HOUSING COURT SEMINAR
OCTOBER 14, 2015
THE ABCs of LANDLORD & TENANT LAW
Hon. Laurie L. Lau and Judy Lu

Housing Court is where landlord and tenant disputes are heard. There are many disputes and the substantive and procedural law with regard to the disputes is often critical to their disposition, whether by stipulation between the parties or by judicial determination after a hearing or trial. What follows is a discussion by reading case law which considers many of those procedural and substantive issues that arise in Housing Court.

SUFFICIENCY OF PLEADINGS

***Kabir v. Limbert*, 2015 NY Slip Op 50758[U] [App Term 2d Dept 2015].**

The landlord commenced a proceeding pursuant to RPAPL 713(5), alleging that there was an oral lease between the parties. The landlord's petition also made inconsistent allegations as to the regulatory status of the apartment, alleging that it was both subject to and exempt from rent stabilization. The tenant claimed that the parties had a rent-stabilized lease. The landlord's petition was found to contain fundamental misstatements and omissions that led the court to affirm the dismissal of the petition. The petition failed to put the court and the tenant on notice of the landlord's claim that the tenant's purported rent-stabilized lease was invalid due to notice of pendency and judgment of foreclosure that had been entered into prior to the execution of the lease between the parties.

Comment: Here's a weird case. Landlord started a RPAPL 713(5) case against the tenant alleging an oral lease. The tenant had, however, a rent stabilized lease. Landlord said the lease was invalid. The Appellate Term dismissed saying that there were material elements not set forth in the petition alerting the tenant and the court that there was a lease, albeit invalid.

***Brookwood Coram I, LLC v. Oliva*, 2015 NY Slip Op 50607[U] [App Term 2d Dept 2015].**

In a holdover proceeding, the landlord made fundamental misstatements and omissions in the petition, therefore, subjecting it to dismissal. The landlord claimed to have a six-month lease with the tenant and failed to set forth facts in the petition to explain why a one-year lease, as required by federal regulation 24 CFR 982.309[a][1], was not entered into instead. The petition also failed to establish the regulatory status of the premises, when at trial, it was found that the tenant was a Section 8 subsidy recipient. The court, in citing *Matter of volunteers of AM. Greater NY, Inc. v. Almonte*, 17 Misc 3d 57 [App Term 2d Dept 2007], held that the petition must set forth the regulatory status of an apartment when the tenancy is subject to a form of regulation because it may determine the scope of the tenant's rights. Therefore, the petition failed to satisfy the requirements set out in RPAPL § 741 and dismissal of the petition was necessary. The court remitted the matter to the District Court to dismiss the petition.

Comment: The petition didn't mention that the tenant was a Section 8 tenant and therefore failed to set forth the regulatory status of the apartment. Oops. Oops #2 was that the 6-month

lease given to the tenant failed to satisfy the Section 8 requirement that a lease be for at lease 1 year. Case dismissed.

***1796 Nostrand Ave., LLC v. Gabriel*, 2015 NY Slip Op 50618[U] [App Term 2d Dept 2015].**

In a holdover proceeding, the landlord's petition alleges that the tenancy was a month-to-month tenancy and that the premises is not rent regulated because it contained fewer than six residential units. The parties then entered into a stipulation in which the tenant agreed to surrender the premises in exchange for a waiver of the arrears. The Civil Court had denied the tenant's motion to vacate the stipulation and the final judgment. However, the Appellate Term reversed to vacate the stipulation and the final judgment, and dismissed the petition because it was found that the building was subject to rent regulation. The court held that the petition's failure to accurately state the regulatory status of the premises resulted in prejudice to the tenant, regardless of whether the landlord was aware of the regulated status of the premises, and therefore, the petition was to be dismissed.

Comment: Even if you didn't know the building was subject to rent regulation when you brought the proceeding, once you find out, you can't terminate a tenancy based on termination of a month-to-month unregulated tenancy.

***Tello v. Dylag*, 2015 NY Slip Op 50617[U] [App Term 2d Dept 2015].**

The petitioner, the owner of the premises, began a nonpayment proceeding alleging that the respondent-occupant was a tenant pursuant to a written lease and had accumulated arrears for seven months. The respondent asserts that she is not a tenant, but rather is a partner in a joint venture pursuant to a written agreement. The respondent produced the agreement which described the petitioner as the purchaser and the respondent as the joint venturer, and stated that the purpose of the union was to repair and maintain the property to sell for profit which was to be shared amongst them. The agreement further provided that the respondent would be allowed to live on the subject premises for one year and would be responsible for the mortgage and property taxes. The petitioner does not dispute the existence of this joint venture agreement. The court finds that there was no basis to award the final judgment to petitioner because the record showed that the respondent was not sworn-in to give testimony. Respondent's allegations directly contradicted those asserted in the petition and therefore, a trial was necessary for these triable issues of fact.

The court also finds that the evidence presented by the respondent is sufficient to show that a landlord-tenant relationship does not exist between the parties, but only a joint venture relationship exists. Consequently, the court finds that there was no basis for this nonpayment summary proceeding. Additionally, the court finds that the petition should have been dismissed at the outset because it failed to allege that the "lease" agreement had expired and did not provide facts showing a subsequent tenancy.

Comment: Swear the parties in for a trial or get reversed on a technicality, which is embarrassing.

A written agreement that doesn't use words like "landlord" and "tenant" is not a lease especially where the parties share expenses.

ATTORNEY'S FEES

***257 Cent. Park W., Inc. v. Abraham*, 2015 NY Slip Op 50837[U] [App Term 1st Dept 2015].**

The landlord, in a holdover summary proceeding, recovered possession of a parking space and was also awarded $151,314.43 in attorney's fees. The tenant appealed the awarding of the attorney's fees. The landlord relied on a lease provision that states that tenant will pay attorney's fees in actions related to tenant's default under the terms of the lease. The landlord further contended that delinquency in paying parking fees by the tenant was a breach of the cooperative's house rules, in effect, also a breach of the lease. The court found that the tenant had not been in default of the lease, and that the proprietary lease provision, on which the landlord relies, is inapplicable to this proceeding, on the grounds that the proceeding was based on the tenant's licensee status and that the license to use the parking space was "freely revocable".

Comment: No attorney's fees in a licensee proceeding to recover a parking space as the proprietary lease only provided for attorney's fees as a result of respondent's default under the term of the lease.

***Ianniciello v. PBDP*, Inc. 2015 NY Slip Op 50770[U] [App Term 2d Dept 2015].**

The landlord and its commercial tenant had a written lease that provided that the tenant would be responsible for reasonable legal fees incurred by the landlord if the tenant defaulted in paying rent or other covenants of the lease, causing the landlord to bring an action against the tenant. In a separate paragraph, the lease further provided that the tenant would also be responsible for all reasonable administrative and legal fees to collect unpaid rent that was past ten days due. The tenant appealed the awarding of $3,250 in attorney's fees to the landlord, alleging that the lease provisions were ambiguous. The court found the lease provisions unambiguous and to be read separately. The first provision was to be applied in the event that the landlord began a proceeding against the tenant, and the second provision for merely collecting unpaid rent in the absence of a legal proceeding. However, the court found that there was a lack of evidence or testimony as to the reasonableness of the rate charged by the landlord's attorney for the services rendered. The court cited language from *Kamco Supply Corp. v. Annex Contr. Inc.*, 261 AD2d 363, 365 [1999]. to note that a contractual provision regarding attorney's fees may only be enforceable to the extent that the amount demanded is reasonable for the services actually rendered. Upon finding that the "judgment failed to render substantial justice between the parties according to the rules and principles of substantive law", the court remanded the case to the Civil Court for a new trial on the amount of attorney's fees.

Comment: No Testimony to show that the attorney's rate was reasonable.

***Hawthorne Gardens Owners Corp v. Jacobs*, 2015 NY Slip Op 50822[U] [App Term, 2d Dept 2015].**

The landlord had commenced a nonpayment summary proceeding due to tenant's alleged violation of the proprietary lease for failure to pay costs incurred by the landlord in removing tenant's property from the basement storage area to allow for the completion of an asbestos remediation project. Tenant's failure to appear on a trial date led to a default final judgment awarding the landlord possession, storage fees, and attorney's fees. The storage fees amounted to

$7,172.78, and the attorney's fees amounted to $85.383.85. The tenant then moved to vacate the default on the ground of medical incapacitation. However, the tenant failed to establish an excusable default as it provided sparse documentation and medical support that occurred subsequent to the default date.

Although the court does not vacate the prior judgment based upon excusable default, it does vacate the default upon determining that the attorney's fees assessed were unreasonable and has remanded the case for a new determination on attorney's fees. The court found that the attorney's fees included fees incurred by the landlord from a separate action against the tenant, and that there was also a huge discrepancy between the storage fees sought and the attorney's fees sought.

