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N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

A Message from the Section Chair

Greetings! With over 5,000 members, the Real Property Law Section is now the largest Section of the New York State Bar Association! We are very pleased to have reached this milestone and are committed to continued growth and outstanding service to each Section member.

Over 360 members attended the Annual Meeting of the Real Property Law Section in January. Program Chair Joshua Stein offered an informative program including updates on NYS mortgage recording and transfer taxes, lease security issues, lease exit transactions, loan enforcement issues, lease litigation and mortgage loan issues including the release and substitution of collateral. The ethics portion of the program offered practical guidance on ethical issues in a transactional real estate practice, and engendered lively debate among the participants. Joshua also presented an overview of the numerous projects underway by the Section's Committees. If you are not yet a member of a Committee, we encourage you to contact any Section officer or Committee Chair for further information.

A highlight of the luncheon following the program was the presentation of the Section's Professionalism Award to Harold A. Lubell, Past Chair of our Section. In his acceptance speech, Harold stated that he defines himself as a lawyer, he likes being a lawyer and he is proud of being a lawyer. These qualities have been readily apparent in Harold's many contributions to our Section and the legal profession throughout his career. To those who know him, it is obvious that he enjoys what he does. Congratulations, Harold!

We are now gearing up for our Section's Summer Meeting, scheduled for July 14–17 at the Lake Placid Resort Hotel & Golf Club. Harry Meyer, Program Chair, is planning a fascinating meeting, including presentations on smart growth and new urbanism practices in land use and zoning, brownfields, electronic title registration and its impact on the legal profession, Adirondack architecture and the NYS "forever wild" requirements as they impact development and redevelopment. In addition to the CLE offerings, Harry is planning numerous social events to take full advantage of the range of amenities offered by the Resort and the natural beauty of the region. Please mark your calendars now for this event!

Inside

SCENES FROM THE REAL PROPERTY LAW SECTION'S ANNUAL MEETING (SEE PAGE 99)

Reflecting the growth of the Real Property Law Section, the Executive Committee of the Section has also increased over the past two years. We are pleased to welcome the following members:

Marvin N. Bagwell, Member-at-Large, is the Vice-President and Eastern Divisional Counsel of United General Title Insurance Company in White Plains, New York. Several of Marvin's articles have been published in the *New York Law Journal, New York Real Estate Law Reporter* and *Settlement Services Today*. See Marvin's recent publication, "*AXYS, LLC v. Ng:* A Close Encounter of the Marketable Title Kind," in the Winter 2005 issue of the *N.Y. Real Property Law Journal.*

S.H. Spencer Compton and **Ralph Habib** join Gary Litke as Co-Chairs of the very active Legislation Committee. Spencer Compton is a Vice President and Special Counsel at First American Title Insurance Company of New York in New York City. Prior to assuming his current position, Spencer practiced real estate law for eleven years in New York City. Spencer has lectured and published numerous articles on commercial real estate law and practice, title insurance and UCC insurance. Ralph Habib, formerly an Onondaga County Assistant District Attorney, practices real estate law in Syracuse and is active in numerous organizations in the Syracuse area. Ralph most recently spoke at a Hot Topics in Real Property Law Practice seminar on the implications of the Patriot Act on real estate attorneys.

Karen A. DiNardo, with Phillips Lytle LLP in Rochester, is Co-Chair of the Section's Membership Committee. Karen practices in the areas of real estate and secured lending. In addition to her participation in NYSBA and the ABA, Karen has been an active member in the Monroe County Bar Association for many years. As the first upstate Co-Chair of the Membership Committee, Karen has already contributed significantly to our Section's growth.

William P. Johnson, Co-Chair of the Publications Committee (responsible for the *Real Property Law Journal)*, is with the Amherst firm of Nesper, Ferber & DiGiacomo, LLP. For three years, Bill chaired the Erie County Bar Association's Real Property Committee where he worked extensively on the PCDA and unauthorized practice of law issues, as well as the Erie County Bar Association's title examination standards.

Nancy M. Langer, Co-Chair of the Unlawful Practice of Law Committee, practices law in Buffalo at the firm of Kevin A. Ricotta. Nancy is Chair of the Unlawful Practice of Law Committee of the Bar Association of Erie County and recently spoke to the Real Estate Section of the Monroe County Bar Association on "Non-Lawyer Closing Agents and the Unlawful Practice of Law."

Charles W. ("Chip") Russell is Co-Chair of the Attorney Opinion Committee. Chip is with the Rochester firm of Boylan, Brown, Code, Vigdor & Wilson, LLP and concentrates his practice in the areas of banking, corporate and real estate financing, commercial real estate sales and acquisitions, leasing, municipal law, and public authorities law. Chip is a former Chair of the Monroe County Bar Association's Real Estate Section.

Richard C. Singer, Co-Chair of Low Income and Affordable Housing, is with the New York City firm of Hirschen & Singer LLP. A former Chair of the Housing and Urban Development Committee, Richard has participated in numerous programs on low-income housing tax credits and has served as a guest lecturer on real estate conveyancing and finance for the Building Owners' and Managers' Institute.

Alfred Tartaglia, Co-Chair of our Section's Professionalism Committee, is the Principal Law Clerk in the Supreme Court of the State of New York, Bronx County. Alfred is also the General Editor of *Warren's Weed New York Real Property* and *Steinman's Bergerman and Roth, New York Real Property Forms Annotated* and is a frequent lecturer at the Judicial Institute to judges and attorneys employed by the Unified Court System.

Benjamin Weinstock, Member-at-Large, is with the New York City firm of Ruskin Moscou Faltischek, P.C. Ben has been a very active member of the Real Property Law Section for many years, serving on the Commercial Leasing and Title and Transfer Committees. He currently holds the position of Secretary of the New York State Board of Realtors. Ben is a frequent lecturer on real estate matters for the NYSBA, numerous County Bar Associations and various educational institutions.

Lawrence J. Wolk serves as Co-Chair of the Committee on Title Insurance, having previously served on the Executive Committee as District Representative for the First District and as Member-at-Large. Larry is with the firm of Holland & Knight LLP and has practiced law in the New York City area for thirty years, except for a four-year hiatus when he was appointed as Assistant General Counsel for Real Estate and Asset Disposition at the Resolution Trust Corporation and Federal Deposit Insurance Corporation in Washington D.C.

We are grateful to all Committee Chairs, Members-at-Large, and District Representatives who willingly give their time and expertise to the Real Property Law Section, thereby benefiting all Section members.

Dorothy H. Ferguson

Model Insurance Requirements for a Commercial Mortgage Loan

By James E. Branigan and Joshua Stein

Commercial buildings make good collateral for a lender. They make even better collateral when properly insured against damage and destruction.

REAL ESTATE LOANS START FROM the fundamental assumption that the borrower's building will continue to exist. As long as the building exists, it can produce rental income so the borrower can pay debt service.

A fire or other loss affecting the borrower's building can undercut this very fundamental assumption and throw the loan into default rather quickly—unless the borrower has maintained an appropriate package of insurance coverage for the mortgaged property.

Similarly, if the building burns down or suffers some other damage without appropriate insurance coverage, the value of the mortgaged property will probably drop, quite possibly to the point where it will not support repayment of the principal of the lender's loan.

For those and other reasons, any mortgage lender will typically regard the borrower's obligation to insure the mortgaged property as one of the most fundamental nonmonetary obligations under any set of loan documents.

This article offers a set of standard insurance requirements that any mortgage lender might want to use in its loan documents for substantial loans. These requirements are reasonably complete, straightforward, thorough, and lender-oriented, without being excessive. They approach insurance as a prudent risk manager would, if that risk manager wanted to protect the mortgaged property and its cash flow in a manner consistent with typical expectations in commercial real estate.

Extensive endnotes explain why some of these insurance provisions say what they say, other ways to approach some issues, and gaps that may still need filling for some loans.

NONGENERIC INSURANCE REQUIREMENTS • Beyond the generic insurance requirements in the model language offered here, loan documents for a substantial commercial loan will often require other insurance based on characteristics of a specific building, such as particular occupancies, construction techniques, zoning issues, nearby risks, special hazards, and the terms of major leases (particularly on rent loss or business interruption insurance and restoration). A lender's insurance advisors should identify and tailor these requirements as appropriate.

Expectations about insurance requirements can vary widely. Every insurance expert seems to have a different view about what any insurance program must include and whether a particular set of insurance provisions is adequate or seriously flawed. Any insurance expert can usually suggest improvements in any insurance requirements or any insurance program. There's always something to add. Many such suggestions, whether for modifications or additions, are often perfectly valid. Differences of opinion about insurance reflect the complexity, multiple facets, and constantly changing nature of the insurance market.

CONTEXT FOR MODEL INSURANCE LANGUAGE • The provisions offered here reflect recent developments in the law, the markets, and the world of insurance. The authors have not tailored this model language specifically for securitized loans or for any particular transaction. This language must always be checked against the specific circumstances of the mortgaged property and the rating agencies' current requirements and expectations. Some further introductory comments:

Future Changes

Insurance markets and mortgage lenders' expectations change over time as the business world becomes aware of new risks or of the true magnitude of older risks previously thought small. These sample insurance provisions seek to respond to the marketplace and lenders' expectations at the time of writing, but will inevitably become out of date. The authors intend to maintain these insurance provisions over time, as a current benchmark, taking into account changes in markets. The authors will distribute updated copies periodically to their clients and, upon request, to others.

Policy Boilerplate

The last few decades have seen the courts create numerous new theories of liability. Enterprising plaintiffs' lawyers usually fashioned these theories, sometimes with help from "public interest" organizations. A gold rush of claims against insurance companies usually followed each new theory. In response to each such gold rush, the insurance industry

created new or improved exclusions from coverage in subsequent insurance policies—for example, the "pollution exclusion" and more recently new limits on coverage for "toxic mold" risks. Terrorism coverage followed a somewhat similar path, at least until federal legislation made the issue go away, at least for now. Some of the latest new policy limitations are buried in the boilerplate of insurance policies. A lender will often want to unearth and understand those limitations as part of the process of closing a loan. In some cases, the lender can (and may want to) require the borrower to pay an additional premium to solve the problem. That entire process falls outside the scope of this discussion, but will often matter a great deal for any particular loan.

Rating Agency Requirements

The requirements of the rating agencies for securitized loans change over time. Anyone who closes securitized loans must stay current with those changes (a comment by no means limited to insurance). For example, on May 1, 2003, based in part on difficulties in the insurance market, Standard & Poor's ("S&P") lowered the required rating for property insurance carriers in AAA-rated transactions to "A," thus matching the requirement for liability insurance carriers. At the same time, S&P made other changes in its insurance requirements.

References to Rating Agencies

Wherever this model language refers to the Rating Agencies, that reference can usually be omitted for portfolio loans, but only after confirming that some other appropriate requirement is added (or already exists) to assure that the matter in question will satisfy the particular lender's requirements.

Best's Ratings

This model language requires insurance carriers to have an A.M. Best rating of at least "A:X." The first letter refers to the company's "quality," as Best measures it, ranging from A++ (the highest) all the way through F (in liquidation) and S (suspended). The second letter refers to the company's "financial size category" ("FSC"), again as Best measures it—a combination of the company's capital, surplus, and "conditional reserve." FSC requirements for any loan should take into account a particular company's potential exposure to loss. FSC ratings can range from I ($10 million FSC) to XV (over $2 billion FSC). Typically a lender will require a rating of at least A:X (i.e., FSC of at least $500 million and quality level of "Excellent"), but may accept a smaller company for a smaller exposure. As an example, earthquake and windstorm coverage are difficult to place and relatively little coverage can usually be obtained. Many lenders would settle for smaller companies for these risks, but not lower their "quality" standards.

Construction

This model language includes very limited requirements on builder's risk insurance—intended only for incidental additions to buildings, and perhaps limited renovations of existing structures. If a borrower undertakes substantial construction, or for any construction loan, the construction-related language here will not suffice. Instead, a comprehensive construction-related insurance program will usually need to be designed, taking into account whatever insurance the contractors and subcontractors bring to the table. Because the borrower ultimately pays for all parties' insurance, the borrower will often want to wrap all insurance for any large project into a single policy, a so-called controlled insurance program ("CIP"). This will often cost less than many separate but overlapping policies from many separate parties. It can also simplify any claim processing. The insurance process for any construction job will also often include a coordinated bonding program. Again, the topic falls outside the present discussion.

"Claims-Made" Policies

For a while, the insurance industry tried to convince its customers to accept "claims-made" policies, where the carrier covered only claims made against the insured during the life of the policy. Because of the limited nature of these policies, they have generally fallen into disuse, except in two areas: environmental risk and professional liability. A typical real estate lender will not accept claims-made coverage outside these two areas.

Coverage Levels

The minimum coverage requirements offered here are purely illustrative, reflecting typical requirements of some lenders. Any determination of minimum coverage requirements requires careful analysis of the risks associated with the particular mortgaged property.

Use of Model Documents

You can use a model legal document, such as this model insurance language, in two ways. First, you can use it in a specific transaction with appropriate modifications. Second, you can use it to compare and contrast against another, similar transactional document. In either case, do not use this model document without appropriate legal and insurance advice tailored to the particular mortgaged property, the particular loan, and applicable law. Also, when you use this model language, remember to define all the generic capitalized terms somewhere.

Model Insurance Requirements

From the Closing Date until the Termination Date, Borrower shall maintain the following insurance policies and comply with the following obligations (those policies and obligations, collectively, the "Required Insurance").

1. Special Perils Insurance

a. Borrower shall maintain property insurance against all risks of loss to the Mort-

gaged Property customarily covered by "All Risk" or "Special Perils Form"[1] policies as available in the insurance market at the Closing Date [or thereafter, as evidenced by written advice from Lender's insurance advisor][2] (collectively, the "Special Perils Insurance").[3] Special Perils Insurance shall cover at least the following perils: building collapse, fire, flood, hurricane, impact of vehicles and aircraft, lightning, malicious mischief, mudslide, subsidence, terrorism, tsunami,[4] vandalism, water damage, and windstorm.

b. Special Perils Insurance shall also cover such other insurable perils as, under good insurance practices, other commercial property owners from time to time insure against for property and buildings similar to the Mortgaged Property in height, location, nature, type of construction, and use, as evidenced by written advice from Lender's insurance advisor ("Comparable Properties").

c. Each Special Perils Insurance policy shall cover:

   i. The additional expense of demolition and increased cost of construction,[5] including increased cost from any changes in Laws on Restoration;

   ii. At least 100 percent of the replacement cost value[6] of the Improvements;[7] and

   iii. All tenant improvements and betterments that any Lease requires Borrower to insure (the "Insured Leasehold Property").

d. Any Special Perils Insurance policy shall contain an agreed amount endorsement[8] or a coinsurance waiver and replacement cost value endorsement[9] without reduction for depreciation. If Borrower's Special Perils Insurance does not otherwise cover damage caused by acts of terrorists,[10] then Borrower shall provide that coverage under a separate policy that meets all requirements for Special Perils Insurance, providing coverage both for certified terrorist acts under the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ("TRIA") and for noncertified terrorist acts.[11]

2. Flood Insurance

a. If any Improvements are located in an area designated as "flood prone" or a "special flood hazard area" under the regulations for the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4001 et seq.,[12] Borrower shall maintain at least the maximum coverage[13] for the Mortgaged Property available under the federal flood insurance plan.

b. Lender may require additional flood insurance coverage, including related Rent Loss Insurance.

c. Any insurance that this paragraph requires is referred to as "Flood Insurance."

3. Earthquake Insurance[14]

a. Borrower shall maintain earthquake insurance in any area of increased risk as Lender or the Rating Agencies require (the "Earthquake Insurance").

b. Lender may change its requirements for Earthquake Insurance from time to time based on:

   i. Review of a current probable maximum loss seismic study, to be prepared at Borrower's expense (up to once every two years), forecasting the expected damage from any event anticipated to reoccur once in 475 years, on a 90-percent-certain statistical basis;

   ii. Actual and potential losses at any other locations the same Earthquake Insurance covers and sharing the policy's occurrence and annual aggregate limits of available coverage; and

   iii. Expected loss of business or rental income during Restoration. Deductibles shall be satisfactory to Lender, but never more than five percent of the location insurable values.[15]

4. Boiler and Machinery Insurance

a. Borrower shall maintain comprehensive boiler and machinery insurance covering all mechanical and electrical equipment against physical damage, rent loss, extra expense, and expediting expense covering Borrower's property and any Insured Leasehold Property (the "Boiler and Machinery Insurance").[16]

b. Borrower shall provide Boiler and Machinery Insurance on a replacement cost value basis. For each accident, Borrower's Boiler and Machinery Insurance shall cover at least the greater of:

i. Fifteen percent of full replacement cost of the Improvements; and

ii. $500,000.

5. Builder's Risk Insurance[17]

a. During any Construction, Borrower shall maintain builder's risk insurance for the full completed project insurable value of the building in which the Construction is being performed. That insurance shall meet the same requirements as Special Perils Insurance, with whatever limits and coverage extensions Lender requires (the "Builder's Risk Insurance"), unless Borrower's Special Perils Insurance already includes that coverage.

b. Any Builder's Risk Insurance shall be written on a "completed value" Form[18] (100 percent nonreporting) or its equivalent and shall include an endorsement granting permission to occupy.[19]

c. Builder's Risk Insurance shall cover:

i. The same perils that Special Perils Insurance must cover;

ii. Loss of materials, equipment, machinery, and supplies whether on-site, in transit, or stored off-site, or of any temporary structure, hoist, sidewalk, retaining wall, or underground property;

iii. Soft costs, plans, specifications, blueprints, and models;

iv. Demolition and increased cost of construction,[20] including increased costs arising from changes in Laws at the time of Restoration and coverage for operation of building Laws, all subject to a sublimit satisfactory to Lender; and

v. Rental interruption[21] (delayed opening) on an actual loss sustained basis and otherwise in compliance with Rent Loss Insurance requirements.

6. Rent Loss Insurance

As an extension to Special Perils Insurance, Flood Insurance, Earthquake Insurance, Boiler and Machinery Insurance, and Builder's Risk Insurance, Borrower shall maintain rent loss insurance[22] on an "actual loss sustained" basis ("Rent Loss Insurance"). ("Property Insurance" means collectively all the insurance the previous sentence mentions.) Borrower shall maintain Rent Loss Insurance equal to at least 12 months of Borrower's actual Gross Revenue, including percentage rent, escalations, and all other recurring sums payable by Tenants under Leases or otherwise derived from Borrower's operation of the Mortgaged Property. On and after the date of any Securitization, "12 months" shall be replaced by "18 months." In addition, Rent Loss Insurance shall be endorsed to include an extended period of indemnity[23] of 180 or 360 days, as Lender shall require from time to time.

7. Liability Insurance[24]

a. Borrower shall maintain the following insurance for personal injury, bodily injury, death, accident, and property damage (collectively, the "Liability Insurance");

i. Public liability insurance, including commercial general liability insurance;[25]

ii. Owned (if any), hired, and nonowned automobile liability insurance;[26] and

iii. Umbrella liability insurance as necessary.[27]

b. Liability Insurance shall provide coverage of at least $___ million per occurrence and $___ million in annual aggregate,[28] per location.[29] If any Liability Insurance also covers other location(s) with a shared aggregate limit, the minimum Liability Insurance shall be increased to $____ million.[30]

c. Liability Insurance shall include coverage for liability arising from premises and operations, elevators, escalators, independent contractors, contractual liability (including liability assumed under Contracts and Leases),[31] and products and completed operations. All Liability Insurance shall name Lender as an "Additional Insured"[32] by endorsement.

8. Statutory Employees' Insurance

Borrower shall maintain workers' compensation and disability insurance as Law requires ("Statutory Employees' Insurance").

9. Environmental Insurance[33]

a. Borrower shall maintain environmental insurance covering unknown environmental hazards as of the Closing Date (the "Environmental Insurance") in an amount of not less than $_____ per discovery. Such coverage shall identify Lender as an "additional named insured" by endorsement.

b. The carrier shall agree that the policy shall be automatically assigned to Lender, with no further action required by any Person, if:

i. Control of the Mortgaged Property passes to

Lender or its designee as the result of an Event of Default or any exercise of Lender's Remedies; or

ii. Lender or its insurance advisor otherwise at any time so requires.[34]

10. Other Insurance

a. Borrower shall maintain such other types and amounts of insurance for the Mortgaged Property and its operations as Lender or the Rating Agencies shall from time to time require, consistent with Comparable Properties.

b. Wherever any Required Insurance specifies any dollar amount, Lender may increase it periodically to reflect Lender's reasonable estimate of inflation.

11. Documentation

a. For all Property Insurance, Borrower shall cause Lender to be named as "Lender Loss Payee" or "Mortgagee" on a standard noncontributory mortgagee endorsement (or its equivalent) naming Lender or its designee as the party to receive Insurance Proceeds.

b. Borrower shall provide such additional evidence of Lender's interest under any Required Insurance as Lender shall reasonably require from time to time,[35] including the following (the "Evidence of Insurance"):

i. An ACORD 28 certificate of insurance for all Property Insurance; and

ii. A paid endorsement or paid binder for Borrower's Liability Insurance evidencing Lender as an additional insured and otherwise evidencing compliance with the Liability Insurance requirements of the Loan Documents.[36]

12. Policy Requirements[37]

a. Borrower shall obtain all Required Insurance from domestic carrier(s) authorized to do business in the State and reasonably satisfactory to Lender with:

i. A claims paying ability of not less than "A"[38] (or the equivalent) by S&P and one other Rating Agency satisfactory to Lender; and

ii. "A:X" or better financial strength rating by AM Best.

b. Lender shall not unreasonably refuse to lower these minimum ratings to reflect market conditions from time to time, based on the written advice of Lender's insurance advisor, if any lower rating shall conform to then-current practices for Comparable Properties and Securitization Requirements.

c. Borrower shall obtain Lender's reasonable approval of the amounts, deductibles, endorsements, form, insureds, loss payees, risk coverage, and sublimits for all Required Insurance.

d. Required Insurance shall contain such provisions as Lender deems reasonably necessary or desirable to protect its interest, including endorsements to negate any coinsurance. Borrower shall pay the premiums for all Required Insurance when due and payable. Borrower shall not finance premiums under any arrangement that could, upon nonpayment, lead to premature cancellation of any Required Insurance.[39]

e. Borrower shall deliver to Lender, immediately upon issuance, copies of the insurance policies (or Evidence of Insurance) for all Required Insurance, certified as true and complete by the carrier or its authorized representative. At least 30 days before any policy expires, Borrower shall deliver evidence of renewal in compliance with the Loan Documents.

f. If at any time Lender has not received satisfactory written evidence that Borrower maintains and has paid for all Required Insurance, then without limiting Lender's Remedies, Lender may (but shall have absolutely no obligation to) force place any Required Insurance or take such other actions as Lender shall deem appropriate to protect its interests. Lender's costs of doing so shall constitute Protective Advances. Lender confirms that as of the Closing Date Borrower's existing insurance coverage satisfies all requirements for Required Insurance.

13. Blanket Coverage

Borrower may provide any Required Insurance under a blanket policy or policies covering the Mortgaged Property and other property and assets, provided that:

i. The blanket policy otherwise meets all requirements for Required Insurance, and, except in the case of Liability Insurance, specifies how much coverage, and which sublimits, apply exclusively to the Mortgaged Property; and

ii. The amount allocated to the Mortgaged Property equals or exceeds the Required Insurance.

14. Protection of Lender's Interest

a. Borrower shall cause its insurance carrier to give Lender the following protections: In each insurance policy (or an endorsement), the carrier shall:

i. Agree not to cancel, terminate, or not renew the policy without giving Lender 30 days' prior written notice (10 days' notice for nonpayment of premium);

ii. Agree not to change the deductible, coverage limit(s), or other term(s) of the policy, if the policy would thereafter cease to comply with this Agreement;

iii. Waive any right to claim any premiums and commissions against Lender, provided that the policy need not waive the requirement that the premium be paid in order for a claim to be paid to the insured; and

iv. Allow Lender to pay premiums to continue the policy upon notice of cancellation for nonpayment.

b. Every Property Insurance policy shall by its terms remain valid and insure the Lender's interest regardless of any:

i. Named insured's act,[40] failure to act, negligence, or violation of warranties, declarations, or conditions;

ii. Occupancy or use of the Mortgaged Property for purposes more hazardous than those permitted; or

iii. Exercise of any Lender's Remedies.

15. No Separate Insurance

a. Borrower may, however, carry separate insurance,[41] concurrent in kind or form or contributing upon Loss, with any Required Insurance.

b. Borrower may, however, carry insurance for the Mortgaged Property, in addition to Required Insurance, but only if the additional insurance:

i. Does not violate any Required Insurance, or entitle the carrier to assert any defense or disclaim any primary coverage under any Required Insurance;

ii. Mutually benefits Borrower and Lender; and

iii. Otherwise complies with this Agreement.

16. Lender's Rights; No Liability

a. Borrower irrevocably authorizes Lender, at any time, to communicate directly with Borrower's insurance carrier(s), broker(s), and Tenant(s) about any Required Insurance.

b. Borrower shall promptly upon demand deliver to Lender further written authorizations addressed to such Persons, and authorizes and directs all such Persons to communicate directly with Lender at Lender's request. Any direct communications by Lender shall not:

i. Impose any obligation or liability on Lender; or

ii. Entitle Borrower to any defense, offset, or counterclaim against the Obligations.

c. Any determination or request that Lender makes about any Required Insurance shall impose no obligation or liability on Lender. Borrower shall not rely on any such determination or request (or its absence) as an implied or express representation about the adequacy of Borrower's insurance. Borrower acknowledges that any such determination or request would be made solely for Lender's own benefit and not for Borrower's. Borrower retains sole responsibility for the adequacy and prudence of its insurance program.

Endnotes

1. Property owners can generally buy three possible levels of property insurance coverage: (1) "basic," which covers fire and lightning; (2) "broad," which includes fire and extended coverage (named perils), covering a substantial list of additional hazards; and (3) "special," which covers risk of loss from all sources except a few specifically listed hazards. Category "3," the broadest, was once called "all risk" coverage, though it didn't really cover all risks.
2. A Borrower would prefer to add the bracketed language, for protection from future insurance market "tightening." A Lender would prefer to omit this language, preserving flexibility to deal with market changes as they occur.
3. Property Insurance is called "first party" coverage, because any claims are paid solely to the policyholder—typically the Borrower but also the Lender if properly endorsed onto the policy. In contrast, "third party" coverage protects the insured from the possible obligation to pay losses and damages due and payable to injured third parties. The latter coverage is sometimes called "casualty" coverage, a term often erroneously applied to property insurance. To avoid confusion, one should not use the word "casualty" for any insurance. In all cases, the "second" party is the insurance carrier, the company that issued the policy.
4. A tsunami is a very large tidal wave, generally considered a risk only in coastal areas along the Pacific Ocean. Special Perils Insurance or Flood Insurance, or both, may cover this risk.
5. Demolition and increased cost of construction coverage, also known as "law and ordinance" coverage, is actually an endorsement (an addition) to a Special

Perils Insurance policy. After a loss, this endorsement extends the policy to cover any additional restoration cost the Borrower incurs from enforcement of a law or building ordinance that requires the Borrower to restore the building to a higher standard after the loss than before. For example, before a loss an older building might not have needed to comply with modern sprinkler requirements or the Americans With Disabilities Act. After the loss, when the Borrower restores, the building must meet both requirements, thus increasing the cost to restore. These endorsements cover that extra cost (deeming it part of the Borrower's loss arising from the casualty), usually subject to a sublimit.

6. "Replacement cost value" is the amount necessary to reconstruct the building on the same site for the same use with similar materials. Replacement cost value includes building improvements to the land. It does not, however, include the market value of the building or the cost of the land.

