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of the New York State Bar Association

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Message from the Chair

Ira S. Goldenberg

The COVID-19 pandemic continues to impact us like nothing else in our lifetimes. As I write this in September 2020, we are devastated by the more than 200,000 lives lost throughout the nation and the millions infected. New York State's economy has been brought to its knees by the thousands of unemployed, as well as closed or barely surviving businesses. Daily life has been turned upside down by social distancing, closed schools, and changes to daily routines. On the positive side, however, has been the recent dramatic decrease in the number of COVID-19 cases in New York State.

The effect on real property law has also been enormous but varied. The number of residential real estate transactions outside of New York City has risen dramatically with concomitant price increases, apparently due to the so-called "Zoom-Town Boom" of those escaping urban life, their exodus eased by record low mortgage rates. Unfortunately, that trend may also contribute to the longstanding disparity between Black and white homeownership as banks tighten credit and people of color, who have been disproportionally financially impacted by COVID-19 as a result of increased unemployment, loss of assets, and a surge in health care costs. In yet another incongruity created by the pandemic, residential sales in New York City have dropped precipitously.

Commercial sales, both within and outside of New York City, have also lagged, while office leasing has dropped dramatically. Moreover, commercial landlords are facing numerous tenant defaults and even abandonments.

Many residential tenants are unable to pay rent. In response, the federal government issued a moratorium on residential evictions to prevent displaced tenants from spreading the virus. However, the impact of the moratorium is that some residential tenants have stopped paying rent, which means that their landlords, particularly individual or family-owned operations, are not receiving revenue used to pay their own expenses, placing their ownership and livelihoods in jeopardy.

Another problem is that due to loss of rent some commercial and investment property owners are unable to pay their mortgages (as well as being unable to pay other obligations, such as real property taxes or insurance premiums). Compounding the problem is that real property litigation, such as summary proceedings and foreclosures, have resumed but only haltingly, hindered by a backlog of cases and the court system's cautious approach to re-opening, designed to discourage the spread of the virus.

Real property lawyers continue to be dramatically affected. Many law offices have not reopened but instead have arranged for their staff to work remotely. Those firms that have reopened often permit employees to enter the offices only part time, on staggered schedules that minimize personal interactions. Many of those reopened offices have been refitted to encourage social distancing and prevent airborne transmission of the virus.

Closings too have been impacted. The number of remote, escrow closings has increased, which is perhaps an indication of a long-term change from the face-to-face closings that have been typical in New York. Even those closings that are in person have adopted new procedures such as placing parties in separate conference rooms, mandatory wearing of masks and social distancing.

The Real Property Law Section has also been impacted by COVID-19. All meetings of our Executive Committee, officers and other committees are no longer held in person but remotely by video or phone. The Annual Meeting of the Bar Association, scheduled for January 2021, will be conducted remotely by video conference. Continuing Legal Education programs, such as the Real Property Law Section program scheduled for the January meeting, will not be in person but will also be held by remote video. It is anticipated that all remote meetings of the Bar Association, including those of the Real Property Law Section and its committees, will continue at least through the first half of 2021.

As might be expected, much of the efforts of the officers and committee chairs of the Real Property Law Section have been devoted to addressing the COVID-19 concerns of our members and real property lawyers, generally.

For example, an urgent issue that confronted real property lawyers starting this past spring and continuing through the present is how the courts should process the flood of residential evictions that built up while the courts were shuttered by the pandemic. To address the

problem, and at the request of Chief Judge Janet DiFiore, the New York State Bar Association convened the COVID-19 Recovery Task Force for which a Working Group was appointed to propose solutions to the anticipated deluge of summary eviction cases.

Among the Working Group's many recommendations for handling residential summary proceedings were delays and remedies to permit tenants to protect themselves from the impact that COVID-19 may have had on their ability to pay rent. While the recommendations were certainly laudatory, the concern of the Section was that the recommendations be balanced to address the concerns of landlords and further, to take into account the practical suggestions of landlord/tenant attorneys.

To assure that its views were accounted for by the Working Group, the Real Property Law Section used a two-pronged approach. First, the Section placed Carlos Perez Lopez, a member of its Executive Committee and the District Representative for the Bronx, on the Working Group to serve as the Section's voice, eyes and ears. Second, the Real Property Law Section submitted thoughtful comments prepared by Paul N. Gruber and Peter Kolodny, co-chairs of the Landlord and Tenant Committee, and Erica F. Buckley and Ingrid C. Manevitz, co-chairs of the Condominiums and Cooperative Committee. (My letter to the Working Group conveying the views of the four co-chairs together with their reports are reprinted elsewhere in this issue.)

The courts have heeded some of the Section's concerns to the extent that adjournments and discovery opportunities have not been broadly granted, but instead each case is given individual consideration.

Another example of the impact of the pandemic on the Real Property Law Section was the cancellation of our July 2020 destination meeting and CLE program that was scheduled for Montreal, Quebec. We thank our program chair, Michelle Wildegrube, First Vice-Chair of the Section, for devoting so much effort and time to planning what would have been a wonderful event.

Fortunately, in place of the Montreal meeting, Michelle organized the "Not the Montreal Summer Meeting, Meeting," a four-CLE-credit Zoom program over two days, followed by a remote entertainment session, all designed to continue with our tradition of fun and educational annual summer meetings.

We hope that our next summer destination CLE meeting, scheduled for July 22 through 24, 2021, in Philadelphia, PA, will occur as planned by our Second Vice-Chair, Spencer Compton. However, in the event that is cancelled due to COVID-19, we anticipate hosting another alternative, remote video event.

Another impact of the pandemic is that the Section's Legislation Committee has been reorganized to better and more rapidly respond to COVID-19-related issues; the co-chairs of the committee are Leon Sawyko, Debra Bechtel and David Mineo. They are joined by Brooklyn Law Student Connor Brancato, who will assist in monitoring bills as they move through the New York State legislature.

The Condominiums and Cooperatives Committee has new co-chairs, Ingrid C. Manevitz and Erica F. Buckley, who at the Section Executive Committee this past July presented suggestions as to how cooperative and condominium boards may address COVID-19 issues. They are also preparing remote, video committee meetings this fall as well as a CLE program during the Annual Meeting of the Bar in January.

Of great concern to the members of the Section is the impending impact of COVID-19 vaccinations on real property owners and tenants as well as on law firms. Matthew Leeds, former chair of the Section, is leading a Section Task Force to coordinate and express the views of members on the subject.

Finally, our own *Real Property Law Journal* is actively soliciting articles relating to COVID-19. I encourage all to submit materials. The *Journal* is the Section's record of how the pandemic impacted real property law and lawyers, so it is crucial that we commit our views and experiences to permanent form for the knowledge and understanding of future members of the Real Property Law Section.

Please be safe and well,

Ira S. Goldenberg

As HSTPA Enhances Anti-Retaliation Protections for Tenants, Don't Forget About New York's Anti-SLAPP Law

Julio Sharp-Wasserman

New York's Housing Stability and Tenant Protection Act (HSTPA), passed in June 2019, expanded protections in the Real Property Law (RPL) for tenants hauled into summary proceedings by their landlords in retaliation for reporting or protesting housing code violations.[1] This form of strike suit has long plagued the courts. Accordingly, tenants in New York State have long availed themselves of the "retaliatory eviction" defense, both under the RPL,[2] and, prior to the enactment of the statutory protection in 1979, as a common law and First Amendment defense.[3] Under RPL § 223-b, if a tenant proves that her landlord initiated a frivolous summary proceeding in retaliation for the tenant's complaints to a governmental authority or the landlord herself about violations of laws regulating residential dwellings, or in retaliation for the tenant's participation in a tenant organization, the tenant can obtain damages, attorney's fees, and other remedies.

Julio Sharp-Wasserman

Less commonly invoked in the landlord-tenant context are the anti-retaliation provisions of New York's "anti-SLAPP" law.[4] The anti-SLAPP law provides procedural protections and monetary relief to defendants subjected to "Strategic Lawsuits Against Public Participation," a type of frivolous lawsuit filed to retaliate against a defendant for exercising her constitutional right to speech and petition. One of the law's applications is to landlords' tort lawsuits designed to stifle tenant advocates' efforts to report housing code violations to government agencies.

A New York City tenant defendant could argue for an analogous application of the anti-SLAPP law to a retaliatory holdover or nonpayment proceeding in the housing part of the New York City Civil Court. Although unusual, a tenant's invocation of the anti-SLAPP statute in Housing Court appears to be allowed under the governing procedural rules. An anti-SLAPP defense would afford certain substantive and procedural advantages over an RPL retaliatory eviction defense and would afford belt-and-suspenders benefits when applied in conjunction with an RPL defense.

Moreover, amendments to New York's anti-SLAPP law that await the Governor's signature at the time of this article's publication[5] would significantly broaden the law's protections in a manner that would accordingly make anti-SLAPP an even more potent defense in the landlord-tenant context. This article discusses the potential applications of both New York's current anti-SLAPP statute and the proposed, broader anti-SLAPP law in the context of summary proceedings in Housing Court.

Anti-Retaliation Protections in the Real Property Law

The RPL provides a private right of action for damages, attorney's fees, costs, and other appropriate relief for tenants who are hauled into summary proceedings by their landlords in retaliation for certain protected conduct.[6] RPL § 223-b(1) provides that:

> No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for (a) A good faith complaint, by or in behalf of the tenant, to the landlord, the landlord's agent or a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance, the warranty of habitability…the duty to repair…or any law or regulation which has as its objective the regulation of premises used for dwelling purposes…; or (b) Actions taken in good faith, by or in behalf of

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> the tenant, to secure or enforce any rights under the lease or rental agreement, the warranty of habitability… the duty to repair…or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes…; or (c) The tenant's participation in the activities of a tenant's organization.

In practical terms, this protection can be invoked in a few situations. First, RPL § 223-b can be invoked when a landlord institutes a frivolous action to evict or collect purportedly unpaid rent in order to punish a tenant for reporting unlawful building conditions to the Department of Buildings, the Division of Housing and Community Renewal, or other city agencies that regulate residential housing. In New York City, tenants often report such violations via 3-1-1 calls. Second, the provision applies when a landlord files a lawsuit to punish a tenant for bringing repair issues or legal violations to the landlord's attention, even when the tenant has not formally reported a violation.[7] The law also protects tenant organizing activities.[8] Retaliation under the RPL is sometimes asserted as an affirmative defense and sometimes as a counterclaim.[9]

Courts apply a burden-shifting framework to RPL § 223-b retaliation claims.[10] Section 223-b(5) creates a "rebuttable presumption that the landlord is acting in retaliation…if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within one year after" a good faith complaint to a governmental authority, the landlord himself, or an agent of the landlord.[11] If the tenant establishes this prima facie case, the burden shifts to the landlord to "establish a non-retaliatory motive for his acts by a preponderance of the evidence."[12] If the tenant prevails, she can obtain damages and attorney's fees, in addition to other relief.[13]

Anti-Retaliation Protections in New York's Current Anti-SLAPP Law

New York's anti-SLAPP statute was enacted in 1992 "to prevent well-heeled public permit holders from using the threat of personal damages and litigation costs . . . as a means of harassing, intimidating or…punishing individuals, unincorporated associations . . . and others who have involved themselves in public affairs by opposing them."[14] During debates in the New York Senate, proponents of the bill cited a history of abuses among developers and other business interests who sought to silence opponents of projects or proposals through frivolous litigation.[15] This particular strain of strike suit is termed a SLAPP, or "Strategic Lawsuit Against Public Participation," a term coined by Professors George Pring and Penelope Canaan in 1988.[16]

Courts assessing an anti-SLAPP defense under New York law employ a threshold twofold inquiry. First, under Civil Rights Law § 76-a(1)(b), the court must determine whether the plaintiff is "a public applicant or permittee," defined as "any person who has applied for or obtained a permit, zoning change, lease, license, or other permission from any government body."[17] Next, under Civil Rights Law § 76-a(1)(a), the court must decide whether the lawsuit is an "action involving public petition and participation," defined as "an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[18] In other words, as under RPL § 223-b, the court must determine that the defendant engaged in qualifying protected activity and that the plaintiff's lawsuit is causally related to that protected activity.

