16. *Id*. at 10.
17. *Id*. at 23-24.
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Sateesh Nori is the Attorney-in-Charge of the Queens Neighborhood Office of the Legal Aid Society. He is a past Chair of the New York City Bar's Housing Court Committee, a past member of the Housing Court Advisory Council, a member of the Mayor's Commission on City Marshals, and a member of the City Council Charter Review Commission. He is a graduate of and adjunct professor at New York University School of Law.

Please note: This article reflects the opinion of the author, and not the New York State Bar Association or the Real Property Section.

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Real Property Law Section Summer Meeting

...more photos on page 31

The New Code Section 1031—It's All About Real Property Now

By Bradley T. Borden

The Tax Cuts and Jobs Act of 2017 (TCJA) changed section 1031 of the Internal Revenue Code to apply only to real property.[1] That change wipes out a significant type of tax-free exchange—mass-asset exchanges of rental equipment and rental cars (the immediate writeoff of the cost of personal property may offset the effect of losing tax-free exchanges). The change to section 1031 brings attention to the definition of real property and warrants a closer look at routine exchanges of real property to consider issues that they raise under the new section 1031.

Bradley T. Borden

Stated simply, section 1031 allows a property owner to transfer real property and acquire other like-kind real property of equal or greater value tax free.[2] Thus, the property owner does not recognize taxable gain on the disposition of real property that is part of a properly structured section 1031 exchange. Qualified intermediaries usually facilitate section 1031 exchanges and generally keep the property owner updated regarding the 45-day identification requirement and the 180-day exchange requirement. Now both the relinquished property and the replacement property must be real property for an exchange to qualify for tax-free treatment under section 1031. Because most types of real property are like kind, some observers may simply conclude that any exchange of real property can be tax free, but even exchanges of real property can raise thorny issues.

An example of a fairly typical exchange of real property illustrates how the narrower scope of section 1031 may affect some transactions. Barron owns and operates Big Hotel, which he would like to exchange for one of the following replacement properties (all of which are of equal or greater value): ranch land (raw land), new hotel (an operating hotel), and office building (a leased-up office building). As a general matter, each of these properties would come within the definition of real property and would be like-kind to big hotel. Questions arise, however, with respect to ancillary property that accompanies the transactions.

An operating hotel requires furniture, fixtures, and equipment (FF&E). Undoubtedly, Barron will transfer the FF&E to the purchaser of big hotel. At first blush, most observers would conclude that FF&E generally would not come within the definition of real property (more on this issue below). Even if it did come within the definition of real property, hotel FF&E would not be like-kind to the land that Barron would acquire, if he chose to acquire ranch land, and much of it would not be like-kind to FF&E that would accompany office building. Thus, the transfer of big hotel in exchange for raw land or office building may not be a perfect section 1031 exchange. That leaves open the question of whether big hotel's FF&E can be like-kind to new hotel's FF&E and whether the FF&E from the respective properties can come within the definition of real property. Notice that even if hotel FF&E could come within the definition of real property, that would not necessarily mean that it is like-kind to other types of real property—not all real property is like kind.

The new section 1031 also raises issues related to cost-segregated property. Cost segregation surveys identify non-structural parts of buildings that qualify for shorter depreciation recovery periods or that do not come within the definition of real property. For instance, the recovery period of a hotel building is 39 years, but non-structural components, such as wall coverings, carpet, parts of the electrical system, and exterior improvements, including landscaping and sidewalks, might have recovery periods that are 15 years or less. Some of the cost-segregated components will not come within the definition of real property, but some structural components, such as qualified improvement property, HVAC systems, and fire protection systems, could be section 1245 real property.[3] Thus, buildings typically include structural components that are real property subject to the general, longer recovery periods, section 1245 real property that is subject to shorter recovery periods, and personal property that is also subject to shorter recovery periods.

"While general interests in real property, such as land and permanent structures, most assuredly come within the section 1031 definition of real property, questions exist with respect to other types of property."

Cost segregation illustrates that property such as a hotel consist of both personal and real property, and the real property can be either section 1245 property or regular real property. The distinction can be important for section 1031 purposes. For instance, if Barron were to exchange big hotel for ranch land, big hotel would likely include non-structural personal property. That

non-structural personal property would not appear to be like-kind to ranch land (but see discussion below and consider whether it might come within the section 1031 definition of real property), so any gain realized on the transfer of that property would be taxable. Furthermore, any gain recognized on that property would likely be section 1245 recapture, meaning it would be taxed at ordinary income rates, not preferential capital gains rates.