7. "Law and ordinance coverage" does not cover the Borrower's losses if current zoning laws are more restrictive than those when the building was built, to a point where the Borrower cannot restore the damaged building to the same size as before the loss (the "legal nonconforming use" problem). Typical Special Perils Insurance will pay only: (a) replacement cost to rebuild the building at the same location, to the extent the Borrower can rebuild it there; and (b) "actual cash value" for the part of the building that could not be rebuilt. Unfortunately, "actual cash value" reflects deductions for depreciation, obsolescence, and other factors. In the worst case, the insurance award might not cover the loan. Depending on the condition of the insurance market, Borrowers, Lenders, and their advisors can nevertheless tailor insurance coverage to make the Lender whole for the resulting "loss of economic value" (and also tailor the corresponding insurance requirements in the loan documents). The disposition of Insurance Proceeds from a major loss affecting such a building then becomes an issue between the Borrower and the Lender, which is outside the scope of this discussion.

8. After a loss, an insurance carrier may impose "coinsurance" adjustments to punish a property owner who underreported the insurable value of its property. (Coinsurance provisions sometimes bear a more innocuous label, such as "proportionate reduction in indemnity" or "margin clause.") For example, if the true replacement cost value of the mortgaged property is $100 and the owner insures it for $40, this represents a 60% level of underinsurance. The insurance carrier was being shortchanged by 60% of the premiums it should have received for bearing the full risk of all possible losses that might affect the building (anywhere from 1% to 100% of its insurable value). The insurance carrier will therefore reduce any Insurance Proceeds by the same percentage, 60%. Under these facts, if the mortgaged property suffers a $30 loss, the carrier will pay only $12 (a 60% reduction, based on a 60% failure to insure). In an "agreed amount endorsement," the insurance carrier waives this adjustment and signs off on the Borrower's valuation. These endorsements can apply to Special Perils Insurance and Rent Loss Insurance.

9. Any insured will prefer "replacement cost value" over "actual cash value." Through a valuation clause, "actual cash value" deducts some percentage from any Property Insurance proceeds for depreciation and obsolescence of the mortgaged property. "Replacement cost value" does not.

10. Coverage for acts of terrorists does not cover losses caused by war, which are not currently insurable. Historically, the federal government has issued limited war insurance during certain periods of hostilities.

11. The preceding sentence offers a brief reminder of the insurance markets in 2001 and 2002. Terrorism insurance was virtually unobtainable. Some servicers still required it, regardless of cost or relative benefit. During that moment in commercial real estate history, newspapers covered terrorism insurance litigation on the front page. All-day seminars devoted themselves to terrorism insurance. Courts forgot about rules against issuing injunctions in disputes that related merely to (non)payment of money. Terrorism insurance often dwarfed all other issues in loan document negotiations. Though Borrowers and Lenders often negotiated all night to do it, they usually agreed on compromise measures like the following, or some subset or variation: "Notwithstanding anything to the contrary in the Loan Documents, Borrower shall provide terrorism insurance only to the extent that: (a) by expending no more than $_____ per year in incremental insurance premiums, Borrower can obtain terrorism insurance coverage of at least $_____ per insured loss; (b) at the time in question, [institutional] [prudent] [reputable] owners of Comparable Properties are generally purchasing and maintaining terrorism insurance; and (c) terrorism insurance is commercially available through ordinary insurance markets upon paying premiums that are commercially reasonable under the circumstances." Although terrorism insurance has receded in importance, at least for now, some Borrowers and Lenders still negotiate over it, fearing that federal legislation on the topic may expire without being renewed.

12. As part of the closing process, the Lender should ascertain the flood zone status of the Mortgaged Property.

13. The National Flood Insurance Plan can cover flood losses, based on actual cash value, of up to $500,000 per commercial building (plus $500,000 for the contents of each building), but not loss of business income or rental income. Private carriers can and do issue more flood insurance. Some Lenders require it.

14. The scope of Earthquake Insurance can vary, depending on how the policy defines "earthquake." It may and may not include mudslides, sinkholes, general earth movement, and even water-saturated land. A Lender may want to beef up these Earthquake Insurance requirements in earthquake-prone areas.

15. For a securitized loan, deductibles beyond 5% of annual net cash flow may require corresponding reserves to cover the Borrower's exposure.

16. Boiler and Machinery Insurance isn't really just boiler and machinery insurance. It covers: (a) explosions of boilers and pressure vessels (no surprise); (b) any mechanical and electrical breakdown of machinery and equipment in a building (essentially any building system—far beyond boilers and pressure vessels); and (c) any damage or loss from an insured event.

17. Special Perils Insurance does not usually cover losses during significant construction, because the level and mixture of risks varies so much from (and usually exceeds) those in a completed building in operation. During major construction, a building owner plugs that gap with Builder's Risk Insurance, covering the higher/different exposure to loss during construction. Builder's Risk Insurance covers the owner's and the contractors' interests in materials installed in the structure and (if properly endorsed) in materials in transit or stored off site. Coverage can be extended to cover "soft costs" (incremental debt service, incremental architecture and engineering expenses, permits, and other expenses not directly related to construction but that the owner incurs to reconstruct). This coverage can also cover a delay in opening that results from a loss during construction. For substantial construction projects, the structuring of Property Insurance and Liability Insurance is a science in itself. A careful owner can dramatically reduce its costs by avoiding duplication and consolidating all coverage in one place, as mentioned in the introductory notes. These sample insurance provisions are not designed for a construction loan.

18. A "reporting form" requires monthly reporting of values, creating opportunities for error and risk of coinsurance. Borrowers and Lenders usually favor a "Completed Value Form." This eliminates the reporting requirement, basing coverage instead on the value of the project as completed.

19. Without this endorsement, if the Borrower finishes construction and allows occupancy of the building, the insurance coverage may vanish.

20. This extra coverage is discussed above, in the context of Special Perils Insurance.

21. A rental interruption endorsement to Builder's Risk Insurance adds Rent Loss Insurance to the package of Builder's Risk Insurance coverages.

22. For investor-owned commercial real estate, Rent Loss Insurance covers the Borrower's loss of rental income and the need to keep paying fixed expenses even while the Mortgaged Property is out of operation, up to the coverage limits. Rent Loss Insurance helps the Borrower only to the extent that leases excuse tenants from paying rent after casualty. If the leases don't abate rent after casualty and instead the tenants just decide not to pay, Rent Loss Insurance won't help. This is why Borrowers and Lenders often want leases to abate rent after a casualty. Of course, the abatement must mesh correctly with the Borrower's Rent Loss Insurance. This coverage will pay up to the coverage limits during a recovery period starting on the date of loss and continuing until the time when, with "due diligence and dispatch," the Mortgaged Property can be restored to its condition before loss. If the Borrower owns, instead of leases, the Mortgaged Property, then the documents would instead require the Borrower to maintain "business interruption insurance," raising similar issues.

23. An "extended period of indemnity" extends Rent Loss Insurance beyond the date when payments would otherwise end, i.e., the date when the Improvements are restored to their condition before loss. In this extension period, the insurance payments continue, up to the specified maximum, to give the Borrower more time to bring rental income (or business income, in the case of business interruption insurance) back to its level before the loss occurred. This can smooth out lost cash flow and protect the Borrower from some market fluctuations.

24. Liability Insurance provides third-party coverage, protecting the insured (the first party) from loss from "tort" liability to third parties. "Tort" refers to damage or injury that one party causes another without a contractual relationship. A car crash creates "tort" liability. So might a banana peel on which someone slips and falls.

25. The commercial general liability policy is the most widely used form for liability coverage. Loan documents still often refer to the "comprehensive form," which was issued in 1972 and required major modifications before Lenders could tolerate it. One still sometimes sees that policy form, but should avoid it. The "commercial form" of general liability insurance policy is broader, solving many problems of the "comprehensive form." All general liability insurance covers only bodily injury, property damage, and death.

26. A commercial general liability policy typically excludes automobile liability. Therefore, it has become common practice to require this coverage as a separate and additional item.

27. "Umbrella" liability insurance provides coverage beyond the "primary" liability coverage. It sits on top of the insured's basic liability coverage package: commercial general liability, automobile liability, and the employer's liability part of a workers' compensation policy. Umbrella liability insurance is usually a bit broader than the underlying coverages, considered as a whole. In contrast, "excess" liability coverage merely increases the dollar amount of particular component(s) of the underlying liability coverage. An insured Borrower (and a typical Lender) will usually prefer "umbrella" over "excess" liability coverage.

28. Policy limits should cover the maximum liability that the Lender and its advisors think has some reasonable likelihood of occurring, taking into account the location, occupancy, risks, size, use, and other characteristics of the mortgaged property. In today's world, any commercial property should rarely carry coverage of less than $5 million to $10 million. A substantial property should carry at least $10 million to $25 million. A very large or trophy property should carry $30 million or more. These limits always depend very much on specific circumstances.

29. Commercial general liability and umbrella liability insurance contain annual policy aggregates. For multiple-location ("blanket") insurance policies, these aggregates can and should be extended to apply on a per location basis.

30. If the borrowing group wants to share aggregate limits of insurance among many locations, the Lender should require higher limits, because of the possibility of multiple large losses across the portfolio.

31. An insured often enters into contracts (such as leases, management contracts, and service contracts) where the insured agrees to indemnify third parties against losses that the insured's Liability Insurance would cover, such as certain property damage, bodily injury, and death to third parties. So that Liability Insurance will back up those indemnity obligations, the insured will typically obtain "Contractual Liability" coverage in its policy. With that extra coverage, which is not automatic, the insured's Liability Insurance covers indemnity obligations arising under only certain "Insured Contracts," as defined in the insurance policy. Any "disconnect" between the policy language and the Borrower's contractual indemnity obligations can produce unpleasant surprises.

32. By becoming an "additional insured" under the Borrower's Liability Insurance, the Lender protects itself against "vicarious liability"—liability it might indirectly suffer from the Borrower's acts and omissions for which some plaintiff can somehow directly or indirectly blame the Lender, in whole or in part. The importance of this coverage cannot be overstated in today's world of ever-wider liability of parties that one might have thought to be "passive" and "innocent" a few decades ago. "Additional insured" status does not protect the Lender from liability for its own acts or omissions. For that protection, the Lender must maintain its own liability insurance (or self-insurance). A Lender is not entitled to "additional insured" status on the Borrower's policy automatically, but must obtain an appropriate endorsement or other documentation.

33. Environmental Insurance can provide both first-party and third-party coverage for clean-up costs both on and off site. Environmental Insurance varies widely, depending on the specific circumstances of the specific site. It is usually written on a "claims made" basis, for some multiple of $1 million in coverage. Virtually every Environmental Insurance policy must be tailored to reflect known environmental conditions (if any) at the site and other unique circumstances. This task requires cooperation among the Lender's environmental, risk management, and insurance advisors. Because of the potential complexity and site-specific nature of this coverage, where it is needed it may be one of the longest lead time items for the closing. It will also typically be quite expensive.

34. These requirements will not suffice for any Project that contemplates remediation. For any such Project, the clean-up contractor should provide at a minimum special coverage for environmental remediation, naming the Borrower and the Lender as additional insureds. The Borrower and the Lender may both also want coverage that assures them the cost of remediation will not exceed a certain

dollar figure, so-called "cap cost insurance." The Lender will need to tailor any environmental coverage to a specific Project and specific remediation plan.

35. The specific requirements for insurance-related deliveries at closing are covered in, for example, Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, Real Estate Finance Journal 46 (Winter 2001).

36. Evidence of insurance can take several forms. These can include binders, typically signed by the insurance company underwriter and carrying the most gravity. Instead, one usually sees certificates of insurance. Property Insurance should only be evidenced by the recently issued ACORD Form 28 certificate, replacing (and solving some problems with) the former ACORD Form 27 certificate. The latter certificate should no longer be used for commercial transactions, though it often still is. ACORD Form 28 contains good language to confirm its correctness and the Lender's interest in the policy. Brokers will try to use an "ACORD Form 25" certificate to evidence Liability Insurance, but it contains so many disclaimers that it serves no reliable purpose. A Lender should instead try to obtain an additional insured endorsement or an insurance binder that either expressly mentions the Lender or states: "additional insured status is automatically extended where required by written contract." Some brokers have come up with their own forms to evidence a Lender's coverage, containing inappropriate disclaimers. Such forms should be avoided.

37. Policy requirements should also reflect the Lender's guidelines and those of the Rating Agencies, if applicable.

38. In May 2003, Standard & Poor's reduced from "AA" to "A" the minimum required rating for a Property Insurance carrier in AAA-rated securitized transactions.

39. Borrowers often propose to finance their annual insurance premium. They borrow the premium at the beginning of the policy term, then repay it over the next eight to 10 months with interest. If the policyholder (Borrower) misses a payment, the premium finance company can, and usually does, exercise its right to cancel the insurance policy. In accordance with the Standard Mortgagee Endorsement, the insurance carrier must then notify the Lender that the policy is being cancelled. The Lender must then scramble to save the policy within 10 days after receiving notice. Many Lenders regard this mechanism as unacceptable.

40. The Standard Mortgagee Endorsement and Lender's Loss Payable Endorsement may protect the Lender from certain "bad acts" by the insured. For more on these endorsements, and some inadequate substitutes for them, see Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, 16 Real Est. Fin. J. 46 (Winter 2001).

41. Nearly all insurance policies contain an "other insurance" clause, precluding recovery if another policy covers the same risk. In other words, if a carrier can find some other carrier to bear a Loss, then the first carrier may refuse to cover it. This finger-pointing can produce a mess after any Loss, to the point where the insured might have had better coverage by buying less coverage. To avoid the problem, the insured Borrower should obtain the first carrier's permission to maintain the second policy. The first carrier would agree not to try to make the second carrier the "bagholder" after a Loss. In any multi-policy insurance program, the Borrower will need to obtain this permission for all underlying insurance, excess insurance, and participating insurance. When a Lender reviews the Borrower's insurance program, the Lender must confirm that multiple carriers have appropriately recognized one another's positions, to prevent unexpected disputes among carriers (and even a denial of coverage) upon Loss.

James E. Branigan, President and Chief Executive Officer of Omega Risk Management LLC, has spoken extensively on insurance and risk management for bar associations and major law firms. His firm is a consultancy, which does not sell insurance. He can be reached at (631) 692-9866 or jb@omegarm.com. Joshua Stein, a partner in the New York office of Latham & Watkins LLP, is a member of the American College of Real Estate Lawyers, First Vice Chair of the New York State Bar Association Real Property Law Section, Editor-in-Chief of *Commercial Leasing* (NYSBA 2004), and author of *New York Commercial Mortgage Transactions* (Aspen 2002), *A Practical Guide to Real Estate Practice* (ALI-ABA 2001), and over 100 articles about commercial real estate law and practice. He can be reached at (212) 906-1342 or joshua.stein@lw.com. **The authors acknowledge with thanks the editorial and research assistance of Michael P. Sugrue, an associate with Latham & Watkins LLP. An earlier version of this article appeared in *The Real Estate Finance Journal* 10 (Winter 2004), and in Joshua Stein's recent Mortgage Bankers Association book, *Lender's Guide to Structuring and Closing Commercial Mortgage Loans.***

Nuisance Holdovers in New York

By Gerald Lebovits and Daniel J. Curtin, Jr.

To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land. The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance. However, not every annoyance will constitute a nuisance.[1]

As in life, few things are more annoying in the landlord-tenant context than a nuisance. Life's solutions vary. One solution in the landlord-tenant context is for a landlord to commence a holdover proceeding against the allegedly objectionable tenant. Many questions arise in the unsettled area of nuisance-based holdovers. They include how to define a nuisance, what conduct constitutes a nuisance, how to settle a nuisance holdover, and what stay may be awarded to an unsuccessful tenant after a judgment of possession. This article offers some answers to the murky questions presented in nuisance holdovers.

Nuisance as a Basis for Holdover Proceedings

A landlord may bring a holdover proceeding against a tenant who commits a nuisance. The underlying concept is that tenants should not be permitted to engage in conduct that threatens other tenants, occupants, or the premises itself. Those who engage in nuisance do so under the threat of losing their tenancy.

The authority for nuisance-based holdover proceedings comes from statutes and lease provisions. In the rent-regulated context, a series of statutes provides that regulated tenancies may be terminated for nuisance conduct. In New York City, the Rent Stabilization Code (RSC) provides that a nuisance-based holdover to recover premises may be maintained when

> [t]he tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety.[2]

The same basic wording is found in the Emergency Tenant Protection Regulations (ETPR), the statutory scheme governing rent-stabilized tenancies outside New York City.[3]

For rent-controlled tenancies in New York City, the New York City Rent and Eviction Regulations provide that an action or proceeding to recover possession of residential property may be maintained when

> [t]he tenant is committing or permitting a nuisance in such housing accommodations . . . or his conduct is such as to interfere substantially with the comfort and safety of the landlord or of other tenants or occupants of the same or another adjacent building or structure.[4]

The State Rent and Eviction Regulations, which govern rent-controlled tenancies outside New York City, have the same language providing for a nuisance-based holdover.[5]

For non-regulated, or free-market, housing accommodations, most leases allow landlords to terminate a tenancy if the tenant is committing or permitting a nuisance.[6] Absent that lease provision, the courts have no jurisdiction under Real Property Actions & Proceedings Law (RPAPL) 711(1) to entertain a nuisance-based holdover.[7] In *Dass-Gonzalez v. Peterson*, for example, the tenant had a lease that did not contain a provision allowing the landlord to terminate the tenancy for objectionable conduct.[8] Civil Court granted the landlord a judgment of possession, but the Appellate Term, First Department, reversed.[9] The Appellate Term held that a nuisance-based holdover may not be maintained absent an express provision in the lease giving the landlord the right to terminate a tenancy on that ground.[10] Thus, even though the tenant did not raise the defect in Civil Court, the Appellate Term found no jurisdictional basis for a possessory proceeding under RPAPL Article 7.[11] The Appellate Division, First Department, affirmed the Appellate Term's ruling and re-articulated that the defect may be raised for the first time on appeal.[12]

Nuisance Defined

A nuisance is a condition that threatens the health, safety, and comfort of a building's occupants.[13] The conduct complained of must be of a continuing or recurring pattern.[14] This stands to reason, at least for rent-stabilized apartments, for which the governing statutory language provides that the conduct must be "persistent and [a] continuing course."[15]

A single incident of problematic conduct will typically be insufficient to establish a nuisance,[16] although some cases say otherwise. Thus, a landlord's allegation that a tenant or subtenants had once plugged multiple extension cords into electrical sockets, causing a fire—conduct that obviously threatened the premises' occupants, not to mention the premises itself—was insufficient to support a nuisance holdover.[17] More typical of nuisance cases is when a pattern of problematic conduct occurs over a period of time. When a tenant engages in a course of offending behavior, like continually allowing offensive and excessive odors and water leaks to emanate from the subject premises, the tenant has engaged in "conduct [that] threaten[s] the comfort and safety of building tenants or occupants."[18]

The most recent Court of Appeals pronouncement regarding nuisance holdovers may be said to require for eviction a course of conduct, as opposed to a single incident of objectionable behavior. The Court of Appeals in *Domen Holding Company v. Aranovich* stated in dicta that "[n]uisance imports a continuous invasion of rights—'a pattern of continuity or recurrence of objectionable conduct.'"[19] Statements or explanations not necessary to a court's determination of the issue at hand are not binding precedent.[20] The *Domen* Court did not need to examine the contours of nuisance proceedings to determine that issues of fact precluded granting summary judgment for the landlord.[21] It can be argued, therefore, that the requirement of a pattern of objectionable behavior in nuisance cases is really no binding requirement at all. But dictum from the Court of Appeals is a statement of law from New York State's highest court and is thus highly persuasive on the lower courts.[22]

Here is where things get confusing, for many courts had held, pre-*Domen*, that a single instance of behavior can be an actionable nuisance if that single instance is sufficiently egregious.[23] And despite *Domen*, some courts still so hold.

For example, a recent, post-*Domen* case held that a landlord made a *prima facie* case for a holdover predicated on nuisance even though the proceeding was based on a single incident. In *160 West 118th Street Corporation v. Gray*, a 75-year-old rent-controlled tenant of some 50 years was alleged to have engaged in "anti-social, disruptive, destructive, dangerous, and/or illegal behavior" when she shot her son with an unlicensed gun. Although the court noted that nuisance generally requires more than one incident, the court weighed the qualitative and quantitative aspects of the behavior in deciding that the conduct complained of constituted a nuisance.[24] Yet the court also found that the tenant's possession of an unlicensed firearm, unless purchased on the day of the shooting, might represent "an ongoing pattern of objectionable behavior."[25]

Hence the conundrum of defining nuisance: Need there be a pattern of objectionable conduct, or may an isolated incident so terribly objectionable provide a sufficient basis to commence a nuisance holdover? The safe money is on saying that a pattern of behavior is required to establish, *prima facie*, a nuisance-based holdover proceeding. Civil Court (Gerald Lebovits, J.), citing *Domen*, so held in *Goodhue Residential Company v. Lazansky*.[26] So did the Appellate Term, First Department, four months later in *S&M Enterprises v. Lau*.[27] A continuous pattern of nuisance is therefore needed, unless, perhaps, like shooting your son with an unlicensed handgun that has been in your possession for some time, the conduct is really, really egregious.

Prerequisite to a Nuisance-Based Holdover: Predicate Notices

Each of the statutory schemes allowing for maintaining a holdover proceeding predicated on nuisance requires that the tenant be afforded notice before the proceeding begins.[28] For free-market housing units, lease provisions govern the requisite notices that must be given before a proceeding begins. This article focuses on the notice required in the rent-regulated context. That requisite notice is known as a termination notice.[29] Rent-stabilized tenants must be afforded a minimum seven days' notice that their tenancy is being terminated and that their failure to vacate might result in a summary proceeding commenced against them.[30] Rent-controlled tenants are afforded 10 days' notice,[31] unless they are weekly tenants, in which case a minimum two days' notice is required.[32] In either event, for rent-controlled tenants, a landlord must also notify the Division of Housing and Community Renewal (D.H.C.R.)'s local office within 48 hours of serving the notice on the tenant.[33] A landlord need not, however, obtain a certificate of eviction before commencing a nuisance holdover against rent-controlled tenants.[34]

Regardless of the regulatory scheme, a notice to cure need not precede a termination notice.[35] If the lease terms require the landlord to serve a notice to cure as a predicate to terminating the tenancy, the landlord must comply with the requirement even if the eviction proceeding is based on nuisance.[36] Nuisance is, by definition, past conduct, incapable of meaningful cure.[37] A tenant need not be afforded a cure period when a nuisance is established, even if the holdover is based on both nuisance and substantial breaches of the lease.[38]

Even though a landlord need not serve a notice to cure in a nuisance holdover, courts will protect valuable leaseholds, and substantial defects in a predicate termination notice will result in dismissing the holdover proceeding.[39] Ideally, the termination notice should apprise the tenant of the lease provision and

statutory ground(s) on which the termination is based, the specific facts that establish the existence of the ground(s) alleged (including approximate dates, times, and individuals involved), and a date certain by which the tenant must vacate and surrender the subject premises.[40] But the test of a proper termination notice is reasonableness.[41] The facts alleged must be plentiful and specific enough to allow a tenant to defend an eviction proceeding. Non-fatal missing facts can be supplied later in a bill of particulars.[42]

Although the failure to articulate less essential elements like the lease provision violated might not be fatal,[43] the failure to proffer sufficient factual detail regarding the alleged wrongful conduct might be. By way of example, *Carriage Court Inn, Inc. v. Rains* involved a nuisance holdover based on the tenant's allegedly causing substantial damage to the housing accommodation, his (or his guests') harassment of the owner or other tenants, and an excessive number of guests, who themselves were allegedly abusive toward other residents, caused unreasonable noise, and threatened to burn down the premises.[44] The landlord failed to allege specific dates and times of the occurrences, the identities of the victims of the problematic behavior, or that the tenant even knew of threats made by his guests.[45] The notice was held insufficient because it failed to apprise the tenant of the specific facts on which the proceeding was based, and thus it could not support the holdover proceeding.[46]

Like all predicate notices, a defective termination notice in a nuisance holdover cannot be amended. A proceeding based on a defective notice will be dismissed.[47] But the landlord will be free to start again, whether or not the conduct continues, because the dismissal will be without prejudice.[48]

Nuisance vs. Breach of a Substantial Obligation of the Tenancy

Landlord-tenant practitioners must be mindful of the underlying theory on which the eviction proceeding is based and of the predicate-notice requirements involved in each. Under RSC § 2524.2(a), eviction for a tenant's wrongful acts is precluded without the landlord's first serving the tenant with proper notice. RSC § 2524.2(b) provides that termination notices must set forth on which of the permissible grounds for eviction listed in RSC § 2524.3 the proceeding relies. Under RSC § 2524.3, nuisance and substantial-breach-of-a-tenancy-obligations are separate grounds in which to seek eviction. A holdover proceeding based on a substantial breach of a tenant's obligation may, however, be maintained only after the owner first serves a notice to cure on the tenant to allow the tenant an opportunity to correct the violation.[49] If the termination notice is insufficient or otherwise defective, the proceeding must be dismissed because, again, a predicate notice cannot be amended.[50]

Examples of Nuisance

The heart of any nuisance proceeding is the tenant's allegedly problematic conduct. That conduct can take many forms, including maintaining a washing machine,[51] harboring a nuisance pet,[52] public urination and other offensive conduct,[53] illegal use,[54] abusive or antisocial behavior toward building staff or owners or other tenants and occupants,[55] conduct that results from a medical condition,[56] excessive noise[57] or odors,[58] the seemingly all-inclusive "objectionable conduct" of a tenant,[59] and, in some instances, even the failure to remit rent.[60] Although any number (or combination) of these (or other) types of conduct will support a nuisance-based holdover, some are litigated more often than others.

Objectionable Conduct

If the lease allows the landlord to terminate the tenancy for objectionable conduct, the landlord must prove in court by "competent evidence" as required by RPAPL 711(1) that the tenant engaged in that type of conduct.

When it comes to cooperative living, a recent development has been an apparent increase by cooperative boards to terminate tenancies for a shareholder-tenant's alleged "objectionable conduct." The basis for this development in the cooperative context is a proprietary-lease provision permitting the board or the shareholders to terminate a tenancy for the shareholder-tenant's objectionable conduct. Although what might constitute objectionable conduct itself is not defined in a standard New York State proprietary lease, the lease does, or should, delineate the procedures to terminate a cooperative lease on this ground. Those procedures used before a tenancy is terminated should minimally include notice to the shareholder-tenant; the shareholder-tenant's having an opportunity to be heard by the board or the shareholders, and a board or shareholder vote.