Once a defendant has made an initial showing of protected activity and causation, the plaintiff faces a heightened burden to demonstrate that her claim has a "substantial basis." Procedurally, an anti-SLAPP motion can be employed via a motion to dismiss or a motion for summary judgment. The dismissal and summary judgment provisions of the New York Civil Practice Law and Rules each incorporate the relevant Civil Rights Law provisions by reference. Rule 3211(g) provides:

> A motion to dismiss . . . in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in [N.Y. Civ. Rights Law § 76-a(1)(a)], shall be granted unless… the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.

CPLR 3211(g). Rule 3212(h) provides:

> A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in [N.Y. Civ. Rights Law § 76-a(1)(a)], shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.

CPLR 3212(h). In requiring the plaintiff to show that her claim has a "substantial basis in law," in the case of 3211(g), or a "substantial basis in fact and law," as in the case of 3212(h), both provisions amend prior law to require a heightened showing by the plaintiff relative to the burden that would otherwise apply at each respective procedural stage.[19] Moreover, the legislature viewed "substantial" as a more stringent standard than the "reasonable" standard otherwise applicable to sanctions for frivolous litigation.[20]

As an added benefit to the defendant, an anti-SLAPP hearing must be calendared on a preferential basis.[21] And if the SLAPP target prevails at this expedited hearing, the court will not only dismiss the action, but may also in its discretion award attorney's fees, as well as, under aggravated circumstances, compensatory and punitive damages.[22] Defendants typically seek the monetary relief elements of the anti-SLAPP remedy via counterclaim.[23]

In at least one case, the anti-SLAPP law has been invoked successfully by a tenant advocacy group sued in retaliation for reporting housing code violations to city agencies. In *New Line Realty Corp. v. United Comms. of Univ. Heights*, a landlord sued the Northwest Bronx Community and Clergy Coalition and other housing organizers, who had been advocating for tenants by helping them report housing code violations to the Department of Housing Preservation and Development (HPD) pursuant to a contract with the agency.[24] The landlord claimed trespass, libel and tortious interference with prospective economic advantage, based on the defendant's entering the building to communicate with tenants, help them organize, and distribute flyers.[25] The New York County Supreme Court granted the defendant tenant advocacy group's anti-SLAPP motion. The court found that the plaintiff landlord was a public applicant or permittee, having obtained a number of "permits, licenses, and subsidies," including Certificates of Occupancy, Multiple Dwelling Registrations, and rental subsidies.[26] The court further found that the plaintiff's claims were materially related to the defendants' efforts to report housing violations to HPD, efforts which amounted to a challenge to plaintiff's fitness to "maintain those permits, licenses, and funds" with respect to the apartment buildings at issue.[27]

Based on *New Line Realty*, there is reason to believe that a tenant could successfully invoke the anti-SLAPP law in a retaliatory summary proceeding. If a tenant reported violations of the New York City Housing Maintenance Code, Construction Codes, or some other pertinent law or regulation to a city agency and was hauled into Housing Court under circumstances that indicated that the proceeding was in retaliation for such reporting, such a case would seem to be analogous to *New Line Realty*. The tenant would have been challenging the landlord's fitness to hold permits or receive state or local rental subsidies that are contingent on compliance with laws and regulations pertaining to residential dwellings.

There are some factual differences between these two situations, but none that are legally relevant. In *New Line Realty*, the retaliatory claims at issue were tort claims, and the landlord sued a non-profit organization advocating on behalf of tenants, rather than the tenants themselves. But neither the content of the claims nor the identity of the defendant is material to anti-SLAPP analysis. Courts consider only the nature of the defendant's activity that provoked a lawsuit and the identity of the plaintiff, both of which are common to the two scenarios.

Informal advocacy, as through, for instance, organizing tenants or posting flyers drawing attention to illegal housing conditions, could constitute protected activity as well. Several courts have found protected activity even when a defendant did not file a complaint with an agency or otherwise directly participate in a governmental process. For instance, in *Duane Reade v. Clark*, the New York County Supreme Court held that a concerned citizen's publication of an advertisement criticizing Duane Reade's construction of a billboard next to a September 11th memorial park constituted protected activity. The court based this conclusion on the temporal proximity between publication of the ad and earlier publicity in the same newspaper concerning Duane Reade's application for a permit to construct the sign.[28] In *National Fuel Gas Distribution Corp. v. PUSH Buffalo*, the Fourth Department held that a community organization's demonstration against plaintiff energy company's misuse of government funds intended to assist low-income customers with heating costs constituted protected activity. The purpose of the protest, the court noted, was to obtain a meeting with the CEO to challenge the company's application to renew the permit at issue.[29]

To succeed in her anti-SLAPP defense, a defendant activist would have to in her speech reference the plaintiff landlord's permitted conduct—it is not sufficient merely that the landlord holds various permits. In *Guerrero v. Carva*, the First Department held that a residential tenant's act of distributing flyers criticizing a landlord did not constitute protected activity, because the numerous evictions and discriminatory employment practices referenced in the flyer did not encompass any conduct violative of the conditions of a permit, and the flyer did not suggest that any such violation had occurred.[30]

There may be some situations in which RPL 223-b applies but the anti-SLAPP law does not. It is unclear, for instance, whether a complaint to the landlord herself would qualify as protected activity, as it does under § RPL 223-b. One could argue that this constitutes "reporting" or "commenting" on the landlord's fitness to hold relevant permits; but there is no case law clarifying this issue. The basis for such an anti-SLAPP defense is especially weak if the complaints concern mere viola-

tions of a lease for an unregulated apartment, or some other matter that would not be within the jurisdiction of the relevant regulatory agencies.

Anti-Retaliation Protections in a Potential Amended Anti-SLAPP Law

Amendments to New York's anti-SLAPP law that await the Governor's signature would make the availability of the above-described protections more certain and enhance their potency. New York Senate Bill No. 52-A/Assembly Bill No. 5991A, if signed into law, would strengthen the anti-SLAPP law's protections in at least two ways relevant to tenants.

First, the definition of protected activity would be significantly broader. The proposed new definition provides an even clearer basis both for the argument that a communication with a government agency regarding a landlord's legal violations is protected activity, and for the argument that tenant activism is protected activity. The amended law would protect"any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."[31]

The new definition of protected activity, in other words, applies to capacious categories of both speech and petitioning conduct. Questioning a landlord's fitness to hold a government-issued permit in a communication with a government body is merely one form of petitioning activity, and a narrow and odd subcategory at that. A broader statutory definition that encompasses *all* petitioning activity could only aid tenant defendants sued for reporting housing code violations, by mitigating the unpredictability of any particular judge's determination of what precisely it means to "report on, comment on, rule on, challenge or oppose" a landlord's "application or permission."[32] Moreover, it seems straightforward to argue that any protest on public property against a landlord's illegal activity both takes place in a public forum and pertains to matters of public concern, namely, a landlord's violation of the law. By contrast, under the current statute, as discussed, whether there is the requisite causal relationship between a defendant's protest and a landlord's lawsuit can depend on finer details of the content of the defendant's speech.

Second, the imposition of attorney's fees on a prevailing tenant would be a certainty rather than a possibility subject to judicial discretion. Under the amended law, the award of attorney's fees and costs is mandatory rather than permissive, as the law would provide that attorney's fees and costs "*shall*," rather than "*may*" be awarded upon a "demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."[33] This change, needless to say, would make it more likely that a tenant who succeeds on an anti-SLAPP motion will be adequately compensated for her trouble. But this amendment also would usher in a more profound, systemic change: it would enable lawyers to take landlord-tenant anti-SLAPP cases on contingency, thus potentially begetting a new legal market and increasing the availability of legal representation for tenants faced with retaliatory evictions.[34]

Housing Court Jurisdiction to Adjudicate an Anti-SLAPP Motion

A more difficult question is whether the housing part of the City Civil Court, in which summary proceedings typically take place, would have jurisdiction to decide an anti-SLAPP motion. While it does not appear that this issue has ever been adjudicated, the plain language of the CPLR and the City Civil Court Act (CCA) indicate that the Housing Court has the requisite jurisdiction. Moreover, procedural rules specific to summary proceedings appear to disfavor the severance of an anti-SLAPP counterclaim.

The CCA incorporates the relevant parts of CPLR 3211 and 3212 into City Civil Court procedure. The CPLR provides that it governs "the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[35] The City Civil Court Act, a candidate inconsistent statute, provides that "[m]otion practice in the court, including time provisions for the making and decision of motions . . . and practice relating to motions before, during and after trial, shall be governed by the CPLR, except as this act otherwise provides."[36] The CCA deviates from the CPLR with respect to motions to dismiss, but these exceptions do not pertain to the anti-SLAPP provision at 3211(g);[37] and the CCA does not alter CPLR 3212 summary judgment procedure.

Moreover, procedural rules specific to the housing part do not prohibit the filing of an anti-SLAPP counterclaim and indeed appear to disfavor its severance. Real Property and Proceedings Law § 743 provides that, in a summary eviction proceeding, "the answer may contain any legal or equitable defense, or counterclaim." Nevertheless, in practice, the Housing Court usually severs tenants' counterclaims, without prejudice to the tenant pursuing them in a separate plenary action.[38] The justification for this practice is that "the primary purpose of the summary proceeding statutes is the speedy and inexpensive determination of landlord-tenant controversies,"[39] and counterclaims concerning matters not directly related to the possessory interests at stake frustrate this policy goal. For instance, courts have severed counterclaims for breach of the warranty

of habitability in holdover proceedings,[40] and counterclaims for harassment in nonpayment proceedings.[41] But there is an exception to this general rule and practice for counterclaims that are "inextricably intertwined" with the landlord's claims,[42] in which case the same value of judicial economy counsels against severance.[43] For instance, a counterclaim of actual or constructive eviction to offset a payment of rent in a nonpayment proceeding is regarded as "inextricably intertwined" with the payment of rent.[44]

Based on these principles, an anti-SLAPP counterclaim should not be severed. New York courts generally do not sever retaliatory eviction counterclaims seeking monetary relief in summary proceedings,[45] which suggests that the Housing Court also would view an anti-SLAPP counterclaim, which seeks the same forms of monetary relief for an essentially identical harm, as "inextricably intertwined" with the underlying action. Moreover, New York courts appear not to sever counterclaims for attorney's fees in other contexts;[46] in fact, the First and Second Departments have gone so far as to deny a tenant the right to assert a claim for attorney's fees in a separate plenary action when the tenant could have requested this relief via counterclaim in a prior summary proceeding, on the grounds that pursuing a separate action for attorney's fees would constitute impermissible claim-splitting.[47]

Furthermore, more generally, the Housing Court has jurisdiction to award the remedies of attorney's fees, compensatory damages, and punitive damages. Under CCA § 110(c), the court for the housing part may "employ any remedy…or sanction authorized by law for the enforcement of housing standards" if it believes that such remedy will be "effective to accomplish compliance or to protect and promote the public interest."[48] This broad remedial authority encompasses punitive damages[49] and compensatory damages.[50] And the Housing Court awards attorney's fees in several contexts. For instance, RPL § 234 specifically authorizes a tenant to counterclaim for attorney's fees whenever a lease provides for a landlord to recover attorney's fees.[51] Furthermore, N.Y. Ct. R. 130 permits the award of attorney's fees as a sanction for frivolous conduct,[52] and extends this rule to the City Civil Court system.[53]

Potential Advantages of Anti-SLAPP over RPL § 223-b

The obvious following question is whether there is any practical reason to invoke an anti-SLAPP defense in housing court, given the protections already afforded by RPL § 223-b. While there is significant overlap in protected conduct and remedies, the anti-SLAPP law affords certain advantages. Moreover, given that each law has some unique benefits and areas of coverage, a belt-and-suspenders strategy is generally advisable, as it is possible that one defense will compensate for the limitations of the other in application.