Comment: Tenant Proprietary Lessee failed to show excusable default and a meritorious defense to set aside a default [the medical excuse was after the default and the Coop had the authority to impose conditions on removal of storage bins prior to asbestos removal]. However, the case was remanded because the attorney's fees were excessive in view of the fact that some fees were for a separate case and the storage fees at issue were small in comparison to the large amount of attorney's fees sought. Thus the fees were found unreasonable.

I don't know about this. The tail sometimes wags a little dog as may have been the case here.

***Eric M. Berman, P.C. v. City of New York*, 2015 Ny Slip Op 05594 [2015].**

Local law 65 imposed a licensing requirement on debt collection agencies where agencies must obtain a license valid for a 2-year period and pay a annual fee of $75. The law had a specific exclusion for any attorney collecting debt when collecting on behalf of a client. However, issues arose when debt was being purchased by third parties who would then use law firms that were exempt from this licensing requirement to pursue their claims. The law was amended in 2009 to include a "buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt" (Administrative Code of City of NY § 20-489 [a]), however, there was a continued exemption for attorneys or law firms that were collecting on behalf of a client "solely through activities that may only be performed by a licensed attorney." Id. at [a][5]. The exemption did not cover attorneys or law firms that regularly engaged in activities usually performed by debt collectors. Local Law 15 was also enacted to place requirements upon the method of debt collection.

The 1st Department notes that judicial law confers authority to the courts to regulate the practice of law. It finds no express conflict between broad authority of the courts to regulate attorneys and the local law of licensing those who collect debt. Therefore, the Local Law does not impose any additional requirements for attorneys. The court finds a significant difference between the conduct of attorney's collecting debt and conduct typical of a collection agency.
The court also finds that there is no field preemption in that the court does not show intent to preempt the field of regulating attorneys. The court regulates all aspects of attorney misconduct, but that does not extend to all attorney conduct.

In cases where it is not clear whether activity counts as attorney activity or whether it falls within regular debt collection activity, the court has cited *Avila v. Rubin*, 84 F3d 222, 229 [7th Cir

1996] to note that it depends on whether professional judgment as to the validity of the amount owed was exercised.

***Graham Court Owner's Corp., v. Taylor*, 2015 NY Slip Op 01482 [2015].**

A lease contained a provision that stated that rent received from re-letting the premises after obtaining possession would be first used to pay for landlord's expenses and then amounts that the tenant owed under the lease. Expenses included legal fees. Real Property Law § 234 states that tenant's have a reciprocal right to attorney's fees when the landlord breaches the lease or when the tenant has a successful defense in a proceeding brought against it. The Court of Appeals found Real Property Law § 234 to apply in the context of this lease. The Court rejected the landlord's first contention that RPL § 234 does not apply because the statute dealt with collecting attorney's fees from rents received through re-letting the premises to another tenant, where here, the landlord is attempting to collect attorney's fees from the original defaulting tenant who had violated the lease. It found the incurring of attorney's fees as a result of the tenant's breach to be sufficient grounds for the application of RPL § 234. The landlord's second contention that RPL § 234 should be treated as only mitigating the amount owed by the tenant was rejected because the provision is interpreted to allow the tenant to demand credit for the entire amount of the rent collected by the landlord from re-letting the premises if the sequence of payments was not established. The Court emphasizes that RPL § 234 is intended to put landlords and tenants on equal footing so as to discourage landlords from engaging in frivolous and unnecessary litigation. Because landlords with such provisions covered under RPL § 234 have the opportunity to collect attorney's fees when the tenant's breach the lease, the same opportunity is impliedly extended to tenants for landlord's breach of lease or a successful defense on the part of the tenant.

Comment: The issue: Bunny Realty type lease clause for attorney's fees. Court of Appeals says that recovery can be had under that clause in Housing Court. Split between the 1st and 2nd Departments now resolved.

SUMMARY JUDGMENT

***208-210 E. 7th LLC v. Martinez*, 2015 NY Slip Op 50880[U] [App Term 1st Dept 2015].**

The tenants constructed an illegal loft in their bedroom by erecting a wooden platform that created two levels. The tenant moved for summary judgment and attorney's fees. The court denied granting both summary judgment and attorney's fees because the actual date of cure could not be established for the record. There was also lack of evidence demonstrating that the landlord was aware of the tenant's cure prior to the proceeding.

Comment: No summary judgment if date of cure alleged by tenant is missing as it is a material issue of fact requiring a trial.

***PS 157 Lofts LLC v. Austin*, 42 Misc 3d 132[A], 2013 NY Slip Op 52241[U] [App Term 1st Dept 2013].**

Summary judgment is granted to landlord for action involving a rent stabilized apartment. The tenant continued to sign renewal leases, but resided elsewhere for a number of years. The subtenant claims succession rights. However, the court finds that the tenant did not reside with

the subtenant for a period of two years prior to the tenant's permanent vacating of the apartment. The court further finds that the subtenant failed to raise triable issues of fact as to whether the landlord had recognized them as tenants in their own right.

Comment: Usually, you can find a reason to deny a motion for summary judgment: hello issue of fact! Any issue of fact! Leave it to Peter to now stand for the proposition that if there are no issues of fact, then grant the motion and get reversed!

***Salaway v. Bosquez*, 2014 NY Slip Op 51571[U] [App Term 1st Dept 2014].**

The tenant's illusory tenancy defense contained certain triable issues of fact that the 1st Department found to be within the Civil Court's authority to determine. The issues of fact included whether the prime tenant did engage in unlawful rent profiteering after vacating the premises and whether the landlord had actual or constructive knowledge of the sublease between the parties. The 1st Department found that the Loft Board need not be involved to determine such issues of fact.

Comment: Boiler plate language about the 2 types of illusory prime tenancy defenses both of which require fact determination making summary judgment not appropriate. Spears reversed for granting summary judgment to petitioner.
Stay pending Loft Board determination denied as application by tenant was post petition.

HPD

***In re Leonardo Enriquez, v Dept. of Housing Preservation and Development of the City of New York*, 2015 NY Slip Op 04581 [App Div 1st Dept 2015].**

The tenants of an illegal cellar apartment were relocated to a hotel by HPD. According to Administrative Code of the City of New York § 260305, HPD is authorized to incur "moving expenses or other reasonable allowances" in relation to the relocation of a tenant and to recoup these costs from the landlord. HPD rules also state that it shall also pay for temporary shelter benefits of the displaced tenant. 28 RCNY 18-01[b][3]. However, the tenant in this case was relocated for an entire year and HPD incurred $16,425 in hotel expenses as a result of this relocation. HPD placed a lien on the landlord, which the landlord sought to have lifted. The court did not find the period of a year to qualify as temporary, and found the financing of a tenant's hotel costs for an entire year to be unreasonable, thus, the lien was lifted from the landlord.

Comment: Here's an interesting case. The City's Administrative Code allows HPD to relocate a tenant at the landlord's expense if relocation is a result of enforcement of housing laws. Relocation can be to a hotel. However, the expenses must be reasonable and the payment of housing the tenant must be a temporary shelter benefit. In this case the tenant was housed in a hotel for a year. A lien was placed for the amount of the housing. Owner sought discharge of the lien. The Appellate Division found this not reasonable and not temporary. Lien for the amount was lifted.

Bottom line: HPD paid $16,425 to house a tenant and can't recoup that from the owner.

COVENANTS/WARRANTIES/DOCTRINES

***Schwartz v. Hotel Carlyle Owners Corporation, et al. and New World Development Co.*, 2015 NY Slip Op 04257 [App Division, 1st Dept 2015].**

The plaintiff is the owner of a residential suite in the Carlyle Hotel and sues the hotel for trespass, conversion, breach of the covenant of quiet enjoyment, and for punitive damages following a water leak in the suite. The trespass claim was dismissed for failure to prove that the hotel's agents entered the apartment without justification or permission as the hotel's agents were permitted to enter as stipulated in the proprietary lease and entered for the purpose of repairing the leak. With respect to the conversion claim, the court found that the plaintiff had been compensated by his insurer for the value of the items claimed missing, and the plaintiff did not show any additional uncompensated loss.

The court also did not find merit in the claim for breach of the covenant of quiet enjoyment. It was necessary for plaintiff to show that an ouster occurred, or an abandonment of the premises if the eviction is constructive. The court found it significant that the plaintiff did not allege that the Hotel caused the water damage, but only that its agents harmed his personal property and that the hotel delayed the making of repairs. The plaintiff's insurer had paid for the expenses incurred by the plaintiff while the apartment was uninhabitable, and the court further found that any delay on the part of the hotel in completing repairs was not due to unreasonable conduct by the hotel. Therefore, the court dismissed the plaintiff's claim for punitive damages since the plaintiff did not provided evidence to show the hotel acted in a morally objectionable manner.