The leading case involving terminating a cooperative tenancy for objectionable conduct is *40 West 67th Street Corporation v. Pullman*.[61] In *Pullman*, the Court of Appeals applied business-judgment deference to a shareholder vote that terminated a shareholder's tenancy for objectionable conduct.[62] The shareholder's vote satisfied the competent-evidence standard, and the cooperative won its motion for summary judgment. The *Pullman* Court recognized that cooperative living is based on sharing control over what happens and who may live in the community.[63] The *Pullman* Court was careful to articulate procedural safeguards to ensure that shareholders are protected against bad-faith, arbitrary, or baseless terminations by

providing shareholders with three affirmative defenses.[64] To avoid affording business-judgment deference to cooperative determinations to terminate tenancies, shareholder-tenants must prove (1) that the cooperative acted outside the scope of its authority, (2) that the termination did not further the cooperative's corporate purpose, or (3) that the termination was made in bad faith.[65]

In *13315 Owner's Corporation v. Kennedy*, the shareholder-tenant successfully defended against a board-of-directors vote to terminate his tenancy.[66] The *Kennedy* court (Gerald Lebovits, J.) found that a two-phase analysis is required under *Pullman*.[67] First the court must decide whether the vote is entitled to business-judgment deference.[68] If the board is entitled to deference, the inquiry ends, and the cooperative must be awarded a final judgment of possession, whether on summary judgment or at trial. If the board is not entitled to deference, then the court must, if issues of fact arise, hold a trial to determine whether the cooperative has competent evidence of the shareholder's objectionable conduct under RPAPL 711(1).[69] The *Kennedy* court held that the shareholder had proven that the board acted outside the scope of its authority and in bad faith.[70] The *Kennedy* court in particular found that the shareholder had established that the board acted outside its authority in that the special-meeting notice required by the proprietary lease contained errors and that the board was not properly elected.[71] The *Kennedy* court also found that the board acted in bad faith when it failed to afford the shareholder a fair opportunity to be heard to defend against the board's accusations.[72]

One issue the *Kennedy* court addressed but ultimately was not required to resolve was whether the Court of Appeals's decision in *Pullman* applied to board votes to terminate tenancies for objectionable conduct.[73] This issue was addressed in *London Terrace Towers, Inc. v. Davis*, in which the court (Gerald Lebovits, J.) decided that the Court of Appeals intended that board votes—not just shareholder votes—be given business-judgment deference.[74] In *Davis*, the shareholder's tenancy was terminated by a unanimous board vote.[75] The shareholder was unable to show that the board had acted outside the scope of its authority, that the vote did not further the cooperative's corporate purpose, or that the board acted in bad faith.[76] The *Davis* court therefore found that the board vote satisfied the competent-evidence standard and granted the board's motion for summary judgment.

Although *Davis* gives cooperative boards broad power to determine who may reside in the cooperative community, courts are under a directive from the Court of Appeals to exercise "heightened vigilance" in examining whether board actions are entitled to business-judgment deference.[77] Cooperative boards must comply with their procedures scrupulously by following proper election procedures, by providing shareholders detailed objectionable-conduct and termination notices, by properly holding required special meetings, by adhering to their lease provisions to give warning in writing (if one is required), and by affording shareholders a true opportunity to defend against the allegations before the board votes to terminate the tenancy.

Chronic Nonpayment or Late Payment of Rent

A tenant's chronic and unjustified withholding of rental payments might be a nuisance if the landlord can demonstrate aggravating conditions.[78] The significance of pleading nonpayment of rent as a nuisance is that it permits a landlord to circumvent the cure opportunities the tenant might otherwise enjoy had the landlord brought a nonpayment proceeding. The Court of Appeals in *Sharp v. Norwood* ruled that a nuisance proceeding based on nonpayment or late payment of rent cannot be maintained absent proof of interference with the landlord's or other tenants' use and enjoyment of the property.[79] But chronic nonpayment holdover proceedings are permitted when predicated on the ground that the tenant has breached a substantial obligation of the tenancy.[80] The Court of Appeals has not expressly ruled on whether chronic nonpayment or chronic late payment can ever be a nuisance.[81]

The Appellate Division foresaw the Court of Appeals's insistence that "additional proof of interference" be pleaded for a nuisance based on chronic nonpayment. In 1989, the Appellate Division, First Department, held that to maintain a nuisance holdover proceeding for nonpayment of rent, a "landlord must show that it was compelled to bring numerous nonpayment proceedings within a relatively short period and that the tenant's nonpayment was willful, unjustified, without explanation, or accompanied by an intent to harass the landlord."[82] In 1991, the First Department extended that rationale to chronic late payment of rent, finding that three nonpayment proceedings over the course of a three-year period, coupled with 49 late payments over a 52-month period, were grounds for a nuisance holdover.[83] Similarly, the Appellate Division, Second Department, was unwilling to permit nuisance proceedings based on chronic nonpayment absent a claim that "aggravating circumstances" existed that impaired the landlord's enjoyment of the property.[84] Thereafter, in 1997, the Court of Appeals decided *Sharp v. Norwood*, officially rendering chronic nonpayment nuisance proceedings nearly impossible to prosecute absent a clear showing of interference with the landlord's use and enjoyment of its property or an intent to harass the landlord by not paying rent on time and having no valid justification for paying rent late or not at all.

Sale and Use of Illegal Drugs

A tenant who engages in or permits illegal drug use or sales within the premises threatens the safety and well-being of neighboring tenants and is subject to eviction for creating a nuisance.[85] Landlords are authorized to begin a holdover proceeding under RPAPL 711(5), which provides that a landlord may maintain a special proceeding if "[t]he premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business." Under N.Y. Real Property Law § 231(1) (RPL), a lease terminates "[w]henever the lessee or occupant . . . shall use or occupy [any building or premises] for any illegal trade, manufacture or other business."

The landlord must therefore prove that the tenant has regularly engaged in the alleged activity.[86] A tenant need not be directly involved in illegal activity, but in that event the landlord must "establish that the tenant knew and/or acquiesced in the illegal activity."[87] The landlord must also establish a nexus between the use of the premises and the tenant's illegal activity.[88]

Sometimes a landlord will be required to show only that illegal activity took place in the subject premises and will not be required to demonstrate the tenant's knowledge of, or even acquiescence in, the activity at issue. Those instances occur when the premises or tenancy is covered by a government-subsidy program. Tenants in these programs receive subsidies for a portion of the monthly rent due the landlord.[89] The leases for premises in these programs often provide that the tenancy may be terminated for any drug-related criminal activity by the tenant of record or the tenant's guest.[90] When a tenant resides in subsidized housing and illegal drug activity takes place in or around the leased premises, the tenant can be evicted for that illegal activity, even if the tenant was not engaging in the activity and even if the tenant was unaware of the activity.[91] A landlord will still have to serve a termination notice and show that the illegal activity took place.[92]

Fire Hazards, Collyer's Condition, and Other Mental-Health Issues

A fire hazard may constitute a nuisance. If a tenant intentionally sets fires, the court will have no trouble finding that a nuisance has occurred.[93] An accumulation of newspapers and garbage in a tenant's apartment may constitute a nuisance when the condition is a health and fire hazard and when the tenant fails or refuses to abate or correct the violative condition.[94]

An extreme case of clutter that results in a fire hazard may be caused by a psychological condition akin to an obsessive-compulsive personality disorder.[95] The obsessive-compulsive tenants' condition is marked by an inability to throw things away; their solution is to keep everything. Colloquially this is known as a Collyer's condition.[96] A Collyer's condition will provide grounds for a nuisance-based holdover, particularly when the premises becomes a health or safety hazard.[97] A tenant residing in an apartment deemed excessively cluttered to the point of constituting a nuisance may be afforded an opportunity to cure the condition.[98] If the condition is cured timely, the warrant of eviction will be stayed permanently.

Obsessive-compulsive personality disorder is not the only mental health condition that may impact a tenancy. For example, in 1991, in *Frank v. Park Summit Realty Corporation*, the court upheld a judgment of possession against an 80-year-old tenant who allowed his schizophrenic nephew to live in the subject premises.[99] While living in the tenant's apartment, the nephew would often engage in bizarre and disturbing behavior, including walking around the building in the nude and verbally abusing other residents with threats of physical and sexual assault.[100] The nephew also caused a health and safety hazard to the other residents because of his poor personal hygiene and unsanitary behavior and to his uncle because he punched him in the face.[101] Although the nephew's behavior was markedly improved while he was medicated, he often failed to take his medication.[102] The police had to be summoned numerous times to usher the nephew to a nearby hospital to medicate him forcibly.[103] Although the nephew voluntarily underwent treatment to prevent future schizophrenic episodes, the court held that the other residents "had already been forced to endure an intolerable and continuing nuisance" and were entitled to immediate relief.[104]

The Supreme Court had issued two injunctions but the Appellate Division, First Department, saw them as ineffectual because the nephew was not precluded from visiting the tenant. Therefore, the First Department found that the behavior the other residents and the landlord's staff had already endured entitled the landlord to possession under RSC § 2524.3(b).[105] The Court of Appeals in turn affirmed the Appellate Division's ruling.[106]

Following the Court of Appeals decision in *Frank*, the Appellate Term, First Department, upheld the eviction of a tenant who suffered from schizophrenia despite the tenant's argument that her conduct did not constitute a nuisance because it was unintentional as caused by her mental illness.[107] In *301 East 69th Street Associates v. Eskin*, five neighbors testified that the tenant's abusive and antisocial behavior substantially interfered with their comfort and safety, that the tenant threatened them, and that the tenant often caused disturbances in the building's

public areas.[108] The tenant's psychiatrist testified that although he did not believe that the tenant was violent, the tenant's outbursts were likely to continue at some future point.[109] The tenant argued that she should not lose her home for unintentionally objectionable conduct.[110] The Appellate Term concluded that the tenant's state of mind is irrelevant when a holdover proceeding is predicated on nuisance, but rather that the effect of the tenant's conduct on the building staff and the other tenants is dispositive.[111]

In cases involving tenants unwilling or unable to attend to their personal needs and who cannot represent themselves, a guardian ad litem is required. Civil Practice Law and Rules (CPLR) article 12 gives a court the power to appoint a guardian for litigants "incapable of adequately prosecuting or defending" their rights.[112] A determination that the tenant is legally incompetent is not required for a court to appoint a guardian ad litem.[113] A guardian may be appointed on the court's own initiative[114] or on motion by one of the parties to the proceeding[115] at any point in the litigation.

Unless the parties consent, a court should hold a hearing to resolve any motion seeking to appoint a guardian to ascertain the facts regarding the tenants' ability to protect or defend their rights.[116] The CPLR requires that before any order appointing a guardian is effective, the proposed guardian submit to the court a written consent to the appointment,[117] although noncompliance with this requirement has been excused.[118]

In the nuisance context, the appointment of a guardian, or the failure to appoint a guardian later determined to have been needed from the proceeding's outset, will result in the court's staying the proceeding to appoint a guardian.[119] The court should not stay the execution of the warrant to appoint a guardian ad litem if it is clear, however, that appointing a guardian will not assist in curing the nuisance.[120]

Washing Machines

To support a nuisance holdover claim for a tenant's use of a washing machine in an apartment, a landlord must establish that the tenant's washing machine damaged individual apartments or the building's plumbing or electrical systems.[121]

If no proof of nuisance exists, the landlord may still seek to remove the tenant, or compel the tenant to cure the condition, for a substantial lease violation. Most standard leases and cooperative house rules provide that tenants may not, without the landlord's consent, install a washing machine in the apartment.[122] A breach of this provision may be grounds to terminate the tenancy for a substantial breach of a lease obligation.[123] A landlord who does not move to terminate the tenancy after becoming aware of the tenant's washing machine may be found to have waived the right to terminate the tenancy under the lease.[124] Courts recognize non-waiver provisions providing that lease requirements may be modified only by a written agreement between the landlord and the tenant.[125] Courts have found that landlords can waive their right to object to a tenant's washing machine despite a non-waiver clause if the landlord or the landlord's employees were aware of the washing machine and if the landlord did not move to enforce the right to terminate for many years.[126] The waiver of non-waiver clauses protects tenants from landlords acting inconsistently with the agreement and then moving to evict.

Pets

As in washing-machine cases, landlords must show facts that the tenant's pet constitutes a nuisance because it substantially and unreasonably interfered with other tenants' property rights.[127] Harboring a pet may also be a substantial breach of a tenancy obligation.[128] Under the New York City "Pet Law," New York City Administrative Code § 27-2009.1(b), once a tenant has begun openly and notoriously to harbor a pet, a landlord has a 90-day window in which to object to a pet's presence as a substantial breach of a tenancy obligation. After the 90 days have passed without the landlord's objection, the landlord will be deemed to have waived any objection to the pet.[129] When the pet in question is alleged to constitute a nuisance, however, the Pet Law will not operate to prevent the tenancy's termination, even if the landlord misses the 90-day window. When the pet is causing a nuisance, the termination is based not on a breach of a substantial obligation of the pet's tenancy, but on the objectionable conduct.[130]

Stipulations and Post-Judgment Stays

Nuisance-based holdover proceedings, like all types of litigation, are often settled by stipulation between the parties. Absent a settlement, and assuming a successful landlord, another issue that frequently arises in resolving nuisance holdovers is the issue of a post-judgment stay.

A settlement agreement in a nuisance-based holdover should be clear and unequivocal and delineate the parties' rights and responsibilities.[131] Because the proceeding is predicated on the tenant's conduct, this often means defining that conduct and providing for a period of "good behavior" that, when concluded, will result in discontinuing the proceeding with prejudice about the prior acts. If the tenant does not comply with the stipulation during the probationary period, the landlord must return to court to prove that the tenant did not abide by the

stipulation and to ask the court for a final judgment and leave to execute a warrant of eviction.[132]

Under RPAPL 753(4) and CPLR 2201, the court may, in appropriate circumstances, allow tenants a cure period before the warrant of eviction issues or is executed. Under RPAPL 753(4), courts shall stay the issuance of the warrant of eviction for a 10-day cure period "[i]n the event that such proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease." In proceedings to recover possession of homes based on the tenant's holding over after the tenancy has terminated, RPAPL 753(1) provides that the court may grant a stay no longer than six months. If a court decides to grant the tenant a stay, RPAPL 753(2) requires the court to direct the tenant to pay continued use and occupancy at the rental value of the premises. A stay under RPAPL 753 is unavailable if the landlord has proven that the premises will be demolished for new construction or that the tenant is objectionable.[133]

When the circumstances do not support staying the proceeding under RPAPL 753(4), it is within the court's discretion under CPLR 2201 to stay conditionally the execution of the warrant on "appropriate terms."[134] Courts have no set rule that defines appropriate terms. The court's exercise of its statutory authority under CPLR 2201 is subject to a reasonableness test.[135] The court must consider the facts of each case when deciding what amounts to appropriate terms.[136] If appropriate circumstances exist, the conditional stay may exceed the six-month statutory maximum set by RPAPL 753.[137]

Conclusion

Litigating nuisance proceedings can be annoying. Knowing the pitfalls and practicalities of these cases will help resolve one of life's problems.

Endnotes

1. *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 123–24, 769 N.Y.S.2d 785, 789 (2003) (citations omitted).
2. RSC (9 N.Y. Comp. Codes R. & Regs) § 2524.3(b) (9 N.Y.C.R.R.).
3. *See* ETPR (9 N.Y.C.R.R.) § 2504.2(b).
4. N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.2(a)(2); *see also* N.Y.C. Admin. Code § 26-408(a)(2).
5. *See* Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.2(b).
6. *See, e.g., Garfield v. O'Donnell*, N.Y.L.J., Jun. 8, 1994, at 24, col. 5 (Hous. Part Civ. Ct. N.Y. Co.).
7. *Dass-Gonzalez v. Peterson*, 258 A.D.2d 298, 298, 685 N.Y.S.2d 197, 197 (1st Dep't 1999) (mem.) ("[B]ecause the parties' lease contained no provision permitting termination of the tenancy if the landlord deemed the tenants' conduct objectionable, Civil Court was without jurisdiction to entertain the instant summary holdover proceeding.").
8. *See Dass-Gonzalez v. Peterson*, 177 Misc. 2d 940, 941–42, 678 N.Y.S.2d 855, 856 (App. Term 1st Dep't 1998) (per curiam), *aff'd mem.*, 258 A.D.2d 298, 685 N.Y.S.2d 197 (1st Dep't 1999).
9. *Id.*
10. *See id.*
11. *See id.*
12. *See Dass-Gonzalez*, 258 A.D.2d at 298, 685 N.Y.S.2d at 197.
13. *Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 35, 573 N.Y.S.2d 655, 657 (1st Dep't 1991) ("A nuisance is a condition that threatens the comfort and safety of others in the building . . . ") (citing *Novak v. Fischbein, Olivieri, Rozenholc & Badillo,* 151 A.D.2d 296, 299, 542 N.Y.S.2d 568, 570 (1st Dep't 1989) ("The only question before the Civil Court was whether the conditions also comprised a nuisance so as to threaten the comfort and safety of the occupants of the building and to entitle the landlord to a final judgment of possession'")), *mod. on other grounds*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991); *see, e.g., J.H. Taylor Constr. Corp. v. Liguori*, 2004 N.Y. Slip Op. 24449, at *2, 2004 N.Y. Misc. LEXIS 2192, at *4 (App. Term 1st Dep't Nov. 12, 2004) (per curiam) ("[U]nder any realistic interpretation, the evidence makes it painfully clear that the tenant's 'continued residency in the building places the comfort and health of others in the building at a constant risk.'") (quoting *Domen*, 1 N.Y.3d at 125, 802 N.E. at 140, 769 N.Y.S.2d at 790).
14. *Park Summit Realty*, 175 A.D.2d at 35, 573 N.Y.S.2d at 657; *S&M Enters. v. Lau*, N.Y.L.J., Apr. 21, 2004, at 24, col. 1 (App. Term 1st Dep't) (per curiam) (finding that isolated occurrences of water leaks emanating from tenant's bathtub were not "'continuous invasion of rights' necessary to support a finding of nuisance") (quoting *Domen*, 1 N.Y.3d at 124, 802 N.E.2d at 139, 769 N.Y.S.2d at 789).
15. *See supra* at text accompanying notes 2 and 3.
16. *Lexington Ave. Props. v. Charrier*, N.Y.L.J., Jan. 29, 1986, at 11, col. 4 (App. Term 1st Dep't) (per curiam) (holding isolated instance of objectionable conduct ordinarily insufficient to compel removal of tenant); *Metropolitan Life Ins. Co. v. Moldoff*, 187 Misc. 458, 460, 63 N.Y.S.2d 385, 387 (App. Term 1st Dep't 1946) (per curiam) (finding that releasing illuminating gas in kitchen in "mere isolated instance of an attempt at self-destruction is not and does not constitute a nuisance"), *aff'd,* 272 A.D. 1039, 74 N.Y.S.2d 910 (1st Dep't 1947).
17. *Vukovic v. Wilson*, 245 A.D.2d 1, 2, 666 N.Y.S.2d 115, 116 (1st Dep't 1997) (mem.); *Pamac Realty v. Bush*, 101 Misc. 2d 101, 102, 420 N.Y.S.2d 614, 615 (Hous. Part Civ. Ct. N.Y. Co. 1979) (finding that alcoholic tenant who started fire after getting drunk and falling asleep with cigarette did not engage in nuisance behavior).
18. *Uses Realty Corp. v. Johnson*, N.Y.L.J., Dec. 3, 1997, at 29, col. 1 (App. Term 1st Dep't) (per curiam) (finding nuisance established when tenant allowed excessive noise, water, and offensive odors to emanate from subject premises over course of time).
19. *Domen*, 1 N.Y.3d at 124, 802 N.E.2d at 139, 769 N.Y.S.2d at 789 (quoting *Park Summit Realty*, 175 A.D.2d at 35, 573 N.Y.S.2d at 657).
20. *E.g., Chiasson v. N.Y.C. Dep't of Consumer Affairs*, 138 Misc. 2d 394, 396, 524 N.Y.S.2d 649, 651 (Sup. Ct. N.Y. Co. 1998).
21. *See generally Domen*, 1 N.Y.3d at 125, 802 N.E.2d at 140, 769 N.Y.S.2d at 790.
22. *London Terrace Towers, Inc. v. Davis*, 2004 N.Y. Slip Op. 24497(U), *11, 2004 N.Y. Misc. LEXIS 2491, at *28–29 (Hous. Part Civ. Ct. N.Y. Co. Dec. 6, 2004) (Gerald Lebovits, J.) ("The court from which the dicta comes is an important consideration when deciding what weight to give the dicta. . . . Lower courts must consider nonbinding statements from a jurisdiction's highest court to be a prophecy about what the law is.").
23. *See, e.g., RNR Realty Corp. v. Smith*, N.Y.L.J., Aug. 6, 1998, at 23, col. 2 (Hous. Part Civ. Ct. Kings Co.) (stating that single occurrence does not constitute nuisance unless incident is so egregious that

it causes serious injury or damage to property, landlord, or other persons).

24. *160 W. 118th St. Corp. v. Gray*, N.Y.L.J., Dec. 15, 2004, at 19, col. 1 (Hous. Part Civ. Ct. N.Y. Co.).
25. *See id.*
26. *See Goodhue Residential Co. v. Lazansky*, 1 Misc. 3d 907(A), 781 N.Y.S.2d 624(A), 2003 N.Y. Slip Op. 51559(U), 2003 N.Y. Misc. LEXIS 1662 (Hous. Part Civ. Ct. N.Y. Co. Dec. 29, 2003) (dismissing nuisance holdover predicated on tenant's urinating due to termination notice that alleged only one incident of urination).
27. *See* N.Y.L.J., Apr. 21, 2004, at 24, col. 1.
28. *See* RSC (9 N.Y.C.R.R.) § 2524.3(b); ETPR (9 N.Y.C.R.R.) § 2504.2; N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.2(a); Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.2.
29. *See* RSC (9 N.Y.C.R.R.) § 2524.2; ETPR (9 N.Y.C.R.R.) § 2504.3; N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.3; Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.3.
30. RSC (9 N.Y.C.R.R.) § 2524.2(c)(2); ETPR (9 N.Y.C.R.R.) § 2504.3(c)(2).
31. N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.3(d)(1); Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.3(d)(2).
32. N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.3(d)(1).
33. N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.3(c); Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.3(c).
34. N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.2(a)(4); Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.2(d); *Club Mgmt. Co. v. Scleiffer*, N.Y.L.J., Sep. 9, 1996, at 26, col. 6 (App. Term 1st Dep't) (per curiam) ("[W]here . . . a landlord seeks to evict a rent controlled tenant based on nuisance, the landlord is not required to first obtain a certificate of eviction from DHCR.").
35. *E.g.*, *Kast Realty v. Houston*, 2003 N.Y. Slip Op. 50892(U), *3, 2003 N.Y. Misc. LEXIS 574, at *2 (App. Term 1st Dep't Apr. 23, 2003) (per curiam) ("Tenant's argument on appeal that a notice to cure was required is without merit since the proceeding was premised upon the theory of nuisance as set forth in the notice of termination."); *Lemle v. Gerwitz*, N.Y.L.J., Sep. 9, 1996, at 25, col. 2 (App. Term 1st Dep't) (per curiam) (holding that no notice to cure is required in holdover proceeding grounded on landlord's allegation that tenant is committing nuisance); *72nd St. Partners v. Otis*, N.Y.L.J., Apr. 17, 1993, at 24, col. 3 (App. Term 1st Dep't) (per curiam).
36. *221 E. 10th St. v. Walker*, N.Y.L.J., June 3, 1992, at 23, col. 4 (Hous. Part Civ. Ct. N.Y. Co.) (finding that although RSC does not mandate service of a notice to cure, landlord is required to comply with lease if its terms require serving notice).
37. *Unicorn 151 Corp. v. Small*, 181 Misc. 2d 304, 310, 693 N.Y.S.2d 883, 887 (Hous. Part Civ. Ct. Kings Co. 1999) ("This court is cognizant of the distinction between a nuisance incapable of cure and a breach of lease.").
38. *Carnegie Park Assocs. v. Graff*, 2003 N.Y. Slip Op. 51198(U), at *3, 2003 N.Y. Misc. LEXIS 1039, at *2 (App. Term 1st Dep't Aug. 8, 2003) (per curiam) ("The service of a notice to cure for the alternative ground of violation of the lease does not require that an opportunity to cure be given where, as here, a nuisance is proven and the court has found that the tenant's pattern of behavior over a period of years continuing through the trial 'shows no sign of abating.'").
39. *See, e.g.*, *Carriage Court Inn, Inc. v. Rains*, 138 Misc. 2d 444, 446, 524 N.Y.S.2d 647, 648 (Hous. Part Civ. Ct. N.Y. Co. 1988).
40. *See* RSC (9 N.Y.C.R.R.) § 2524.2(b); ETPR (9 N.Y.C.R.R.) § 2504.3(b); N.Y.C. Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2204.3(b); Rent & Evict. Regs. (9 N.Y.C.R.R.) § 2104.3(b); *Harrison v. Rankin*, N.Y.L.J., Feb. 18, 1993, at 22, col. 4 (Hous. Part Civ. Ct. N.Y. Co.) (holding that ambiguous termination notice is fatally defective); *Palomino v. Link*, N.Y.L.J., Apr. 22, 1992, at 25, col. 2 (Hous. Part Civ. Ct. Kings Co.) (holding that termination notice that fails to allege dates of misconduct is fatally defective).
41. *Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 17, 651 N.Y.S.2d 418, 427 (1st Dep't 1996), *appeal dismissed*, 90 N.Y.2d 829, 683 N.E.2d 17, 660 N.Y.S.2d 552 (1997); *Carnegie Park Assocs.*, 2003 N.Y. Slip Op. 51198(U), *3, 2003 N.Y. Misc. LEXIS 1039, at *2; *Lincoln Shore Owners Inc. v. Springer*, 2003 N.Y. Slip Op. 50991(U), *1, 2003 N.Y. Misc. LEXIS 712, at *1 (App. Term 1st Dep't May 1, 2003) (per curiam).
42. *City of New York v. Valera*, 216 A.D.2d 237, 237, 628 N.Y.S.2d 695, 695 (1st Dep't 1995); *McGoldrick v. DeCruz*, 195 Misc. 2d 414, 414, 758 N.Y.S.2d 756, 757 (App. Term 1st Dep't 2003) (per curiam); *Gracie Gardens Owners Corp. v. Goldfarb*, 189 Misc. 2d 620, 620, 735 N.Y.S.2d 349, 350 (App. Term 1st Dep't 2001) (per curiam).
43. *Dafodil Purchasing Corp. v. Pritzker*, N.Y.L.J., Oct. 1, 1996, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (finding that because notice was factually detailed and specific, it was not a "fatal jurisdictional defect that the notices failed to identify any lease provision(s) violated").
44. *See* 138 Misc. 2d at 446, 524 N.Y.S.2d at 648.
45. *Id.*, 524 N.Y.S.2d at 648.
46. *See id.*, 524 N.Y.S.2d at 648.
47. *See Chinatown Apts., Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 788, 412 N.E.2d 1312, 1324, 433 N.Y.S.2d 86, 88 (1980); Warren A. Estis & William J. Robbins, *Determining Adequacy of Communication is No Easy Task*, N.Y.L.J., Apr. 7, 1999, at 5, col. 2 (discussing predicate-notice requirements).
48. *See generally Valley Cts., Inc. v. Newton*, 47 Misc. 2d 1028, 1031, 263 N.Y.S.2d 863, 866 (Syracuse City Ct. 1965); 2 Joseph Rash, *New York Landlord and Tenant—Including Summary Proceedings* § 30:60, at 468 n.230 (Robert F. Dolan 4th ed. 1998).
49. RSC (9 N.Y.C.R.R.) § 2524.2(a).
50. *See Chinatown Apts.*, 51 N.Y.2d at 788, 412 N.E.2d at 1324, 433 N.Y.S.2d at 88.
51. *E.g.*, *RNR Realty*, N.Y.L.J., Aug. 6, 1998, at 23, col. 2; *Fanchild Investors, Inc. v. Cohen*, 43 Misc. 2d 39, 42, 250 N.Y.S.2d 446 (Civ. Ct. Bronx Co. 1964) (discussing washing machine as nuisance when it "overburden[s] plumbing or electrical outlets").
52. *E.g.*, *Piazza v. Greitzer*, N.Y.L.J., Feb. 6, 1996, at 25, col. 3 (App. Term 1st Dep't) (per curiam) (finding that tenant's harboring ten pigeons and two dogs with attendant odors and infestation are grounds for nuisance); *John Dean Realty Corp. v. Supple*, N.Y.L.J., July 26, 1984, at 6, col. 1 (App. Term 1st Dep't) (per curiam) (finding that biting dog constitutes nuisance); *cf., Thelen v. Torres*, N.Y.L.J., Oct. 21, 1998, at 29, col. 5 (Hous. Part Civ. Ct. Bronx Co.) (finding presence of four dogs not a nuisance).
53. *E.g.*, *Acorn Realty, L.L.C. v. Torres*, 169 Misc. 2d 670, 671, 652 N.Y.S.2d 472, 473 (App. Term 1st Dep't 1996) (per curiam) (finding that occurrences of vandalism and urinating in public areas, together with other conduct, constituted nuisance); *but see Goodhue Residential*, 1 Misc. 3d 907(A), 2003 N.Y. Slip Op. 51559(U), 781 N.Y.S.2d 624, 2003 N.Y. Misc. LEXIS 1662 (dismissing nuisance holdover because termination notice alleged but one urination incident).
54. *E.g.*, *Harrison*, N.Y.L.J., Feb. 18, 1993, at 22, col. 4 (upholding termination notice in nuisance proceeding when notice referenced tenants' fear resulting from drug activity in premises, even though fearful tenants were not named in notice); *1021-27 Ave. St. John H.D.F.C. v. Hernandez*, 154 Misc. 2d 141, 143–45, 584 N.Y.S.2d 990, 991–93 (Hous. Part Civ. Ct. Bronx Co. 1992) (allowing nuisance holdover when tenant lacks willingness or ability to restrict illegal use of premises).
55. *E.g.*, *Acorn Realty*, 169 Misc. 2d at 671, 652 N.Y.S.2d at 473 (finding that antiso-

cial behavior of tenant's children, including "verbal abuse of other residents and actual assaults on building staff," constituted nuisance); *Aldus I Assocs. v. Maldonado*, 13 H.C.R. 6A, Jan 11, 1985 (Hous. Part Civ. Ct. Bronx Co.).