First, anti-SLAPP rules are better designed to mitigate the burdens inherent in defending a lawsuit. The anti-SLAPP law uniquely requires an expedited hearing.[54] Insofar as a frivolous holdover or non-payment action presents a substantial burden of time or resources on a defendant, it may be in her interest to dispose of the matter quickly. The proposed amended anti-SLAPP law would mitigate these burdens further, as it additionally provides that pending the resolution of an anti-SLAPP motion, "[a]ll discovery, pending hearings, and motions" shall be stayed.[55]

Second, unlike RPL § 223-b, the anti-SLAPP law's protections are not limited to tenants of "rental residential premises except owner-occupied dwellings with less than four units."[56] This limitation in RPL § 223-b has been applied to exclude, for example, renters of commercial premises,[57] residents of trailers who pay rental fees to a lot owner,[58] licensees present on residential rental premises,[59] and residential renters in owner-occupied dwellings with less than four units.[60] Neither the current nor the proposed amended anti-SLAPP provisions, by contrast, are in any way limited depending on the identity of the defendant.

Third, the anti-SLAPP burden-shifting framework is arguably more favorable to the tenant. There is no requirement in the anti-SLAPP law that a defendant make an initial showing that her challenge to the plaintiff's fitness to hold a permit was made in "good faith." In RPL 223-b cases, by contrast, the threshold issue of good faith can be heavily litigated.[61] Additionally, once the burden shifts to the plaintiff, the anti-SLAPP law imposes a uniquely defined heightened burden of proof at whatever procedural stage it is adjudicated.[62]

Conclusion

While novel, the argument that a retaliatory eviction is a SLAPP could succeed. Individual success on an anti-SLAPP motion in a test case could lead to the availability of a powerful new defense tool for New York City tenants. At worst, the anti-SLAPP counterclaim would be severed, without prejudice to the defendant pursuing a separate plenary action in the Civil Court or the Supreme Court. In any case, this maneuver is worth an attempt.

Endnotes

1. *See* Gerald Lebovits et al*., New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know-Part III*, 91 NYSBA Journal. 33, 35-36 (2019).
2. *See* RPL § 223-b.
3. *See, e.g., Portnoy v. Hil*l, 57 Misc. 2d 1097, 1100, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968) (recognizing retaliatory eviction as an equitable defense in a summary proceeding); *Markese v. Cooper*, 70 Misc. 2d 478, 481, 333 N.Y.S.2d 63, 75 (Sup. Ct., Monroe Co.1972) ("It is apparent that without such a defense, regardless of how it is labeled, the threat of eviction would coerce the most justifiable complaints into a submissive silence. A landlord could, with impunity, continue to rent a dwelling containing the most flagrant and reprehensible housing violations and the elaborate legislative scheme to ensure compliance with the housing laws would thus be circumvented."); *Hosey v. Club Van Cortland*, 299 F. Supp. 501, 504-506 (S.D.N.Y. 1969) (holding that the First Amendment, as incorporated through the Fourteenth Amendment, prohibits a state court from evicting a tenant when the "overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights," in this case the tenant's First Amendment rights to organize other tenants and file complaints with city officials); *see also* Major James A. Hughes, *Retaliatory Eviction*, 102 Mil. L. Rev. 143, 146-50 (1983).
4. *See* N.Y. Civ. Rights Law §§ 70-a, 76-a; CPLR 3211(g), 3212(h).
5. S. B. S52A (N.Y. 2020); Assemb. B. A5991A (N.Y. 2019).
6. *See* RPL § 223-b(3).
7. Housing Stability and Tenant Protection Act (HSTPA) redefined protected activity in the RPL to encompass complaints to the landlord herself. Gerald Lebovits et al., supra note 1, at 35; RPL § 223-b(1)(a) (defining protected activity to encompass a "good faith complaint . . . to the landlord, the landlord's agent or a governmental authority").
8. *See* RPL § 223-b(1)(c).
9. *See, e.g., Pena v. Lockenwitz*, 53 Misc. 3d 428, 432, 36 N.Y.S.3d 574, 577 (Albany City Ct. 2016); *Martens v. O'Leary*, 40 Misc. 3d 1201(A), 1201(A), 972 N.Y.S.2d 144, 144 (Dist. Ct., 3d Dist., Suffolk Co. 2013); *Ghadamian v. Channing*, 295 A.D.2d 127, 129, 742 N.Y.S.2d 632, 633 (1st Dep't 2002); *Morris I LLC v. Baez*, 62 Misc. 3d 1227(A), at n.1, 113 N.Y.S. 3d 833, at n.1 (Civ. Ct., Bronx Co. 2019).
10. *See, e.g., Matter of Kirkview Assoc. LP. v. Amrock*, 160 A.D.3d 1108, 1110, 75 N.Y.S.3d 288, 291 (3d Dep't 2018); *1540 Wallco, Inc. v. Smith*, 54 Misc. 3d 1207(A), 52 N.Y.S.3d 247 (Civ. Ct., Bronx Co. 2017); *Bender v. Olsen*, 2019 N.Y. Misc. LEXIS 5930, at *6-*7 (Justice Ct., Town of Cornwall, Orange Co. 2019).
11. HSTPA amended the RPL to extend the time period for establishing presumptive retaliation from six months to one year. HSTPA also extended the presumption to non-payment proceedings. *See* RPL § 223-b(5); Lebovits et al., *supra* note 1, at 35-36.
12. HSTPA amended the RPL to require a landlord to prove a "non-retaliatory motive," rather than simply a "credible explanation." *See* RPL § 223-b(5); Lebovits, *supra* note 1, at 35.
13. *See* RPL § 223-b(3).
14. *See* N.Y. Civ. Rights Law § 76-a; *see also Adelphi Univ. v. Committee to Save Adelphi*, No. 37161-95, 1997 WL 34848950, at *2 (Sup. Ct., Nassau Co. 1997).
15. *See* Senate Debate Transcripts, L. 1992, ch. 767, New York Legis. Serv.
16. The term "SLAPP" was coined by Professors George Pring and Penelope Canan in a pair of articles they co-authored in 1988. *See* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & Soc'y Rev. 385 (1988); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).
17. *See Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920 (Sup. Ct., N.Y. Co. 2004) (quoting N.Y. Civ. Rights Law § 76-a(1)(b)).
18. *See id.* (quoting N.Y. Civ. Rights Law § 76-a(1)(a)).
19. *See Int'l Shoppes v. At the Airport*, 131 A.D.3d 926, 931, 16 N.Y.S.3d 72, 77 (2d Dep't 2015) (Miller, J., concurring in part and dissenting in part); *Hariri v. Amper*, 51 A.D.3d. 146, 150-51, 854 N.Y.S.2d 126, 129 (1st Dep't 2008); *Guerrero v. Carva*, 10 A.D.3d 105, 106, 779 N.Y.S.2d 12, 14 (1st Dep't 2004); *Duane Reade*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920.
20. *Duane Reade*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920; Letter from Assemblyman William Bianchi to Governor Cuomo (July 14, 1992) (re: A. 4299, Bill Jacket at 13-14); CPLR 8303-a(a)(2) (providing for sanctions for a claim that is "commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law").
21. *See, e.g.*, CPLR 3211(g), 3212(h) ("The court shall grant preference in the hearing of such motion.").
22. *See* N.Y. Civ. Rights Law § 70-a(1).
23. *See, e.g., Edwards v. Martin*, 158 A.D.3d 1044, 1045, 72 N.Y.S.3d 606 (3d Dep't 2018); *Joglo Realties, Inc. v. Marionovsky*, 2015 NY Slip Op 30754(U) (Sup. Ct., Kings Co. 2015); *Duane Reade*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920.
24. *New Line Realty V Corp. v. United Comms. of Univ. Heights*, No. 1021/2004, 2006 N.Y. Misc. LEXIS 2872, at *3-*5 (Sup. Ct., Bronx Co. 2006).
25. *See id.* at 3-4.
26. *See id.* at 9-10.
27. *See id.*
28. 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920.
29. 104 A.D.3d 1307, 1308, 962 N.Y.S.2d 559, 559 (4th Dep't. 2013).
30. 10 A.D.3d 105, 118, 779 N.Y.S.2d 12, 23.
31. S. B. S52A (N.Y. 2020); Assemb. B. A5991A (N.Y. 2019).
32. *See* N.Y. Civ. Rights Law § 76-a(1)(a).
33. S. B. S52A (N.Y. 2020); Assemb. B. A5991A (N.Y. 2019).
34. *See Ketchum v. Moses*, 24 Cal.4th 1122, 1131, 17 P.3d 735, 741 (2001) (noting that mandatory fee-shifting "encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement."); *see also* Samantha Brown & Mark Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, Rev. of Eur. Community and Int'l Envtl. Law 19(1): 3-13 (2010) ("The single most important component of anti-SLAPP legislation is the ability of a defendant to recover attorney's fees. The ability to recoup fees allows a defendant who otherwise could not afford an attorney to secure one on a contingency basis.").
35. CPLR 101.
36. N.Y.C. Civ. Ct. Act § 1001.
37. N.Y.C. Civ. Ct. Act § 1002.
38. *See, e.g., Titleserv, Inc. v. Zenobio*, 210 A.D.2d 314, 314, 619 N.Y.S.2d 768, 769 (2d Dep't 1994); *Central Blvd. Bldg. Corp. v. Purville*, 63 Misc.3d 1201(A), at *2, 114 N.Y.S.3d (City Ct. of Mount Vernon, Westchester Co. 2019); *Ring v. Arts Int'l, Inc*., 7 Misc.3d 869, 880, 792 N.Y.S.2d 296, 305 (Civ. Ct., N.Y. Co. 2004).
39. *See 525 Jericho Realty LLC v. Anuj Rani Grp., LLC*, 64 Misc. 3d 875, 878, 105 N.Y.S.3d 695, 697 (Dist. Ct., 1st Dist., Nassau Co. 2019) (citing Robert F. Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 43:40 (5th ed. 2018)); *see also Haskell v. Surita*, 109 Misc. 2d 409, 413-14, 439 N.Y.S.2d 990, 991-93 (Civ. Ct., N.Y. Co. 1981).
40. *See e,g., Payne v. Rivera*, 28 Misc. 3d 469, 470, 904 N.Y.S.2d 878, 880 (Civ. Ct., Kings Co. 2010).

41. *See e.g., Severin v Rouse*, 134 Misc. 2d 940, 948, 513 N.Y.S.2d 928, 934 (Civ. Ct., N.Y. Co. 1987), *Ain v. Vasques*, 40 Misc. 3d 1202(A), 972 N.Y.S.2d 142 (Dist. Ct., Nassau Co. 2013).

42. *See Central Blvd. Bldg. Corp.*, 63 Misc.3d 1201(A), at *2, 114 N.Y.S.3d; Ring, 7 Misc. 3d at 880, 792 N.Y.S.2d at 305 (Civ. Ct., New York Co. 2004); *Haskell*, 109 Misc. 2d at 414, 439 N.Y.S.2d at 993.

43. *See Chinatown Pres. HDFC v. Ya Hua Chen*, 27 Misc.3d 1213(A), 910 N.Y.S.2d 761 (Civ. Ct., N.Y. Co. 2010); Ring, 7 Misc. 3d at 881.

44. *See Jericho Realty LLC v. Anuj Rani Grp., LLC*, 64 Misc. 3d 875, 878, 105 N.Y.S.3d 695 (Dist. Ct., Nassau Co. 2019); *Ring*, 7 Misc. 3d at 880, 792 N.Y.S.2d at 305.