Comment: The facts: Plaintiff owns his residential suite in the Hotel Carlyle. There was a water leak & water damage. He sued the Carlyle for negligence and lost. This case was brought for breach of the covenant of quiet enjoyment, trespass, conversion [specified personal items went missing] and punitive damages.

The fun stuff:
Trespass is intentional entry without justification or permission. The proprietary lease provided access for leak damage and repairs. Thus, no trespass.

No proof of conversion and the insurance company compensated him for everything.

An action for damages for breach of the covenant of quiet enjoyment requires a showing of ouster. If the eviction is constructive, abandonment of the premises must be shown. Citing *Barash v. Pennsylvania Terminal*, constructive or actual eviction requires a wrongful act depriving the tenant of beneficial or actual possession.

This is a fun case because the residential suite isn't either the primary or secondary resident of plaintiff. It also is good for actual or constructive eviction language.

***Amoamah v. Fried*, 2015 NY Slip Op 25238 [App Term 2d Dept 2015].**

In a small claims case, the tenant sought to recover money damages for damages suffered as a result of the landlord's alleged failure to provide repairs. The tenant had filed complaints with HPD, DHCR, and the Department of Buildings. The Civil Court had dismissed the case without prejudice based on the Doctrine of Primary Jurisdiction. The doctrine is intended to allow the agency to make available its views on the factual and technical issues involved, and also to provide the courts with the scope and meaning that the agency gives to the statute involved. In

this case, the Appellate Term found that the repairs involving mold and faulty wiring were separate from the causation and damages issues before the Civil Court. Therefore, the court found no risk of inconsistent judgments between the courts and the agencies involved.

Comment: Small Claims case improperly dismissed because there were pending HPD and DHCR complaints between the parties. Doctrine of Primary Jurisdiction (who knew) coordinates between the courts and an agency. The court can seek the agency's view. In this case, however, the issues were different. Bottom line for this case: the Doctrine of Primary Jurisdiction.

***303 W. 122nd St., HDFC v. Hussein*, 2015 NY Slip Op 50131[U] [App Term 1st Dept 2015].**

The trial court dismissed a holdover petition after finding that the high rent increase in the renewal lease violated the doctrine of unconscionability. The First Department reverses and orders a new trial because the tenant had failed to raise the issue of unconscionability during the proceedings. In addition, the issue was considered sua sponte at the close of evidence, which violates RPL § 235-c[2]. According to RPL § 235-c[2], the court must allow reasonable opportunity for parties to present evidence on the issue of unconscionability if the lease is claimed or appears to the court to be possibly unconscionable. The First Department noted that the trial court should have made findings as to whether the tenant was justified in refusing to accept the renewal lease.

Comment: Here's an interesting reversal of Jack Stoller. He dismissed on a sua sponte finding of unconscionability of a lease renewal. RPL Section 235-c[2] says this can't be done sua sponte. Who knew?

***Ordway Holdings, LLC v. Pugmire,* 2015 NY Slip Op 50246[U] [App Term 1st Dept 2015].**

The court finds the increase in the amount of abatements awarded to tenants for inhabitability to be unwarranted. The evidence led the court to find that the tenants "set forth a litany or prerequisites to providing access... [that] became so burdensome and overbearing that it paralyzed [landlord's] diligent efforts to effectuate the needed repairs," and that landlord corrected the rent impairing conditions "as soon as proper access was afforded." Id.

Comment: Burdensome prerequisites to access can rebut a claim of breach of the warranty of habitability. Of course, we're also talking about the Pugmire's.

***386 Ft. Wash. Realty LLC v. Brenes,* 2015 NY Slip Op 50286[U] [App Term 1st Dept 2015].**

The tenant's counterclaim for breach of warranty of habitability was properly dismissed since the only form of notice prior to the proceeding was a letter that insufficiently gave notice of a flooding condition. Tenant based its breach of warranty of habitability claim on the flooding issue, however, it merely mentioned a bathtub situation in its letter. No complaints regarding the condition of the apartment were made aside from that which was mentioned in the letter.

Comment: A case to add to the string cite that notice is required for breach of warranty of habitability.

***72 Realty Assoc., L.P. v. Mercado*, 2014 NY Slip Op 24397 [App Term 1st Dept 2014].**

The landlord brought a nonpayment proceeding against the tenant. However, the tenant claims to have attempted to pay and was unsuccessful because the landlord refused to accept checks from the daughter who wished to succeed to the apartment. The tenant raised a warranty of habitability defense. Since the tenant did not state any rent impairing conditions in the affidavit and failed to notify the landlord of the alleged conditions, the court rejected the habitability defense. The court however, found the defense of laches not subject to summary disposition since the circumstances and reasonableness of the landlord's delay in beginning the proceeding must be explored at trial before a determination of the defense can be made.
The court also decided on ancillary issues of tenant's claim for attorney's fees and landlord's motion for a rent deposit order. The tenant's counterclaim for attorney's fees was dismissed with prejudice and the landlord's motion for a rent deposit order granted.

Comment: Peter should have been reversed in this non payment but was not. It provides tidbits for us. Complicated case as tenant not paying because tenant insists landlord accept rent from tenant's daughter (succession). Summary judgment proper on issue of habitability claim. No notice. Cited AD1st case. Rent liability established. However, LACHES requires trial. Ancillary issues: Tenant's counterclaim for attorney's fees should have been denied as landlord got a permanently stayed warrant. Also, RENT DEPOSIT SHOULD HAVE BEEN ORDERED.

OVERCHARGE

***Arker Yellowstone, L.P. v. Chetrick*, 2015 NY Slip Op 50691[U] [App Term 2d Dept 2015].**

The tenant filed a rent overcharge complaint with the DHCR, and the landlord brought a holdover proceeding based on nuisance grounds against the tenant. The tenant counterclaimed for rent overcharge, alleging that the landlord failed to remove the 15% charge for air conditioners from the legal rent-stabilized rent after the building became submetered. The tenant, wishing to resolve the overcharge issue in Civil Court, withdrew its complaint with the DHCR. The Civil Court found that the tenant was entitled to any excess money paid to the landlord after the building had become submetered and found an overcharge of $100 to exist.
The Appellate Term went into detail regarding the fees involving the air conditioning for the premises. It began by explaining that it was commonplace to charge tenants additional money when a master-metered electrical system was in place, $100 in this case, for the "hiring" of the air conditioners—this charge being added to the tenant's legal rent-stabilized rent. Upon becoming a submetered electrical exclusion building, the landlord reduced the tenant's rent by $60.20 pursuant to DHCR regulations. The landlord argued that the DHCR did not require further reductions to be made unto the rent, whereas the tenant contended that the landlord is not permitted to collect monies to offset the cost for air conditioning, even if previously authorized. A stipulation in the lease states that a $20 charge per month was included in the rent for the use of the air conditioners. The court here, refused to determine that the entirety of the $20 was allocated to excess electricity costs. The court instead stated that it did not have a method to determine how much of the $20 would be for the hire and maintenance of the air conditioners and how much of it was to compensate the landlord for excess electricity costs due to the tenant's use of the air conditioners. Instead, the court determined that it would be more appropriate for the DHCR to determine the issue given its expertise in the area. The court reversed the judgment and dismissed the overcharge counterclaim without prejudice to the tenant seeking to proceed with the DHCR action.

Comment: Ever had a head scratcher case involving issues of rent overcharge where the tenant also filed a DHCR claim? Well, this case says that the DHCR, in those circumstances is the better forum! And reversed the Housing Judge for determining the issue and for not letting DHCR do it!

We've seen an uptick in overcharge cases. This case might be your savior. I'd suggest printing it out.

***Smoke v. Windemere Owners LLC*, [2015 Slip Op 06195] [App Div 1st Dept 2015].**

The landlord was found guilty of rent overcharge for failure to produce adequate documentation for the improvements that destabilized the apartment. However, the First Division was reluctant to grant treble damages because the improvements were made prior to the landlord acquiring the building and therefore, making it difficult to show that the overcharges were willful in nature.

Comment: A new owner of the building could not provide documentation that removed the apartment from rent stabilization. The finding of overcharge was affirmed. The issue is whether or not the new owner is liable for treble damages. Note that the Appellate Division stated that the default formula in *Thornton* was the formula to be used to calculate the amount of the overcharge. The case is interesting because the apartment came out of stabilization more than 10 years ago from a different owner. There is no indication in this short decision what the *Grimm* type of fraud was found to determine the overcharge issue.

PREDICATE NOTICE

***Great Location NY, Inc. v. Seventh Ave. Fine Foods, Inc.,* 2015 NY Slip Op 50267[U] [App Term 1st Dept, 2015].**

The landlord commenced a holdover action and attempted to enforce a conditional limitation provided for in the governing lease for nonpayment of rent. The court found that the cure and termination notices used in connection with a prior holdover proceeding were sufficient predicate notice for a holdover proceeding that is brought on the same grounds, commenced on the same day that the initial proceeding was terminated, and did not cause prejudice unto the tenant.