56. *See, e.g.*, *Park Summit Realty*, 175 A.D.2d at 36, 573 N.Y.S.2d at 657.

57. *E.g.*, *Davis*, 2004 N.Y. Slip Op. 24497, *13, 2004 N.Y. Misc. LEXIS 2491, at *34.

58. *E.g.*, *Mosholu Preservation Corp. v. Fisher*, N.Y.L.J., July 27, 1999, at 22, col. 1 (App. Term 1st Dep't) (per curiam) (upholding nuisance proceeding based on consistent stench from premises).

59. *E.g.*, *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745 (2003).

60. *E.g.*, *Greene v. Stone*, 160 A.D.2d 367, 368, 552 N.Y.S.2d 421, 422 (1st Dep't 1990); *25th Realty Assocs. v. Griggs*, 150 A.D.2d 155, 157, 540 N.Y.S.2d 434, 436 (1st Dep't 1989); *but see Sharp v. Norwood*, 89 N.Y.2d 1068, 659 N.Y.S.2d 834 (1997).

61. 100 N.Y.2d 147, 760 N.Y.S.2d 745 (2003).

62. *See id.* at 150, 760 N.Y.S.2d at 747.

63. *See id.* at 154, 760 N.Y.S.2d at 750.

64. *See id.* at 155, 760 N.Y.S.2d at 751.

65. *Id.*, 760 N.Y.S.2d at 751.

66. *See* 4 Misc. 3d 931, 951, 782 N.Y.S.2d 554, 570–71 (Hous. Part Civ. Ct. N.Y. Co. 2004).

67. *See id.* at 938, 782 N.Y.S.2d at 561.

68. *Id.* at 943, 782 N.Y.S.2d at 565.

69. *Id.* at 950, 782 N.Y.S.2d at 570.

70. *See id.* at 948–49, 782 N.Y.S.2d at 568–70.

71. *See id.* at 943–45, 782 N.Y.S.2d at 565–67 (finding that notice did not name officers entitled to call special meeting and did not properly name petitioner).

72. *See Kennedy*, 4 Misc. 3d at 948–49, 782 N.Y.S.2d at 569–70.

73. *See id.* at 939–43, 782 N.Y.S.2d at 562–65.

74. *See* 2004 N.Y. Slip Op. 24497, at *11, 2004 N.Y. Misc. LEXIS 2491, at *28–29 (Hous. Part Civ. Ct. N.Y. Co. 2004).

75. *See id.* at *2.

76. *Id.* at *12–13.

77. *See Pullman*, 100 N.Y.2d at 158, 760 N.Y.S.2d at 753.

78. *Sharp*, 89 N.Y.2d at 1069, 659 N.Y.S.2d at 835; Andrew Scherer, *Residential Landlord-Tenant Law in New York* § 8:81 (2004 ed.).

79. *See Sharp*, 89 N.Y.2d at 1069, 659 N.Y.S.2d at 835; s*ee also Swingtime, LLP v. The White House (NY) Inc.*, N.Y.L.J., Jul. 31, 2001, at 18, col. 1 (App. Term 1st Dep't) (per curiam); *ACP 305 E. 72nd St. Assocs. v. Kokkinogoulis*, N.Y.L.J., Jan. 13, 1998, at 25, col. 1 (App. Term 1st Dep't) (per curiam) (holding that in nuisance holdovers premised on chronic late payment of rent, landlord must show "aggravating circumstances" to support eviction).

80. *Carol Mgmt. Corp. v. Mendoza*, 197 A.D.2d 687, 687, 602 N.Y.S.2d 941, 942 (2d Dep't 1993) (mem.).

81. *See Sharp*, 89 N.Y.2d at 1069, 659 N.Y.S.2d at 835.

82. *Griggs*, 150 A.D.2d at 156, 540 N.Y.S.2d at 435.

83. *See Stone*, 160 A.D.2d at 368, 552 N.Y.S.2d at 422.

84. *See Carol Mgmt.*, 197 A.D.2d at 687, 602 N.Y.S.2d at 942.

85. *Hernandez*, 154 Misc. 2d at 148, 584 N.Y.S.2d at 994.

86. *See Grosfeld Realty Co. v. Lagares*, 150 Misc. 2d 22, 23, 575 N.Y.S.2d 220, 220 (App. Term lst Dep't 1989) (per curiam) (quoting *Lituchy v. Lathers*, 35 Misc. 2d 556, 557, 232 N.Y.S.2d 627, 627 (App. Term 1st Dep't 1962); *Howard Ave. Assocs. v. Rojas*, N.Y.L.J., Apr. 5, 2002, at 20, col. 6 (Hous. Part Civ. Ct. Kings Co.) (Gerald Lebovits, J.); *Hernandez*, 154 Misc. 2d at 145.

87. *Rojas*, N.Y.L.J., Apr. 5, 2002, at 20, col. 6; *Pim Consultants Corp. v. Santos*, N.Y.L.J., Feb. 21, 2001, at 25, col. 5 (Hous. Part Civ. Ct. N.Y. Co.).

88. *See RRW Realty Corp. v. Flores*, N.Y.L.J., Feb. 10, 1999, at 28, col. 3 (Hous. Part Civ. Ct. N.Y. Co.).

89. *See generally* Daniel Finkelstein & Lucas A. Ferrara, *Landlord and Tenant Practice in New York* § 19-1 et seq. (Subsidized Housing) (2004 ed.).

90. *See, e.g.*, *B&L Assocs. v. Wakefield*, 2004 N.Y. Slip Op. 24473, at *1, 6 Misc. 3d 388, 785 N.Y.S.2d 681, 2004 N.Y. Misc. LEXIS 2361, at *2 (Hous. Part Civ. Ct. Kings Co.).

91. *HUD v. Rucker*, 535 U.S. 125 (2002) (holding that federal regulations governing subsidized housing permit landlords to evict tenants for illegal drug activity whether or not tenant was aware that drug activity was taking place).

92. *N.Y.C. Hous. Dev., LLC v. Arias*, 2 Misc. 3d 343, 346, 772 N.Y.S.2d 789, 792 (Hous. Part Civ. Ct. N.Y. Co. 2003) (dismissing drug holdover when landlord established that drug activity was on-going in premises but failed to issue termination notice).

93. *See, e.g.*, *177 E. 90th St. Co. v. Niemela*, 115 Misc. 2d 189, 190, 453 N.Y.S.2d 567, 568 (Civ. Ct. N.Y. Co. 1982) (holding that petition alleging that tenant started fires in subject premises set forth sufficient basis for nuisance proceeding).

94. *Stratton Co-op., Inc. v. Fener*, 211 A.D.2d 559, 559, 621 N.Y.S.2d 77, 78 (1st Dep't 1995) (lifting stay of warrant of eviction when tenant failed to cure fire hazard consisting of collection of newspapers and debris); *Kast Realty, LLC v. Houston*, N.Y.L.J., Nov. 13, 2002 , at 19, col. 1 (Hous. Part Civ. Ct. Bronx Co.), *aff'd*, 2003 N.Y. Slip Op. 50892U, 2003 N.Y. Misc. LEXIS 574 (App. Term 1st Dep't 2003) (per curiam) (finding apartment a nuisance overcome with thousands of books, magazines, cans, bottles, pictures, rags, and assorted other items).

95. Diagnostic and Statistical Manual of Disorders IV 301.4(5).

96. The name comes from the story of Homer and Langley Collyer, two brothers who lived in Harlem in the early 1900s. The brothers were hermits who stuffed their home to the rafters with over 180 tons of debris and rigged booby traps to protect their property. The condition of their home was discovered when the police received a tip that a dead person was in their house. Because of the amount of debris in their house, the police were forced to gain entry by climbing through a second-floor window. When the police made it inside, they found Homer dead. Langley was found dead nine days later while the city cleared the house. He was less than 10 feet from where his brother was found. The police surmised that Homer, who was unable to feed himself, had starved to death after Langley was killed by one of the booby traps they had fashioned out of their stuff. For the Collyer brothers' story, see Robert D. McFadden, *Bronx Man is Rescued From His Own Prison*, N.Y. Times, Dec. 30, 2003, B1, col. 2.

97. *Stratton Co-op*, 211 A.D.2d at 559, 621 N.Y.S.2d at 78.

98. *4G Realty LLC v. Vitulli*, 2 Misc. 3d 29, 773 N.Y.S.2d 776 (App. Term 2d Dep't 2003) (mem.); *Lindsay Park Hous. Corp. v. Clarke*, N.Y.L.J., March 12, 1993, at 33, col. 1 (App. Term 2d Dep't .) (mem.); *but see Eberhart v. Smith*, N.Y.L.J., May 19, 1993, at 25, col. 2 (App. Term 1st Dep't) (per curiam) (upholding eviction after tenant was given opportunity to cure Collyer's condition but no cure occurred); *see also* discussion of post-judgment stays, *infra*.

99. 175 A.D.2d 33, 36, 573 N.Y.S.2d 655, 657 (1st Dep't 1991), *aff'd as modified by*, 79 N.Y.2d 789, 579 NY.S.2d 649 (1991).

100. *Park Summit Realty*, 175 A.D.2d at 33, 573 N.Y.S.2d at 657.

101. *Id* at 33, 35, 573 N.Y.S.2d at 657.

102. *Id*. at 33, 573 N.Y.S.2d at 657.

103. *Id*. at 34, 573 N.Y.S.2d at 657.

104. *Id*. at 34–35, 573 N.Y.S.2d at 657.

105. *See id.* at 35–36, 573 N.Y.S.2d at 657.

106. 79 N.Y.2d 789, 579 NY.S.2d 649 (1991).

107. *See 301 E. 69th St. Assocs. v. Eskin*, 156 Misc. 2d 122, 123, 600 N.Y.S.2d 887, 888 (App. Term 1st Dep't 1993) (per curiam).

108. *See id.*, 600 N.Y.S.2d at 888.

109. *Id.*, 600 N.Y.S.2d at 888.

110. *Id.*, 600 N.Y.S.2d at 888.

111. *See id.*, 600 N.Y.S.2d at 888.

112. CPLR 201.

113. *Kaliman v. Driscoll*, N.Y.L.J., Mar. 6, 1991, at 22, col. 3 (Civ. Ct. N.Y. Co.), *aff'd*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam); *Grasso v. Matarazzo*, N.Y.L.J., Apr. 9, 1998, at 32, col. 3 (Hous. Part Civ. Ct. Kings Co.).

114. CPLR 1202(a).

115. CPLR 1202(a)(3).

116. *State v. Kama*, 267 A.D.2d 225, 226, 699 N.Y.S.2d 472, 473 (2d Dep't 1999) (mem.); *Parras v. Ricciardi*, 185 Misc. 2d 209, 213, 710 N.Y.S.2d 792, 796 (Civ. Ct. Kings Co. 2000); *Daejan Ltd. v. Cohen*, N.Y.L.J., Apr. 11, 1991, at 24, col. 1 (App. Term 1st Dep't) (per curiam) (requiring hearing to determine whether tenant's condition was under control after tenant initially held to be nuisance and later adjudged incompetent).

117. CPLR 1201(c).

118. *Hotel Preservation v. Byrne*, N.Y.L.J., May 6, 1998, at 30, col. 2 (Hous. Part Civ. Ct. N.Y. Co.).

119. CPLR 1201; *see generally Shad v. Shad*, 167 A.D.2d 532, 533, 562 N.Y.S.2d 202, 203 (2d Dep't 1990) (holding that courts have duty to protect litigants who need guardians).

120. *See, e.g.*, *Stratton Co-op*, 211 A.D.2d at 559, 621 N.Y.S.2d at 78 (affirming Appellate Term's refusal to stay eviction to appoint guardian for tenant because tenant continually refused access to allow landlord to clean her apartment).

121. *E.g.*, *RNR Realty*, N.Y.L.J., Aug. 5, 1998, at 23, col. 2 (finding that tenant's washing machine caused numerous floods and backed-up soap water to enter other apartments); *A & B Cabrini Realty Co. v. Newman*, 237 N.Y.S.2d 970, 973 (Civ. Ct. N.Y. Co. 1963) (finding that landlord failed to establish that tenant's washing machine caused any damage).

122. *See, e.g.*, *Crystal Acts. Grp. v. Cook,* 147 Misc. 2d 676, 677, 558 N.Y.S.2d 786, 786–87 (Hous. Part Civ. Ct. Queens Co.) (holding that portable washing machine is "installed" for purposes of violating lease provision against installing washing machines).

123. *Starrett City, Inc. v. Granthan*, 2 Misc. 3d 132(A), 784 N.Y.S.2d 924, 2004 N.Y. Slip Op. 50121(U), *1, 2004 N.Y. Misc. LEXIS 157, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists Jan. 29, 2004) (mem.); *see also Cannon Point North, Inc. v. Abeles*, 160 Misc. 2d 30, 31–32, 612 N.Y.S.2d 289, 290 (App. Term 1st Dep't 1993) (per curiam) (holding that business-judgment rule governs enforceability of no-washing-machine rule).

124. *255 Fieldston Buyers Corp. v. Michaels*, 196 Misc. 2d 105, 106, 761 N.Y.S.2d 762, 763 (App. Term 1st Dep't 2003) (per curiam); *Binaku Realty Co. v. Penepede*, 2001 N.Y. Slip Op. 40111(U), *2-4, 2001 N.Y. Misc. LEXIS 454, at *3–6 (Hous. Part Civ. Ct. Bronx Co. June 12, 2001).

125. *See Cannon Point North*, 160 Misc. 2d at 31–32, 612 N.Y.S.2d at 290 (upholding validity of non-waiver provision); George M. Heymann, Outside Counsel, *Washing Machine Holdover Proceedings for Residential Premises*, N.Y.L.J., July 5, 1996, at 1, col. 1.

126. *Barker Ave. Co. v. Rivera*, N.Y.L.J., Oct. 27, 1993, at 27, col. 3 (Hous. Part Civ. Ct. Bronx Co.).

127. *See 980 Fifth Ave. Corp. v. Smith*, 295 A.D.2d 133, 133, 743 N.Y.S.2d 435, 436 (1st Dep't 2002) (mem.).

128. *Hollywood Leasing Corp. v. Rosenblum*, 109 Misc. 2d 124, 126, 442 N.Y.S.2d 833, 834 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1981) (per curiam).

129. *1700 York Assocs. v. Kaskel*, 182 Misc. 2d 586, 588, 701 N.Y.S.2d 233, 237 (Hous. Part Civ. Ct. N.Y. Co. 1999) (holding that landlord's agent's knowledge of ferret was sufficient to impute knowledge to landlord).

130. 2 Joseph Rasch, *Landlord Tenant–Including Summary Proceedings* § 30:61, at 470 (Robert F. Dolan ed., 4th ed. 1998). *See* discussion of nuisance proceedings versus termination for breach of a substantial obligation of the tenancy, *supra*.

131. *See generally* Finkelstein & Ferrara, *supra* note 89, at §§ 15:531 et seq.

132. *See, e.g.*, *Lexington Partners, LLC v. Pelter*, 5 Misc. 3d 126(A), 2004 N.Y. Slip Op. 51151(U), at *1, 2004 N.Y. Misc. LEXIS 1676, at *1–2 (App. Term 1st Dep't Oct. 5, 2004) (per curiam) (holding that landlord had failed to establish that tenant had substantially violated stipulation although tenant "postur[ed] with a horned 'deer head' as if 'to charge' at . . . building superintendent and point[ed] a decorative bow and arrow set at building staff and contractors while 'laughing like crazy'"); *Sacchetti v. Rosen*, 2001 N.Y. Slip Op. 40306(U), *2, 2001 N.Y. Misc. LEXIS 565, at *1-2 (App. Term 1st Dep't Sept. 25, 2001) (per curiam) (affirming Civil Court's granting leave to landlord to execute warrant because landlord proved that tenant's antisocial behavior did not stop).

133. *See* RPAPL 753(3).

134. *326-330 E. 35th St. Assocs. v. Sofizade*, 191 Misc. 2d 329, 332, 741 N.Y.S.2d 380, 382 (App. Term 1st Dep't 2002) (per curiam); *203 E. 13th St. Corp. v. Lechycky*, 67 Misc. 2d 451, 452, 324 N.Y.S.2d 560, 561 (App. Term 1st Dep't 1971) (per curiam); *New York Univ. v. Arnold*, 133 Misc. 2d 1040, 1041, 508 N.Y.S.2d 869, 870 (Hous. Part Civ. Ct. N.Y. Co. 1986).

135. *MacLeod v. Shapiro*, 20 A.D.2d 424, 428, 247 N.Y.S.2d 423, 427 (1st Dep't 1964) (per curiam) (holding five-month stay unreasonable); *Niego Prop., Ltd. v. Schuette*, N.Y.L.J., May 22, 2002, at 25, col. 4 (White Plains City Ct.).

136. *E.g.*, *Newman v. Sherbar Devel. Co.*, 47 A.D.2d 648, 648, 364 N.Y.S.2d 20, 21–22 (2d Dep't 1975) (mem.).

137. *Arnold*, 133 Misc. 2d at 1041 n.3, 508 N.Y.S.2d at 870 n.3.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in New York County and an adjunct professor at New York Law School. Daniel J. Curtin, Jr., is an associate at Finkelstein Newman LLP, the principal research and writing assistant for Finkelstein and Ferrara's *Landlord and Tenant Practice in New York* (West), and an adjunct professor at New York Law School. **The authors thank Court Attorney Justin J. Campoli for his contributions toward this article.**

Responses of the Legislature and the Bar Associations to Court Decisions on Sales of Residences

By Karl B. Holtzschue

Overview

This article addresses the reaction of the legislature and the bar associations to court decisions in two substantive areas of the law relating to sales of residences: (1) *caveat emptor* and providing information to the purchaser on the condition of the property; and (2) allocation of the risks in making the purchase contingent on obtaining a mortgage loan commitment.[1]

I. *Caveat Emptor* Cases and the Property Condition Disclosure Act

The condition of a property is a critical aspect in the sale of a residence. Most purchasers have an inspection made, either before the contract of sale is signed or after the signing, with the obligation to buy contingent on a "satisfactory" inspection.

A. Seller Generally Has No Duty to Disclose Defects

The well-established case law rule of *caveat emptor*, that the seller has no duty to disclose defects, has only a few exceptions in limited circumstances, such as active concealment, partial disclosure or buried hazardous waste. Note that this rule strictly applies only to an affirmative duty of the seller to disclose; the rules as to misrepresentations by the seller are discussed later below.[2]

Consequently, here is some advice the seller's attorney should give to the seller to explain *caveat emptor*: "You have the right to remain silent. Anything you say may be held against you in a court of law."[3]

The leading, and most amusing, case on caveat emptor is *Stambovsky v. Ackley*,[4] where a little old lady contracted to sell her house in Nyack to a New York City stockbroker. After the buyer's architect refused to inspect because the house was reputed to be haunted by a cheerful "little person" in Revolutionary garb, the buyer sued to rescind the contract. The Supreme Court, New York County (Lehner, J.) "reluctantly" dismissed the complaint, holding that the buyer had no remedy at law.

The Appellate Division, First Department modified the decision to reinstate the cause of action for rescission, holding (3-2) in an opinion by Judge Rubin that in pursuit of a legal remedy for fraudulent misrepresentation, the buyer hasn't "a ghost of a chance," but the unusual facts clearly warranted equitable relief to the buyer, who sued prior to the closing, was not familiar with the area and could not readily have learned about its reputation. The seller's articles in the Reader's Digest and the local press in 1977 and 1982 estopped her from denying the haunting.

The opinion states that Prosser's rule (*an action for non-disclosure is available if the facts are not patent and the buyer has equal opportunity for obtaining the correct information*) is *not* the law in New York. There is no duty on the seller to disclose any information unless there is a confidential or fiduciary relationship, active concealment, affirmative misrepresentation or partial disclosure.

The opinion mentioned as "*contra*," but did not follow, the Third Department case of *Young v. Keith*,[5] holding that the failure to disclose serious disrepair of water and sewer systems of a mobile home park was concealment of a material fact with intent to defraud. This "superior knowledge" exception has only been followed in underground sewage cases in the Third Department.

Other cases on *caveat emptor*:

- No duty to disclose class action on groundwater contamination, even where seller was plaintiff in class action.[6]
- No duty to disclose sewer line through third party land without permission.[7]
- No duty to disclose land fill, improper footings and foundation.[8]
- No duty to disclose use of chemicals in apple orchard.[9]
- No duty to disclose sex offender across the street.[10]

B. Buyer Must Use Means Available

The seller has frequently been held *not* liable for misrepresentations where the buyer had the means available to verify the information.[11]

1. Most cases found the buyer had the means available.[12]
2. A few cases found the buyer did *not* have the means available.[13]
3. Several cases held that the question of means available was a question of fact for the jury.[14]
4. Whether the buyer had the means to discover the truth by reasonable inspection is illuminated by comparing *Dimatos v. Michel*,[15] with *Schooley v. Mannion*.[16] In *Dimatos*, the buyer was faulted for only testing the water for bacteria but not for chlorides and nitrates that would make the water unsuitable for drinking (not a "full ordinary inspection"). In *Schooley*, the court implied that the buyer could have reasonably relied

on a representation that the building was fully insulated, because insulation is a nonvisual component not easily verified without destructive testing.

C. Buyer Has Duty to Inspect and Inquire

The purpose of *caveat emptor* is more explicitly stated in the full Latin phrase: that the purchaser should exercise "proper caution."[17] In other words, the purchaser has a duty to inspect. Thus, "buyer take care" would be more accurate than "buyer beware," which might be interpreted to mean that the buyer takes all risks. A corollary to the purchaser's duty of inspection is a duty of inquiry about conditions observed during the inspection.[18]

D. "As Is" Clause May Protect Seller

The seller may successfully argue that the buyer loses due to the standard language in the "as is" clause that the buyer has inspected, accepts the property "as is" and is not relying on prior representations of the seller.[19] Contracts elsewhere have described this more fully as accepting the property "as is, with all faults." A used car ad I saw once took this to the extreme by describing the car as "slightly as is"—implying that the phrase had come to mean "faulty" or "damaged."

E. Response of the Legislature: Property Condition Disclosure Act

1. PCDA Passed

At the urging of the real estate brokers, the legislature passed the Property Condition Disclosure Act (PCDA),[20] effective March 1, 2002. The author was chair of a task force of the NYSBA's Real Property Law Section that commented on the statute and gave advice to the Governor's Counsel. The Governor vetoed an earlier version of the bill.[21]

The PCDA requires the seller to deliver to the residential buyer a 48-question Property Condition Disclosure Statement (PCDS) and provides for *actual* damages for *willful* failure to provide truthful answers based on *actual* knowledge or a *credit* of $500 at closing for failure to deliver the PCDS. The 48 questions are listed in four groups: (1) general (1–9); (2) environmental (10–19); (3) structural (20–25); and (4) mechanical (26–47). (Question 48 asks about the school district.) The originally proposed standard of "constructive" knowledge was deleted in the bill as enacted, primarily due to the vigorous objections of the Real Property Law Section. The seller may answer the questions with "yes," "no," "not applicable," or "unknown." The PCDS form explicitly warns the buyer to obtain an inspection.

Upstate, where the broker usually fills in the blanks in a bar association contract, a PCDS is routinely being delivered; downstate, where attorneys prepare the contracts and transactions often involve larger prices, the seller often opts to give the $500 credit instead of delivering a PCDS.

2. Cases on PCDA

There have been two lower trial court cases on the PCDA so far, both before the same judge in Richmond County. At issue was: (1) a defect in a swimming pool; (2) lack of municipal approval and a certificate of occupancy for a deck. Interestingly, there is no question in the PCDA on either subject. In the first case the sellers answered "unknown" to 30 of the 48 questions, but still got sued and were held not liable because they were not shown to have actual knowledge of the defect in the swimming pool.[22] In the second case, the seller was not sued, and the purchaser's attorney was held not liable for malpractice for failure to discover the lack of approval for the deck.[23]

3. Effect of PCDA on Prior Case Law

Failure to disclose in a PCDS would likely *reverse* the result in the cases on: landfill (Q13), fuel storage tanks (Q14), termite infestation (Q22), apple orchard chemicals (Q18), roof leaks (Q24), water in the basement (Q30), school district (Q48), contaminated groundwater (Q18?, Q27?), and sewer line under third party land (Q7?).

Failure to disclose in a PCDS would *not* make the seller liable in the sex offender case because there is no question in the PCDS on that subject. There are also no questions on the condition of a swimming pool or compliance with a certificate of occupancy. Question 9 simply asks if there are certificates of occupancy related to the property.

Compliance with the certificate of occupancy is covered by the standard bar association contracts and should not be duplicated in the PCDS.

4. Problems with the PCDS Questions

The environmental questions are so broad that they are a trap for unwary sellers (e.g., grandma). The Note to Seller lists a number of petroleum products and hazardous substances to worry about, but states that the lists are not limited to the listed items. Question 18 asks has "any hazardous or toxic substance [undefined] spilled, leaked or otherwise been released"? Question 19 asks has the property been tested for . . . or any other petroleum product, methane gas or any hazardous or toxic substance [undefined]?" The use of those terms without definition does not tell the seller what to think about and exposes the seller to an unlimited list of items.

The "material defect" standard for roof and structural systems and mechanical systems and services was deliberately left undefined, because the sponsors could not come up with a more definite standard. The Real Property Law Section had suggested a $2,500 threshold. The lack of definition leaves the seller and buyer (and their attorneys and the brokers)

in an uncertain situation and passes the buck to the courts.

Sellers who answer most of the questions with "unknown" may find themselves sued nonetheless and challenged by evidence of their actual knowledge of the defect, as in the swimming pool case discussed above.

In a recent survey conducted by the Real Property Law Section, practitioners noted these problems and several practitioners suggested adding a question about toxic mold.

So dealing with the known ambiguities, and applying the PCDA to future cases, has been left by the legislature to the courts.