45. *See, e.g., Mayfair York L.L.C. v. Zimmerman*, 183 Misc. 2d 282, 288, 702 N.Y.S.2d 494, 499 (Civ. Ct., N.Y. Co. 1999) (awarding damages in a summary proceeding for a retaliatory eviction counterclaim); In re 20 Henry St. Assocs. LLC, 2004 NYLJ LEXIS 3661, *11-*14 (Civ. Ct., Kings Co. 2004) (entertaining and dismissing a retaliatory eviction counterclaim); *Pena v. Lockenwitz*, 53 Misc. 3d 428, 432, 36 N.Y.S.3d 574, 577 (City Ct., Albany Co. 2016) (finding a retaliatory eviction claim "part and parcel of tenant's defense to landlord's claim for rent" and thus unseverable); *Weil v. Kaplan*, 168 Misc. 2d. 68, 71, 643 N.Y.S.2d 312, 314 (Dist. Ct., Nassau Co. 1996) (entertaining a retaliatory eviction counterclaim while severing a counterclaim for damages for failure to provide electricity, water, and heat).

46. *See* RPL § 234 (authorizing a counterclaim for attorney's fees in a summary proceeding when the lease permits the landlord to recover attorney's fees); *see also Furnished Dwellings LLC v. Households Headed by Women*, 62 Misc. 3d 864, 866, 92 N.Y.S.3d 542, 544 (Civ. Ct., N.Y. Co. 2018) (noting that a tenant may seek attorney's fees under RPL § 234 via counterclaim in a summary proceeding or via a separate action).

47. *See O'Connell v. 1205-15 First Ave. Assoc. LLC*, 28 A.D.3d 233, 234, 813 N.Y.S.2d 378, 379 (1st Dep't 2006); *67-25 Dartmouth St. Corp. v. Syllman*, 29 A.D.3d 888, 890, 817 N.Y.S.2d 299, 301 (2d Dep't 2006). *But see Caracaus v. Conifer Cent. Square Assocs.*, 158 A.D.3d 63, 71-72, 68 N.Y.S.3d 225, 231 (4th Dep't 2017).

48. *See also Davis v. Williams*, 92 Misc. 2d 1051, 1055, 402 N.Y.S.2d 92, 94 (N.Y. Civ. Ct., Kings Co. 1977).

49. *See id.; Williams v. Llorente*, 115 Misc. 2d 171, 172-73, 454 N.Y.S.2d 930, 931-32 (1st Dep't 1982).

50. *See Llorente,* 115 Misc. 2d at 171-72, 454 N.Y.S.2d at 931.

51. "[T]here shall be implied in such lease . . . an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant." RPL § 234.

52. N.Y. Ct. R. 130-1.1(a).

53. N.Y. Ct. R. 130-1.4; *see also Active Care Med. Supply Corp. v. Delos Ins. Co.*, 55 Misc.3d 144(A), 57 N.Y.S.3d 674 (2d Dep't 2017).

54. *See* CPLR 3211(g), 3212(h).

55. S. B. S52A (N.Y. 2020); Assemb. B. A5991A (N.Y. 2019).

56. *See* RPL § 223-b(6).

57. *Tirse v. Andrews*, 128 A.D.3d 1112, 1114, 8 N.Y.S.3d 711, 713 (3d Dep't 2015).

58. *See Matter of Lazy Acres Park, LLC v. Ferretti*, 118 A.D.3d 1406, 1407, 988 N.Y.S.2d 364, 365 (4th Dep't 2014).

59. *See Rogers v. Payne*, 65 Misc. 3d 1210(A), 119 N.Y.S.3d 10 (Civ. Ct., Queens Co. 2019).

60. *See Weil v. Kaplan*, 168 Misc. 2d 68, 70, 643 N.Y.S.2d 312, 314 (Dist. Ct., Nassau Co. 1996), *aff'd*, 175 Misc. 2d 482, 483, 670 N.Y.S.2d 666, 667 (2d Dep't 1997).

61. *See, e.g., Bender*, 2019 N.Y. Misc. LEXIS 5930, at *6-*7; *Martens* 40 Misc. 3d at 1201(A), 972 N.Y.S.2d at 144); *Morning Light Realty, LLC v. Brown*, 62 Misc. 3d 274, 286-88, 87 N.Y.S.3d, 450, 459-61 (City Ct., Kings Co. 2019).

62. *See Bender*, 2019 N.Y. Misc. LEXIS 5930, at *6-10.

Alternatives to Eviction: Legal Remedies When Faced with a Mentally Ill Tenant

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Whether representing condominium boards, homeowners' associations, cooperatives, or landlords, attorneys practicing real property law, or in related areas, should be familiar with the use of various New York Mental Hygiene Law tools when faced with concerning conduct of a symptomatic mentally ill individual in their building.[1] The behaviors exhibited in an apartment building due to an underlying mental illness can be extremely difficult to manage. Complaints may range from a pattern of behavior that infringes upon the neighbors' quiet enjoyment of their home, to behavior that is seriously dangerous, threatening the safety of others. Depending on the behaviors and symptoms observed, mental health legal interventions are feasible alternatives to eviction proceedings.

The Challenges of an Eviction Proceeding

While an eviction proceeding may ultimately be required, the process is time consuming, adversarial, and expensive. As the months, and potentially years, pass by during a pending eviction proceeding, the mentally ill tenant is likely still suffering, and quite possibly escalating in terms of their symptoms or behaviors. Initiating an eviction proceeding may only further complicate a situation when dealing with a mentally ill tenant. In our experience, the court may refer the individual to Adult Protective Services, appoint a guardian ad litem, or take other steps outside the control of the petitioner, prolonging the eviction even further.

Currently, certain legal remedies may not even be available to clients during the COVID-19 pandemic. Within days of declaring a state disaster emergency in New York, Executive Orders by New York Governor Cuomo and Administrative Orders by the New York State courts limited court operations to essential matters and specifically prohibited the enforcement of an eviction or foreclosure in New York through June 20, 2020.[2] Subsequent Orders have extended this "eviction moratorium" only allowing courts to resume certain non-essential operations.[3] As recently as October 2020, the Governor and Chief Administrative Judge issued new orders allowing eviction cases to proceed, but there are still significant caveats protecting certain tenants.[4] Additionally, the backlog of cases and restrictions on courthouse foot traffic will result in extraordinary delays. The mental health legal system, however, has continued to operate largely uninterrupted during the COVID-19 pandemic. Most mental hygiene matters in New York are considered essential. These essential court conferences and hearings are conducted virtually using Skype for Business, and now, Microsoft Teams, in counties across New York, involving multiple parties, attorneys, and court personnel.

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Another challenge in choosing to initiate an eviction proceeding against a symptomatic mentally ill tenant is communication, or rather, the inability to engage in a meaningful discussion about behavior that violates a lease agreement, shareholder agreement, or other contract. The tenant may escalate or retaliate when confronted by neighbors, staff, the board, or its counsel. A mentally ill tenant who lacks insight into the consequences of the dangerous or disruptive behaviors may dismiss verbal requests to change behaviors and ignore letters or other legal notices, leaving the board and its counsel no option but to turn to court proceedings.

The question here, however, is which court proceeding is appropriate? When faced with a mentally ill and symptomatic tenant and advising clients of the legal options, consider alternatives to eviction. Specifically, consider how the various mental health legal "tools" explained in further detail below can provide an outcome that would better serve the tenant, their family, their neighbors, building management, and staff. It has been our experience that most boards and neighbors want to be compassionate and supportive while also balancing the needs and safety of all tenants.

Mental Hygiene Law Article 81 Guardianship Proceedings

Guardianship, pursuant to N.Y. Mental Hygiene Law Article 81, is a legal proceeding by which a court appoints and oversees a legal decision maker, or "guardian," for another adult, who due to incapacity or other disability, is unable to manage his or her own affairs.[5] The court, specifically, the Supreme Court, can appoint a Personal Needs Guardian and/or a Property Management Guardian to manage multiple aspects of the individual's affairs.[6] Generally, a family member or close friend would petition the court for the appointment of a guardian for an at-risk individual who would otherwise suffer harm without assistance. If a family member or friend is unavailable or unwilling to intervene, or perhaps when there is no one else to call upon, the building, through its board or management, with the assistance of legal counsel, can serve as the petitioner in a guardianship action.

Regardless of an actual diagnosis of a mental illness, which the building management, board, and/or its counsel may not be privy to, when determining whether an individual requires a guardian, it is important to focus on the individual's symptoms and behaviors. A variety of different property management issues may be caused or exacerbated by the symptoms of a mental illness, psychological disorder, or substance abuse issue. Examples of these property issues are hoarding, refusing to clean the apartment, neglecting the kitchen appliances, and/or neglecting plumbing issues. These behaviors may affect neighbors as the smell or water infiltrates the hallways or other apartments. There might be a bed bug infestation or other rodent problem that is not remedied. In the past, our clients have had issues where, among other things, the tenant refused to allow access to the apartment for necessary repairs, emergencies, fire alarm, and smoke alarm checks. The individual may be engaging in behavior that has caused destruction to the property, such as flooding the bathroom or punching holes in the walls. In these situations, what type of legal intervention is appropriate outside of a typical eviction proceeding when the individual refuses to cooperate and remedy the issue? An eviction proceeding, which could take years, would not provide any immediate relief to the building staff or neighbors during the pending proceeding. In our experience, a guardian appointed by the court can safely manage these issues in a timely manner. The court can even grant interim relief, before a hearing, in the form of a temporary guardian who can immediately work to remediate a problem in the building that is disruptive or dangerous. A Property Guardian can be authorized by the court to hire and pay for a heavy-duty cleaning service, maintenance cleaning services and/or an exterminator service. The court can grant a Property Guardian the authority to access the apartment, including maintaining a copy of the keys, as well as the authority to grant access to the superintendent or others for emergencies, necessary repairs, and maintenance.

A Personal Needs Guardian might also be helpful in the context of a mentally ill tenant's unsafe or objectionable behaviors. Neighbors or staff may observe that an individual is unkempt, neglecting personal hygiene issues, dressed inappropriately, and/or showing signs of dehydration or malnutrition, all examples of an inability to manage the "activities of daily living."[7] An individual who suffers from dementia or some other cognitive impairment might unintentionally engage in unsafe behaviors such as leaving the stove on unattended. The individual's impaired judgment and lack of insight into the need for assistance, may necessitate the appointment of a Personal Needs Guardian. This guardian can use the individual's funds to hire and monitor the appropriate professional required to safely maintain the tenant in his or her own apartment, such as a companion, home health aides, visiting nurse service, and/or a case manager. Last, but certainly, not least, the guardian would be a liaison between the building and the tenant, allowing for meaningful discussions about compliance with building rules to enable the tenant to remain in his or her apartment without disrupting or threatening the lives of others.

It is important to note, however, that a guardian's authority is limited as it relates to psychiatric treatment in the community. A guardian cannot consent to psychiatric treatment over the individual's objection and cannot force the individual to see a psychiatrist or attend other treatment programs.[8] A guardian can, however, play a crucial role in ensuring compliance with treat-

ment within the limitations of the statute. For example, the guardian can identify the appropriate mental health professionals available, ensure health insurance coverage, if appropriate, make the appointments, arrange for transportation, and encourage the individual to participate. The guardian can access protected health information, such as medical or mental health records, and speak with treatment providers. If a guardian can accomplish these tasks, assisting the individual in maintaining treatment, the behavioral disturbances in the building and other objectionable conduct may be significantly reduced or stabilized.

Mental Hygiene Warrant

If the tenant is acutely ill, exhibiting dangerous behaviors that pose an imminent risk to self and/or others, in or around the building, the individual may require a psychiatric evaluation and treatment in a hospital. Hospitalization would allow for a psychiatrist or other physician to evaluate any mental health or medical issues, establish a diagnosis, and recommend a treatment plan. The principal statute governing the inpatient hospitalization of mentally ill patients in New York is MHL Article 9. This statute contains the legal standards and procedures for the voluntary, involuntary, and/or emergency admissions to a hospital, as well as retention of psychiatric patients pursuant to a court order.