Barron would face a different issue with the section 1245 real property, such as qualified improvement property and HVAC systems. Such property would most likely come within the section 1031 definition of real property, and it would likely be like-kind to most other real property, but it could still trigger taxable gain on an exchange. To avoid taxable gain on the exchange of depreciated section 1245 real property, the property owner must replace it with other section 1245 real property. To illustrate, if Barron were to exchange big hotel for ranch land, he would transfer section 1245 real property, but he would not replace it with other section 1245 real property (land is not qualified improvement property or an HVAC, for instance). Consequently, he would recognize gain on the transfer of the section 1245 real property, even though the transaction is an exchange of like-kind real property.

The discussion to this point illustrates that exchanges of real property can be taxable in part under new section 1031. The discussion also raises the question of what constitutes real property for purposes of section 1031. Because section 1031 does not provide a definition of real property, the current boundary of section 1031's application is not clear. Land and permanent structures should come within any definition of real property, but the lack of a definition leaves open whether interests such as air rights, water rights, mineral rights, leases, and other partial interests in real property come within the section 1031 definition of real property. Even if a partial interest does come within the definition of real property, a question may be whether the property is like-kind to other types of real property. For instance, the tax court has ruled that a non-perpetual water right is not like-kind to a fee interest in real property, even though the water was real property under state law.

By not defining real property, section 1031 leaves open the possibility that a definition in another part of the Internal Revenue Code may apply to section 1031. At least four other sections of the Internal Revenue Code have definitions of real property, and they each differ slightly, as illustrated in the accompanying table.

All these definitions of real property include land and improvements. For the most part, they also include unsevered natural resources. That is not surprising. Most observers would conclude that rights to unsevered natural resources are part of the bundle of sticks that

Some Definitions of Real Property in the Internal Revenue Code

IRC Section (Area of Law)	Definition

Section 512 (Unrelated Business Taxable Income)	• All real property
	• Any property that is not personal property
	• Three types of real property
	  • Intangibles—leaseholds
	  • Building and structural components
	  • Other tangible real property

Section 263A (Capitalization Rules)	• Land • Unsevered natural products of land • Buildings • Inherently permanent structures

Section 856 (Real Estate Investment Trusts)	• Land
	  • Water, air space, natural products, deposits unsevered from the land
	• Improvements to land
	  • Inherently permanent structures and their structural components

Section 897 (FIRPTA, Effectively Connected Income)	• Land
	• Unsevered natural products of the land
	• Improvements
	• Personal property associated with the use of real property
	  • Property used in mining, farming, forestry
	  • Property used in improvement of real property
	  • Property used in operation of lodging facility
	  • Property used in the rental of furnished office and other work space

comprise a fee interest in real property. Once severed, the natural resources most likely become personal property. The interesting aspect of the definitions is how they differ from each other. Perhaps the most striking difference is found in the section 897 definition, which includes personal property associated with the use of real property. Barron would be interested to know if the section 897 definition might apply to section 1031 because, if it did, then big hotel's FF&E and non-structural components would come within the definition of real property for purposes of section 1031 and could be exchanged for other like-kind real property, which would most likely be FF&E and non-structural components of another hotel. Thus, if section 1031 adopts the broadest definition of real property, then perhaps all of the property of an operating hotel could be like-kind to all of the property of another operating hotel.

Section 1031 is now narrower than it was just a few months ago. The constriction of section 1031 should not have a significant effect on the practices of the real estate bar. Sellers of real property who wish to reinvest proceeds in other real property will continue to do section 1031 exchanges. Their advisors should be aware, however, that the definition of real property for section 1031 purposes is not entirely settled. While general interests in real property, such as land and permanent structures, most assuredly come within the section 1031 definition of real property, questions exist with respect to other types of property. Some of those questions may be relevant in a large number of exchanges—those involving buildings; for example. Other questions, such as whether certain partial interests come within the definition, will most likely arise less frequently, but can be relevant in some big-dollar transactions.

Endnotes

1. Tax Cuts and Jobs Act, Pub. L. No. 115-97 (2017); I.R.C. § 1031 (West 2017).
2. I.R.C. § 1031 (West 2017).
3. I.R.C. § 1245 (West 2017).

Bradley T. Borden is a Professor of Law at Brooklyn Law School. He is a past chair of the Sales, Exchanges & Basis Committee of the ABA Section of Taxation. He is the author of numerous books and articles on issues related to taxation of real estate transactions and passthroughs, and works with real estate attorneys to advise on tax aspects of real estate transactions.

A more extensive version of this article was published as Bradley T. Borden, Code Sec. 1031 After the 2017 Tax Act, 21 J. Passthrough Ent. 17 (May-June 2018).