II. Mortgage Commitment Contingency Cases Lead to Contract Changes

A. Nearly All Residential Purchasers Need a Mortgage Loan

Because most residential purchasers need a loan to pay for the purchase, they almost always condition their obligation to buy on obtaining a mortgage loan commitment. All standard bar association contracts provide the purchaser with a period of time to obtain a loan commitment. In fact, the purchaser needs to be able to obtain the loan proceeds at the closing of the purchase, but many things can happen to prevent that from happening (such as a loss of the purchaser's job). If the loan does not close, the seller has lost a sale at the agreed price and time and the purchaser may be in default under the contract. The critical question is who takes the risk of loss if that occurs.[24]

B. Case Law Remedy for Purchaser's Default: Forfeiture

A critical aspect in dealing with a failure of financing at the closing is the well-established Court of Appeals rule that a defaulting purchaser cannot recover the deposit, whether or not the seller suffered any loss (the deposit was 10%).[25] The decision noted that this rule has been criticized as out of harmony with the principle that actual damages is the proper remedy for breach of contract and has been abandoned by several jurisdictions. But the court said that the actual damage rule would cause disputes over actual damages. Real estate contracts are the best examples of arm's-length transactions. If people are dissatisfied with the rule, the court concluded, the time to say so is at the bargaining table. My view is that this 100-year-old precedent provides certainty, but not always fairness.

A recent case, *Uzan v. 845 UN Ltd. Partnership*,[26] upheld forfeiture of a down payment of 25% of a multimillion dollar price for the purchase of new construction luxury condominium units from a Donald Trump sponsor by Turkish billionaires, who were subject to restraint of assets and arrest for a prior $1 billion fraud against Motorola, Inc., finding that (1) the 25% down payment was specifically negotiated; (2) the transaction was arm's length; (3) the parties were sophisticated business people and represented by counsel; (4) the 25% down payment was *customary* for new construction luxury condominium units; and (5) there was no evidence of a disparity of bargaining power or duress, fraud, illegality or mutual mistake. The opinion includes a detailed discussion of prior cases on forfeiture.

C. The Purchaser Must Pursue the Application in Good Faith

The requirement of good faith on the part of the purchaser in pursuing the application for a loan is well established.[27]

D. Commitment Required to be Firm?

Several courts have allowed purchasers to cancel on the ground that the commitment was not "firm" (i.e., unconditional), often without considering whether the contract clause specified that the commitment had to be "firm." The standard contract of sale of a residence downstate, jointly prepared by the Real Property Law Section of the NYSBA, the N.Y. State Land Title Association, the Committee on Real Property Law of the Association of the Bar of the City of New York and the Committee on Real Property Law of the N.Y. County Lawyers' Association ("Multibar Residential Contract"), has never required the commitment to be "firm"; it has referred to a commitment on "customary commitment terms."

There is no such thing as an unconditional commitment; commitments are always conditioned on the purchaser's credit and title to the property remaining acceptable and payment of fees and costs. Commitments are often also conditioned on sale of the purchaser's prior home or repayment of pre-existing debt. Despite this custom, the Second Department has held in at least three cases that a contract conditioned on the sale of the purchaser's home is *not* a "firm" commitment, in some cases where the phrase "firm" does not appear in the contract.[28]

E. Multibar Residential Contract Conditioned on Issuance of a Commitment

The 1990 and 1996 Multibar Residential Contracts provided that the contract was conditioned on issuance of a written commitment from an Institutional Lender to make a first mortgage loan for a specified amount, interest rate and term and on "*other customary commitment terms, whether or not conditional upon any factors* other than an appraisal satisfactory to the Institutional Lender." The purchaser was obligated to apply for the loan, furnish accurate information, pay all fees, pursue the application with diligence, cooperate with the lender and comply with all requirements of the commitment.

F. Multibar Residential Contract Not Conditioned on Funding of the Loan

All bar association residential contracts condition the purchaser's obligation to buy on issuance of a commitment letter for the loan, not on successful closing of the loan. A former version of the standard bar association contract to purchase a cooperative apartment conditioned the purchase on funding of the loan, but that contract no longer does so. The Multibar Residential Contract is also conditioned only on issuance of a loan commitment. The risk has to be placed on either the seller or the purchaser, and the bar associations have chosen to put it on the purchaser.

G. Several Appellate Courts Have Nonetheless Protected Purchasers When the Commitment Was Cancelled

After issuance, the mortgage commitment may be cancelled by the lender for any number of failures to satisfy commitment conditions, such as loss of the purchaser's job, failure of the purchaser to sell a prior home, or failure to satisfy the lender's requirement of private mortgage insurance.

The Appellate Division First Department has been particularly sympathetic to the plight of purchasers, reading into the contract a right of the purchaser to cancel and obtain a refund if the commitment is cancelled through no fault of the purchaser. The court has noted in *Creighton v. Milbauer*[29] and *Kapur v. Stiefel*[30] (discussed below) that the contract does not provide for cancellation by the purchaser in this circumstance. That is true, but the bar association draftsmen believe that the contract deliberately put this risk on the purchaser by not providing a right to cancel in that situation.[31]

In cases in the Second and Third Departments, however, the purchaser has been held liable because the loan commitment, not the contract of sale, was conditioned on sale of the purchaser's prior home.[32]

H. Opinion and Dissent in the *Kapur* Case

In the *Kapur* case,[33] the purchaser got a loan commitment, but lost his job before the closing, causing revocation of his commitment, and then sued the seller to recover his down payment. The case involved the cooperative apartment contract of sale, but it is virtually identical to the Multibar Residential Contract on these issues.

In a relatively short opinion, the majority held that because they could not find an express provision in the contract as to whether the purchaser could cancel in this situation, they would read in a test of good faith and allow the purchaser to cancel if he showed good faith (i.e., that the termination of the purchaser's employment was not of the purchaser's making intended to bring about the failure of the subject real estate transaction). The majority could not find that provision in the contract because it was deliberately omitted by the draftsmen of the contract. The opinion also stated: "we rely on the established principle that '[a] mortgage contingency clause is construed to create a condition precedent to the contract of sale,'" citing *Creighton*. The majority clearly had great sympathy for the purchaser and went to some lengths to read into the contract a right to cancel where the purchaser acted in good faith.

The lengthy dissent by Judge Saxe said that the majority had misread the clear language of the contract, and the draftsmen of the contract agree with that analysis. Judge Saxe said that the contract reflects a recognition by the parties that the purchaser might receive a conditional mortgage commitment. Thus, the parties specifically contemplated the possibility of such a condition to the commitment and that the conditional commitment letter would satisfy the contract condition of obtaining a commitment. "It is a fundamental tenet of contract law that the parties are free to allocate the risks that might affect performance." The seller bears the risk until the purchaser obtains a commitment; thereafter the contract allocates to the purchaser the risk of his financing falling through prior to the closing.

Judge Saxe said that *Creighton* incorrectly treats conditions contained in the commitment as *conditions precedent* to the related, but separate, contract of sale. "To the extent that this rule is applied without reference to the terms of the parties' own agreement, it represents a complete departure from the law of contracts and condition, the only body of law truly applicable, in favor of an equity-laden analysis founded in nothing more than sympathy for the unfortunate buyer."

In closing, Judge Saxe noted that the turnover of the deposit to the sellers was not a windfall to them, because the sellers had lost valuable rental income for several months and incurred carrying costs for seven months longer.

The draftsmen of the contract find Judge Saxe's analysis wholly consistent with their intent.

I. Bar Associations Respond by Amending the Multibar Residential Contract

The decisions allowing purchasers to cancel after commitments were issued were widely criticized by practitioners, who were at a loss to explain the outcome to their seller clients.[34]

A Joint Committee of the bar associations responsible for the Multibar Residential Contract was formed to work on amendments to the contract in response to the decisions. The committee deliberated at some length changing the contract to condition the purchase on funding of the loan, but rejected doing so by an overwhelming margin, primarily because it would be a major change

in a long-standing practice that would for the first time put this risk on the seller.

On the other hand, the Committee felt that it was important to clarify the language of the contract: (1) to clearly alert the purchaser to the risks placed on the purchaser by the contract and (2) to make sure that the intent of the draftsmen was clear to the parties and the courts. To alert the purchaser, additional language was added to the contingency clause to make explicit the commitment conditions that the purchaser was at risk for and lengthy Notes on the Mortgage Commitment Contingency Clause were added at the end of the contract.[35] The author was chair of the Joint Committee that participated in drafting the changes to the contract.

Specific language was added to Paragraph 8(a) of the 2000 Multibar Residential Contract to address these issues:

(1) "The obligation of the Purchaser to purchase under this contract is conditioned upon issuance" of the specified commitment. This was intended to make clear that the contingency is a condition subsequent, not a condition precedent, to the contract. The purchaser has contract obligations to apply and accept the specified commitment in good faith.

(2) "To the extent a Commitment is conditioned on the *sale of Purchaser's current home*, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any *other customary conditions*, Purchaser accepts the risk that such conditions may not be met" [emphasis supplied]. This was intended to make clear that a commitment conditioned on sale of a prior home puts the risk on the purchaser of losing the commitment if the prior sale does not occur. It also alerts the purchaser to the risk, allowing the purchaser to contract otherwise if the purchaser so desires.

(3) The Notes on Mortgage Commitment Contingency Clause, that appear at the end of the contract, provide, among other things:

(a) Note 1: Both parties are reminded that "Negotiated modifications should be made whenever necessary."

(b) Note 2: "If the commitment is later withdrawn or not honored, Purchaser runs the risk of being in default under the contract of sale with Seller." This expressly alerts the purchaser to the risk.

(c) Note 3: "If there are loan terms and conditions that are required or would not be acceptable to Purchaser, such as the interest rate, terms of the loan, points, fees or a condition requiring sale of the current home, those terms and conditions should be specified in a rider." If, for example, the purchaser does not want to accept the risk that the commitment will be withdrawn if the purchaser does not sell its home in time, the purchaser can negotiate with the seller to delete that portion of the contract clause.

(d) Note 5: "If, as has been common, the commitment letter itself is conditioned on sale of Purchaser's home or payment of any outstanding debt . . . , such a commitment will satisfy the contract contingency nonetheless, and Purchaser will take the risk of fulfilling those commitment conditions, including forfeiture of the down payment if Purchaser defaults on its obligation to close." Here, the purchaser is expressly warned of the risk of forfeiting the down payment.

Thus, the Joint Committee of the bar associations modified the standard residential contract of sale to make the intent of the draftsmen with respect to the mortgage commitment contingency clause clear both to the purchaser and to the courts. It remains to be seen if the message is received by both.

J. Do Judges Consider The "*Maxton* Effect"?

As noted above, the Court of Appeals held in the *Maxton* case that a defaulting purchaser cannot recover the down payment, whether or not the seller suffered a loss. Could it be that this rule is influencing judges, either consciously or unconsciously, to try to find a way out for purchasers who lose their commitments through no fault of their own (the "*Maxton* Effect")?

In fact, the *Maxton* forfeiture rule is substantially undercut in practice by the uniform contract provision that the down payment is *held in escrow* by the seller's attorney until the closing.[36] Where the purchaser's commitment is cancelled, the seller can declare the purchaser to be in default, but the seller's attorney cannot turn the escrowed down payment over to the seller without first notifying the purchaser and getting the purchaser's consent. A purchaser who has lost a commitment through no fault of the purchaser is unlikely to readily agree to a release of the escrow. At that point, the parties usually negotiate a settlement, making their best arguments. If the seller can show damages, the seller will insist on recovering the damages first (at a minimum). But total damages to the seller cannot be fully

known until a sale to another purchaser is closed and the carrying costs are calculated. In ordinary situations, where a resale has not yet taken place when the refund is demanded, the purchaser is likely to recover some portion of the down payment as the price of agreeing to release the escrow. The *Maxton* rule gives the upper hand to the seller, but it does not in practice provide an automatic forfeiture of the full amount to the seller.

K. What to Do?

Because of the practice of escrowing the down payment, an *actual damage rule* would probably provide better guidance on reaching a just-negotiated settlement. Would not a judge be more willing to accept that a contract puts the risk on the purchaser if the purchaser was only liable for actual damages if the purchaser was not at fault? Since there is not much prospect of changing the *Maxton* rule in the Court of Appeals, the only other way to change the rule would be to say so in the contract of sale. So far, the bar associations have not attempted to do that. Maybe a creative judge will find a way.

Endnotes

1. This article is based on a CLE presentation to the Judicial Conference at Pace Law School in White Plains on November 2, 2004 to Supreme Court judges, Civil Court judges, law clerks and court attorneys.
2. *See* Holtzschue, "Caveat Emptor," Warren's Weed, New York Real Property, "Caveat Emptor," § 20.02 (in 130 cases, sellers won nearly twice as often as purchasers, 83 to 47); New York Practice Guide: Real Estate § 2.11[5]; Holtzschue on Real Estate Contracts, § 2.2.11.1; Holtzschue, *Caveat Emptor Ain't What it Used to Be: New Developments, Trends and Practice Tips*, 25 N.Y. Real Prop. L.J. 3 (Winter 1997).
3. The Miranda warning (*Miranda v. State of Arizona*, 384 U.S. 436), but it is a pretty accurate summary of the law of *caveat emptor*.
4. 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dep't 1991).
5. 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985).
6. *Venezia v. Coldwell Banker Sammis Realty*, 270 A.D.2d 480, 704 N.Y.S.2d 663 (2d Dep't 2000).
7. *Perin v. Mardine Realty Co.*, 6 N.Y.2d 920, 190 N.Y.S.2d 995 (1959).
8. *Moser v. Spizziro*, 25 N.Y.2d 941, 305 N.Y.S.2d 153 (1969); *London v. Courduff*, 141 A.D.2d 803, 529 N.Y.S.2d 874 (2d Dep't 1988), *appeal dismissed* 73 N.Y.2d 809, 537 N.Y.S.2d 494 (cited in *Stambovsky, supra* note 4).
9. *Banker North Salem Associates I v. Haight*, 204 A.D.2d 949, 612 N.Y.S.2d 281 (3d Dep't 1994).
10. *Glazer v. LoPreste*, 278 A.D.2d 198, 717 N.Y.S.2d 256 (2d Dep't 2000).
11. *Schumaker v. Mather*, 133 N.Y. 590 (1892) (but buyer actually held *not* to have means to determine ability of farm to maintain 100 head of cattle).
12. *See, e.g.*, *Danann Realty Corp.*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
13. *See, e.g.*, *Schumaker*, *supra* note 11.
14. *Casey v. Masullo Bros. Builders Inc.*, 218 A.D.2d 907, 630 N.Y.S.2d 599 (3d Dep't 1995) (school district misrepresented by seller).
15. 160 A.D.2d 1083, 553 N.Y.S.2d 247 (3d Dep't 1990).
16. 241 A.D.2d 677, 659 N.Y.S.2d 374 (3d Dep't 1997).
17. "*Caveat emptor, qui ignorare non debuit quod jus alienum emit*," meaning "Let a purchaser, who ought not be ignorant of the amount and nature of the interest to be acquired, exercise proper caution." Weinberger, *Let the Buyer Be Well Informed? — Doubting the Demise of Caveat Emptor*, 55 Md. L. Rev. 388 n.5 (1996) (citing Herbert Broome, *A Selection of Legal Maxims* 528 (10th ed. 1939)).
18. *See, e.g.*, dicta in *Stambovsky*, *supra* note 4.
19. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
20. N.Y. Real Property Law §§ 460–467.
21. Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (Winter 2002) (discussing the statute and legislative history in detail).
22. Holtzschue, *First Case on Property Disclosure Act: Right Result, Faulty Analysis*, N.Y.L.J., vol. 229, Feb. 21, 2003, p. 4, col. 4; Holtzschue, *Property Condition Disclosure Act: First Case Has Right Result for Wrong Reasons*, 31 N.Y. Real Prop. L.J. 5 (Winter/Spring 2003). In a 15-page opinion in Civil Court, Richmond County, the judge reached the right result under the PCDA and the common law, but the reasoning of the opinion and analysis of the PCDSA is faulty in many respects.
23. *Korik v. Gallo*, N.Y.L.J., Mar. 3, 2004, p. 20 (Small Claims Ct., Richmond Co.). Once again, the judge reaches the right result as to the PCDA, but, in a 14-page opinion in Small Claims Court, Richmond County, the analysis is faulty on the PCDA and on the conflict of interest of the purchaser's attorney using his wholly owned title abstract company.
24. *See* Warren's Weed, New York Real Property, "Contracts" § 8A; New York Practice Guide: Real Estate § 2.11[3][b]; Holtzschue on Real Estate Contracts § 2.3.1.
25. *Maxton Builders, Inc. v. LoGalbo*, 68 N.Y.2d 373, 509 N.Y.S.2d 507, 502 N.E.2d 184 (1986) (upholding forfeiture of the "traditional 10% down payment," discussing and rejecting arguments to change this century-old rule under *Lawrence v. Miller*, 86 N.Y. 131 (1881)).
26. 778 N.Y.S.2d 171 (1st Dep't 2004).
27. *Falk v. Goodman*, 7 N.Y.2d 87, 195 N.Y.S.2d 645 (1959) (purchaser must not fraudulently underestimate income to obtain rejection of application).
28. *Weaver v. Hilzen*, 147 A.D.2d 634, 538 N.Y.S.2d 40 (2d Dep't 1989); *Kressel, Rothlein & Roth v. Gallagher*, 155 A.D.2d 587, 547 N.Y.S.2d 653 (2d Dep't 1989); *Munson v. Germerican Assocs.*, 224 A.D.2d 670, 638 N.Y.S.2d 739 (2d Dep't 1996).
29. 191 A.D.2d 162, 594 N.Y.S.2d 185 (1st Dep't 1993).
30. 264 A.D.2d 602, 695 N.Y.S.2d 330 (1st Dep't 1999).
31. Holtzschue, *Mortgage Contingency Clauses: Courts Favor Purchasers*, 26 N.Y. Real Prop. L.J. 53 (Spring 1998).
32. *Arnold v. Birnbaum*, 193 A.D.2d 710, 598 N.Y.S.2d 68 (2d Dep't 1993); *Webster v. DiTrapano*, 114 A.D.2d 698, 494 N.Y.S.2d 550 (3d Dep't 1985).
33. *Kapur,* 264 A.D.2d 602.
34. *See, e.g.*, Holtzschue, *Mortgage Contingency Clauses: Courts Favor Purchasers*, 26 N.Y. Real Prop. L.J. 53 (Spring 1998) (*in 117 cases, purchasers won nearly twice as often as sellers, 75 to 42*) (suggesting contract amendments in response to the court decisions) (written before *Kapur*).
35. Holtzschue, *2000 NYSBA Residential Contract of Sale: Mortgage Commitment Contingency Clause and Other Changes*, 28 N.Y. Real Prop. L.J. 107 (Fall 2000).
36. *See, e.g.*, Multibar Residential Contract § 6.

Karl B. Holtzschue is an attorney in New York City, Secretary of the Real Property Law Section, a former Adjunct Professor at Fordham Law School, the author of books on real estate and a frequent lecturer.

Post-Eviction Motions to Restore

By Gerald Lebovits

I. Introduction

Like the Baudelaire orphans in the Lemony Snicket children's books, parties to a summary proceeding in New York's First and Second Departments sometimes suffer through what can only be described as a series of unfortunate events. Landlords and tenants often suffer unfortunate iniquities when an eviction occurs or does not occur.

Before executing the warrant of eviction, the marshal, the court's enforcement officer, must serve a notice of eviction on the tenant.[1] A tenant who does not obtain a stay of the execution of the warrant of eviction will be evicted. In the case of a legal possession, the marshal will remove the tenant from the premises, change the locks or direct that the locks be changed, and remain until the landlord secures possession.[2] If the marshal conducts a full eviction, the tenant's possessions are also removed.[3]

Once the tenant is evicted, what can the tenant do to be restored to possession? Under what circumstances may a court grant the relief the tenant requests? If the tenant is entitled to restoration, what must the court do to ensure that the landlord does not suffer losses for enforcing lawful rights? This paper addresses these issues.

Motions to restore are typically brought by order to show cause and are scheduled to be heard one or two days, and usually the next day, from the tenant's request. All post-eviction proceedings are emergency applications. Once the tenant is evicted, the landlord can re-let the premises to a third party. The order to show cause to restore a tenant to possession therefore contains an order directing the landlord not to re-rent, sublet, or place anyone else in possession of the subject premises until the court resolves the tenant's motion to be restored. In the court's discretion, the tenant may be granted access to the premises before the hearing date to allow the tenant to collect medication or personal belongings that remain locked in the premises.

Because the motion is heard before the marshal can be served, the court often calls the marshal to say that a post-eviction order to show cause has been signed. That call assures that a legal-possession case will not become an eviction. Service on the landlord's attorneys is done by fax or personally. There is no time to await a mailing. If the landlord's attorneys appear regularly in the court, some judges direct service by calling counsel to inform them to go to the court room to pick up the order to show cause.

If the eviction did not arise out of a nonpayment or holdover proceeding in which the court awarded the landlord a final judgment of possession, the tenant must bring an illegal lockout proceeding under RPAPL 713(10) instead of an order to show cause to restore in the existing proceeding.[4]

Many landlords consent to restoring tenants to possession. Landlords have their reasons; they have no incentive to evict an otherwise good tenant if re-letting to someone new will not increase the rent. This is often the case in New York City if the home is hard to rent, if the tenant pays a high free-market rent, or if the apartment is federally subsidized and the rent will not be increased upon vacancy. If the tenant in one of these situations is not objectionable, the landlord often allows the tenant to be restored because the landlord will be paid all arrears and expenses, often by the Department of Social Services (DSS). DSS, which perhaps had declined to assist earlier but might assist in the event of an eviction (in which event it will now also pay the landlord's expenses), can put the tenant on the budget and thus assure that the landlord will be protected in the future by having DSS forward checks to the landlord directly.

In many other cases, landlords' attorneys consent to restoration because they believe that the judge will order it anyway or because they believe it morally the right thing but request that the court issue an order they can show their clients so that their clients will not blame them but rather the judge, the tenant, or the legal system in general.

That leaves a small percentage of cases actually litigated. But litigated motions to restore are hotly contested in both the First and Second Departments.

II. Vacating Defaults

If a tenant defaults, the court can grant the landlord a judgment. If a tenant defaults in a holdover case, the court must hold an inquest before the court may enter a default against the tenant. If a tenant fails in a nonpayment case to answer or answers but later fails to appear in court, the court will not hold an inquest but will award a final judgment of possession on default.[5] A number of different approaches support vacating a default judgment in both holdover and nonpayment proceedings. The court may vacate a default judgment and restore the tenant to possession if the tenant demonstrates a meritorious defense and excusable default under CPLR 5015, or the court may vacate a default in the exercise of the court's inherent power to vacate its own judgments. To do so the court may

hold a *Torres* hearing. A *Torres* hearing, named after *New York City Housing Authority v. Torres*,[6] is a hearing at which the court entertains a motion to vacate a warrant of eviction based on the "good cause" provision of RPAPL 749(3).

CPLR 5015(a)(1) requires a movant to demonstrate an excusable default and meritorious defense before a court will vacate a default.[7] A tenant's claim of constructive eviction is sufficient to demonstrate excusable default and meritorious defense.[8] Granting a motion to vacate a default is discretionary.[9] Vacating a default is inappropriate if the tenant does not establish a meritorious defense or an excusable default.[10] Strong public policy in New York favors opening default judgments so that disputes are resolved on their merits.[11]

A. Excusable Default

The court will first determine whether the tenant has presented a valid excuse for the default. The list of factors that will establish a tenant's excusable default is non-exhaustive. The following are examples of excusable defaults.

(1) Tenant Never Received Validly Served Process

The court may, in a proper case, vacate the possessory judgment even if the tenant was properly served with the petition and notice of petition. Vacating a default judgment may be appropriate if the movant did not receive actual notice of the litigation until after the entry of judgment.[12] The tenant may establish an excusable default by proving that the tenant was out of state at the time service was attempted.[13] In *Brooklyn Properties v. Shade*,[14] the Appellate Term, Second Department, found that a tenant's allegations need not rise to the level of requiring a traverse hearing to excuse a default. The *Shade* court found that Civil Court should have ascertained whether the tenant, at work elsewhere as a live-in aide when the landlord served process, had an excuse for defaulting.[15] If the tenant establishes a meritorious defense but not an excusable default, vacating the default judgment is inappropriate.[16]

(2) Law-Office Failure

Under CPLR 2005 and CPLR 5015(a)(1), courts have the discretion to vacate a default for law-office failure in the case of a represented litigant. To establish an excusable default, the movant must submit a sworn statement from someone with knowledge of the specific failure.[17] Merely asserting law-office failure without supporting facts to explain and justify the default will be insufficient to excuse a default.[18] Not all law-office failures are sufficient to establish an excusable default. Isolated mistakes or instances of neglect might permit the court to exercise its discretion to vacate a default, but evidence of serious negligence or a pattern of neglect will not.[19] Waiting 11 months before moving to vacate the default, for example, is unreasonable and is not law-office failure sufficient to establish an excusable default.[20]

B. Meritorious Defense

If the tenant establishes an excusable default, then the court will consider whether the tenant has a meritorious defense. To vacate a default, a meritorious defense need not be a complete defense. But the defense must be complete to restore a tenant to possession. If the defense is only partial, such as a partial claim under the warranty of habitability, the court, assuming an excusable default, will, before restoring a tenant, attach conditions making the landlord whole, consistent with the viability and degree of the partial defense. The tenant need establish only a *prima facie* showing of a meritorious defense.[21]

(1) Lack of Personal Jurisdiction

After being evicted, the tenant may raise the defense of lack of personal jurisdiction when moving to be restored to possession. The landlord's failure to make a reasonable effort to complete personal (in-hand or substituted) service before resorting to conspicuous-place service is sufficient to establish a meritorious defense.[22] The defense of improper service of the petition and notice of petition satisfies both requirements that a tenant offer the court an excusable default and a meritorious defense. As the First Department has noted, if "Civil Court did not have in personam jurisdiction over the tenant, the court, even after the eviction has taken place, may open the default and dismiss the petition."[23] The tenant must present the court with a sworn statement that the landlord did not properly serve the petition and notice of petition. A traverse hearing should then be held to determine whether the tenant received proper notice of the proceeding. A default will not be vacated and the tenant will not be restored to possession if the proceeding's only defect is that the marshal's notice of eviction was served improperly or not at all.[24] The tenant's only recourse in that event is to sue the marshal.

(2) Payment of the Money Owed

Tenants who can prove that they tendered to the landlord all the rent owed before the warrant of eviction issued will show excusable default and a meritorious defense sufficient to support vacating the judgment.[25] Tenants who pay before a warrant is issued are entitled to restoration. Landlords who are paid in full are not entitled to a warrant and may not evict.[26] Courts should also vacate a default and restore the tenant to possession if, before the warrant issues, the landlord refuses to accept a proper tender of the rent owed.[27]

(3) Other Defenses

Courts have recognized other defenses available to tenants that satisfy the meritorious-defense requirement. Breach of the warranty of habitability is a meritorious defense.[28] A landlord's engaging in rent overcharging is a meritorious defense.[29] A landlord's failure to file a certificate of occupancy with the Department of Buildings is a meritorious defense.[30] This list is not exhaustive. Any substantive or procedural defense that has seeming validity will satisfy the meritorious-defense requirement a tenant may assert in a motion to restore.