If the individual has decompensated and requires hospitalization, a family member, or other concerned individual, such as the president of the board, on behalf of a co-op or condo, or landlord, can initiate a request for a Mental Hygiene Warrant, pursuant to Article 9.[9] This civil proceeding involves petitioning the Supreme Court, in the county where the individual resides, alleging that the individual is "apparently mentally ill and is conducting himself or herself in a manner which in a person who is not mentally ill would be deemed disorderly conduct or which is likely to result in serious harm to himself or herself."[10] The desired and anticipated effects of this intervention would be to obtain a psychiatric evaluation and treatment in a hospital to reduce psychiatric symptoms and return him or her to an improved level of functioning in the community.

The Verified Petition must include information about the individual and the behaviors or symptoms that demonstrate a risk of harm to self and/or others. This behavior might manifest itself as harassment to others in the building, depriving them of the quiet enjoyment of their home. For example, the individual may be verbally abusive to staff or neighbors, spending time in common areas such as the lobby, mail room or laundry room, berating others and making threats. The individual may demonstrate an incoherent or disorganized thought process, ranting or frequently changing topics without any connection, or may be observed talking to him or herself. In extreme cases, the individual may threaten to, attempt to, or actually physically harm someone. The individual might also exhibit behaviors that pose a substantial risk of harm to self, such as self-harm or not taking care of the activities of daily living, not sleeping or eating appropriately, or neglecting a serious medical condition.

Based upon that Verified Petition, the court has authority to issue a civil warrant directing that the individual be brought before the court for a hearing. Executing the warrant requires coordination and collaboration with the sheriff's department in the county where the individual resides. At the hearing, which takes place the same day as the execution of the warrant, the petitioner has the burden of proof, by clear and convincing evidence. The subject of the proceeding, the respondent, is entitled to legal counsel, appointed through the Mental Hygiene Legal Service (MHLS).[11] A neighbor, staff member, or board member, who has personally observed the concerning, dangerous behaviors, can testify in court to support the petition. The respondent is afforded the opportunity to cross-examine the witnesses and testify in his or her defense.

The court then determines if the respondent suffers from a mental illness "which is likely to result in serious harm to himself or herself or others."[12] The court has the authority to direct the sheriff to bring the individual to a specific hospital, identified in the order, for a psychiatric evaluation. The court does not have the authority to order the involuntary admission of the individual to a hospital or require psychiatric medication. The hospital, following its protocols, must determine whether or not that individual should be admitted for psychiatric treatment.

At this point, when the individual is evaluated and/or admitted to the hospital, he or she is afforded certain rights, including those protecting personal health information under HIPAA laws. The petitioner (e.g., building management or the board) and its legal counsel will not have access to information about the individual's diagnosis and treatment while in the hospital without the individual's consent. More importantly, the petitioner and legal counsel will likely not be able to participate in discharge planning or even receive notice of the discharge date. This is one of the reasons it may be helpful to simultaneously initiate a guardianship proceeding, as described above. A guardian would be able to access HIPAA-protected health information and assist in the transition from the hospital back into the community.

Hospitalization would hopefully allow for the treatment of any acute symptoms and resolution of inappropriate or disruptive behaviors occurring in the building. Once stable and discharged from the hospital, the goal would be to return to the building at an improved level of functioning, enabling the individual to think more clearly and rationally, gain insight into the extent of the illness and concerning behaviors, and live safely in the community.

Assisted Outpatient Treatment

Non-compliance with psychiatric treatment in the community may be a contributing factor causing the objectionable conduct in the building or other dangerous behaviors. If the individual has a history of non-compliance with outpatient psychiatric treatment, the board, landlord, or other concerned individual, can make a referral for Assisted Outpatient Treatment (AOT) in the county where the individual resides.[13] Known as "Kendra's Law" in New York, AOT is court-ordered psychiatric treatment and supervision in the community with the goal of preventing "a relapse or deterioration" in the individual's psychiatric condition.[14]

One of the benefits of AOT is that this program provides for case management services, either an Intensive Case Manager (ICM) or an Assertive Community Treatment (ACT) Team to coordinate the individual's psychiatric care in the community.[15] This team is directed by court order to meet with the individual in the community, usually four to six times per month, follow the plan for the administration of psychiatric medication and monitor medication compliance. The AOT program can provide alcohol or substance abuse counseling, as well as require blood tests or urinalysis to monitor the presence of alcohol or illegal drugs.[16] If non-compliant with the treatment plan, the team has the authority to call the police or a mobile crisis team to bring the individual to a hospital for an examination.[17] The hospital, in following its protocols, must then determine if the individual requires admission to the hospital.

One obstacle in choosing this intervention is the inability to access protected health information to complete the referral application. The board or landlord may have to collaborate with family members or friends who know the mentally ill individual's diagnosis and history of previous hospitalizations. If he or she has a guardian, as described above, the guardian can access the protected health information to complete the referral application. This information is essential, since in order to be eligible for AOT, the application must demonstrate that the individual is 18 years of age or older, suffers from a mental illness, and has a history of non-compliance with psychiatric treatment.[18] An individual meets criteria for participation in the AOT program if said non-compliance has resulted in a hospitalization at least twice within the last 36 months or has resulted in an act of violence toward self or others, or threats of, or attempts at physical harm to self or others within the last 48 months.[19] After a hearing, the court can authorize up to one year of Assisted Outpatient Treatment.[20]

AOT is a valuable tool for mentally ill individuals who refuse mental health services in the community, decompensate leading to dangerous or inappropriate behaviors in a residence or other apartment building, and are frequently hospitalized as a result.

Conclusion

In pursuing one or more of these mental health legal options as alternatives to eviction proceedings, the tenant can hopefully receive the assistance needed, whether in the form of a guardian and/or psychiatric treatment, so that he or she can live safely in the community. Early intervention is the key to effectively addressing any underlying mental health concerns of a disruptive tenant. Initiating an eviction proceeding against a symptomatic mentally ill tenant can be extremely expensive, time-consuming, and adversarial and not lead to the desired or preferred outcome. The best way to manage these complicated situations is with the consultation and advice of a mental health law attorney who can help navigate the mental hygiene laws, explain the benefits and drawbacks of each intervention relating to persons with mental illness, and come up with a creative solution that benefits all.

Endnotes

1. Hereinafter, the word "tenant" is used universally to refer to the individual of concern residing in an apartment, whether he or she is a shareholder, tenant or other type of resident.
2. *See* N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.
3. *See* N.Y. Exec. Order No. 202.28 (May 7, 2020), https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.
4. *See* N.Y. Exec. Order No. 202.67 (Oct. 4, 2020), https://www.governor.ny.gov/news/no-20267-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency; *See* N.Y. AO/231/20, Chief Admin. Judge, Lawrence K. Marks, https://www.nycourts.gov/whatsnew/pdf/EvictionsMemo-10-09-20.pdf.
5. MHL § 81.02(a). In New York, incapacity refers to functional limitations rather than a mental or physical condition. MHL § 81.02(c).
6. *See* MHL § 81.22.
7. *Id*. § 81.03(h).
8. The Mental Hygiene Law compensates for this gap through the procedures outlined in Article 9 of the Mental Hygiene Law as well as through case law such as *Rivers v. Katz*, that provides authority for the involuntary administration of medication in the hospital. 67 N.Y.2d 485, 504, N.Y.S.2d 74 (1986).
9. MHL § 9.43.
10. *Id.*
11. *See id*. § 47.01.
12. *Id*. § 9.43(a).
13. *Id*. § 9.60.
14. *Id*. § 9.60(a), (c)(6).
15. *Id*. § 9.60(a)(1).
16. *Id.*
17. *Id*. § 9.60(n).
18. *Id*. § 9.60(c).
19. *Id*. § 9.60(c)(4).
20. *Id*. § 9.60(j)(2).

Rediscovering Discovery in Eviction Proceedings After *Regina Metro*

By Miles F. Altarac

Tenants do not have an automatic right to discovery in housing court.[1] Thus, they must seek permission of the court to perform discovery. Generally, in non-payment, and even holdover proceedings, in Housing Court, it is very common for a tenant to interpose a defense or counterclaim of rent overcharge. When a tenant makes such a claim, the next step is to make a motion seeking the rent history of the apartment in order for the tenant to attempt to bolster the claim of rent overcharge. Following the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) on June 14, 2019, the rules regarding discovery in summary eviction proceedings were vastly altered.[2]

Miles F. Altarac

Prior to the enactment of the HSTPA, discovery was limited to four years prior to the date that the tenant made a claim of rent overcharge.[3] In order to warrant consideration of the rental history beyond this four-year statutory period, the tenant was required to make a colorable claim of fraud by identifying substantial evidence of a fraudulent scheme to deregulate and remove an apartment from rent stabilization,[4] a somewhat difficult standard. Furthermore, landlords were allowed to dispose of their rent records after four years.[5]

Then, on June 14, 2019, the HSTPA made profound changes to this process.[6] The HSTPA eliminated the four-year statutory lookback period, and instead imposed no time limit on how far back the courts could look in order to determine whether an overcharge has occurred.[7] Under the HSTPA, the courts were instructed to consider all available rent history "reasonably necessary" to determine the legal rent and any overcharge that may have occurred.[8] In addition, landlords were no longer able to dispose of rent records after four years, but rather, were suddenly required to have kept records in perpetuity in order to satisfy any potential inquiry into the validity of the apartment's rent.[9] Since all rental histories became subject to review under the HSTPA, the increased potential for rent overcharge liability was alarming for landlords. A building that may have once been safe from the great economic threat of a rent overcharge claim was now open to nearly unlimited review and questioning of the landlord's record keeping and reliability of the rent.

These changes resulted in tenants' attorneys taking full advantage of their newfound ability to challenge the rent of an apartment based on the most minor discrepancy in an apartment's rent registrations. Tenants' attorneys began making motions seeking to conduct discovery going back to 1984, simply because the apartment's DHCR registrations indicated a considerable rent increase at some point in time.[10] In many situations, the DHCR registrations showed a significant rent increase after a tenant vacated an apartment. It is common knowledge that when a tenant who lived in an apartment for a number of years vacates the apartment, the landlord is going to make improvements to the apartment, both in an effort to increase the rent and to keep up with the standards of the housing market in New York City. However, these improvements after vacancy are usually not indicated on DHCR registrations. Tenants' attorneys began arguing that any increase in the rent that was greater than the Rent Guidelines Board allowable increase was grounds for a rent overcharge claim and an examination of the apartment's full rental history.

However, on April 2, 2020, the Court of Appeals issued a landmark determination in *Matter of Regina Metro. Co., LLC v. New York State Division of Housing and Community Renewal*, ruling that the retroactive application of the changes to the rent overcharge provisions made by the HSTPA is improper.[11] The Court of Appeals ruled that the harsh changes of the HSTPA cannot be applied to cases where the alleged rent overcharge occurred prior to June 14, 2019, and that such cases must be decided based on the law that was in effect at the time the overcharge occurred.[12] Specifically, the

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court held that "the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment," reasoning that "rather than serving any of the policy goals of rent stabilization (which it would not), retroactive application of the overcharge calculation amendments would merely punish owners more severely for past conduct they cannot change—an objective the Court of Appeals has deemed illegitimate as a justification for retroactivity."[13]

"Essentially, the Court of Appeals decision in *Regina Metro* reversed the course of the discovery process in summary eviction proceedings."

While *Regina Metro* did not concern a motion for discovery, the Court of Appeals indirectly addressed the effect of the changes made by the HSTPA, stating that

> the rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations.[14]

Essentially, the Court of Appeals decision in *Regina Metro* reversed the course of the discovery process in summary eviction proceedings. No longer do tenants have free rein to challenge the validity of an apartment's rent. Rather, rent overcharge claims are again governed by the pre-HSTPA standard that requires the tenant to put forth some evidence to establish a colorable claim of fraud.[15] In that regard, conclusory allegations of fraud are insufficient to trigger an inquiry into the legitimacy of a base date rent and allow the court to disregard the four-year lookback period. The courts have found that an increase in rent alone is not sufficient to establish a colorable claim of fraud. Skepticism about the quality and extent of improvements, failures to indicate reasons for a rent increase and even incorrect or missing registrations are also insufficient to raise a colorable claim of fraud.