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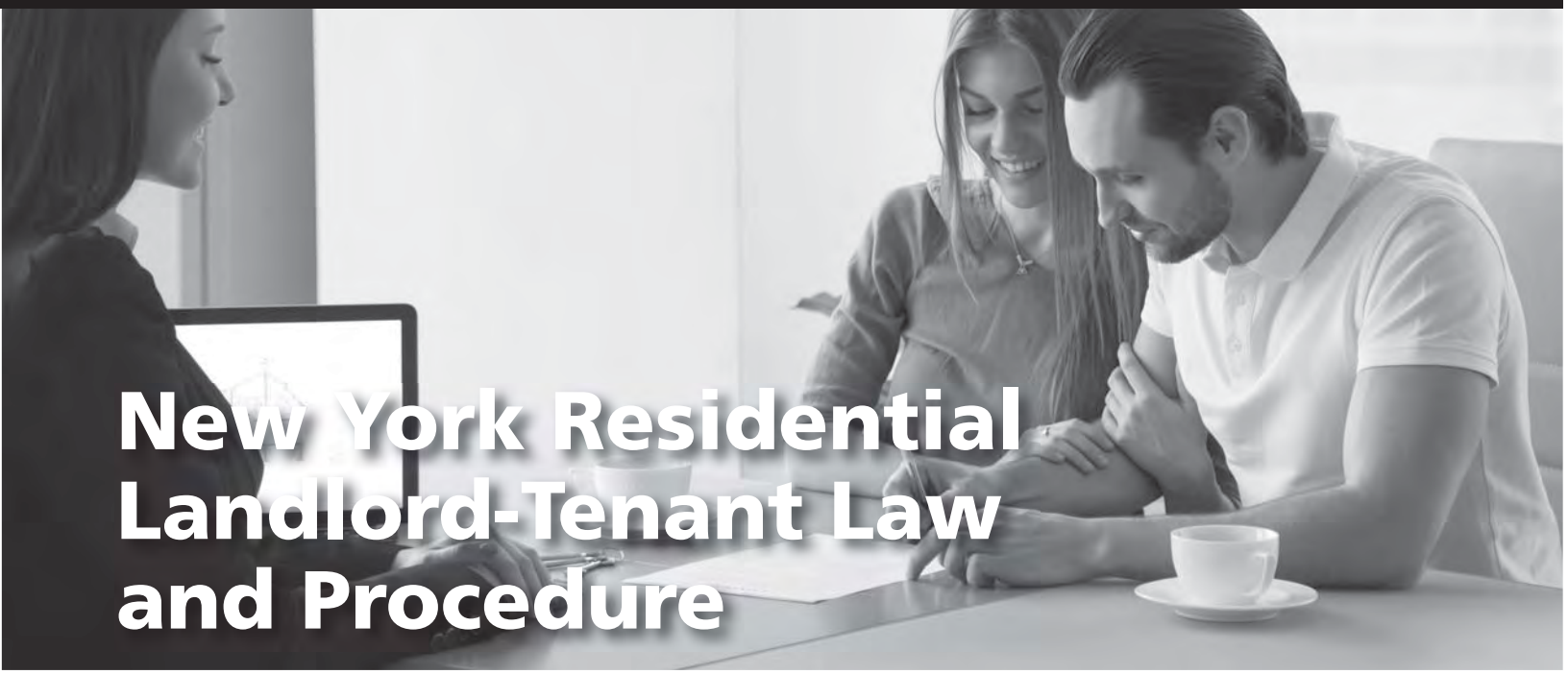

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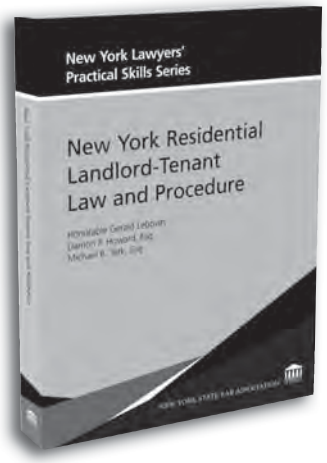

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Otto L. Walter Distinguished Writing Award

New York residential landlord-tenant law is daunting to newcomers and the experienced alike, given its patchwork statutory framework, discordant case law, and emotion-laden disputes involving homes, money, and the charged landlord-tenant relationship. This practice guide introduces the fundamentals of residential landlord-tenant law and offers a guide to the procedural mechanics practitioners face in landlord-tenant disputes.

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Bergman on Mortgage Foreclosures
When the Borrower's Lack of Service Claim Is Waived

By Bruce J. Bergman

In assessing the state of mortgage foreclosure action in New York we are wont to observe on more than a few occasions that the most fertile arena for borrower protests is lack of service of process. (Without an empirical study we cannot say for sure that standing is not the most common defense nowadays, but at the very least, service of process is up there.)