C. Tenant's Incompetence

Vacating a default judgment may be appropriate independent of CPLR 5015 if the default judgment was entered against a tenant who suffers from some condition or impairment that contributed to or caused the default. Under CPLR 1203, vacatur may also be appropriate if the landlord was aware of the tenant's condition and did not bring it to the court's attention. In *Surrey Hotel Assocs. LLC v. Sabin*,[31] for example, Civil Court vacated the default judgment because the landlord did not inform the court that the tenant was incompetent, although the landlord was aware that Adult Protective Services (APS) paid the tenant's rent and the landlord had observed the tenant's strange behavior. If the landlord does not know or have reason to know that the tenant is incompetent, the landlord may rely on a presumption of competence.[32]

Vacatur is proper even if a tenant is not judicially declared incompetent or appointed a guardian ad litem. In *Sengstack v. Sengstack*,[33] the Court of Appeals articulated the special duty courts have to protect rigorously the interests of incompetent persons. Courts may not turn blind eye to protecting incompetent litigant, even those not yet judicially declared to be incompetent.[34] Public policy is to protect the rights of the mentally infirm.[35]

III. Tenants' Failure to Adhere to Stipulations

A tenant evicted for failing to comply with a stipulation that awards a landlord a final judgment may move to be restored by urging that the stipulation be vacated. That would restore the tenant to the status quo ante—a time before the tenant consented to the judgment that led to the eviction.

Enforcing stipulations, like enforcing the enforcing courts' own orders, remains subject to court supervision.[36] The Appellate Division, First Department, has stated that Civil "[C]ourt possesses the discretionary power to relieve parties from the consequences of a stipulation effected during litigation upon such terms as it deems just and, if the circumstances warrant, it may exercise such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it."[37] Courts should vigilantly investigate the facts underlying a proposed stipulation of settlement before so-ordering it. In *Hegeman Asset LLC v. Smith*,[38] for example, the Appellate Term, Second Department, restored the tenant after finding that Civil Court erred in so-ordering a stipulation that contained a discrepancy between the amount sought in the petition and the amount owed when the proceeding began.

Courts apply a good-cause test to determine whether the tenant is entitled to relief from a stipulation.[39] The Appellate Division, Second Department, quoting from the Court of Appeals's *In re Estate of Frutiger*, has stated that "good cause is demonstrated where . . . a party has 'inadvertently, unadvisably or improvidently entered into an agreement."[40]

Another line of cases holds, however, that stipulations are binding contracts and that absent fraud, overreaching, or duress, one should not be relieved from the agreement's obligations and burdens.[41] The argument that stipulations are like contracts assumes that the parties came to an agreement after an arm's-length negotiation.[42] Vacatur may be appropriate if the tenant was not represented in the negotiation process.[43] But courts are reluctant to vacate stipulations that two attorneys negotiate.[44]

Some courts have declined to follow the contract standard due to the reality that many tenants appear pro se and are unaware of their rights and possible defenses.[45] Courts will look to whether a tenant has agreed to give up valuable defenses to determine whether the tenant should be relieved from the stipulation.[46] Courts may look at the facts underlying the tenant's decision to sign the stipulation to decide whether the stipulation should be vacated.[47] This is especially true of mentally incompetent tenants.[48]

IV. A Court's Inherent Power to Vacate Judgments and Restore Tenants

In both the First and Second Departments, a court may grant restoration conditioned on the tenant's paying all arrears and the landlord's costs, preferably by cash, certified check, or money order to prevent any problems requiring re-execution of the warrant.

A landlord in neither department may appeal the court's decision to restore if the landlord accepts payment. In that event, the landlord will no longer be an aggrieved party under CPLR 5511.

Issuing an eviction warrant terminates the landlord-tenant relationship.[49] But a court has the power to grant relief after the warrant issues if the tenant can demonstrate that the judgment resulted from fraud, misrepresentation, or misconduct.[50]

Courts also have the power to open a judgment if the landlord fails to accept a proper tender of rent before the warrant issues.[51] Beyond these grounds are grounds to restore on which the First and Second Departments agree and disagree.

A. Important Factors in the First and Second Departments

If the tenant seeks to vacate a warrant of eviction before it has been executed in the Second Department or to be restored to possession in the First Department, courts in both departments consider some of the same factors when deciding whether to restore a tenant.

Both departments consider the reason for the tenant's default an important factor. For example, both departments consider a default attributable to DSS delays to be excusable because the delay is beyond the tenant's control.[52]

Both departments further consider the landlord's bad acts when deciding whether to restore the tenant to possession.[53] Failing to credit the tenant with money already paid is therefore something on which courts rely when restoring tenants to possession.[54] A landlord's right to evict the tenant could be vitiated by accepting rent from the tenant after the judgment is satisfied and then refusing to reimburse money after the tenant is evicted.[55] A landlord's fraud or misconduct in facilitating the warrant's execution is grounds to restore the tenant to possession.[56]

A landlord's acceptance of rent after the warrant issues but before it is executed will revive the landlord-tenant relationship if the tenant can show that the landlord accepted the rent with the intent to revive the landlord-tenant relationship.[57] The lease is not automatically revived if the landlord accepts rent after the warrant issues. The tenant must prove that both parties intended to revive the tenancy.[58] The tenant may prove the intent to revive by showing that the landlord ratified a renewal lease after the warrant issued.[59]

A split exists between the First Department and the Second Department about what other circumstances allow Civil Court to vacate a judgment and restore the tenant to possession.[60]

B. First Department

In the First Department, Civil Court has the discretion to restore a tenant to possession and stay re-letting of the premises. The court will consider equitable factors and exercise its discretion to restore a tenant who shows good cause to be restored, tenders the rent, and makes the landlord whole. Failing to restore if a tenant shows good cause is an abuse of discretion that will lead to reversal and appellate restoration.

First Department courts cite a variety of sources for this discretionary power. Some courts cite only case law for the proposition that Civil Court may in appropriate circumstances vacate a warrant of eviction and restore the tenant to possession even after a tenant has been evicted.[61]

Other courts resort to equity. In *New York City Housing Authority-Edenwald Houses v. Roque*,[62] the court articulated the equitable principle that a court may grant relief from its judgments. The *Roque* court held that the principle is embodied in CPLR 5015 and made applicable to Civil Court through Civil Court Act § 212.[63]

Still other courts cite RPAPL 749(3) for the proposition that courts may vacate a warrant of eviction and restore for good cause shown.[64] These First Department courts cite RPAPL 749(3) despite its express language. RPAPL 749(3) provides:

> The issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant, but nothing contained herein shall deprive the court of the power to vacate such warrant for good cause shown prior to the execution thereof. Petitioner may recover by action any sum of money which was payable at the time when the special proceeding was commenced and the reasonable value of the use and occupation to the time when the warrant was issued, for any period of time with respect to which the agreement does not make any provision for payment of rent.

On its face, RPAPL 749(3) might not seem the logical source on which a court may grant post-eviction relief to a tenant. From its plain language, RPAPL 749(3) applies only until the warrant of eviction is executed and the tenant is evicted. But many First Department courts rely on its good-cause language nonetheless.

Wherever the power comes from, First Department courts have adopted the "good-cause" provision of RPAPL 749(3) to determine whether factors make it appropriate to restore a tenant to possession.[65] If the tenant shows good cause, the court will then look to whether the tenant has the ability to make the landlord whole.[66]

(1) Good Cause

The courts in the First Department have not stated definitively what constitutes good cause. The courts treat each proceeding on a case-by-case basis rather than stating a rigid formula to determine good cause.[67] Although the courts do not use hard-and-fast rules about what constitutes good cause, a study of the case law reveals a non-exhaustive list of factors that First Department courts consider when deciding whether to restore. In *Parkchester*

Apartments Co. v. Heim,[68] for example, the Appellate Term, First Department, offered some factors, including willfulness and circumstances of the tenant's payment defaults, the length of the tenancy, the apartment's rent-regulatory status, and the tenant's delay in coming to court to ask to be restored to possession.[69] These factors are considered in combination, not individually. Courts must therefore engage in "a delicate balancing of the equities between the parties" to determine whether good cause exists.[70] The court must balance all the equities and facts of the case, and in doing so the court would be wise to hold a *Torres* hearing, taking testimony as appropriate.

The following is a discussion of what courts in the First Department consider important when looking at each factor individually.

(a) The Underlying Reason for the Tenant's Default in Payment

A tenant's history of defaulting in payments is a factor courts consider when deciding whether good cause supports a motion to restore the tenant to possession. Courts are more concerned, however, with why a tenant has defaulted than with creating a predetermined number of defaults that would automatically preclude granting a tenant's motion to restore. If the tenant's default is due to third-party delays not within the tenant's control, the court may appropriately grant the tenant's motion to be restored.[71] A common third-party delay occurs when DSS processes a tenant's request for assistance.[72]

Restoration is also proper if the tenant provides a reasonable explanation for the default.[73] Courts might also restore if the tenant's default under the stipulation is de minimis and the landlord is not prejudiced by the tenant's restoration.[74]

On the other hand, a tenant's willful failure to tender payments owed to the landlord under a stipulation or order might prevent the court from finding good cause to restore.[75] A tenant's poor payment history is an example of a factor against finding good cause to restore the tenant.[76] Courts also have the discretion to consider the tenant's failure to abide by stipulations to pay the landlord the arrears owed.[77] If the tenant withholds rent unjustifiably, no good cause exists to restore to possession.[78]

(b) Length of the Tenancy

Courts may consider the length of the tenancy when deciding whether to grant the tenant's motion to restore.[79] In *Parkchester Apartments Company v. Scott*,[80] the First Department made clear how important the length of the tenancy is on a motion to restore a tenant to possession.[81] The *Scott* Court affirmed a Civil Court order to restore to possession of his apartment, a 20-year tenant who had not fully satisfied the judgment amount before he was evicted.[82]

(c) Apartment's Rent-Regulated Status

Courts consider the rent-regulatory status of the premises when deciding whether the tenant should be restored to possession.[83] Courts are less willing to allow a substantial forfeiture as would occur if a rent-regulated tenant were to lose a valuable tenancy for a relatively de minimis default.[84] Conversely, courts are less willing to vacate a judgment and overturn a warrant for an unregulated tenancy.[85]

(d) Tenant's Health

The tenant's health is another factor courts consider when deciding whether good cause exists to restore a tenant to possession.[86] Often, the tenant's health is a factor that contributes to a default.[87] In *Allerton Associates v. Paschall*,[88] for example, Civil Court granted the tenant's motion to be restored to possession after it considered the tenant's serious liver disease and the consequences of his medical treatment.[89]

(e) Effect of Eviction on Tenant's Children

Evictions can be traumatic events for the tenant's family, including any minor children in the home. The court may consider the detrimental effect an eviction will have on a tenant's minor children when deciding whether good cause exists to restore the tenant to possession.[90]

(f) Tenant's Bad Acts

One Bronx court ruled in late 2004, in *Hazy Realty Corporation v. Bermuda*, that a court may consider "in assessing whether good cause has been shown sufficient to restore an evicted tenant to possession . . . the evicted tenant's activities at the premises and whether such activity poses a threat to other tenants in the building."[91] Several factors favored the tenant in *Hazy Realty.* Post eviction, he had all the money through DSS, to satisfy the arrears and the landlord's expenses, and he was a 60-year-old man with a 17-year rent-stabilized tenancy. But after a hearing with testimony, the court found that the tenant pre-eviction had sold narcotics from his apartment. The court rejected the tenant's argument that "if the landlord wished to evict him [for selling drugs] it should have started a holdover proceeding or should commence one, once he is restored to possession."[92] Noting that the warrant extinguished the landlord-tenant relationship, the court wrote that it "certainly has a duty to investigate whether it is prudent to restore a tenant to possession, even in a non payment proceeding, where allegations are made of illegal activity at the premises which directly affects the quiet use and enjoyment of the premises of not only other tenants but of the landlord itself."[93]

(2) Tenant's Ability to Make the Landlord Whole

An important consideration that courts must make when deciding whether the tenant is entitled to be restored to possession is whether and when the tenant can make the landlord whole.[94] The court may fashion a remedy by which the tenant is restored and ordered to pay all the landlord's costs.[95]

The costs for which the tenant is responsible include all outstanding arrears to date (a sum that might exceed the judgment amount and extends to the date of restoration),[96] the process server's fees,[97] the marshal's fees, any moving costs the landlord incurred as a result of a full eviction,[98] the landlord's attorney fees,[99] and all filing fees.[100]

It is doubtful in a typical case that a court may restore the tenant before the landlord is made whole, although some courts do so if the landlord does not object strenuously. In one recent Queens case, a court restored a tenant temporarily when the landlord was not ready to proceed to a hearing on a motion to restore.[101] In another recent Bronx case, a court ordered that the tenant be restored upon paying arrears and stayed re-letting through July 29, 2004, but scheduled a hearing on attorney fees and costs for August 18, 2004, because the court could not "determine from the limited record before it what, if any, attorney's fees and costs should be awarded" to the landlord.[102] Untested on appeal, moreover, is whether a court may immediately restore a tenant in dire need of restoration if the tenant has a guaranteed commitment from DSS to make the landlord whole in a few days and, to assure payment, whether a court may allow re-execution of the warrant without further marshal's notice if full payment is not made by a date certain.

It is unclear when the funds must be tendered to the landlord for the tenant to be restored to possession. If the delay in obtaining the funds necessary to make the landlord whole is attributable to a third party like DSS, the court, in its discretion, may grant the motion to restore but postpone the date of payment and stay re-letting briefly.[103]

The rule in the First Department, therefore, is that if the tenant has the funds in court to make the landlord whole or will have the funds by a date certain, the court may properly consider granting the tenant's motion to be restored, with a brief stay of re-letting, if good cause supports the motion.[104]

The Appellate Term, First Department, has upheld the exercise of Civil Court's discretion to vacate a warrant of eviction and restore the tenant to possession when the tenant can secure DSS or charitable assistance to satisfy the underlying judgment and the landlord's expenses.[105] The Appellate Term, First Department, has even found that Civil Court commits reversible error in deciding a motion to restore when it fails to take evidence about the tenant's application to DSS.[106]

If an issue arises over whether the landlord's costs—like the attorney fees—are reasonable and justifiable, the court should hold a hearing. Courts differ over how much attorney fees a landlord is entitled to. Some courts will award attorneys fees from the commencement of the proceeding; other courts exclude fees from any point at which the landlord entered into a stipulation with the tenant but did not expressly reserve the right to seek attorney fees.

C. Second Department

(1) The Second Department's General Rule

Second Department case law holds that once the warrant of eviction is executed, the court's power to grant relief from a possessory judgment is restricted.[107] Although this rule might be evolving, as explained below, the Second Department's general rule is that a court may vacate a warrant of eviction and restore a tenant to possession only if the tenant can prove that the warrant was issued due to (1) fraud under CPLR 5015(a)(3); (2) lack of jurisdiction under CPLR 5015(a)(4); or (3) the landlord's refusal to accept a proper tender of arrears under CPLR 5015(a)(3).[108] The reason to grant a tenant's motion to be restored under those three circumstances according to the Second Department's general rule is that the court presumes that but for the landlord's misconduct, the tenant would have taken the steps necessary to prevent the warrant's execution.[109]

Second Department courts cite RPAPL 749(3) for the proposition that the power of a court to sign an order to show cause to vacate a warrant and restore the tenant to possession ends once the warrant is executed.[110] That is, Second Department courts take a purist approach by reading RPAPL 749(3) literally.

In construing RPAPL 749(3), the Appellate Term, Second Department, has consistently held that paying rent arrears does not, by itself, constitute good cause to vacate the warrant of eviction after its issuance.[111] Second Department courts, under its established rule, cannot restore tenants conditioned on landlord receiving full payment.[112] In *Davern Realty Corporation v. Vaughn*,[113] for example, the Appellate Term, Second Department, held that a tenant may obtain relief from a judgment once the warrant is executed only by showing factors that allow a court to vacate a judgment under CPLR 5015.[114]

(2) The Argument That the Second Department Should Follow the First Department's Discretionary Analysis

The foundation of the argument that the Second Department should follow the First Department's good-cause analysis interpreting RPAPL 749(3) and Civil Court Act § 212 is that the Appellate Division is a single statewide court divided into departments for convenient court administration. The argument con-

tinues that stare decisis requires that courts in other departments follow the precedents set by another department's Appellate Division until their Appellate Division or the Court of Appeals articulates a different rule.[115] The Appellate Division, Second Department, noted in *Mountain View Coach Lines, Inc. v. Storms* that the principle of stare decisis is "necessary to maintain uniformity and consistency."[116]

The Appellate Division, First Department, has repeatedly upheld Civil Court's discretionary power to restore tenants to possession, most recently in *Parkchester Apartments Company v. Scott*[117] and *102-116 Eighth Avenue Associates, L.P. v. Oyola*.[118] The First Department held in *Scott* in 2000 that Civil Court may in its discretion restore a tenant to possession and stay re-letting of an apartment if the tenant shows good cause.[119] The *Oyola* Court in 2002 reaffirmed the *Scott*'s good-cause test.[120] Neither the Court of Appeals nor the Appellate Division, Second Department, has yet enunciated a rule different from the First Department's good-cause rule. Rather, and as explained above, the Appellate Term, Second Department, has developed a rule that leaves Civil Court little discretion about an evicted tenant's motion to be restored.[121]

Tenants accordingly argue that the First Department's *Scott* and *Oyola* decisions have overruled the Appellate Term, Second Department's rule governing when it is appropriate to restore a tenant to possession. Some Civil Court and Housing Part judges in the Second Department have rendered unpublished opinions agreeing with this argument. One published opinion, *Kew Gardens Associates v. Ruvio*,[122] decided in December 2004 in the Second Department's Queens County, adopted the First Department's good-cause argument outright. Citing *Scott* and *Oyola*, although without discussing the point about stare decisis, the court restored a long-term rent-stabilized tenant who missed a payment because he was suffering from depression, who had the funds but could not prove it when he applied for an order to show cause, who upon eviction owed only one month of rent, and who applied for prompt relief.[123] Several cases currently on appeal in the Appellate Term, Second Department, raise whether Second Department courts must follow *Scott* and *Oyola*, but thus far the Appellate Term, Second Department, has not addressed the *Mountain View* argument. Nevertheless, the Appellate Term, Second Department, has moved incrementally in the past year toward the First Department's position in terms of First Department results, if not in terms of First Department reasoning.

(3) Developments in the Second Department

The Appellate Term, Second Department, has recognized over time and in selected cases that courts have some judicial discretion when confronted with a motion to restore to possession when the tenant defaults under a stipulation. In *Ocean Realty Associates v. Mitchell*,[124] the court, without citing CPLR 5015, held that if a tenant's default is de minimis, Civil Court has the discretion to restore the tenant to possession. In *Mitchell*, the Appellate Term restored the tenant to possession after finding that the tenant's default under a stipulation was minimal, inadvertent, and promptly cured.[125] In *Raridge Properties v. Haner*,[126] the court similarly found that under the circumstances the tenant's failure to comply with the stipulation was inadvertent and promptly cured.[127]

Recently, the Appellate Term, Second Department, has highlighted factors that make it appropriate to restore a tenant to possession despite the tenant's not proving fraud, that the landlord was paid, that the landlord refused payment before the warrant issued, or that the court lacked jurisdiction because of defective service of process.[128] The factors include the tenant's ability to pay the landlord all the arrears.[129] As currently formulated, the Second Department's test, as best this author can determine, is that if a court should have stayed execution of the warrant pre-eviction, a court should restore post eviction.

For example, in *Hegeman Asset LLC v. Smith*,[130] the Appellate Term, Second Department, conducted its own evidentiary hearing and overturned Civil Court's decision because of "clear error and exigent circumstances."[131] The tenant claimed in her post-eviction order to show cause that she complied with the stipulation.[132] The landlord submitted no written opposition, and the motion court did not conduct an evidentiary hearing.[133] The Appellate Term vacated the stipulation and the judgment and, citing CPLR 5015(d) and Civil Court Act § 212, restored the tenant to possession.[134]

This trend in the Second Department toward considering equitable factors when deciding whether to restore a tenant to possession continued in *NYCHA-Kingsborough v. Sullivan*.[135] The *Kingsborough* court reversed and remanded a Civil Court denial of the tenant's motion to be restored to possession after DSS failed to pay the arrears.[136] A DSS liaison was in the courtroom when the stipulation was entered into, and the liaison assured the court that the tenant's application for public assistance was approved.[137] The *Kingsborough* court stated that the tenant should be restored because "the fault for DSS's failure to make the payment by [the stipulation] date cannot be laid at tenant's door."[138] The *Kingsborough* court pointed out that because the landlord is a City agency and because it, or at least its attorney, knew that another City agency had agreed to pay the outstanding rent, the City should not have evicted the tenant.[139]

Moreover, in late 2004, the Appellate Term, Second Department, in a brief unpublished opinion, came close to adopting the First Department's good-cause analysis. In *576 Realty Corp. v. Sneed*,[140] the court upheld Civil Court's exercise of discretion in restoring a tenant to possession.[141] The *576 Realty* court pointed to the evicted tenant's lengthy tenancy (20 years) and restored the tenant on the condition that she pay all arrears and the landlord's marshal and legal fees.[142]

In view of the recent case law reversing lower courts for denying tenants' motion to restore, it is clear that a shift has affected the Appellate Term, Second Department, yet the contours of the shift are not yet clear.

V. RPAPL 747-a

Under RPAPL 747-a, if the tenant appears in the proceeding and thereafter defaults, the court may not stay re-letting of the subject premises unless the tenant first deposits the full amount of the judgment with the court. The First Department has held that RPAPL 747-a is facially constitutional.[143] The First Department has found that RPAPL 747-a does not strip the court of its "fundamental decision making capacity,"[144] including the ability to restore a tenant to possession.

The Appellate Term, Second Department, reached a different conclusion in *Jones v. Allen*.[145] That court found the statute unconstitutional as applied to a court's discretion temporarily to stay warrants when the ultimate relief sought was not more time to pay but to vacate the warrant or final judgment.[146] The Appellate Term, Second Department, found RPAPL 747-a unconstitutional as applied to stays to vacate warrants or judgments under the separation-of-powers doctrine because, the court wrote, the legislature created a statute that impermissibly interferes with the court's inherent judicial function.[147] Thus, in *Brooklyn Properties v. Shade*,[148] the Appellate Term, Second Department, granted itself the power to stay re-letting and to restore the tenant to possession pending the tenant's appeal of an order denying restoration after eviction. The court concluded that by limiting stays of re-letting under RPAPL 747-a, the legislature affirmed the courts' power to grant stays not prohibited by statute.[149]

VI. New Tenants in Possession of the Subject Premises

If restoration to possession is sought, the movant-tenant must join any person in possession. However, the trial court may not join sua sponte; so the tenant must make a motion.[150] Appellate courts, however, have directed the joinder of the new tenant.[151] New tenants have a due-process interest in the premises, and they may not be deprived of that interest without being made a party.[152] If the former tenant does not join the current tenant, the former tenant is relegated to an action for damages against the landlord for wrongful eviction.[153]

If the former tenant is eligible to be restored, the court must balance the equities between the former tenant and the current tenant to decide whether the current tenant should be ousted.[154] The court must consider a variety of factors when balancing the equities.[155] One consideration is the timeliness of the evicted tenant's motion for reinstatement.[156] Another is whether the new tenant is implicated in the illegality by being involved with the landlord or whether the new tenant is an innocent party.[157] Courts have a difficult time disturbing an innocent third party's tenancy, but a court will do so on a proper balancing of the equities.[158]

If the evicted tenant can establish a case for wrongful eviction, the court may award treble damages under RPAPL 853.[159] A landlord's possible defenses to a claim for wrongful eviction include that the premises was voluntarily surrendered or abandoned or that an accord and satisfaction concerned a surrender.[160] A judgment of possession will also defeat a claim for wrongful eviction.[161]

VII. Conclusion

The power of the court to grant relief from its own orders and judgments is a fundamental judicial prerogative designed to prevent injustice, make the parties whole, and avoid forfeiture. Granting or denying a tenant's motion to be restored to possession can have dire consequences for landlords, tenants, and the public at large. Tenants can lose valuable tenancies for a simple default. After numerous stays, a landlord might be forced to accept a deadbeat tenant and source of considerable aggravation. And the public has a stake in preventing homelessness and, at the same time, assuring that court orders and stipulations be adhered to. The court must look to the facts and the evolving law in each department to decide who is entitled to relief and how to fashion that relief.

Endnotes

1. RPAPL 749(2).
2. *See* New York City Marshals Handbook of Regulations Chap. IV, § 6-3 (1997), at http://www.nyc.gov/html/doi/html/marshals/mar4.html (last visited Feb. 28, 2005).
3. *See id.* (defining changing locks as "legal possession" and fully removing tenant and property as "eviction"). Landlords effect full evictions to prevent tenants from returning and to make room for new tenants.
4. *E.g.*, *Ric-Mar Equity Ventures, Ltd. v. Murrell*, 184 Misc. 2d 298, 299, 708 N.Y.S.2d 562, 563–64 (App. Term 2d & 11th Jud. Dists. 2000) (mem.).
5. *See In re Brusco v. Braun*, 84 N.Y.2d 674, 725, 621 N.Y.S.2d 291, 292 (1994).
6. 61 A.D.2d 681, 403 N.Y.S.2d 527 (1st Dep't 1978) (per curiam).
7. *See Dash Realty Corp. v. Barbosa*, 198 A.D.2d 89, 89, 603 N.Y.S.2d 841, 841 (1st Dep't 1993) (mem.) (finding that tenant failed to establish either excusable default or meritorious defense); Daniel Finkelstein & Lucas Ferrara, *Landlord and Tenant Practice in New York* § 14:225 (2004 ed.).

8. *Manoocherian v. Soffer*, N.Y.L.J., Mar. 26, 1983, at 14, col. 4 (App. Term 1st Dep't) (per curiam).

9. *See Flexro, Ltd. v. Korn*, 9 A.D.3d 445, 445–46, 780 N.Y.S.2d 184, 185 (2d Dep't 2004) (per curiam); *38 Holding Corp. v. City of New York*, 179 A.D.2d 486, 487, 578 N.Y.S.2d 174, 175 (1st Dep't 1992) (mem.); *Beneficial Finance Co. of N.Y., Inc. v. Kramer*, 48 A.D.2d 822, 822, 368 N.Y.S.2d 266, 267 (2d Dep't 1975) (mem.) (holding that movants established excusable default because court clerk gave them wrong hearing date and that bankruptcy discharge was meritorious defense).

10. *See Forthy Central Parking v. McClean*, N.Y.L.J., Jan. 8, 1985, at 11, col. 1 (App. Term 1st Dep't) (per curiam).

11. *See Ackerson v. Stragmaglia*, 176 A.D.2d 602, 604, 575 N.Y.S.2d 44, 46–47 (1st Dep't 1991) (mem.) (quoting *Picinic v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 508, 497 N.Y.S.2d 924, 926 (1st Dep't 1986) (mem.)).

12. *See, e.g.*, *Bishop v. Galasso*, 67 A.D.2d 753, 753, 412 N.Y.S.2d 214, 215 (3d Dep't 1979) (mem.).

13. *See Martine Assocs. LLC v. Minck*, 5 Misc. 3d 61, 62, 785 N.Y.S.2d 648, 649 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2004) (mem.) (holding that tenant established excusable default when landlord served process while tenant was out of state); *Dupont Mgmt. Co. v. Fischman*, N.Y.L.J., June 10, 1982, at 6, col. 2 (App. Term 1st Dep't) (per curiam) (vacating default because tenant was in San Diego at time of service).

14. 4 Misc. 3d 29, 31, 780 N.Y.S.2d 467, 469 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).

15. *See id.*, 780 N.Y.S.2d at 469.

16. *See, e.g.*, *City of New York v. Rogers*, 165 Misc. 2d 240, 241, 629 N.Y.S.2d 628, 629 (Hous. Part Civ. Ct. Kings Co. 1995).

17. *See Gourdet v. Hershfeld*, 277 A.D.2d 422, 422, 716 N.Y.S.2d 714, 714 (2d Dep't 2000) (mem.) (finding attorney's conclusory affirmation insufficient to excuse default).

18. *See Bravo v. N.Y.C. Hous. Auth.*, 253 A.D.2d 510, 510, 676 N.Y.S.2d 871, 872 (2d Dep't 1998) (mem.).