Based on all of the foregoing, the effect of the Court of Appeals decision in *Regina Metro* is twofold. Firstly, in cases where a tenant's motion for discovery was already granted prior to April 2, 2020, a Motion to Renew the court's decision is necessary. Such a motion is generally granted where a change in the law would have an effect on the outcome of the earlier motion. Clearly the change in the law made by *Regina Metro* would have had a profound effect on any motion seeking discovery based on the HSTPA. Secondly, in cases where a tenant made a motion for discovery under the HSTPA prior to April 2, 2020, but a decision has not yet been made by the court, submissions need to be filed that address the changes made by the *Regina Metro* decision. If opposition papers were already filed prior to April 2, 2020, a request must be made to the court for permission to file a sur-reply in order to address the changes made by *Regina Metro*.[16]

For landlords defending against a tenant's claim of rent overcharge in housing court proceedings, the Court of Appeals decision in *Regina Metro* has positively changed the course of the discovery process.

Endnotes

1. *See* Andrew Scherer & Hon. Fern Fisher, Residential Landlord-Tenant Law in New York § 13:46 (25th ed. 2019).
2. S. 6458, 2019 N.Y. State S., Leg. Sess., (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6458.
3. *See* CPLR 213-a.
4. *See Grimm v. State Div. of Hous. & Cmty*. Renewal Office of Rent Admin., 15 N.Y.3d 358, 367, 912 N.Y.S.2d 491, 496 (2010).
5. *See* Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, NYSBA Journal 35, 38 (2019).
6. *See id*.
7. *See* N.Y. Unconsol. Laws § 8632.
8. *Id.*
9. *See* N.Y.C. Admin. Code § 26-516(g); CPLR 213-a.
10. *See BPE Realty Owner LLC v. Garrick*, 045677/2019, 2020 NYLJ LEXIS 617, at *1-2 (Civ. Ct., Bronx Co. 2020); *517 W. 161 Realty LLC v. Vega*, 52851/19, 2020 NYLJ LEXIS 917, at *1 (Civ. Ct., N.Y. Co. 2020).
11. *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, No. 1, 2020 N.Y. Slip Op. 02127, at *1 (2020).
12. *Id*. at *21.
13. *See id*. at *17.
14. *See id*. at *5.
15. *See id*. at *7.
16. *See id*. at *9.

Real Estate Joint Ventures in New York: Non-Imputation Endorsements

By Thomas G. Maira and Jack Piontkowski

Thomas G. Maira

Jack Piontkowski

Purpose of a Non-Imputation Endorsement—Why Would an Investor Require One?

A Non-Imputation Endorsement preserves title insurance coverage for a joint venture capital investor ("investor") acquiring an interest in an entity (that in turn owns the applicable real property), even though the other party that holds an interest in that entity ("sponsor") had knowledge of a title matter. Such knowledge is typically an exception to title insurance coverage for such applicable title matter. This knowledge of the sponsor may otherwise be imputed to the investor as a defense by the title insurer to coverage under the title insurance policy. Thus, in the event that the investor does not obtain a Non-Imputation Endorsement and a title issue arises of which the sponsor had knowledge, the title insurer may have a defense to coverage under the title policy based on the premise that the investor is deemed to have known (imputed knowledge) of the title issue as a result of the knowledge of the sponsor. Examples of title matters that the sponsor could have knowledge of and which could result in a title issue include an unrecorded mortgage, an unrecorded easement or a mechanic's lien that does not yet appear in applicable public records.

Structure Example

A common joint venture structure in which obtaining a Non-Imputation Endorsement would be advisable is a structure where the investor enters into an amendment to the existing operating agreement of the property holding entity with the sponsor. In this context, the investor would likely obtain a title policy to insure that the entity it is becoming a member of is in fact the record owner of the real property and a partial equity transfer Non-Imputation Endorsement (as described below) would be advisable. Note that the Non-Imputation Endorsement does not ensure that the investor holds an interest in the entity.

Seller Credit Party Needed; Address in Joint Venture Documents; Types of Non-Imputation Endorsements in New York

In order to issue a Non-Imputation Endorsement, the title insurer will require that a credit-worthy entity on behalf of the sponsor (other than the property owner entity) acceptable to the title insurer indemnify the title insurer for any amounts that may be paid to the investor in connection with the non-imputation endorsement. Thus, the joint venture documents should obligate the sponsor to provide such credit entity to the title insurer at the time the joint venture is effective.

There are three types of Non-Imputation Endorsements provided by title insurers in New York: (i) full equity transfer; (ii) partial equity transfer; and (iii) additional insured.[1] The type of Non-Imputation Endorsement that an investor would obtain will be determined by the percentage of interest an investor is acquiring in the entity. When an investor is acquiring a 100% interest in the entity that is the owner of real property, the full equity transfer endorsement is appropriate. If an investor is acquiring less than 100% interest in the entity, then

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the partial equity transfer endorsement would be applicable. Finally, the additional insured endorsement is appropriate when an investor partners with a party that is conveying its interest in real property to a new entity that the two partners form.

In all three cases, the amount of the Non-Imputation Endorsement will be determined by the fair market value of the entity's equity interest in the real property that it holds or the consideration paid by the investor for an interest in that entity. The policy amount would be determined by whichever of these two amounts is greater. In the case of a full equity transfer endorsement, the minimum amount of the policy will be the greater of 100% of the fair market value or the consideration paid since the investor is acquiring a 100% interest in the entity.[2] In comparison, in the case of a partial equity transfer endorsement, the Investor's percentage interest in the entity must be taken into account when calculating the minimum amount of the policy. Therefore, for a partial equity transfer endorsement, the minimum amount of the policy would be the greater of (i) the fair market value of the entity's interest in the real property multiplied by the investor's percentage interest in that entity or (ii) the consideration paid by the investor for its partial interest in the entity.[3]

Conclusion

A Non-Imputation Endorsement should be a consideration in all commercial real estate joint venture transactions where an investor is acquiring an interest in an entity that owns real property in order to provide protection to the investor so that title insurance coverage is not denied as a result of the sponsor's knowledge of a title matter.

Endnotes

1. Title Insurance Rate Service Association, Inc., Title Insurance Rate Manual for New York State, 20-21 (reprt. 2015, rev. 2019) (1993).
2. *Id*. at 20.
3. *Id.*

Exchange of Enhancements for Concessions—Insights into the Modern Loan Workout

By Richard S. Fries

Whether a result of the coronavirus pandemic, the suddenly dislocated capital markets, the end of the lengthy commercial real estate boom, or changes in the real property or its revenue, the property owner reaches out to the lender for urgent, needed debt relief. The owner is not nefarious, malevolent or incompetent and may have merely fallen prey to market or other—COVID-19—forces outside of its control. The lender, which strives for a performing asset, an on-going relationship with its customer, and repayment—not foreclosure or distress—makes concessions.

Richard S. Fries

The lesson here, and the focus of this article, is that in exchange for concessions the lender should obtain credit and legal enhancements. These should put the lender in a far better legal framework to recover the debt and minimize any loss should a subsequent default—malevolent, ill-advised or not—occur. These should also enable the lender to make concessions that are more meaningful to the property owner, its investors, its tenants and its business.

The exchange of concessions for enhancements is the "art of the commercial real estate loan workout." The exchange itself—the trade—is intuitive; yet bankers (especially "loan originators" or relationship managers), while adept at negotiating a business deal, routinely fail to seek, or obtain, enhancements of this type; their "business deal term sheets" may not disclose that such enhancements are available—and should be delivered quite readily for that most coveted of commodities, debt relief.

The lender's economic or legal concessions cover a wide range of benefits to the property owner. They include: (i) extension of the maturity date; (ii) deferral or postponement (today's focus everywhere, "top of mind," as the economy has been shut down since mid-March and the "revenue apocalypse" has taken hold) of debt service installments, for several months, with extensions if revenue is not restored; (iii) forbearance (until a "forbearance expiration date") of enforcement of remedies, also with extensions if identified milestones are achieved; (iv) waiver of defaults; (v) waiver of covenants, such as debt service coverage and loan to value ratios, annualized operating income, leasing requirements, continuous operations (e.g., hotels), substantial completion deadlines, financial reporting; (vi) modification—when debt service payments resume, if applicable—of the contractual interest rate into a "note rate" and a "pay rate"; (vii) suspension of principal amortization payments, either for the duration of the pandemic, or longer; (viii) reduction in "release prices" upon the sale of collateral, such as individual condominium units; (ix) a substantive restructure of the business deal and/or recapitalization of the borrower, including new investors, capital and subordinate debt; (x) release of guarantors (investors or partners exiting the project); (xi) release of collateral or a consent to a pledge thereof; (xii) additional funds for capital improvements or a resumption of loan advances; or (xiii) the "crown jewel" concession—a discounted repayment of the indebtedness tied to a realistic re-appraisal of the value of the property.

The foregoing "compendium of concessions," or permutations thereof, often combined, populate the workout negotiations from the borrower's perspective. The lender should make a business, asset-based, market-driven and reputational analysis and respond. The borrower's concessions wish list may be pared down. The lender should seek business accommodations in return, such as the infusion of fresh investor capital or additional tangible collateral. The business deal is preliminarily in hand.

But the deal's not done, and shouldn't be done. Here's what the lender should seek, in exchange. The

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following "secret sauce" is in response to the quality of the lender's concessions, the parties' leverage, and their good faith efforts to achieve a fair, mutually beneficial, workout.

Acknowledgement of Debt

Borrower and guarantor should unconditionally and irrevocably acknowledge their default (unless the default is waived) and the entire indebtedness, without defense, offset or counterclaim. This acknowledgement covers the outstanding principal balance, accrued interest at the contract and default rates (even if the default rate component is later waived), protective advances, late charges, prepayment premiums, and all other indebtedness due under the loan documents, including legal fees and expenses.

Cure Loan and Perfection Defects; Ratify Loan Documents

The lender should utilize the workout to cure existing loan and perfection defects, if any. Signatures may be missing; guarantors may not have ratified all loan amendments; there may be a gap in the mortgage "chain of title"; certain original mortgage notes in the chain (there cannot be a lien without a corresponding debt) may be missing, or were never transferred to the lender; security interests lapsed or were never properly perfected; scrivener's error occurred (an absent "maturity date" or incorrect debt amount contained in the mortgage). These, or any other, defects should be fixed as part of the workout. This could be accomplished via ratification by borrower and guarantor of the loan documents, the guaranties, the collateral for the loan, the lender's perfection of its security interest (mindful of the bankruptcy preference risk), and receipt of updated title insurance—all as of the date of loan origination, and as of the date of the workout agreement.

Expanded or Additional Guaranties

Guaranties may be expanded; or, there may be additional guaranties furnished by new or existing investors in the borrower entity. These are nuanced: perhaps a portion (or increased portion) of the principal balance; new loan advances; completion of capital improvements; longer duration of recourse for debt service and carrying charges; or expanded full debt events covered by an amendment to the non-recourse carve-out guaranty (the "Bad Boy Guaranty").

(a) Interference with Remedies. Expansion of the Bad Boy Guaranty may be an art form unto itself. The traditional Bad Boy Guaranty has evolved over time and is commonplace, standard fare. However, there is no "market" in the workout, and a guaranty against interference with remedies should be pursued vigorously by lenders. Concessions are made; upon a subsequent default the lender will or may pursue remedies, including receivership. If the borrower or guarantor interferes with, contests or delays these remedies (after having secured meaningful economic concessions), the guarantor should do so at its peril—interference with the lender's remedies would trigger full recourse under the guaranty.