Comment: Updating your string cite for *Arol Development*: predicate notices for an earlier holdover can be used for a new one so long as the new one is commenced while the old one is still alive.

***155 Realty, LLC v. Mottola*, 2015 NY Slip Op 51069[U] [App Term 2d Dept 2015].**

A default monetary and possessory judgment was entered against the tenant after the tenant filed a notice of appearance, but failed to appear along with her counsel on the trial date. The tenant then proceeded to file three orders to show cause to vacate the final judgment. Seven years later, the tenant moved to vacate the judgment on the grounds of having never received notice. Tenant had already made fourteen payments on the monetary judgment entered against her. The Second Department found that the tenant's claims of lack of personal jurisdiction for not receiving notice was already waived by the tenant's notice of appearance and failure to raise the issue in

the prior orders to chow cause. The court further noted that the tenant is not entitled to vacate the judgment based on excusable default since the tenant's conclusory statements of not being responsible for the money owed is insufficient to establish such a defense.

Comment: Landlord started a holdover and tenant retained counsel who filed a notice of appearance. No appearance by the tenant or attorney and an inquest money judgment issued. 7 years later and after 3 OSCs, the tenant argued lack of personal jurisdiction deprived the landlord of a money judgment. The court agreed and got reversed. The Appellate Term found waiver and also no meritorious defense to a conclusory statement that the money was not owed.

***City of NY v. VJHC Dev. Corp*, 2015 NY Slip Op 00819 [App Div 1st Dept 2015]**

The defendant was deemed properly served with an amended complaint when service was made unto his 47-year-old daughter at his place of business, in addition to the amended complaint being mailed to the place of business. The court rejected defendant's contention that his daughter did not have the authority to accept service on his behalf because it found authority to be irrelevant to service on individuals. The court further found that it was proper for the process server to also leave the document in her vicinity, upon her refusal to accept service. Defendant's contention that the process server was not properly licensed was also rejected by the court as irrelevant and not sufficient to invalidate service.

Comment: Substituted service of process on an individual does not require showing that person had "authority" or "capacity" [person served here was 47 year old daughter of attorney at attorney's place of business]. ALSO, if process server not licensed service not affected.

***H.S. Realty Assoc., Inc. v. Ilagan,* 2015 NY Slip Op 50268[U] [App Term 1st Dept 2015]**

The Appellate Term found the landlord's written rent demand to be sufficient predicate notice for the maintenance of the nonpayment summary proceeding. The tenant attempts to use its pretrial dismissal motion to challenge the sufficiency of the rent demand. The court held that the arrears should not be disputed in the context of the tenant's pretrial dismissal motion.

Comment: Sufficiency of a rent demand even though substance is disputed.

GOOD CAUSE

789 St. Marks Realty Corp. v. Waldron, 2015 NY Slip Op 50073[U] [App Term 2d Dept 2015].

The respondents-licensees were evicted after failure to comply with a stipulation that would have provided respondents with a lease with execution of the warrant stayed for payment of arrears. After eviction, respondents claim that they had not been served with a marshal's notice. Although petitioners were in violation of the Civil Court's order of serving a marshal's notice, the respondents failed to make an application for contempt. Furthermore, the respondents demonstrated no ability to pay the arrears, and therefore, restoration of the respondents would be futile. Thus, the Civil Court was not found to have improvidently exercised its discretion in denying respondents' motion for restoration.

Comment: No restoration if futile

***83-55 Austin Prop. Assoc. v. Gales*, 45 Misc 3d 132[A], 2014 NY Sip Op 51664[U] [App Term 2d Dept 2014].**

In a nonpayment proceeding, the tenant was ordered to make payments in order to stay the execution of the warrant. The tenant failed to pay, however, the tenant was able to show good cause for the delay in compliance. The tenant paid all the arrears by the adjourned return date of the proceeding and therefore, the court found that the warrants should be permanently stayed.

Comment: And here is a decision providing for a stay for good cause prior to execution of the warrant of eviction, citing Bodenheim.

***2242 Clarendon Realty, LLC v. Etienne*, 45 Misc 3d 132[A], 2014 NY Slip Op 51665[U] [App Term 2d Dept 2014].**

Tenant defaulted on a stipulation by paying the arrears late. Tenant was able to get funds from HRA to pay all of the arrears and did so within ten days after the arrears were due. Tenant also made substantial payments throughout the proceeding and shows the ability to pay the rent going forward. Therefore, the court found that the default was minimal and that the tenant should be restored to the premises since the default was cured within a short period of time.

Comment: Here is an example of what I mean when I say that there are not as many distinctions between the 1st and 2nd Departments as was true in years past.

This case is extremely significant as it says plainly what the 2nd Department has been doing obliquely. It now plainly is following the 1st Department and restoring a tenant for good cause.

***Dino Realty Corp. v. Khan*, 2014 NY Slip Op 24401 [App Term 2d Dept 2015].**

The respondent was unable to comply with a money judgment in the stipulation due to the landlord's refusal to provide W-9 forms to a charity that promised to pay the arrears owed. The 2nd Department affirmed the Civil Court's finding that the landlord had breached the implied covenant of good faith and fair dealing and had frustrated the respondent's efforts in good faith to comply with the stipulation in a timely manner. It further stated that the refusal by the landlord to provide the W-9 form constituted good cause to vacate the nonpayment warrant.

Comment: Really interesting. W-9 Form must be provided by petitioner.

NUISANCE/ HARASSMENT

***Clarke v. 6485 & 6495 Broadway Apartment Inc., et al. Defendants*, 2014 NY Slip Op 07961 [App Div 1st Dept 2014].**

The plaintiff, a cooperative apartment owner who rented out the cooperative, brought a proceeding against the owner of the cooperative upstairs for a continuous noise nuisance. Citing *Bernard v. 345 E. 73rd Owners Corp.*, 181 AD2d 543 [1st Dept 1992], the court notes that a cause of action for nuisance does not lie against any landlord who did not create the nuisance and who had given control of the premises to a tenant. The owner of the nuisance-creating apartment failed to demonstrate that there was a lease between the owner and the tenant to show that the owner surrendered control of the apartment and was not liable for the nuisance. The

conclusory affidavit submitted by the upstairs owner was not sufficient to clear the owner of liability.

Comment: Interesting case. Owner of a coop not responsible for noise nuisance of person to whom it rents the apartment. So what is the remedy of the upstairs neighbor?

***Leprovost v. Pitts*, 2015 NY Slip Op 50102[U] [NY Civ Ct 2015].**

Respondent, an officer of the HDFC, illegally rented out rooms in the apartment as de facto SROs. The petitioner, a tenant renting a room from respondent, commenced the proceeding against respondent demanding repairs and extermination of a bedbug infestation. The petitioner also alleged that respondent harassed her on multiple occasions. The court found petitioner's harassment claim to be credible since respondent refused to make any repairs, threatened to ruin petitioner's reputation, removed petitioner's front door, damaged her property, called petitioner a prostitute on several occasions, denied petitioner access to the mailbox, and had multiple men enter petitioner's room on different occasions. The court cites the Administrative Code § 27-2004[a][48] which defines harassment as including the unlawful removal of the tenant's door to the Apartment. The court further explains that the Administrative Code allows for findings of harassment against those acting as an agent on behalf of the owner. Therefore, since respondent was acting on behalf of the landlord, the respondent is subject to the Administrative Code.

Comment: Harassment found; C violation issued.

TRAVERSE

***Eva Stern 45, LLC v. Punnett*, 2015 NY Slip Op 50672[U] [App Term 2d Dept 2015].**

The petitioner commenced a summary nonpayment proceeding and was awarded a $6,288.76 after the Civil Court entered a default judgment against respondent. The respondent then moved to vacate the default, claiming that the process server served at an address that the respondent had never resided at. The court cited *European Am. Bank & Trust Co. v. Serota*, 242 Ad2d 363, 363-364 [1997], which provided that a defendant need not demonstrate reasonable excuse for the default or a meritorious defense where a defendant has asserted a lack of personal jurisdiction to vacate a default judgment. The court further stated that although the process server's affidavit of service is prima facie evidence of proper service, the respondent's sworn denial of receipt of process due to service being made at an address where the respondent claims to have never resided, the affidavit of service is deemed rebutted. The court held that a traverse hearing must also be held and that the petitioner has the burden of establishing jurisdiction over respondent by demonstrating preponderance of the evidence. Accordingly, the court reversed the previous order and remitted the matter to the Civil Court for a traverse hearing.

Comment: We know this, of course. An assertion of lack of personal jurisdiction is both excusable default and a meritorious defense. We also know that an affidavit by a process server is prima facie proof of service which can be rebutted requiring a traverse hearing where the standard of proof is a preponderance of the evidence.
Bottom Line: This has all the black letter law you need on issues of personal jurisdiction and traverse.