19. *See Burlew-Watkins v. Wood*, 225 A.D.2d 973, 974, 639 N.Y.S.2d 548, 549 (3d Dep't 1996) (finding attorney's behavior neglectful and unreasonable).

20. *Eveready Ins. Co. v. Devissiere*, 134 A.D.2d 323, 323, 520 N.Y.S.2d 800, 801 (2d Dep't 1987) (mem.).

21. *See Cadle Co. II, Inc. v. Becker*, 261 A.D.2d 201, 201, 689 N.Y.S.2d 506, 507 (1st Dep't 1999) (mem.) (finding meritorious defense in defendant's informal letter before she defaulted); *Nahal v. C&S Bldg. Materials*, 116 A.D.2d 822, 823, 497 N.Y.S.2d 209, 210 (3d Dep't 1986) (mem.) (affirming default's vacatur based on defendant's allegations in supporting affidavit).

22. *See Eight Assocs. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984) (mem.), *aff'd*, 65 N.Y.2d 739, 481 N.E.2d 555, 492 N.Y.S.2d 15 (1985); RPAPL 735; CPLR 308.

23. *Hynes*, 102 A.D.2d at 748, 476 N.Y.S.2d at 884.

24. *See 1199 Housing Corp. v. Warren*, 2003 N.Y. Slip Op. 51046(U), *1, 2003 N.Y. Misc. LEXIS 817, at *1 (App. Term 1st Dep't June 13, 2003) (per curiam) (holding that Civil Court did not abuse its discretion in refusing to restore tenant who argued that marshal's notice was improperly served); *West Gramercy Assocs. v. Simeonov*, N.Y.L.J., June 18, 1990, at 26, col. 4 (App. Term 1st Dep't) (per curiam) (same); *but see Sec. of Hous. & Urban Develop. v. McClenan*, N.Y.L.J., Nov. 3, 2004, at 19, col. 3 (Hous. Part Civ. Ct. Queens County) (continuing stay in favor of temporarily restored tenant pending final resolution of motion to restore because "warrant of eviction was not properly served").

25. *Siafakas v. Danzy*, N.Y.L.J., June 6, 1997, at 31, col. 6 (Hous. Part Civ. Ct. Kings County) (restoring tenant who paid rent owed before landlord commenced eviction proceeding).

26. *See In re Albany v. White*, 46 Misc. 2d 915, 917, 261 N.Y.S.2d 361, 362 (Civ. Ct. N.Y. Co. 1965).

27. *See, e.g.*, *Iltit Assocs. v. Sterner*, 63 A.D.2d 600, 601, 405 N.Y.S.2d 68, 68 (1st Dep't 1978) (mem.).

28. *See Manoocherian*, N.Y.L.J., May 26, 1983, at 14, col. 4 (holding that tenant's breach-of-warranty-of-habitability claim sufficiently established meritorious defense to stay execution of warrant); *Fazal Realty Corp. v. Paz*, 151 Misc. 2d 396, 399, 573 N.Y.S.2d 399, 401 (Civ. Ct. N.Y. County 1991) (same).

29. *Fort Greene Assets, Inc. v. Delain*, N.Y.L.J., Mar. 27, 1995, at 30, col. 3 (App. Term 2d & 11th Jud. Dists.) (mem.).

30. *See Skala v. Edlich*, 2002 N.Y. Slip Op. 50129(U), *5, 2002 N.Y. Misc. LEXIS 577, at * 4 (Civ. Ct. Richmond Co. Feb. 4, 2002) (finding that tenant's assertion that premises was illegal multiple dwelling established meritorious defense to stay execution of warrant).

31. N.Y.L.J., June 29, 2000, at 28, col. 4 (Hous. Part Civ. Ct. N.Y. Co.).

32. *See Green v. Resch*, 114 Misc. 2d 780, 783-84, 452 N.Y.S.2d 314, 317 (Civ. Ct. Kings Co. 1982); Edward Josephson, *Post-Judgment Relief*, NYCLA—Jack Newton Lerner Lecture Series, Landlord/Tenant Litigation 7–8 (2003) (unpublished CLE manuscript) (noting special protection courts give incompetent tenants).

33. 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342 (1958).

34. *See Palaganas v. D.R.C. Indust., Inc.*, 64 A.D.2d 594, 594, 407 N.Y.S.2d 170, 171 (1st Dep't 1978) (mem.).

35. *Vinokur v. Balzaretti*, 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).

36. *See, e.g.*, *Strassman v. Estate of Eggena*, 151 Misc. 2d 638, 639, 582 N.Y.S.2d 899, 900 (App. Term 1st Dep't 1992) (per curiam) (vacating stipulation because, after signing it, tenant qualified for "noneviction protection" under Court of Appeals's newly expanded succession rights established in *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1981)).

37. *1420 Concourse Corp. v. Cruz*, 135 A.D.2d 371, 373, 521 N.Y.S.2d 429, 432 (1st Dep't 1987) (mem.), *appeal dismissed mem.*, 73 N.Y.2d 868, 537 N.Y.S.2d 487 (1989).

38. 5 Misc. 3d 8, 13, 783 N.Y.S.2d 192, 196 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

39. *See generally In re Estate of Frutiger*, 29 N.Y.2d 143, 149–50, 324 N.Y.S.2d 36, 40 (1971) (establishing good cause as test for relief from stipulations); Finkelstein & Ferrara, *supra* at note 7, at § 14:407 (noting that good-cause standard is test to vacate stipulations).

40. *Cabbad v. Melendez*, 81 A.D.2d 626, 626, 438 N.Y.S.2d 120, 120 (2d Dep't 1981) (mem.) (quoting *Frutiger*, 29 N.Y.2d at 159, 272 N.E.2d at 546, 324 N.Y.S.2d at 400) (quoting—but really misquoting—*Van Nuys v. Fitsworth*, 10 N.Y.S. 507, 508 (Sup. Ct. Gen. Term 5th Dep't)).

41. *See Hallock v. New York*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512 (1984) (analogizing test for vacating stipulations to test for rescinding contracts when both sides are represented by counsel).

42. *See 1420 Concourse Corp. v. Cruz*, 175 A.D.2d 747, 750, 573 N.Y.S.2d 669, 672 (1st Dep't 1991) (mem.) (refusing to vacate stipulation and noting that parties' attorneys negotiated stipulation).

43. *See Genesis Holding LLC v. Watson*, 5 Misc. 3d 127(A), 2004 N.Y. Slip Op. 51218(U), *1, 2004 N.Y. Misc. LEXIS 1804, at *2–3 (App. Term 1st Dep't Oct. 15, 2004) (per curiam) (vacating default because lawyer who signed stipulation for tenant was never retained).

44. *See N.Y.C. Hous. Auth. v. Soto*, N.Y.L.J. Apr. 16, 1993, at 25, col. 5 (App. Term 1st Dep't) (per curiam) (declining to vacate stipulation because counsel represented tenant when stipulation was signed); *but cf.*, *Dep't of Hous. Pres. & Develop. v. Maccarone*, N.Y.L.J., Oct. 16, 2002, at 24, col. 4

(Hous. Part Civ. Ct. Richmond Co. 2002) (Gerald Lebovits, J.) (vacating two-attorney stipulation while explaining difference between *Hallock* and *Frutiger* line of cases).

45. *See, e.g.*, *Thelma Realty v. Harvey*, 190 Misc. 2d 303, 307, 737 N.Y.S.2d 500, 503 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.) (affirming Civil Court's vacatur because tenant signed stipulation without counsel and waived defenses in stipulation).

46. *Harbor View Ctr., Inc. v. Berichi*, N.Y.L.J., Apr. 1, 1993, at 26, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

47. *City of New York v. Hicks*, N.Y.L.J., Feb. 3, 1992, at 24, col. 4 (App. Term 1st Dep't) (per curiam) (relieving tenant from stipulation because she was ill and mistook landlord's attorney for court-appointed attorney).

48. *Holding v. Lambert*, N.Y.L.J., Nov. 27, 2002, at 20, col. 3 (Hous. Part Civ. Ct. Bronx Co.) (granting APS's motion to appoint tenant guardian ad litem for tenant and stating that guardian could later move to vacate stipulation).

49. RPAPL 749(3); Finkelstein & Ferrara, *supra* note 7, at § 15:608.

50. *Third City Corp. v. Lee*, 41 A.D.2d 611, 612, 340 N.Y.S.2d 654, 655 (1st Dep't 1973) (per curiam) (entitling dispossessed tenant to relief but finding that his failure to join new party in possession leaves him only with his already-commenced action for damages); *In re Joseph v. Cheeseboro*, 42 Misc. 2d 917, 919, 248 N.Y.S.2d 969, 971 (Civ. Ct. N.Y. Co. 1964) (noting that RPAPL 749 does not rob court of power to act when warrant issues improperly), *rev'd on other grounds*, 43 Misc. 2d 702, 251 N.Y.S.2d 975 (App. Term 1st Dep't 1964) (per curiam); 3 Joseph Rasch, *Landlord Tenant—Including Summary Proceedings* § 46:7, at 196 (Robert F. Dolan ed., 4th ed. 1998).

51. *Torres*, 61 A.D.2d at 682 n.1, 403 N.Y.S.2d at 528 n.1; *Albany*, 46 Misc. 2d at 917, 261 N.Y.S.2d at 363.

52. *See Sorkin v. Salazar*, N.Y.L.J., Oct. 24, 2000, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (finding tenant's default excusable as attributable to DSS's delay); *Fisher v. Nugent*, N.Y.L.J., Sept. 28, 1995, at 30, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1995) (mem.) (finding good cause to stay warrant because tenant's defaults were attributable to DSS).

53. *See Marcus v. Boonsompornkul*, 2002 N.Y. Slip Op. 40266(U), *1, 2002 N.Y. Misc. LEXIS 752, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 1, 2002) (mem.) (remanding for hearing on whether landlord engaged in misconduct or fraud by telling tenant she had 12 days to pay when she was evicted in two days); *Unity Assocs. LP v. Spicer*, N.Y.L.J., June 6, 2000, at 30, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (noting that tenant was unaware of problem with subsidy while landlord knew that subsidy checks were not coming in).

54. *1635 Union St. Realty LLC v. Tannis*, 2002 N.Y. Slip Op. 50683(U), *1, 2002 N.Y. Misc. LEXIS 1938, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. Dec. 20, 2002 (mem.) (noting that landlord failed to credit tenant $680 in stipulation).

55. *See 467 42nd St., Inc. v. Decker*, 186 Misc. 2d 439, 440, 719 N.Y.S.2d 798, 799 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.) (finding that landlord's right to evict was vitiated by accepting rent and refusing to reimburse tenant after judgment was satisfied).

56. *See Sutter Houses v. Diaz*, N.Y.L.J., June 1, 1990, at 25, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (stating that landlord's fraud or misconduct in facilitating warrant's execution are grounds to restore tenant to possession).

57. *101 Maiden Lane Realty Co., LLC. v. Tran Han Ho*, 1 Misc. 3d 908(A), 2004 N.Y. Slip Op. 50002 (U), *2, 781 N.Y.S.2d 628 (A), 2004 N.Y. Misc. LEXIS 15, at *3–4 (Civ. Ct. N.Y. Co. Jan. 12, 2004) (noting that controlling factor is landlord's intent when accepting rent arrears).

58. *See J. A. R. Mgt. Corp. v. Foster*, 109 Misc. 2d 693, 694, 442 N.Y.S.2d 723, 724 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1980) (mem.) (stating that revival is not automatic upon landlord's accepting rent).

59. *Kew Gardens Assocs. LLC v. Camacho*, 3 Misc. 3d 135(A), 2004 N.Y. Slip Op. 50473(U), *1, 2004 N.Y. Misc. LEXIS 693, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 3, 2004) (mem.) (restoring tenant to possession because landlord ratified renewal lease after warrant issued).

60. *See 2785 Ocean Pkwy. Assocs. v. Stern*, N.Y.L.J., Jan. 11, 1995, at 31, col. 4 (Hous. Part Civ. Ct. Kings Co.) (noting split between First and Second Departments); Lawrence Schirro, *Orders to Show Cause in Housing Court*, 25 Westchester B.J. 71, 75–80 (1998) (noting departments' different approaches to granting stay and restoration motions).

61. *See Pomeroy Co. v. Thompson*, 5 Misc. 3d 51, 51, 784 N.Y.S.2d 278, 278 (App. Term 1st Dep't 2003) (per curiam) (citing *Brusco*, 84 N.Y.2d at 682, 621 N.Y.S.2d at 294 (stating that "Civil Court may, in appropriate circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed")); *Central Brooklyn Urban Dev. Corp. v. Copeland*, 122 Misc. 2d 726, 729, 471 N.Y.S.2d 989, 993 (Civ. Ct. N.Y. Co. 1984) (citing *Oppenheim v. Spike*, 107 Misc. 2d 55, 56, 437 N.Y.S.2d 826, 828 (App. Term 1st Dep't 1980) (per curiam)).

62. 1 Misc. 3d 833, 837, 766 N.Y.S.2d 540, 542–43 (Hous. Part Civ. Ct. Bronx County 2003).

63. *See id.*, 766 N.Y.S.2d. at 542–43.

64. *See Allerton Assocs. v. Torres*, N.Y.L.J., Oct. 4, 2004, at 18, col. 3 (Hous. Part Civ. Ct. Bronx Co.) (restoring tenant to possession because DSS caused her default).

65. *E.g.*, *Kohl v. Fusco*, 164 Misc. 2d 431, 439, 624 N.Y.S.2d 509, 513 (Hous. Part Civ. Ct. Bronx Co. 1994); Andrew Scherer, *Residential Landlord-Tenant Law in New York* § 17:39 (2004 ed.).

66. *E.g.*, *Sherman/Nagle Realty Corp. v. Garcia*, 2003 N.Y. Slip Op. 50631(U), *1, 2003 N.Y. Misc. LEXIS 223, at *1 (App. Term 1st Dep't Mar. 12, 2003) (per curiam) (holding that RPAPL 749(3) does not prevent Civil Court from restoring tenant to possession, assuming that tenant tenders landlord all rent arrears).

67. *See Parkchester Apts. Co. v. Heim*, 158 Misc. 2d 982, 983–84, 607 N.Y.S.2d 212, 213 (App. Term 1st Dep't 1993) (per curiam) (rejecting idea of restricting judicial discretion by applying rigid formula to decide when court may sign order to show cause to restore tenant to possession); *Allerton Assocs. v. Torres*, N.Y.L.J., Oct. 4, 2004, at 18, col. 3 (outlining sui-generous factors and collecting First Department jurisprudence).

68. 158 Misc. 2d at 983-84, 607 N.Y.S.2d at 213.

69. *See id.* at 984, 607 N.Y.S.2d at 213.

70. *See id.* at 984, 607 N.Y.S.2d at 213.

71. *See Sorkin*, N.Y.L.J., Oct. 24, 2000, at 26, col. 1 (granting tenant's motion to be restored because defaults were attributable to APS and DSS delays).

72. *Laurian Assocs. v. Woody*, N.Y.L.J., July 29, 1996, at 27, col. 3 (App. Term 1st Dep't) (per curiam) (affirming tenant's restoration to possession after DSS tendered all funds in court).

73. *See Solack Estates, Inc. v. Goodman*, 78 A.D.2d 512, 513, 432 N.Y.S.2d 3, 4 (1st Dep't 1980) (mem.) (affirming Civil Court's order restoring tenant who defaulted by sending rent payments to former managing agent and was who evicted while vacationing in Florida); *3950 Blackstone Assocs. v. Hess*, 2002 N.Y. Slip Op. 50281(U), *1, 2002 N.Y. Misc. LEXIS 895, at *1 (App. Term 1st Dep't July 3, 2002) (per curiam) (restoring tenant evicted based on isolated $572.69 rent default while she vacationed in Florida).

74. *See Turin Hous. Dev. Co., Inc. v. Morris*, N.Y.L.J., Jan. 13, 1984, at 6, col. 2 (App. Term 1st Dep't) (per curiam) (restoring tenant after landlord refused to accept

tenant's last payment because it was tendered three days late).

75. *14 Realty Corp. v. Mendez*, N.Y.L.J., Oct. 9, 1992, at 22, col. 1 (App. Term 1st Dep't) (per curiam) (stating that courts should consider tenant's willful defaults and prejudice to landlord).

76. *See Lexicon Realty, LLC. v. Wood*, 2003 N.Y. Slip Op. 51212(U), *1, 2003 N.Y. Misc. LEXIS 1064, at *1 (App. Term 1st Dep't Aug. 15, 2003) (per curiam) (finding that tenant's poor payment history made it inappropriate to grant post-eviction relief).

77. *S.F.J. Realty Corp. v. Hernandez*, N.Y.L.J., Feb. 19, 1992, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (holding that motion court did not abuse its discretion in denying tenant's motion to vacate warrant when tenant failed abide by court orders).

78. *Ram I, LLC v. Reif*, 2002 N.Y. Slip Op. 50169(U), *1, 2002 N.Y. Misc. LEXIS 404, at *2 (App. Term 1st Dep't Apr. 23, 2002) (per curiam) (holding that tenant's withholding rent because landlord owed him money was unjustifiable default).

79. *See, e.g.*, *248 Sherman Ave. Corp. v. Coughlin*, N.Y.L.J., July 20, 1999, at 26, col. 3 (App. Term 1st Dep't) (per curiam) (listing tenant's 50-year tenancy as equitable factor supporting restoration); *Jane St. Co. v. Prince*, N.Y.L.J., Nov. 13, 1995, at 25, col. 1 (App. Term 1st Dep't) (per curiam) (granting tenant's restoration motion in view of 21-year tenancy in addition to other factors); *1409 Second Ave. Corp. v. Pflesinger*, N.Y.L.J., Nov. 1, 1995, at 25, col. 5 (App. Term 1st Dep't) (per curiam) (restoring long-term tenant to possession when all funds due and owing to landlord were paid after eviction); *Civetta v. Ackerly*, N.Y.L.J., Apr. 6, 1993, at 29, col. 1 (App. Term 1st Dep't) (per curiam) (stating that despite numerous orders to show cause before eviction, forfeiting long-term rent-regulated tenancy was unwarranted when tenant ultimately secured funds from DSS).

80. 271 A.D.2d 273, 707 N.Y.S.2d 55 (1st Dep't 2000) (mem.).

81. *See id.* at 274, 707 N.Y.S.2d at 55.

82. *See id.*, 707 N.Y.S.2d at 55.

83. *See, e.g.*, *Heim*, 158 Misc. 2d at 983, 607 N.Y.S.2d at 213 (affirming Civil Court's restoring long-term rent-stabilized tenant to possession).

84. *See, e.g.*, *AF & G v. Martinez*, N.Y.L.J., Mar. 1, 1996, at 25, col. 2 (App. Term 1st Dep't) (per curiam) (stating that courts should consider tenant's loss of valuable rent-regulated tenancy).

85. *E.g.*, *Fahy v. Mincy*, 2003 N.Y. Slip Op. 50812(U), * 1, 2003 N.Y. Misc. LEXIS 448, at *1 (App. Term 1st Dep't Apr. 17, 2003) (per curiam).

86. *See Pomeroy*, 5 Misc. 3d at 51, 784 N.Y.S.2d at 278 (finding that tenant's health and other factors support good cause to restore tenant).

87. *214 E. 178th St. Corp. v. McFadden*, N.Y.L.J., Feb. 22, 1991, at 26, col. 5 (App. Term 1st Dep't) (per curiam) (finding excusable payment delays due in part to tenant's disability).

88. N.Y.L.J., Dec. 5, 2001, at 20, col. 4 (Hous. Part Civ. Ct. Bronx County).

89. *See id.*

90. *See Linus Holding Corp. v. Harrison*, 2001 N.Y. Slip Op. 40616(U), *1, 2001 N.Y. Misc. LEXIS 940, at *1 (App. Term 1st Dep't Nov. 27, 2001) (per curiam) (affirming Civil Court in considering effect of eviction on tenant's minor children); *N.Y.C. Hous. Auth.-Edenwald Houses*, 1 Misc. 3d at 837, 766 N.Y.S.2d at 543 (considering adverse effect of eviction on tenant's 15-year-old son).

91. N.Y.L.J., Nov. 22, 2004, at 20, col. 1 (Hous. Part Civ. Ct. Bronx County).

92. *Id.*

93. *Id.*

94. *See* CPLR 5015(d); Civ. Ct. Act § 212; *N.Y.C. Hous. Auth.-Edenwald Houses*, 1 Misc. 3d at 837, 766 N.Y.S.2d at 543 (conditioning restoration on payment of all arrears and eviction and moving costs).

95. *See, e.g.*, *Edenwald Houses*, 1 Misc. 3d at 837–38, 766 N.Y.S.2d at 543; *accord 326-330 E. 35th St. Assocs. v. Sofizade*, 191 Misc. 2d 329, 333, 741 N.Y.S.2d 380, 382 (App. Term 1st Dep't 2002) (per curiam) (finding that court in chronic-nonpayment holdover may grant stay of warrant under CPLR 2201 conditioned on appropriate terms to prevent unwanted future rent defaults and to avoid unnecessary eviction).

96. *E.g., Manning v. Hernandez*, 2001 N.Y. Slip Op. 40251(U), *1, 2001 N.Y. Misc. LEXIS 1298, at *1 (App. Term 1st Dep't Aug. 15, 2001) (per curiam) (affirming Civil Court's restoring tenant on condition that tenant pay landlord judgment amount and any costs).

97. *See id.* at *1, 2001 N.Y. Misc. LEXIS 1298, at *1.

98. *E.g.*, *Allerton Assocs. v. Paschall*, N.Y.L.J., Dec. 5, 2001, at 20, col. 4 (restoring tenant upon his paying arrears and landlord's expenses).

99. *E.g.*, *1781 Realty, LLC v. Checo*, 2003 N.Y. Slip Op. 50964(U), *1, 2003 N.Y. Misc. LEXIS 685, at *1 (App. Term 1st Dep't June 3, 2003) (mem.) (affirming Civil Court's direction to landlord to accept arrears and attorney fees to avoid forfeiting rent-regulated premises); *Edelstein v. Silva Construction*, N.Y.L.J., Apr. 18, 2000, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (restoring tenant who paid landlord's attorney fees and all arrears).

100. *E.g.*, *Parkchester Preservation Co. v. Rowe*, N.Y.L.J., May, 11, 2000, at 30, col. 3 (App. Term 1st Dep't) (per curiam) (restoring to possession tenant who paid all arrears and fees with DSS's help).

101. *See McClenan*, N.Y.L.J., Nov. 3, 2004, at 19, col. 3.

102. *See Allerton Assocs. v. Torres*, N.Y.L.J., Oct. 4, 2004, at 18, col. 3.

103. *See id.*

104. *See generally 102-116 Eighth Ave. Assocs., L.P. v. Oyola*, 299 A.D.2d 296, 296, 749 N.Y.S.2d 724, 724 (1st Dep't 2002) (mem.).

105. *E.g.*, *Heim*, 158 Misc. 2d at 982–83, 607 N.Y.S.2d at 213 (holding that despite tenant's default on three stipulations, court properly exercised its discretion to restore tenancy when tenant secured DSS assistance); *14 Realty*, N.Y.L.J., Oct. 9, 1992, at 22, col. 1 (holding that forfeiting tenancy was unwarranted when DSS eventually paid arrears).

106. *See Vision East Side v. Arrieta*, N.Y.L.J., Jan. 24, 1994, at 27, col. 2 (App. Term 1st Dep't) (per curiam).

107. *See 2785 Ocean Pkwy. Assocs.*, N.Y.L.J., Jan. 11, 1995, at 31, col. 4.

108. *See, e.g.*, *Sutter Houses*, N.Y.L.J., June 1, 1990, at 25, col. 5.

109. *See id.*

110. *See, e.g.*, *Davern Realty Corp. v. Vaughn*, 161 Misc. 2d 550, 551, 616 N.Y.S.2d 683, 683 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1994) (mem.) (reversing grant of motion to restore).

111. *E.g., Woodside Gardens Assocs. v. Lombardo*, N.Y.L.J., Feb. 3, 1992, at 27, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (holding that DSS mistake does not permit vacating warrant of eviction after its execution); *133-24 Sanford Ave. Realty Corp. v. Hutchinson*, N.Y.L.J., May 25, 1989, at 29, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (noting that landlord's accepting rent after warrant issues does not automatically revive tenancy).

112. *See 32-05 Newton Ave. Assocs. v. Hailazopoulos*, 168 Misc. 2d 125, 127, 645 N.Y.S.2d 260, 261–62 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1996) (mem.) (reversing Civil Court's granting tenant's motion to be restored to possession despite Civil Court's condition that tenant pay landlord all outstanding arrears); *J. A. R. Mgmt.*, 109 Misc. 2d at 694, 442 N.Y.S.2d at 724 (reversing Civil Court's order granting tenant's motion to be restored to possession).

113. 161 Misc. 2d. 550, 616 N.Y.S.2d 683 (App. Term 2d & 11th Jud. Dists. 1994).

114. *Id.* at 551, 616 N.Y.S.2d at 683.

115. *See People v. Shakur*, 215 A.D.2d 184, 185, 627 N.Y.S.2d 343, 343 (1st Dep't 1995); *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664, 476 N.Y.S.2d 918, 919 (2d Dep't 1984); *Fairbanks Gardens Co. v. Gandhi*, 168 Misc. 2d 128, 129–30, 645 N.Y.S.2d 262, 263 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1996) (mem.); *Storrs v. Holcomb*, 168 Misc. 2d 898, 899, 645 N.Y.S.2d 286, 287 (Sup. Ct. Tompkins Co. 1996).

116. *Mountain View Coach Lines*, 102 A.D.2d at 664, 476 N.Y.S.2d at 919.

117. 271 A.D.2d 273, 707 N.Y.S.2d 55 (1st Dep't 2000) (mem.).

118. 299 A.D.2d 296, 749 N.Y.S.2d 724 (1st Dep't 2002) (mem.).

119. *See* 271 A.D.2d at 273–74, 707 N.Y.S.2d at 55.

120. *See* 299 A.D.2d at 296, 749 N.Y.S.2d at 724.

121. *See, e.g.*, *Davern Realty*, 161 Misc. 2d at 551, 616 N.Y.S.2d at 683.

122. N.Y.L.J., Dec. 8, 2004, at 20, col. 3 (Hous. Part Civ. Ct. Queens County).

123. *See id.*

124. N.Y.L.J., May 22, 1995, at 30, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

125. *See id.*

126. N.Y.L.J., Aug. 16, 1991, at 28, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

127. *See id.*; *cf. 603-607 Realty Assocs. v. Gachelin*, 2003 N.Y. Slip Op. 51105(U), *1, 2003 N.Y. Misc. LEXIS 937, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 24, 2003) (mem.) (noting that restoration is inappropriate if tenant's default under stipulation is not de minimis, inadvertent, or likely to be cured).

128. *Ama Realty LLC v. Farfan*, 4 Misc. 3d 131 (A), 2004 N.Y. Slip Op. 50702(U), *1, 2004 N.Y. Misc. LEXIS 1018, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 30, 2004) (mem.) (remanding for Civil Court "to determine whether tenant was in substantial compliance with the stipulation and whether there exists other good cause to vacate the warrant") (citation omitted).

129. *See Western Estates LLC v. Roberts*, N.Y.L.J., July 26, 2004, at 27, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (granting tenant's motion to be restored to possession pending appeal on condition that tenant pay arrears).

130. 5 Misc. 3d 8, 783 N.Y.S.2d. 192 (App. Term 2d & 11th Jud. Dists. 2001).

131. *See id.*, 783 N.Y.S.2d at 196.

132. *See id.*, 783 N.Y.S.2d at 196.

133. *See id.*, 783 N.Y.S.2d at 196.