(b) Intervening Liens. The Bad Boy Guaranty may be expanded to cover other events or actions that could prevent the lender from enforcing its remedies or realizing on its senior lien. For example, unbeknownst to the lender, the borrower may permit the recording of an intervening or priming lien or judgment. The borrower may challenge a "lost note" in the chain of title or (in New York) a delay in filing a building loan agreement. Those "impermissible acts," wholly within the borrower's control, should bear a consequence—guarantor recourse in whole or in part.

(c) Future Promises. The workout may include a transfer of the property—a deed in lieu of foreclosure—at a defined future date to a third party purchaser marketed and procured by the lender. In New York a deed in lieu of foreclosure, held in escrow, to be delivered or released later deprives the borrower of its "equity of redemption." As such, it is treated, under Section 320 of the Real Property Law, as additional collateral in the nature of a mortgage and not as a "deed absolute." Thus, the lender should structure this type of workout as a contractual promise to deliver the deed, the keys, and ancillary transfer documents, to the lender's designee or nominee on a future date certain. But what if the market, or borrower's hopes and dreams for the asset, change during that marketing period, and borrower seeks to extricate itself from that promise. The lender should collateralize the promise and ameliorate the risk by triggering (or "springing") full recourse for the debt on the part of an existing or new creditworthy guarantor. Lenders have done this, with success and execution certainty. This is a powerful workout tool.

Consent Judgment of Foreclosure and Sale

An often-overlooked legal enhancement is the imposition of a menu of "litigation" remedies in favor of the lender should borrower subsequently default under the workout agreement. There is a wide range of these remedies with varying potency; several may be "tickets for admission" to the workout. Others may be more difficult to secure, but are available and enforceable, and should be considered for the longer-term, more substantive or concession-laden workout agreement. This, too, may become an art form.

The gold standard remedy is the consent (in a judicial foreclosure state like New York) to the entry of a judgment of foreclosure (the judgment includes a computation of the indebtedness and the waiver of a referee to compute) with a stay of execution (the foreclosure auction) until the earlier of the occurrence of a default or the forbearance expiration date. This powerful remedy—which lenders have observed works very well and can be orchestrated in a number of ways—should not be granted, or even sought, in exchange, for example, for three months' deferral of debt service due to COVID-19. That's an unfair overreach. By contrast, if the forbearance period is nine-to-twelve months with deferred payments, waived covenants and a discounted repayment option, then the consent judgment of foreclosure and a public auction of the property on a negotiated date certain may, subject to the laws of the jurisdiction where the mortgaged property is located, be an appropriate remedy. Because the judgment of foreclosure is consensual, the lender can bypass many of the time-consuming, cumbersome and unpredictable steps required in a judicial foreclosure action. The lender achieves litigation finality up front.

And if the consent judgment of foreclosure is coupled with a promise to deliver a deed in lieu of foreclosure, collateralized by springing guarantor recourse for failure to perform—the lender has achieved, at least from a legal perspective, workout royalty. With that workout royalty comes the enthusiasm to make greater, more economically meaningful, concessions to the borrower. All parties benefit; the property and its occupants benefit; the parties have orchestrated a workout that works.

Consensual Receiver or Property Manager

The workout works better still from a lender's perspective with additional, reasonable, enhancements. The borrower should consent, in any subsequent (or pending) foreclosure action, to the appointment of a receiver (an "officer of the Court") for the mortgaged property as identified and recommended by the lender, without further notice or challenge. A sometimes preferable alternative is a consensual property manager, designated by the lender but engaged by the borrower, to collect rent and revenue, enter into new leases, make essential repairs and otherwise manage, protect and preserve the lender's collateral. One might even envision a workout scenario where the consensual property manager (or receiver) markets the mortgaged property for sale, with minimum sales pricing parameters to be set by the parties.

Lock Box or Cash Management Account

In lieu of the formality of receivership (which requires the pendency of a foreclosure action) or a consensual property manager (which does not), the lender may recognize that management of the property is better served, and should remain, in the hands of borrower (as a going distress-free concern), or its property manager. In such a case, the enhancement should consist of a "hard" lock box, or cash management account maintained by lender (or its designee bank), into which borrower will, and will direct tenants to, deposit rent or other revenue (such as hotel receipts). The proceeds in the account will be additional security for the loan. The lender will disburse sums for controlled pre-approved expenditures (including debt service), as evidenced by an updated monthly (or quarterly) approved budget. Excess cash flow will either be "swept" monthly (or less frequently) by the lender and applied in reduction of the principal balance of the loan or to unscheduled property expenses, or retained in the account, or a bit of both.

General Release

Another enhancement is a general release in favor of the lender, and "lender parties," of all defenses, claims and counterclaims. In exchange for concessions, the lender wants, and should receive, unfettered immunity from any lender liability-type claims or defenses, a clean slate and the legal certainty that at least through the date of the workout agreement, the lender did nothing wrong. No claims or defenses, whether feigned or real, should be asserted. The releases should not be mutual or reciprocal. Borrower should not be entitled to a release—at least until the indebtedness is repaid.

Limitation on Distributions

The lender also should limit distributions—other than for payment by borrower or its investors of federal and local income tax—out of the property's cash flow to borrower's investors (even if there is no hard lock box, approved budget or cash flow sweep). After all, a borrower should be hard-pressed to exact debt relief on the ground revenue is insufficient, and then turn around and distribute "excess" cash flow to its principals or investors. That limitation on distributions should last for the duration of the workout (or at least until the deferred debt service installments have been repaid).

Consent to Vacate Automatic Stay in Bankruptcy

An important, sometimes expanded and often negotiated, enhancement is the consent by the borrower to vacate the automatic stay provisions of the Bankruptcy Code. The borrower parties waive all protections and benefits of the automatic stay and agree not to take any action further to stay, prevent, delay, hinder or enjoin the lender from enforcing its remedies. While not binding on the Court, the trustee in bankruptcy, or on other creditors, the consent to vacate the stay is generally binding on the debtor if given as part of the meaningful loan workout or debt restructure. (The consent to vacate the

stay may be treated differently in different jurisdictions.) There are certain more fulsome bankruptcy waivers and consents that the lender may seek. These include: (i) "adequate protection" payments during any automatic stay; (ii) the requirement for filing a plan of reorganization within ninety days that leaves the interests of the lender unimpaired; (iii) the prohibition on incurring senior priority debt secured by the mortgaged property; and (iv) the prohibition on supporting any plan of reorganization that abridges the lender's rights or senior lien. The borrower should also acknowledge that these bankruptcy protections are material inducements to the lender in exchange for concessions, on which the lender relies to its detriment.

Conclusion

The distressed real estate loan workout is a business deal filled with mutual compromise that right-sizes the asset and resets the loan obligations and the parties' expectations. Any lender making material economic concessions has bargained for, and should acquire, legal enhancements of the type described above. By doing so, the lender may maximize its ability to achieve the just and uneventful realization on its collateral and its state court remedies upon a subsequent default. This is the "secret sauce" that paves the way for a successful, fair and lasting loan workout, in troubled times, or not.

Bergman on Mortgage Foreclosures

By Bruce J. Bergman

Does Discovery Interfere With Lender's Summary Judgment in Foreclosure?

It can, but usually does not, at least in the residential mortgage foreclosure case.[1]

But first a word as to why this is meaningful to lenders and servicers—and borrowers—when much of the time this issue is addressed by their counsel.

Mortgage foreclosure cases in New York are too time-consuming even when a defendant borrower does not oppose the case. However, and as lenders and servicers well know, an answer from the borrower is frequently interposed. Once that occurs, the answer must be disposed of for the case to proceed. Typically, this is addressed by a motion for summary judgment, the plaintiff's assertion that there are no issues of fact. Indeed, the foreclosure is stalled until summary judgment can be granted.

Along with an answer, defaulting borrowers will not infrequently either make discovery demands (interrogatories, notices for depositions, among others) or oppose the motion for summary judgment on the ground that discovery is needed to reveal certain facts or facts claimed to be known only to the foreclosing party. If discovery must indeed proceed, then it will add many, many months—or much more—to the course of the proceeding, which already will incur six months, or much more, to dispose of the motion for summary judgment. In sum, if discovery claimed to be needed by a defendant will intercept the summary judgment process, the length of the foreclosure will be greatly increased.

So, does it happen that way? As noted, it can in more complex commercial cases, but it is far less likely in the residential matter.

In the new case, principles, albeit rather standard, were restated but they are worth knowing. One concept is that an award of summary judgment is not deemed premature merely because discovery has not been completed.

Next, a defendant seeking discovery is required to present some evidentiary basis to suggest that the discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion for summary judgment were exclusively within the knowledge and control of the moving party, i.e., the foreclosing plaintiff.

Finally, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process will not suffice to deny the motion for summary judgment.

Lenders and servicers (and certainly their counsel) will readily recognize that in the overwhelming number of instances, defendants' assertions regarding discovery fall into the categories mentioned: the borrower will not have evidence showing that essential facts—or any others—are solely within the knowledge of the foreclosing plaintiff. Nor will their expectation that somehow something will turn up be a basis to halt the summary judgment process.

While none of this means that a discovery effort by a defaulting borrower cannot impede foreclosure, case law is clear (restated by the case cited here) that discovery demands typically will not halt the foreclosure case.

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The Strategy of Discontinuance and a Good Ruling

While discontinuing a mortgage foreclosure action is usually just a ministerial act, it can also be a meaningful strategy. In that regard, cases have warned in the past that discontinuance might not be all that easy—it can be successfully opposed. A recent ruling, however, highlights some helpful principles for lenders in that regard.[2]

To be discussed here are strategy and mechanics, strategy to be the initial subject.

Sometimes the foreclosing party realizes that it may be in some difficulty because of delay, or it may be unable to prove service of some notice or it may have detected some other infirmity—upon which basis it would prefer to begin the action all over again.

To show how prudent this can sometimes be as a strategy, note an actual case where a borrower opposed a foreclosure on the ground that the lender had not sent the required 30-day notice. When the trial court ruled against the plaintiff upon summary judgment by determining that proof of the 30-day notice had *not* been made, the lender elected to *appeal* the decision. That consumed a year, much expense and resulted in affirmance, that is, the appeals court agreed that proof of the notice was not made. Now the lender was faced with a trial on that subject with no assurance that it could prove mailing of the notice, this after all the time and expense.

Instead, when the original motion was lost, the lender could have simply discontinued the action, making sure that it could prove this time service of the notice, thereby saving so much time and expense. This is, of course, but one example of when discontinuance can selectively be of aid to the foreclosing party.

As noted, and as confirmed by the new case, an action may be voluntarily discontinued upon terms and conditions as the court deems proper. Absent a showing of special circumstances, including prejudice or other improper consequences, a motion for voluntary discontinuance *is* generally granted.

That noted, there are cases wherein the lender's motion to discontinue was *denied*. It *can* happen, and that obviously presents danger. The lesson of those cases was what should be avoided, whenever that is possible. The recent case mentioned, however, shows how some borrower opposition to discontinuance may not be so potent after all.

Here, the action had been pending for approximately three years at the time the discontinuance motion was made. The borrower argued that it was prejudiced by the delay, but the court believed no evidence existed of prejudice or any other improper consequences flowing from the discontinuance. In particular, the borrower wanted to pursue discovery, but the court found that could be attended to in a subsequent foreclosure action. So, delay alone, while portentous, is not a basis to deny discontinuance of an action.

In addition, the borrower had filed a counterclaim, wanted to preserve that, and objected to the discontinuance on that ground. Here, though, the court held that the argument about the counterclaim lacked merit because the borrower had not pursued a default (the plaintiff didn't answer the counterclaim) on her counterclaim within one year. Therefore, the counterclaim was deemed to have been abandoned.

Still further on that point, the interposition of a counterclaim in and of itself is not deemed dispositive with respect to discontinuance. Rather, the discontinuance must work a *particular prejudice* against a defendant. In this case, defendant was not prejudiced because she would be able to assert her counterclaim in any subsequent foreclosure.