***LR Credit 15, LLC v. Alford*, 2015 NY Slip Op 50216[U] [App Term 2d Dept 2015].**

The landlord commenced an action to recover money owed by the commercial tenant from an automobile loan agreement. A default judgment was entered against the tenant, who moved to vacate the default judgment and to dismiss for lack of personal jurisdiction pursuant to CPLR 5015 (a) (4). Finding service to be improper, the Civil Court vacated the default judgment and accepted the tenant's new answer.

The Appellate Term found that the tenant's motion should have been denied and reinstated the default judgment. The process server's sworn affidavit of service was determined to be prima facie evidence of proper service. Tenant's failure to establish absence of receipt of the summons and the complaint in time to defend the action against him also demonstrated that the default judgment should not have been vacated. Additionally, the tenant's unsworn statements during oral argument were found to lack demonstrative value and the tenant's assertion that he did not owe any money was also found to be insufficient to establish a meritorious defense.

Comment: Traverse issues: the commercial tenant's written allegations of service were conclusory and his unsworn oral statements during argument should not have been considered in vacating the default judgment. Interestingly, the written statement that he did not owe the money was considered conclusory and not sufficient to rise to the level of meritorious defense.

SUCCESSION

***Naroznik v. Prockett*, 2015 NY Slip Op 50613[U] [App Term 2d Dept 2015].**

The respondent-tenant had been residing in a rent-stabilized premises with his life partner until the life partner's death in 2010. The petitioner-landlord then entered into a lease agreement with the respondent for an amount nearly twice as much as the rent paid by the life partner, who was the tenant of record. Subsequently, the landlord commenced a nonpayment proceeding against the tenant. The court found that the Civil Court could properly decide on the issue of succession rights in order to determine whether the lease was valid or not. The court explained that an agreement by the tenant to waive benefits of Rent Stabilization Law is void, pursuant to 9 NYCRR §2520.13 and that the Civil Court had the authority to consider equitable defenses such as rescission and reformation.

For successorship to be valid, the Rent Stabilization Code requires that there be simultaneous tenancy of two years immediately prior to the tenant's permanent removal from the premises by a family member. The court notes that what constitutes a "family member" should not be determined by any sole factor. In this case, the tenant had moved in as the tenant of record's boyfriend in 1987, and had been the sole caregiver of the tenant of record while she was dying from cancer. The court found such a relationship to constitute a familial kind, fitting the requirements of the code, and found the current tenant to have succession rights. Thus, the court affirmed the Civil Court's dismissal of the petition.

Comment: Whoa Nellie! Print this case out! It says that issues of succession can be considered in a non payment case. Life just got more complicated.

***Infinity Corp. v. Danko*, 2015 NY slip Op 50294[U] [App Term 1st Dept 2015].**

The respondent seeks succession rights to a rent-stabilized apartment that he shared with the tenant of record, now deceased. The court found the relationship to constitute an emotional and financial commitment and interdependence sufficient to entitle respondent to succession. The respondent and the tenant of record had a family-type relationship for fifteen years. The tenant was dependent on the respondent's care at the end of his life, the tenant provided financial support while the respondent cared for the home, the two shared a joint bank account, and respondent was a beneficiary of the tenant's estate. Furthermore, the court found the petitioner's claim that the respondent worked as a male escort to be irrelevant to establishing the relationship between the respondent and the tenant.

Comment: Save for Kavros.

***East Harlem Pilot Block Bldg. IV HDFC Inc. v. Diaz*, 2015 NY slip Op 50289[U] [App Term 1st Dept 2015].**

Petitioner's demand for rent arrears that accrued prior to the successor of a Section 8 project tenancy coming into tenancy is dismissed. The court cites RPAPL § 711[2] to state that a nonpayment proceeding can be maintained only to collect rent that is owed pursuant to an agreement between the parties. A nonpayment proceeding does not lie against a tenant if the arrears were not accrued when the tenant was a party to a lease. *Strand Hill Assoc. v. Gassenbauer*, 41 Misc 3d 53, 54-55 [2013].

Comment: A successor does not become liable for rent until the successor signs the lease Bright line demarcation case.

STIPULATIONS

***Gloria Homes Apts. LP v. Wilson*, 2015 NY Slip Op 50665[U] [App Term 1st Dept 2015].**

The landlord and tenant entered into a stipulation to settle a nuisance holdover proceeding. In the stipulation, the tenant agreed to refrain from producing loud noise or stomping sounds alleged by the landlord. It further provided that the landlord may restore the case for an immediate hearing on the sole issue of the violation of the stipulation if it were found to be violated. After an alleged breach, the matter was set down for a hearing to determine whether or not tenant breached the Probationary Stipulation and what remedy would be appropriate for the breach. Following the hearing, it was held that the tenant had repeatedly breached the Probationary Stipulation and awarded the landlord final judgment of possession. The Appellate Term, however found that the landlord was not entitled to a final judgment of possession because the Probationary Stipulation did not include a remedy of eviction or anything otherwise. The court held that a hearing to discern the intent of the parties is necessary and remitted the case for such proceeding.

Comment: Probationary Stipulation in a nuisance holdover provided for a hearing where "the sole issue" would be a violation of the Stipulation. The matter was set down for a hearing following landlord's allegation of breach by an order that a hearing be held as to breach and what remedy for that breach. Judge Hahn found numerous defaults and ordered eviction. Reversed an remanded for a *de novo* hearing because the Stipulation ***did not identify the type of relief*** the landlord would be entitled to if breach of the Probationary Stipulation was found.

***Altman v. 285 W. Fourth, LLC*, 2015 NY Slip Op 03485 [App Div 1st Dept 2015].**

The tenant of a rent-stabilized apartment, entered into two stipulations with the landlord. The first stipulation attempted to fix the rent at $2,488.62, an amount exceeding the legal regulated rent. In the second stipulation, the tenant agreed to refrain from claiming rent overcharge, and to also refrain from challenging the non regulated status of the premises in the future. The Supreme Court granted the landlord's cross motion for summary judgment that dismissed the tenant's complaint and declared that the tenant was not entitled to the protection of rent stabilization laws. The Appellate Division found that the Supreme Court erred in dismissing the tenant's complaint and making such a declaration since the tenant was originally entitled to a rent-regulated apartment and could not waive the protections of the rent stabilization laws without being satisfied with conditions for deregulation.

Comment: The landlord's bar is screaming over this case. Doesn't have much to do with us but I thought you'd like to know about it. The amount of the vacancy increase cannot be used in order to take the apartment into vacancy decontrol.

***567 W. 125th St. Realty, LLC v. VJRJ Rests. LLC,* 2015 NY Slip Op 50287[U] [App Term 1st Dept 2015]**

Pursuant to a so-ordered stipulation, that settled a commercial nonpayment proceeding between the petitioner-landlord and respondent-commercial tenant, the tenant was responsible for complying with specified "time of the essence" payments and would be evicted for failure to do so after a three-day cure period. Tenant failed to make payments according to the schedule and offered no valid excuses for the failure to comply with the stipulation. Tenant had entered into the stipulation upon the advice of its counsel.

The Appellate Term stated that parties in a civil dispute are free to chart their own course, which the parties did do in this instance. Therefore, the court reversed the prior order granting stay of the warrant of eviction because "good cause" was found to be absent as a matter of law.

Comment: A stipulation case saying that they are enforceable and parties are free to chart their course. The more interesting reason this is being sent is that The Appellate Term specifically said that good cause did not exist **as a matter of law**.

***Hernco, LLC v. Hernandez [d/b/a Generation Hernandez Furniture]*, 2015 NY Slip Op 50062[U] [App Term 2d Dept 2015].**

Commercial tenants entered into a stipulation with the landlord to pay $56,000 in arrears. Tenant only paid $32,000 and claims to have entered into an oral agreement for a new lease and different terms of payment on the money judgment. Tenant, however, did move out of the premises and sought to vacate the judgment against it. The court finds that the stipulation should not be set aside because the motion is based upon events occurring after the entry into the stipulation. The court notes that the tenant was represented by counsel at the time the tenant entered into the stipulation, shows no meritorious defense, and does not demonstrate that the stipulation was wrongly entered into. The tenant was aware of the nature of the month-to-month tenancy and knew of the arrears owed. Furthermore, tenant's contention that there are jurisdictional defects in the pleadings is rejected because such defenses do not implicate a

court's subject matter jurisdiction. The court finds that tenant's claims have been waived by entering into the stipulation.

Comment: Every thought you ever had about Stipulations is in this decision. Add it to any string cite. Really!