It is always facile for a borrower (or other defendant) to allege lack of service and the nuances here are extraordinary. Indeed, New York's leading treatise on civil practice devotes no less than two full volumes to process service alone! This is assuredly, then, a place for mischief and mishap so that mortgage lenders and servicers must be especially meticulous in pursuing process service. To be sure, service can be defective—all the more reason for care in pursuing it—but borrowers and other defendants often seize upon this as a solid place to oppose just because it tends to be a ready forum for a quarrel.

Dangerous though this aspect assuredly is, the protesting borrower can nonetheless be hoisted on his own petard for want of his own (perhaps more accurately his lawyer's) attention to detail. Of two major principles applicable here (of course, there are others) one is addressed by a recent case and merits mention. [*Wilmington Savings Fund Society, FSB v. Zimmerman*, 157 A.D.3d 46, 69 N.Y.S.3d 654 (2d Dep't 2018)].

One place the borrower can be tripped up is neglecting to make a motion to dismiss for supposed lack of service. This is a matter of the practice statute in New York [CPLR 3211(e)] providing that if a pleading asserts lack of service, such as in an answer, that defense is waived *unless* the objecting party moves for judgment on that ground within 60 days after servicing the pleading. So the borrower who neglects to make such a motion, even having inserted the defense in the answer, loses the ability to pursue it.

In the new case, the defendant had appeared in the action via notice of appearance, only much later trying to argue that he wasn't served. In rejecting that defense, the court ruled that the borrower had waived the defense of lack of personal jurisdiction by appearing in the action but without asserting an objection to jurisdiction by way of motion or in an answer. That is the compelling principle.

Underscoring how overarching is this rule, in another case which had reached the settlement conference stage long after the 60 days had expired, a court *sua sponte* dismissed the action for what it found to be lack of jurisdiction. But this was reversed for the very reason that the homeowner-borrower had not moved within 60 days of serving his answer to dismiss the complaint on the ground of defective service. [*Wells Fargo Bank, N.A. v. Cajas*, 159 A.D.3d 977, 733 N.Y.S.3d 223 (2d Dep't 2018)].

Bruce J. Bergman

Process service will remain an area of concern for foreclosing lenders, but there are, as noted, ways that borrowers objecting to service can undermine their own claim.

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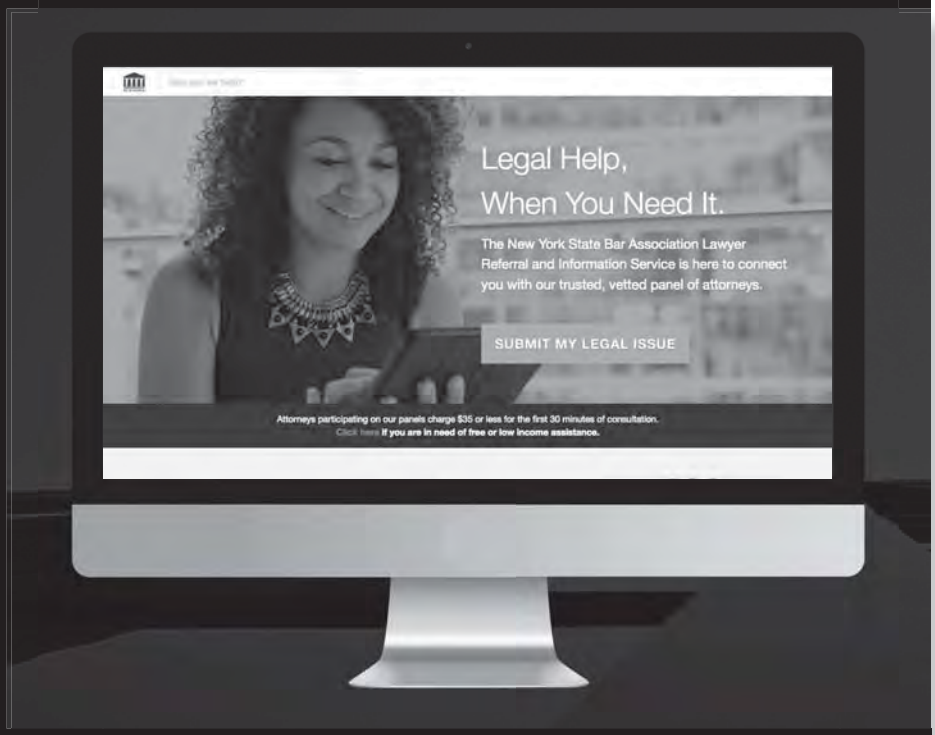

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...continued Summer Meeting photos from page 18

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