134. *See id.*, 783 N.Y.S.2d at 196; *see also* Warren A. Estis & William J. Robbins, Landlord-Tenant, *Summary Reversal—Tenant Restored to Possession by Appellate Term*, N.Y.L.J., Oct. 6, 2004, at 5, col. 2.

135. 4 Misc. 3d 131(A), 2004 N.Y. Slip Op. 50697 (U), 2004 N.Y. Misc. LEXIS 1009 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 30, 2004) (mem.).

136. *See id.* at *1, 2004 N.Y. Misc. LEXIS 1009, at *1.

137. *See id.*, 2004 N.Y. Misc. LEXIS 1009, at *1.

138. *See id.*, 2004 N.Y. Misc. LEXIS 1009, at *1.

139. *See id.*, 2004 N.Y. Misc. LEXIS 1009, at *1.

140. 2004 N.Y. Slip Op. 51686 (U), 2004 N.Y. Misc. LEXIS 2820 (App. Term 2d Dep't 2d & 11th Jud. Dists. Dec. 22, 2004) (mem.).

141. *See id.* at *1, 2004 N.Y. Misc. LEXIS 2820, at *1.

142. *See id.*, 2004 N.Y. Misc. LEXIS 2820, at *1.

143. *See Lang v. Pataki*, 271 A.D.2d 375, 376, 707 N.Y.S.2d 90, 92 (1st Dep't 2000) (mem.).

144. *See id.* at 376, 707 N.Y.S.2d at 92.

145. 185 Misc. 2d 443, 712 N.Y.S.2d 306 (App. Term 2d & 11th Jud. Dists. 2000) (mem.).

146. *See id.* at 444, 712 N.Y.S.2d at 308.

147. *See id.*, 712 N.Y.S.2d at 308.

148. N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

149. *See id.*

150. *Figuredo v. Vareris*, N.Y.L.J., Feb. 18, 1983 at 13, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (reversing Civil Court's naming tenant in possession co-respondent nunc pro tunc).

151. *E.g.*, *Schwartz v. Rush*, N.Y.L.J., Feb. 22, 1983, at 16, col. 6 (App. Term 1st Dep't) (per curiam) (requiring movant to join tenant in possession as party).

152. *E.g.*, *Oppenheim*, 107 Misc. 2d at 57, 437 N.Y.S.2d at 829.

153. *See id.*

154. *See Padilla v. Padilla*, 164 Misc. 2d 740, 744, 626 N.Y.S.2d 656, 659 (Civ. Ct. Bronx Co. 1995); *D.U. Fourth Realty Co. v. Meredith*, 119 Misc. 2d 423, 425, 463 N.Y.S.2d 374, 376 (Civ. Ct. N.Y. Co. 1983) (choosing not to exercise power to restore wrongfully ousted tenant to possession because new tenant was innocent third party).

155. *See B&A Realty v. Castro*, N.Y.L.J., May, 29, 1995, at 25, col. 1 (App. Term 1st Dep't) (per curiam) (remanding for hearing on equitable factors); Finkelstein and Ferrara, *supra* note 7, at § 16:419.

156. *See Cooperative Estates Co. v. O'Brien*, N.Y.L.J., Oct. 1, 1981, at 7, col. 2 (App. Term 1st Dep't) (per curiam) (holding that four-month delay is excessive); *Padilla v. Padilla*, 163 Misc. 2d 740, 744, 626 N.Y.S.2d 656, 659 (Hous. Part Civ. Ct. N.Y. Co. 1995) (holding that tenant waited too long to move for restoration).

157. *Parkash v. Lorenzo*, N.Y.L.J., Oct. 12, 1994, at 24, col. 4 (Hous. Part Civ. Ct. N.Y. Co.) (denying tenant's restoration motion because equities favored innocent tenant in possession); *LaValle v. Kast Realty Co.*, N.Y.L.J., Sept. 27, 1994, at 23, col. 2 (Hous. Part Civ. Ct. N.Y. Co.) (same).

158. *See B&A Realty Co. v. Castro*, N.Y.L.J., May 9, 1995, at 25, col. 1 (App. Term 1st Dep't) (per curiam) (remanding for hearing on whether equities require restoring former tenant when premises were leased to innocent new tenant); *S.W.S. Realty Co. v. Geandomenico* 126 Misc. 2d 769, 773-74, 484 N.Y.S.2d 402, 405-06 (Hous. Part Civ. Ct. Bronx Co. 1984) (stating that if other factors are equal, person first in time has greater right to subject premises).

159. *Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 288, 614 N.Y.S.2d 513, 514 (1st Dep't 1994) (mem.) (stating that treble damages under RPAPL 853 is discretionary); *Lyke v. Anderson*, 147 A.D.2d 18, 28, 541 N.Y.S.2d 817, 823 (2d Dep't 1989) (same); Finkelstein & Ferrara, *supra* note 7 at § 16:409 (same).

160. *E.g.*, *Spence v. Franklin Plaza Apts.*, 91 A.D.2d 897, 898, 457 N.Y.S.2d 516, 517 (1st Dep't 1983) (mem.).

161. *See Dinolfi v. Berkeley Assocs. Co.*, 98 A.D.2d 644, 644, 469 N.Y.S.2d 398, 398 (1st Dep't 1983) (mem.).

Gerald Lebovits is judge of the New York City Civil Court, Housing Part, and an adjunct professor at New York Law School. He thanks Court Attorney Justin J. Campoli for his work on this article.

BERGMAN ON MORTGAGE FORECLOSURES:

(Who Cares About) Entering the Foreclosure Judgment

By Bruce J. Bergman

This sounds like it might be the minutae which we hope others need to cope with. But as a practical matter the issue can impact upon the progress of a foreclosure and *then* it certainly matters to all. (By the way, there is a happy ending to this one.)

As most practitioners should recall, in New York, the judgment of foreclosure and sale (let's just call it the judgment) is the last paper which issues from the court in the course of a foreclosure and it is the document which finally authorizes that a foreclosure sale be conducted. Sometimes it takes many months to obtain (as in New York City) but once the judge signs it, the case is *almost* on its way. First, though, the clerk of the court must enter it, which means officially log it in and file it. Although that act is itself simple and ministerial, not infrequently it takes days or weeks to be done. Sometimes the court even loses the judgment and then the problem is much worse than just wondering when it will be entered.

In any event, a copy of the judgment is usually not available to counsel until after it is entered and a sale cannot be scheduled until at least a copy of the judgment is received. In much of upstate New York, though, the court makes the judgment available to the attorney with responsibility then upon counsel to convey it to the clerk for entry.

So, mundane, yes, unimportant, no. It is conceivable that an unentered judgment can be obtained (counsel pushes for that which pleases clients) and the foreclosure action could proceed even though there was no entry. While moving the case along is desirable, the lack of entry would still be a defect. Could borrowers—especially those crafty ones bent on delay as a lifetime ambition—pounce on that as a fatal error? A fairly recent case says probably not.[1]

Under what the court referred to as "unique circumstances" (although it wasn't clear what those were) failure to enter the judgment was ruled a correctable defect because the borrower suffered no cognizable prejudice. This really is heartening. Ministerial glitches like this are inevitable from time to time. And it is hard to imagine that a defendant could be damaged by failure to perform this mechanical task. That being so, the courts do not want to vacate a foreclosure for what in the end is a mistake without consequence.

Endnote

1. *Chase Home Mort. Corporation v. Marti*, 279 A.D.2d 270, 719 N.Y.S.2d 14 (1st Dep't 2001).

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

CASE NOTE

767 Third Avenue LLC v. Orix Capital Markets LLC, 2005 NY Slip Op. 50123U, 2005 N.Y. Misc. LEXIS 204 (Sup. Ct. N.Y. Co. 2005)

Plaintiffs, 767 Third Avenue LLC (767) and 320 West 13th Realty LLC (320), which are related entities, commenced this current action against their loan servicer, Orix Capital Markets LLC (Orix). In an attempt to minimize mortgage recording fees, both plaintiffs wanted to refinance their mortgage loans by pre-paying the loans and receiving an assignment of mortgage instead of a satisfaction. Plaintiffs allege that Orix wrongfully charged 767 an excessively high assignment of mortgage fee, and wrongfully refused to provide 320 with an assignment of mortgage because of 767's challenge on the fee issue.

The Supreme Court, New York County, consolidated three separate motions made by both sides on this pending litigation. In the first motion, Motion 001, Orix moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In the second motion, Motion 002, Orix moved for summary judgment as to liability on its counterclaim against 767. In the third motion, Motion 003, plaintiffs moved under CPLR 3025(b), for leave to amend the complaint. The court denied motion 002 entirely, and granted, in part, elements of motions 001 and 003.

767 is the fee owner of the land and commercial office building located at 767 Third Avenue, New York, New York. On May 11, 1998, 767 executed two loan documents from Credit Suisse First Boston Mortgage Capital LLC (CSFB). These documents included an "Amended, Restated and Consolidated Promissory Note," promising to pay CSFB the principal sum of $41,500,000, with interest. They also included, as security, an "Amended, Restated and Consolidated Mortgage, Assignment of Rents and Security Agreement." Both of these loan documents were first assigned to State Street Bank and Trust Company (State Street), as trustee for the benefit Certificate holders of the Credit Suisse First Boston Mortgage Commercial Mortgage-Pass Through Certificate Series 1998-C1. They were re-assigned, pursuant to a "Pooling and Servicing Agreement," to Orix as master servicer of the trust.

In August 2003, 767 requested an assignment of its mortgage and informed Orix of its intent to refinance the loan. Orix requested that 767 pay an assignment fee in the amount of $413,819.77, which equaled one-percent of the unpaid principal remaining on the loan. 767 agreed to pay the fee in order to avoid the higher mortgage recording fee of $1,815,000. At the closing held on September 11, 2003, Orix delivered an assignment and 767 delivered a release. The release provided in relevant part, "Borrower hereby releases Noteholder and Serviceholder and their agents, employees and attorneys [collectively the "Releasees"] from: [a] any and all claims relating to the $413,819.77 fee charged for the Assignment and [b] any claim that the amounts set forth in the Payoff Statement are incorrect."

767 claims that Orix demanded that it be released from any liability arising from the collection of the assignment fee. Additionally, 767 asserts that it only agreed to the release and payment of the high assignment fee because the closing date for its refinance was quickly approaching and it wanted to mitigate its damages.

The second plaintiff, 320 is the fee owner of the land and a commercial office building located at 320 West 13th Street, New York, New York and a related entity to 767. On April 22, 1998, 320 executed loan documents, which included an "Amended, Restated and Consolidated Promissory Note," which promised to pay the principal amount of $5,850,000. It also included, as security, an "Amended, Restated and Consolidated Mortgage, Assignment of Rents and Security Agreement." Thereafter, as with the 720 loan, CSFB assigned the 320 loan documents to State Street.

In March 2004, 320 requested from Orix an assignment of its mortgage and informed Orix that it intended to repay the note. In a letter, dated March 31, 2004, Orix denied 320's request for an assignment of mortgage. On April 9, 2004, 320 prepaid the note and Orix delivered a satisfaction of mortgage. On the same day, 320 entered into a new loan, and paid a mortgage recording tax in the amount of $275,000. 320 alleges that Orix denied its assignment request to punish 320 because the related entity, 767, had ques-

tioned the legality of Orix's actions in their refinancing.

In its motions, Orix argued that 767's claim was barred by the Release, which freed Orix from liability from all of the claims asserted in this action, also, that the tort claims were invalidly stated. Orix also argued that New York Real Property Law, after its amendment in 1989, only obligates a lender to provide a "certificate of discharge." Orix asserted that this certificate had been offered to 767, and actually given to 320. Orix also claimed that the operative agreements, both of which contained merger clauses, do not require it to provide an assignment of mortgage, and that the one-percent fee it charged 767 was a proper subject of negotiation. Orix also asserted as a counterclaim, that it was damaged by 767's breach of the release, and sought recovery of costs and fees, including attorney's fees.

Plaintiffs withdrew the causes of action for breach of implied statutory right to an assignment, unfair completion and coercion. Plaintiffs also argued that summary judgment was inappropriate because there had been very little discovery, and because extrinsic evidence, including custom and trade in the industry, were required to establish the terms of the loan documents. Additionally, plaintiffs argued that the Release executed by 767 was unenforceable because it was procured through economic duress, fraud, and unconscionable conduct, and also that the factual issues dominated their tort claims.

The court denied Motion 001 in part, finding merit in plaintiff's argument that the release was void due to fraud, and that there were material issues of fact relating to whether Orix breached the operative agreements by demanding the one-percent fee and by its refusal to provide 320 with an assignment of mortgage. The court did agree that Orix was entitled to dismissal of some of the causes of action, which had not been withdrawn by plaintiffs. The court did not grant dismissal in relation to the breach of contract allegations.

The court denied Motion 002 entirely, finding that Orix was not entitled to summary judgment on the issue of the breach of the release because Orix did not establish that 767's claim of fraud in regards to the release will be unsuccessful. The Court granted Motion 003 to the extent that it allowed plaintiffs to amend the complaint to add the fraud claim, but denied the request to add other causes of action.

The saving grace of this litigation was plaintiffs' fraud argument. The release, which had to be overcome, had essentially barred this claim, and the court wholly rejected 767's duress argument. Here, in very quotable language, the court lays out the elements of fraud and what must be proven to save an action from early summary judgment death. In a very clever argument, plaintiff met its burden.

Plaintiffs had sought to add several causes of action to their shrinking complaint; the only cause of action which the court accepted related to the alleged fraud. 767 argued that Orix falsely represented to 767 that it was demanding the release on behalf of the Trustee—State Street—and that it was acting within the power that the Trustee had granted to it. Additionally, 767 claims that the release, which Orix prepared, falsely stated that the release was being provided "in order to induce Noteholder to provide the Assignment. . . ." 767 also claims that Orix had presented it with a power of attorney which stated that 767 could "rely completely unconditionally and conclusively, on [defendant's] authority" to act on the Trustee's behalf.

Orix did point out weaknesses in plaintiffs' arguments, such as the fact that the Trustee has not asserted that Orix acted without authority. The court, however, found that there were issues of fraud that could not be disposed of on Summary disposition. Thus, while plaintiffs' fraud claim may be difficult to prove at trial, it created enough of material issue of fact to keep this case alive. In any event, the outcome of this case should make for interesting precedent.

Annmarie Giblin, 06

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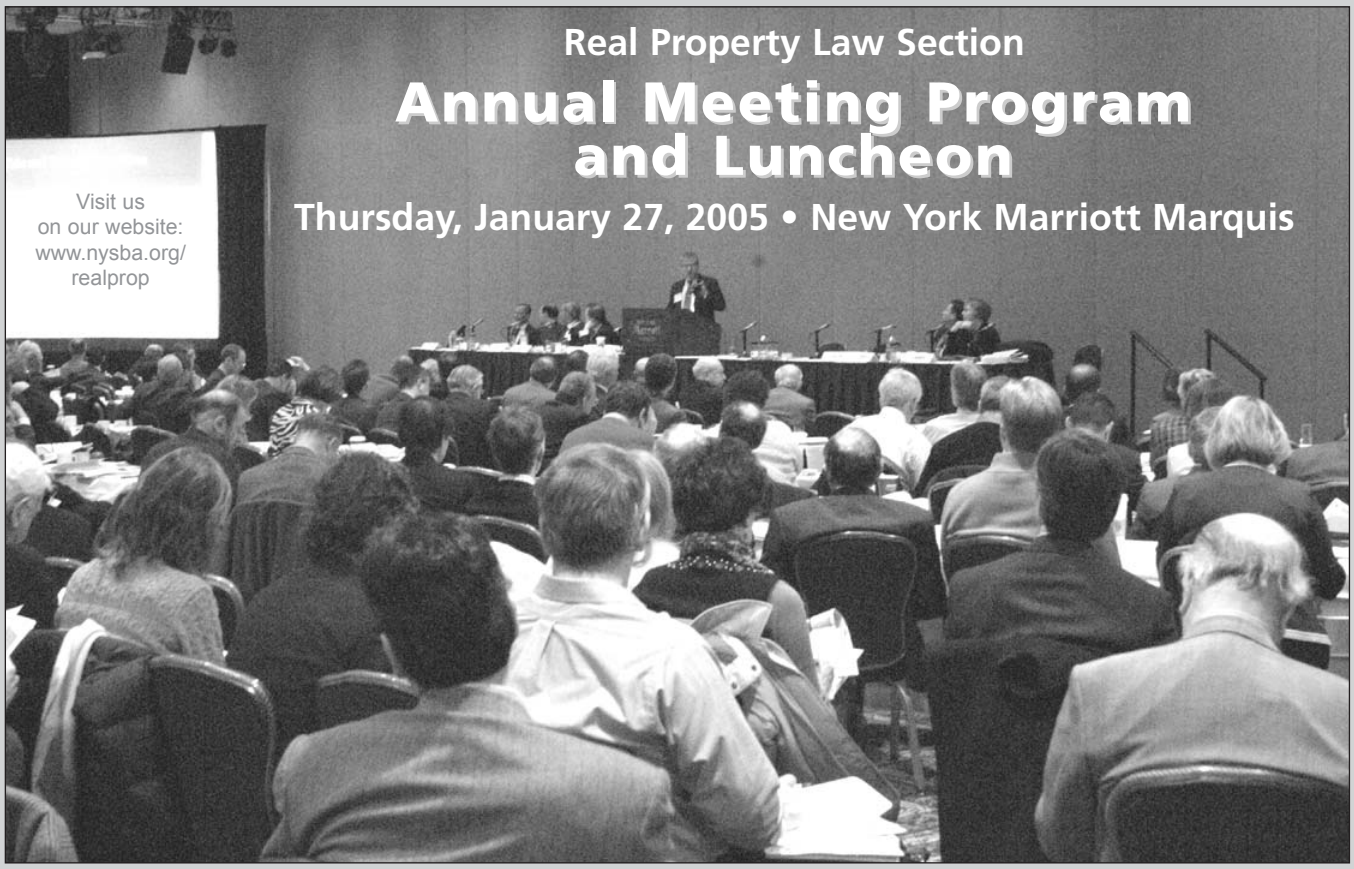



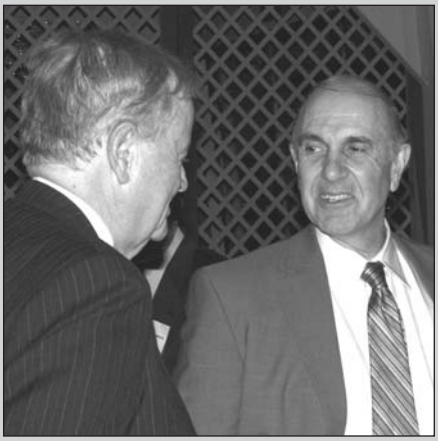



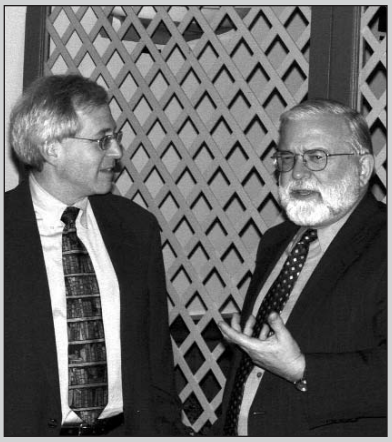


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Committee on Attorney Opinion Letters
Charles W. Russell (Co-Chair)
2400 Chase Square
Rochester, NY 14604
(585) 232-5300
Fax: (585) 232-3528
E-Mail: cwrussell@boylanbrown.com

David J. Zinberg (Co-Chair)
250 Park Avenue
New York, NY 10177
(212) 907-9601
Fax: (212) 907-9681
E-Mail: dzinberg@ingramllp.com

Committee on Awards
John G. Hall (Chair)
57 Beach Street
Staten Island, NY 10304
(718) 447-1962
Fax: (718) 273-3090
E-Mail: hallj@hallandhalllaw.com

Committee on Commercial Leasing
Austin J. Hoffman, II (Co-Chair)
4 Clinton Square
Syracuse, NY 13202
(315) 422-7000
Fax: (315) 472-4035
E-Mail: austinhoffman@pyramidmg.com

Bradley A. Kaufman (Co-Chair)
1270 Avenue of the Americas
Suite 2500
New York, NY 10020
(212) 218-5503
Fax: (212) 218-5526
E-Mail: bkaufman@seyfarth.com

Committee on Computerization & Technology
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633 Third Avenue, 16th Floor
New York, NY 10017
(212) 850-0624
Fax: (212) 331-1511
E-Mail: mberey@firstam.com

Jill M. Myers (Co-Chair)
206 Park Avenue
Rochester, NY 14607
(585) 697-0040
Fax: (585) 697-0043
E-Mail: jmyers@jmyerslaw.com

Committee on Condemnation, Certiorari & Real Estate Taxation
Robert L. Beebe (Co-Chair)
514 Vischers Ferry Road
Clifton Park, NY 12065
(518) 373-1500
Fax: (518) 373-0030
E-Mail: rbeebe@beebelaw.com

Jon N. Santemma (Co-Chair)
300 Garden City Plaza, 5th Floor
Garden City, NY 11530
(516) 393-8277
Fax: (516) 393-8282
E-Mail: jsantemma@jshllp.com

Committee on Condominiums & Cooperatives
David L. Berkey (Co-Chair)
845 Third Avenue, 8th Floor
New York, NY 10022
(212) 935-3131
Fax: (212) 935-4514
E-Mail: dlb@gdblaw.com

Joseph M. Walsh (Co-Chair)
42 Long Alley
Saratoga Springs, NY 12866
(518) 583-0171
Fax: (518) 583-1025
E-Mail: joewalsh@spalaw.net

Committee on Continuing Legal Education
Terrence M. Gilbride (Co-Chair)
One M&T Plaza, Suite 2000
Buffalo, NY 14203
(716) 848-1236
Fax: (716) 819-4625
E-Mail: tgilbrid@hodgsonruss.com

Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630
E-Mail: halubell@bryancave.com

Committee on Environmental Law
Joel H. Sachs (Co-Chair)
445 Hamilton Avenue, Suite 1500
White Plains, NY 10601
(914) 946-4777 x318
Fax: (914) 946-6868
E-Mail: jsachs@kblaw.com

John M. Wilson, II (Co-Chair)
2400 Chase Square
Rochester, NY 14604
(585) 232-5300
Fax: (585) 232-3528
E-Mail: jwilson@boylanbrown.com

Committee on Land Use & Planning
Karl S. Essler (Co-Chair)
295 Woodcliff Drive, Suite 200
Fairport, NY 14450
(585) 641-8000
Fax: (585) 641-8080
E-Mail: kessler@fixspin.com

Carole S. Slater (Co-Chair)
61 Broadway, Suite 1105
New York, NY 10006
(212) 391-8045
Fax: (212) 391-8047
E-mail: cslater@slaterbeckerman.com

Committee on Landlord & Tenant Proceedings
Edward G. Baer (Chair)
270 Madison Avenue
New York, NY 10016
(212) 867-4466
Fax: (212) 867-0709
E-Mail: ebaer@bbwg.com

Committee on Legislation
S.H. Spencer Compton (Co-Chair)
633 Third Avenue
New York, NY 10017
(212) 850-0647
Fax: (212) 331-1680
E-Mail: SHCompton@firstam.com

Ralph Habib (Co-Chair)
307 South Clinton Street, Suite 200
Syracuse, NY 13202
(315) 701-0741
Fax: (315) 479-8847
E-Mail: rhabib64@yahoo.com

Gary S. Litke (Co-Chair)
787 Seventh Avenue
New York, NY 10019
(212) 728-8516
Fax: (212) 728-9516
E-Mail: glitke@willkie.com

Committee on Low Income & Affordable Housing
Brian E. Lawlor (Co-Chair)
38-40 State Street
Albany, NY 12207
(518) 486-6337
Fax: (518) 473-8206
E-Mail: blawlor@dhcr.state.ny.us

Richard C. Singer (Co-Chair)
36 West 44th Street, Suite 712
New York, NY 10036
(212) 819-1130
Fax: (212) 302-8536
E-Mail: rsinger90@aol.com

Committee on Membership
Karen A. DiNardo (Co-Chair)
28 E. Main Street, Suite 1400
Rochester, NY 14614
(585) 238-2038
Fax: (585) 232-3141
E-Mail: kdinardo@phillipslytle.com

Richard S. Fries (Co-Chair)
1251 Avenue of the Americas
New York, NY 10020
(212) 835-6215
Fax: (212) 884-8725
E-Mail: richard.fries@dlapiper.com

Committee on Not-for-Profit Entities & Concerns
Mindy H. Stern (Chair)
60 East 42nd Street, 39th Floor
New York, NY 10165
(212) 661-5030, x 214
Fax: (212) 687-2123
E-Mail: mstern@schoeman.com

Committee on Professionalism
Anne Reynolds Copps (Co-Chair)
126 State Street, 6th Floor
Albany, NY 12207
(518) 436-4170
Fax: (518) 436-1456
E-Mail: arcopps@nycap.rr.com

Alfred C. Tartaglia (Co-Chair)
851 Grand Concourse, Room 841
Bronx, NY 10451
(718) 590-3838
Fax: (718) 590-4830
E-Mail: atartagl@courts.state.ny.us

Committee on Publications
William A. Colavito (Co-Chair)
300 Garden City Plaza, Suite 404
(516) 294-9600
Fax: (516) 294-6033
E-Mail: wcolavito@libertytitle.biz

William P. Johnson (Co-Chair)
501 John James Audubon Parkway
Suite 300
Amherst, NY 14228
(716) 688-3800
Fax: (716) 688-3891
E-Mail: wjohnson@nfdlaw.com

Robert M. Zinman (Co-Chair)
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6646
Fax: (718) 990-6649
E-Mail: zinmanr@stjohns.edu

Ad Hoc Committee on Public Relations
Maureen Pilato Lamb (Co-Chair)
One East Main Street, Suite 510
Rochester, NY 14614
(585) 325-6700, x220
Fax: (585) 325-1372
E-Mail: mlamb@lambattorneys.com

Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630
E-Mail: halubell@bryancave.com

Committee on Real Estate Financing
Steven M. Alden (Co-Chair)
919 Third Avenue
New York, NY 10022
(212) 909-6481
Fax: (212) 909-6836
E-Mail: smalden@debevoise.com

Leon T. Sawyko (Co-Chair)
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8632
Fax: (585) 419-8815
E-Mail: lsawyko@harrisbeach.com

Committee on Title Insurance
Peter V. Coffey (Co-Chair)
224 State Street
P.O. Box 1092
Schenectady, NY 12305
(518) 370-4645
Fax: (518) 370-4979
E-Mail: pcoffey@ecmlaw.com

Lawrence J. Wolk (Co-Chair)
195 Broadway
New York, NY 10007
(212) 513-3200
Fax: (212) 385-9010
E-Mail: lwolk@hklaw.com

Committee on Title & Transfer
Joseph D. DeSalvo (Co-Chair)
188 East Post Road, 4th Floor
White Plains, NY 10601
(914) 286-6415
Fax: (212) 331-1455
E-Mail: jdesalvo@firstam.com

Samuel O. Tilton (Co-Chair)
2 State Street
700 Crossroads Building
Rochester, NY 14614
(585) 987-2841
Fax: (585) 454-3968
E-Mail: stilton@woodsoviatt.com

Committee on Unlawful Practice of Law
John G. Hall (Co-Chair)
57 Beach Street
Staten Island, NY 10304
(718) 447-1962
Fax: (718) 273-3090
E-Mail: hallj@hallandhalllaw.com

Nancy M. Langer (Co-Chair)
1110 Main Place Tower
350 Main Street
Buffalo, NY 14202
(716) 854-6424
Fax: (716) 854-6425
E-Mail: nml@kevinricotta.com

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Real Property Law Section
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