***Bank of Am. N.A. v. Chau T. Lam*, 2015 NY Slip Op 00282 [App Div 1st Dept 2015].**

The parties entered into a stipulation that set the date for closing the sale of a property. The parties dispute whether the stipulation should be construed as being expired on the date of the closing date or whether it should be construed as closing and expiring within a reasonable time of the set date. The court finds that the intent of the parties is to be discerned from any unambiguous writing that was signed by the parties, namely the stipulation in this case. Where a stipulation is unambiguous, the court finds that extrinsic evidence shall not be considered. Therefore, the stipulation was declared expired and unenforceable. The court also rejected the seller's contention that it could rely on the doctrine of laches. It found the doctrine inapplicable here because there was only a delay caused by the defendant, rather than any demonstrable prejudice done unto the plaintiffs.

Comment: Stipulations: Not lightly cast aside. Error to deviate from unambiguous terms and look at "intent of the parties". Laches is an equitable bar. In short, a good string citation for stipulations and laches. Hello Hallock!

***New York Hanover Corp. v. Ibodli*, 2014 NY Slip Op 24410 [App Term 1st Dept 2014].**

The parties entered into a stipulation where the tenant would waive any right to the premises as rent stabilized after five years. The court cites *Drucker v. Mauro*, 30 Add 37, 39 [2006] to deem the stipulation unenforceable because it waives the benefit of a statutory protection in violation of public policy. Allowing such a waiver of the rent stabilized status would deregulate the apartment on that stipulated date, which would be contrary to the intent behind the rent stabilization scheme.

***329 Union Bldg. Corp. v. LoGuidice*, 2015 NY Slip Op 25022 [App Term 2d Dept 2015].**

A summary holdover proceeding was commenced by the landlord to regain possession from an ex-superintendent of the building and his siblings who also lived in the premises. The parties entered into a stipulation that provided that the landlord would offer a lease with a rent higher than what the tenants had been paying. The stipulation also provided that if the tenants defaulted on the stipulation, a nonpayment proceeding could be brought against them. The parties entered into another stipulation that agreed to the provisions set forth in the previous stipulation and provided that the tenants would sign the offered lease. A lease was offered to tenants, however tenants did not sign the lease. A subsequent nonpayment proceeding was brought against tenants alleging that rent according to the offered lease was owed. The court finds that there is no basis for a nonpayment proceeding because the parties did not enter into an agreement for the amount on the offered lease and therefore, no landlord-tenant relationship was established. Other factors such as the tenants' lack of understanding due to the illness of their attorney at the time they signed the stipulation and the failure to explore the tenants' rent-stabilized status were also considered by the court and reasons the court used to vacate the stipulations.

Comment: Long story short: Nonpayment case can only be maintained against a tenant. Gets dismissed if landlord sues occupants who never had a landlord/tenant relationship (read: lease).

CREDIBILITY

***Sendowski v. Pilzer*, 2015 NY Sliip Op 50627[U] [App Term 1st Dept 2015].**

The Appellate Term affirms the decision of the Civil Court granting possession to the landlord in a holdover summary proceeding. The trial, consisting of twelve court dates, led to the finding that the landlord genuinely intended to reacquire the premises to allow his daughter to use the premises are her primary residence. The Appellate Term found the lower court's determination on the issue of good faith on the part of the landlord to be a fair interpretation as the Civil Court considered facts such as the premises' close proximity to the family's business where the daughter was employed and the proximity to the residences of the landlord's other children. The court held that the Civil Court was in a better position to make such findings of fact on the issue of the landlord's good faith since it observed the testimony first hand, especially when the issue is largely grounded upon considerations relating to the credibility of the witnesses.

Comment: Good language for credibility determinations at trial.

***Sajo Realty Corp. v. Antoine*, 2015 NY Slip Op 51076[U] [App Term 2d Dept 2015].**

In a summary nonpayment case, the Appellate Term affirms the trial court's possessory and money judgment for the landlord. The court emphasizes that substantial deference is to be given to the trial court's determination of the credibility of the witnesses. The trial court's opportunity to observe the testimony allows it to form a more superior perspective as to the credibility of the testimony.

Comment: A credibility case to add to the string cite.

SECTION 8

Riverview II Preserv., L.P. v. Brice-Frazier, 2015 NY Slip Op 50484[U] [App Term 2d Dept, 2015].

Tenant is a recipient of Section 8 Subsidies and resides in a federally subsidized preservation project. Landlord brought this nonpayment proceeding to collect electricity charges that the petition claims as constituting "additional rent". The landlord alleges that the lease between the parties provided for the payment of electric utility charges. However, the court found such an agreement to be unenforceable, and held that the Civil Court did not have the jurisdiction to dismiss the petition because the total of the tenant's rent and purported electricity charges would exceed 30% of the tenant's income.

Comment: Electrical charges billed as "additional rent" cannot be collected from a Section 8 tenant as the tenant's rent cannot exceed 30% of the tenant's monthly adjusted income. Non payment gets dismissed.

***Matter of Flosar Realty LLC v. New York City Hous. Auth.*, 2015 NY Slip Op 01906 [App Div 1st Dept 2015].**

19 owners of residential apartment buildings petitioned for an article 78 mandamus to compel NYCHA to process renewal leases that requested Section 8 rent subsidy increases, to process requests seeking reinstatement of Section 8 subsidies that had been suspended because of housing quality violations. The petitioner-owners assert that they are entitled to Section 8 subsidy increases commensurate to RGB increases. They further assert that NYCHA must reinstate suspended subsidies for Housing Quality Violations that were subsequently remedied. The 1st Department affirmed the Supreme Court's granting of NYCHA's cross motion to dismiss the causes of action to the extent that the order be modified to demand NYCHA to actually make a determination on the petitioner's requests. Article 78 mandamuses may compel an agency to perform duties that are enjoined upon it by law and do not compel activities that involve the exercise of discretion. The determination of Section 8 subsidy increases and whether Housing Quality Violations have been sufficiently cured to allow for reinstatement of subsidies is within the discretion of NYCHA and therefore, cannot be acts that an article 78 mandamus can compel. However, the court found that according to 24 CFR 982.507[a][2][i] that NYCHA must make such determinations. The court found that NYCHA cannot leave the petitioners in limbo after such requests have been submitted to NYCHA. Furthermore, the court made a finding that NYCHA's argument that petitioner's claims are time barred is not valid. Petitioners were required to commence the article 78 mandamus proceeding within 4 months after the agency's refusal to perform its duty. Here, the agency never answered and therefore, never made a refusal of any kind that would trigger the limitations period to begin running.

Comment: The Appellate Division agrees that mandamus can be used to compel NYCHA to act with regard to requests to reinstate suspended subsidies. Usually, it does nothing. The other major thing NYCHA has to do is to determine whether the rents in renewals of rent stabilized leases whose tenants also have NYCHA vouchers are REASONABLE. The Appellate Division did NOT equate RGB increases to be the same as REASONABLE increases in renewal leases. This is going to mean a lot of tenants with NYCHA vouchers might not sign renewal leases arguing that the rents are not reasonable.

ARTICLE 81

Matter of Drayton v. Jewish Assn. for Servs. For the Aged 2015 NY Slip Op 03233 [App Div 1st Dept, 2015]

The tenant, an IP who had been appointed an Article 81 guardian— the Jewish Association for Services for the Aged (JASA), was brought to Housing Court by the landlord based on alleged hoarding activity. JASA requested that the proceeding be stayed to allow it to apply for additional authority in Supreme Court to be able to relocate the IP. The Housing Court denied JASA's request and JASA thereafter requested the article 81 court for expanded guardianship powers. The article 81 court had stated that the guardian had already possessed the power to choose the IP's place of abode. Subsequently, the guardian and the landlord entered into a stipulation that provided for the relocation of the IP; the IP was not made aware of the stipulation prior to it being signed.

The court found that the stipulation between the guardian and the landlord to be void in part because the guardian did not have the authority to enter into such an agreement to relocate on

behalf of the IP. Pursuant to Mental Hygiene Law article 81, the guardian only has the authority to choose the place of the IP's abode only when necessary. If the IP refuses to relocate and if it is reasonable under the circumstances to maintain the IP in his home, the guardian has no power to relocate the IP to more restrictive housing. The court cited *Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H. v. City of New York]*, 89 NY2d 889,891 [1996], to assert that the decision to relocate an IP to a more restrictive setting affects "constitutionally protected liberty interests".

Mental Hygiene Law § 81.36(c) also provides that the IP must be provided with a hearing or the factual basis for dispensing with a hearing must be shown before a guardian can remove the IP from his home. The Supreme Court's declining to sign an order to show cause is not sufficient to set forth any factual basis for dispensing with a hearing. Therefore, the stipulation between JASA and the landlord was entered into without complying with Mental Hygiene Law.

The stipulation was found to be void also because of the existence of mutual, substantial mistake that existed at the time the parties entered into the stipulation. *Thor Props., LLC v. Chetrit Group LLC*, 91 AD3d 476, 478 [1st Dept 2012]. Both the landlord and the guardian were mistaken to what extent the guardian had authority to terminate the IP's tenancy and relocate the IP.

Comment: An Article 81 Guardian does not have an unfettered right to stipulate and surrender an apartment. Mental Hygiene Law Section 81.36(c) requires a hearing on notice before the Article 81 Court if the tenant is to be moved against the tenant's wishes because relocation from a home or community to a nursing home or other facility affects "constitutionally protected liberty issues."

The Article 81 Guardian and the landlord's attorney didn't know there was such a restriction. Neither did the Housing Judge [that would be me].

Division set aside the stipulation because of the mutual mistakes made by all. So this case can also be cited for mutual mistake sufficient to set aside a stipulation.

ANSWER

***HSBC USA v. Lugo*, 2015 NY Slip Op 03070 [App Div 1st Dept 2015].**

The plaintiff-lender commenced a mortgage foreclosure action against the defendant-borrower. The 1st Division found that the Civil Court should have granted the defendant's motion to compel the acceptance of the untimely answer. The answer was not found to be willful, the cause of any change in position on the part of the plaintiff, or the cause of any prejudice against the plaintiff. It was also demonstrated that the plaintiff had placed the foreclosure file on hold for a period of time, followed by a hold placed on the case by FEMA. Thus, the 1st Division found that the delays justify the acceptance of the defendant's late answer. Defendant's potentially meritorious affirmative defense is also persuasive to the court as the court states that issues are better resolved on the merits than by default.

J. Tom (Dissenting in Part): The defendants failed to show any excuse for the delay in answering the complaint and therefore, the late answer should not be accepted. The defendant has benefitted from the delay by retaining possession of the property for the period of the delay,

and the plaintiff has been prejudiced by interest on the debt accruing and the carrying costs involved. Negotiations that the defendant alleges to have caused the delay are not valid cause to extend the time allowed to serve an answer. The defendant's failure to assert an affirmative defense is also unexcused when it was never included in the answer that had been rejected.

Comment: Foreclosure action on HSBC's backburner for long time. The majority said that by serving a late answer the defendant waived her right to seek dismissal on abandonment grounds as the courts favor a merits determination. There is discussion about settlement negotiations affecting the period the case was on the backburner.

Pretty standard stuff until you read Peter Tom's dissent. If reaching a merits determination is the ultimate goal, why bother having default provisions is essentially what he says. Actually, I like his language: "the exception swallowing the rule."

***AJAL, L.P. v. Macak*, 42 Misc 3d 132[A], 2013 NY Slip Op 52239[U] [App Term 1st Dept 2013].**

The landlord brought a holdover action against the tenant. The tenant was unable to produce his expired U.S. passport upon being ordered to do so by the Civil Court, which led to the striking of the answer. The 1st Department finds that the spoliation sanction was warranted, however, the striking of respondent's answer to be unwarranted and extreme. The failure to produce the passport did not prejudice the landlord or provide it without means to prove its claim and counter the tenant's defense.

Comment: Spoliation sanctions in Housing Court! But don't strike the answer; take an adverse inference!

MISCELLANEOUS

***Jones v. MHANY 2012 HDFC*, 2015 NY Slip Op 50485[U] [App Term 2d Dept 2015].**

Petitioner is the tenant of a residence that was selected for the 2001 Neighborhood Redevelopment Program. The program required that the tenants be temporarily relocated from the premises and be returned to their apartments upon the completion of the project. Tenant was the only resident that failed to relocate by 2005. In 2013, the tenant commenced this case against the then owner of the premises to compel the correction of violations pursuant to a vacate order. Shorter after tenant commenced this case, the building transferred ownership. The new owners moved for an order, which the Civil Court granted, to allow the new owners to remove the tenant's belongings, required the tenant to be present during the move, and asked for immunity in the event of the tenant's absence from the relocation. The order also specified that tenant's belongings would be relocated on the new owner's expense, imposed conditions on the transfer and storage of the items, and called for restoration of the belongings once the rehabilitation project was completed. The court found that the Civil Court did not abuse its discretion by granting the order.

Comment: Section 110 of the Civil Court Act provides sufficient authority for a Housing Judge to allow a landlord to remove a tenant's belongings to a Relocation Apartment and gives immunity to the landlord for removal even if the tenant is not present.

***DiStasio v. Macaluso*, 2015 NY Slip Op 50694[U] [App Term 2d Dept 2015].**

Respondent is the married to petitioner's nephew. Respondent is currently the petitioner of a divorce action against the petitioner's nephew and resides at the premises with her two children from the marriage. In 2013, the Supreme Court awarded her sole use and occupancy of the premises. Petitioner claims that she is the owner of the premises. Respondent claims that her husband is the owner of the premises and that the premises is held in petitioner's name for convenience only. The respondent moves to dismiss the petition for failure to state a cause of action. The District Court, on its own motion, stayed the proceeding pending the resolution of the matrimonial action. The Appellate Term however, found that the District Courts stay was an abuse of discretion since the issue of title could have been fully litigated in the summary proceeding and that the issue could not have been fully litigated in the matrimonial action since the petitioner here is not a party to that case. The court reversed the prior order, vacated the stay, and remitted the matter of determining the respondent's motion to dismiss the petition to the District Court.

Comment: Respondent is the wife of petitioner's nephew and asserted that her husband was the true owner of the building. The District Court, on its own motion, stayed the licensee proceeding pending Divorce Court proceedings. District Court reversed as there are no grounds to stay the summary proceeding since issues of title can be fully litigated for the purposes of determining the right to possession.

Bonus: In *dicta*, the Appellate Term advises that the respondent is not a licensee but a tenant at will.

Bottom Line: The licensee proceeding is going to get dismissed without the court having to reach issues of title.

***Federal Natl. Mtge. Assn. v. Simmons*, 2015 NY Slip Op 25138 [App Term 1st Dept 2015].**

The respondent initially had possession of the cooperative apartment pursuant to a proprietary lease. The respondent later defaulted on a loan secured by the shares of the cooperative and also defaulted on the proprietary lease, leading to the sale of the shares and the lease at a UCC article 9 nonjudicial sale. Petitioner, the purchaser of the shares and the lease at the sale, brought this holdover proceeding against respondent to recover possession. Petitioner had served a ten-day notice to quit that alleged that respondent's license to occupy the apartment had expired.

The court found that a licensee holdover proceeding pursuant to RPAPL 713(7) did not properly lie against respondent since respondent had entered into the apartment as a tenant pursuant to a proprietary lease. The court cites *Federal Home Loan Mortge. Assn v. Perez*, 40 Misc3d 1,3 [2013] when it states that respondent is still in possession as a holdover tenant and not a licensee when a lease has been terminated.

The court further found that petitioner's reliance on RPAPL § 713[1] was misplaced. RPAPL § 713[1] permits a purchaser to remove an occupant by summary proceeding where property has been sold against him and the title of sale has been perfected. The notice to quit was found to be inadequate for failing to give proper notice of such a claim. More importantly, RPAPL § 713[1] is not applicable to this case because the property that was sold was "personal property" and not the sale of real property. In addition, the court mentioned that petitioner also misplaces reliance

upon UCC article 9 as grounds to maintain this proceeding because such grounds were a creation of statute and therefore, only applies to cases authorized by statute.

Comment: Really interesting case. No licensee proceeding or Housing Court procedding against a former coop owner who lost the Apartment at a UCC 9 Sale [non judicial sale] because the Apartment is considered personal property, the former coop owner did not enter into the Apartment by licensee but by a proprietary lease and shares, and the coop did not change the name of the shareholder on the proprietary lease.

***Ernest & Maryanna Jeremias Family Partnership, L.P v. Sadykov*, 2015 NY Slip Op 25100 [App Term 2d Dept 2015]**

The landlord is a limited partnership that brought an action against the tenant for nonpayment of rent. The Civil Court dismissed the petition upon finding that the tenant was entitled to a complete setoff and landlord appeals the final judgment on the grounds that the entire proceeding was a nullity, and requests to dismiss the petition. The landlord's reasoning rests on § 236 of the Civil Practice Act and CPLR 321 (a) which state that a corporation or voluntary association shall appear by attorney and not pro se. The court cited *People v. Highgate LTC Mgt., LLC*, 69 AD3d 185, 187 [2009] in explaining that limited liability companies have also been required to be represented by counsel when before the court because of its nature as a legal entity distinct from the members of the association. The rule applied to limited liability companies also applies to limited liability partnerships as the "lower courts have uniformly held that 28 USC § 1654. . . does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney" *Sadykov* 2015 NY Slip Op 25100 (citing *Reiseck v. Universal Commc'ns of Miami Inc*., 2014 WL 1100140 [SD NY 2014]).

The court further elaborated by explaining that partnerships are considered subsets of voluntary associations which are covered under CPLR 321 (a) and Civil Practice Act § 236, and cites cases of sister jurisdictions which require that partnerships and limited partnerships be represented by counsel. Therefore, as a matter of policy and uniformity of practice, the court required that limited partnerships and partnerships be represented by counsel.

The court denied the landlord's request to reverse the final judgment and to dismiss the petition because the landlord seeks to have its action dismissed after trial when the landlord itself had improperly commenced the action without counsel. The appearance by the landlord without counsel is determined to be a nullity and the adverse determination against the landlord deemed entered through default. Such a default cannot be vacated based upon violation of CPLR § 321 [a] because this law was not intended to penalize the opposing party for one party's improper appearance. Therefore, the landlord here was estopped from seeking dismissal of the action.

Comment: Partnerships and Limited Partnerships must appear by counsel and a failure to appear by counsel requires dismissal. Unless, as here, you are the loser LP in a non payment case and now argue that the case should have been dismissed rather than an abatement awarded. Then you are estopped. Of course, it would be Jeremias who would make this argument.

***Meyers v. Four Thirty Realty*, 2015 NY Slip Op 03069 [App Div 1st Dept, 2015]**

The landlord registered rent increases with the DHCR and registered the apartment as permanently exempt from rent stabilization. The tenant claims that the landlord had done so

while still receiving J-51 tax benefits and that the destabilization occurred fraudulently. The 1st Department found that a proper base date rent, whether overcharge claims were barred by the statute of limitations, and whether such overcharge was willful could not be determined without first deciding the issue of fraud.

Comment: A Grimm case. The proper base date could not be determined because of how the rent increased and whether or not there was fraud. File it with the other Grimm-type cases. Otherwise uninteresting.

***Goncalves v. Soho Vil. Realty, Inc.*, 2015 NY Slip Op 25080 [App Term 1st Dept, 2015]**

Petitioner, the occupant and son of the deceased rent controlled tenant, commenced an illegal lockout proceeding against respondent-landlord. There were allegations by the petitioner of forcible entry and detainer. The court held that the landlord's post-answer motion to dismiss the lockout proceeding should be denied as untimely. In addition, due to lack of notice to the parties, the court will not dismiss the petition and grant summary judgment. Summary resolution is not warranted for this proceeding because there exist some material triable issues of fact.

In terms of maintaining the proceeding, the number of consecutive days in possession is relevant to the extent of determining whether a landlord-tenant relationship exists, however, it is unrelated to determining whether such a forcible entry proceeding should be maintained.

Comment: In a nutshell:

1. The pre-answer motion to dismiss should have been denied as untimely;
2. The dismissal motion cannot be converted to a summary judgment without notice;
3. Issues of fact preclude summary judgment;
4. The number of consecutive days in the apartment is not solely the rule for lockouts. Here, petitioner was the son of the deceased rent controlled tenant. There is a suggestion of a succession issue and whether petitioner was in actual or constructive possession.
5. Make a record

***789 St. Marks Realty Corp. v. Waldron*, 2015 NY Slip Op 50073[U] [App Term 2d Dept 2015]**

The respondents-licensees were evicted after failure to comply with a stipulation that would have provided respondents with a lease with execution of the warrant stayed for payment of arrears. After eviction, respondents claim that they had not been served with a marshal's notice. Although petitioners were in violation of the Civil Court's order of serving a marshal's notice, the respondents failed to make an application for contempt. Furthermore, the respondents demonstrated no ability to pay the arrears, and therefore, restoration of the respondents would be futile. Thus, the Civil Court was not found to have improvidently exercised its discretion in denying respondents' motion for restoration.

Comment: No restoration if futile.

***Mansfield Owners, Inc. v. Robinson*, 45 Misc 3d 133 [A], 2014 NY Slip Op 51667[U] [App Term 2d Dept 2015].**

Tenant was brought to court for an illegal-sublet holdover proceeding in which the landlord was awarded possession with the warrant stayed for tenant to cure the illegal-sublet. The tenant obtained counsel and served a 30-day notice on the subtenant. The tenant also commenced a holdover proceeding against the subtenant after the subtenant failed to vacate by the date noted on the 30-day notice. The court found that the tenant's actions had cured the breach in a timely manner and that the delay in the actual eviction of the subtenant is deemed de minimis.

Comment:
[1] And look! Here is even good cause form the 2nd Department to extend the 10 day cure period after a sublet holdover proceeding.
[2] Tenant did not cure illegal sublet on time because her subtenant did not timely vacate. However, tenant had timely filed holdover against subtenant. Term agreed that tenant timely cured but modified because the judgment should not have been vacated. Rather, the warrant should have been permanently stayed.

***Rosenberg v. Regan*, 42 Misc 3d 133[A], 2013 NY Slip Op 52242[U] [App Term 1st Dept 2013].**

Citing *Matter of Michael O.F.*, 101 AD3d 1121, 1122 [2012], "A person is aggrieved within the meaning of CPLR § 5511 when he or she asks for relief but that relief is denied in whole or in part,' or, when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part'." The plaintiff moved to add her estranged husband as a party defendant. The court found that the defendant is not aggrieved by the addition of the estranged husband as a defendant because the underlying motion did not seek relief against the defendant.

Comment: If you ever need a cite for the proposition that a person is "aggrieved", look no further than here.

***944 Kent, LLC v. Padilla*, 2015 NY Slip Op 51058[U] [App Term 2d Dept 2015].**

The 2nd Department affirmed the Civil Court's order to vacate a final judgment following default of a stipulation. The circumstances, which include the 30-year length of tenancy, availability of funds to pay all of the arrears, and the fact that the tenant began receiving social security benefits enabling her to make timely rent payments in the future, were persuasive as to vacating the default final judgment.

Comment: Wow. Big case! Cure allowed in the 2nd Department in chronic non payment holdover default that was promptly cured, money available to pay future rent, and a 30 year tenancy.

***Kalikow Family Partnership, LP v. Seidemann*, 2015 NY Slip Op 51080[U] [App Term 2d Dept 2015].**

The tenant is a professor who teaches at Brooklyn College two to three times per week and spends the rest of his time with his family who reside in Connecticut. The court affirmed the Civil Court's finding that a substantial physical nexus to the apartment was not established. The tenant performed 60% of his work duties in Connecticut and spent between 120 to 160 days per

year in Brooklyn. He did testify however, that his healthcare providers were located in Brooklyn and that he did most of his banking in Brooklyn.

In addition, the tenant alleges that the Civil Court demonstrated bias towards him which allegedly deprived him of a fair trial. The Appellate Term found that the Civil Court's conduct was not so egregious as to truly deprive the tenant of a fair trial.

Comment: A non primary residence case that sets forth the burdens that each party has to establish. This case is mainly sent to you because it also talks about the tenant complaining about bias. The appellate Term set forth the view that the tenant was given a fair trial and the judge's actions were to expedite the trial.

***Matter of 381 Search Warrants Directed to Facebook, Inc.*, 2015 NY Slip op 06201 [App Div 1st Dept 2015].**

Hundreds of digital search warrants were issued for Facebook accounts in connection to an investigation by the DA into fraudulent Social Security disability claims. Facebook appealed the Supreme Court's denial of its motion to quash the warrants by claiming that the warrants violate the Fourth Amendment and are protected by the Federal Stored Communications Act (SCA). The 1st Department held that the search warrants were properly issued because there is no constitutional or statutory right to challenge the warrants prior to their execution. It found that Facebook's constitutional argument to be invalid because of measures already in place that protect the rights of its customers. Ex ante protection exists in the form of the Fourth Amendment's Warrants Clause that establishes the constitutional requirements for the issuance of a search warrant such as probable cause and sworn statements. Ex post protection is available in the form of the motion to suppress. The court found these protections to be sufficient to ensure that the government does not overstep the boundaries of its authority when issuing or executing a search warrant.

Facebook's argument that it is protected under the SCA was also denied by the court's finding that the search warrants were neither analogous to court orders or subpoenas. The SCA authorizes the use of search warrants to obtain electronic information, however, it is based upon a showing of "probable cause" and not "reasonable grounds to believe" as is applied to orders and subpoenas. The court, in balancing privacy concerns with the need to conduct a thorough criminal investigation, holds that sufficient measures are in place to protect Facebook's customers and that probable cause had been shown. Therefore, Facebook was ordered to collect and seize such data pertaining to the issued warrants and to provide them to the Manhattan District Attorney's Office.

Gloria Homes Apts. LP v. Wilson 2015 NY Slip Op 50665(U) (App Term 1st Dept 2015)

The landlord served tenants a notice to terminate the lease for chronic rent delinquency. Complying with 9 NYCRR § 2523.5[a], the landlord also offered tenants a renewal lease to maintain the status quo of the apartment as rent stabilized. Although tenants argued that the offering of the renewal lease warrants dismissal of this holdover proceeding, the 1st Department held that the offering of the renewal lease did not void the landlord's previous service of notice to terminate the tenancy.

Comment: Landlord's tender of renewal lease while terminating a tenancy for chronic nonpayment did not warrant dismissal of proceeding as landlord required to serve renewal lease.