Care in timing a discontinuance is still very much in order, but the principles expressed here can, in some cases, be helpful.

Endnotes

1. The recent decision eliciting this discussion is *Wells Fargo Bank, N.A. v. Gonzalez*, 174 A.D.3d 555, 104 N.Y.S.3d 167 (2d Dep't 2019).
2. *Green Tree Servicing LLC v. Shiow Fei Ju*, 182 A.D.3d 840, 122 N.Y.S.3d 764 (3d Dep't 2020).

Reports: COVID-19 Recovery Task Force

NEW YORK STATE BAR ASSOCIATION

REAL PROPERTY LAW SECTION

July 16, 2020

Thomas J. Richards, Esq. Deputy General Counsel
Director of Public Interest
New York State Bar Association
One Elk St., Albany, NY 12207

Re: Response to Recommendations of the Housing Working Group of the Covid-19 Recovery Task Force

Dear Mr. Richards:

I write to you as Chair of the Real Property Law Section ("RPLS") of the New York State Bar Association. This is in response to your request for comments to the Recommendations of the Housing Working Group of the COVID-19 Recovery Task Force (July 9, 2020), which we understand was formed by the New York State Bar Association in coordination with others to offer recommendations to the court system to address the anticipated volume of non-payment proceedings involving residential tenants economically or otherwise adversely affected by COVID-19.

The RPLS appreciates the effort and thought that the Working Group devoted to this difficult and controversial topic. However, the RPLS suggests that the Working Group revise its Recommendations to address the concerns discussed below of members of the RPLS, as our members have the unique perspective of regularly appearing in landlord/tenant courts in New York City and throughout New York State, representing both landlords and tenants.

In particular, two committees of the RPLS have provided comments which the Working Group should consider. The Condominiums and Cooperatives Committee proposes that the Recommendations not apply to proceedings involving cooperative housing corporations. The Landlord Tenant Committee takes issue with specific recommendations of the Working Group that may unduly delay proceedings and create new burdens on small landlords who may be in as much financial jeopardy as the tenants who occupy their properties.

Comments of the Condominium and Cooperatives Committee:

We have reviewed the COVID-19 Recovery Task Force's Housing Working Group's recommendations to the State of New York to address the current COVID-19 exacerbated housing crisis. While we believe the recommendations will provide much-needed protections to tenants at risk of eviction and address the needs of landlords facing hardship from lost rental income, we believe the report should explicitly state that cooperatives are not rental housing, and therefore are expressly excluded from the recommendations made in the report.

Cooperatives are a unique form of homeownership. Purchasers in cooperatives purchase (i) shares of an apartment corporation, which owns the apartment building, and (ii) rights to use and occupy apartments in the building pursuant to a long-term lease called a proprietary lease. Owners in cooperatives are referred to as tenant-shareholders since they are both tenants and owners.

The relationship between the apartment corporation and tenant-shareholders in cooperatives is very different from the relationship between a landlord and its tenants in rental buildings. For example, when an owner in a cooperative, defaults on its obligation to pay monthly maintenance, the other owners effectively are burdened with making up the shortfall in operating costs and real estate taxes. In rental buildings, on the other hand, a tenant's rent default burdens the landlord, not the other tenants. As another example, owners in cooperatives have a say in how the building is run: they comprise the apartment cooperation's board of directors and vote their shares to elect the board. Tenants in rental buildings, by contrast, have no voice.

Because the recommendations refer to landlords and tenants without differentiating between rental buildings and cooperatives, to avoid application of these recommendations to owners in cooperatives we believe it would be appropriate for language to be included explicitly excluding cooperatives. This would be consistent with positions taken on the applicability of the Housing Stability and Tenant Protection Act of 2019, which failed to explicitly state that cooperatives were exempt from the law, prompting corrective legislation with widespread support.

Comments of the Landlord Tenant Committee:

The Landlord Tenant Committee believes that the anticipated volume of new cases will likely vary from geographical areas as the COVID-19 did not affect each area in the same manner and extent. The increased volume of nonpayment proceedings will likely occur in the Courts of New York City, its surrounding suburbs and in upstate cities. Any response should be tailored to reflect the circumstances of each such area.

The Committee notes that subsequent to the formation of the Working Group, L. 2020, chs. 126 and 127, were enacted creating a program for rent vouchers for certain residential tenants and restricting the ability to evict residential tenants for COVID-19 period rent arrears. These provisions ameliorate the need for some of the recommendations in the Working Group report.

The Landlord Tenant Committee has the following specific recommendations:

Any practice adopted by the courts should balance the need of tenants, many involved in a landlord-tenant court proceeding for the first time, who need access to financial assistance and time to pay rent arrears that accrued in the COVID-19 period; and owners, whose obligations to maintain their properties and operating expenses did not abate and may have increased as a result of COVID-19, especially for the owners of 1 to 4 family houses and smaller multiple dwellings and residences— (less than 36 units) for an extended period of lost rent income from a higher than usual percentage of its tenants.

The Committee supports the right to counsel in civil litigation Given that the goal of the Working Group, however, is to address a specific situation resulting from a unique event, the Committee does not believe that an extensive expansion of counsel programs, or requiring counsel as a prerequisite to obtaining a judicial resolution of a dispute, at this time would be appropriate.

If the role of counsel in COVID-19 related cases is to assist in the navigation of the social service process and to obtain resources to pay rent, this work often can be performed by students, trained volunteers, social workers and others under the supervision of existing legal services, attorneys or court personnel if necessary.

The Committee notes the recommendation for mandatory settlement conferences has been eliminated, but the 60-day adjournment proposal is unnecessary and is capable of abuse. The court should provide resources to both represented and unrepresented parties to mediate and assist in settlement during any period from commencement to the first court date and afford a period not to exceed 15 days, or less depending on local conditions, to allow for a settlement. If it appears that settlement is unlikely, the court should immediately fix a date for further proceedings and, in appropriate circumstances, utilize its inherent authority and statutory powers to direct the payment of use and occupancy without prejudice to the rights of the parties or ultimate outcome of the proceeding. There should also be a way for small owners with demonstrable need to expedite court proceedings where settlement efforts have proven to be futile. A 60-day adjournment at the inception of all cases without regard to the circumstance of the courts or parties simply invites delay and poses the risk of injustice.

The effort to provide for disclosure without leave of court, ordinarily required in a summary proceeding, should be circumscribed. Disclosure provisions should be limited to records concerning payments and amounts due designed to assist a social service provider Landlords regularly provide rent records to assist social service agencies presently. This is not a time for extensive litigation concerning the legality of a regulated rent, which the items sought to be presented to tenant's counsel is designed to elicit. Such claims can be reserved and/or severed without prejudice in any settlement or court order. Further, a rent regulated tenant who believes their rent is incorrect may always pursue such claim in an administrative forum. The Working Group's suggestion will actually increase the burden of the court at a time when that should be avoided.

Further, in order to alleviate the burden upon the court, in cases where a tenant raises a COVID-19 defense or claim, the court should only consider those issues, and defenses concerning payments and immediately hazardous conditions

only. Any other claim or defenses should be severed or deferred without prejudice to another time, proceeding and/or forum.

The Committee notes that a tenant who is seeking to assert a COVID-19 defense is now required by law to establish its entitlement to relief under L. 2020, Ch. 127. Efforts should be made so that the financial material required to be produced is accessible to the court and counsel, including landlord's counsel, yet not be made part of a public court filing to protect tenant privacy.

The Committee takes no position on those portions of the Working Group's recommendations which address proposed changes as they relate to the availability of funds from social service agencies to assist tenants in paying rent arrears except insofar as it relates to the use of rent demands and rent ledgers as a basis to obtain COVID-19 related assistance prior to the commencement of a summary proceeding, or the entry of judgment therein, with which it agrees.

Very truly yours,
Ira S. Goldenberg
Ira S. Goldenberg, Chair
Real Property Law Section
New York State Bar Association

cc.:

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Ingrid C. Manevitz, Esq.
Co-Chair, Condominiums and Cooperatives Committee

Paul N. Gruber, Esq.
Co-Chair, Landlord Tenant Committee

Peter Kolodny, Esq.
Co-Chair, Landlord Tenant Committee

New York State Bar Association
Real Property Law Section
Committee on Landlord and Tenant Proceeding

Response to Recommendation of the Housing Working Group of the COVID-19 Recovery Task Force

Introduction

The Committee on L&T proceedings ("Committee") of the RPLS of the NYSBA submits this response to the proposed recommendations of the Housing Working Group. It is our understanding that the working group was created to offer recommendations for the court system to address an anticipated volume of non-payment proceedings involving residential tenants economically or otherwise adversely affected by COVID-19. The Committee believes this anticipated volume of new cases will likely vary from geographical areas as the COVID-19 did not affect each area in the same manner and extent. It is believed that the increased volume of nonpayment proceedings will likely occur in the Courts of New York City, its surrounding counties and in upstate cities. Any response should be tailored to reflect the circumstances of each area.

It is noted that subsequent to the formation of the Working Group, L. 2020, chs. 126 and 127, were enacted creating a program for rent vouchers for certain residential tenants and restricting the ability to evict residential tenants for COVID-19 period rent arrears. These provisions ameliorate the need for some of the recommendations set forth in the Working Group report.

Further, any recommended practices and procedures should balance the need of tenants, many involved in a landlord-tenant court proceeding for the first time, who need access to financial assistance and time to pay rent arrears that accrued in the COVID-19 period; and owners, whose obligations to maintain their properties and operating expenses did not abate and may have increased as a result of COVID-19, especially for the owners of 1 to 4 family houses and smaller multiple dwellings and residences – (less than 36 units) for an extended period of lost rent income from a higher than usual percentage of its tenants.

The Committee takes no position on those portions of the Working Group recommendations which address proposed changes as they relate to the availability of funds from social service agencies except insofar as it relates to the use of rent demands and rent ledgers as a basis to obtain COVID-19 related assistance prior to the commencement of a summary proceeding with which it agrees.

With respect to the balance of the recommendations, inasmuch as the goal of the Working Group is to provide recommended practices and guidance to the courts with respect to a class of cases arising from a unique circumstance and involving tenants likely never involved in a landlord-tenant court, it is the committee's belief that a system should be created in courts with high volumes of nonpayment proceedings arising from COVID-19 to address these cases in an expeditious manner, with minimum delay and limited to issues arising from COVID-19 with all other claims and defenses, except those related to the payment and immediately hazardous conditions, deferred without prejudice to another time, proceeding and/or forum. This will serve the interest of case management while addressing tenant's principal concerns at a sensitive time.

The Committee also believes that while the courts and the bar will learn much from practice at this unique time, this is not the best time to embark on an expanded or enhanced availability of counsel paid for at public expense—a goal sought by many legal services and civic groups over the years. The Committee champions the right to counsel but does not believe that tenants should be compelled to retain counsel and that courts should not be able to further delay cases where a tenant or a landlord chooses not to retain counsel.

The Committee also believes that while parties should amicably resolve issues where COVID-19 related reasons have led to a rent default, they should not be compelled to engage in mandatory settlement negotiations where circumstances indicate that such a process would be counterproductive.

The Committee further agrees that additional resources should be given to facilitate the resolution of cases, including the training and appointment of mediators familiar with the area of practice.

Response to Working Group Recommendation

A. Recommendation II: Counsel-Related Issues

The Committee unequivocally supports the right to counsel in civil litigation and support efforts to obtain resources to expand the ability of individuals with limited financial means to obtain the benefit of counsel in summary proceedings. Given that the goal of the Working Group, however, is to address a specific situation resulting from a unique event, the Committee does not believe that an extensive expansion of counsel programs, or requiring counsel as a prerequisite to obtaining a judicial resolution of a dispute, at this time would be appropriate. As the Working Group recommendation relies upon unspecified sources of funding, and the availability of pro bono service from firms, bar associations and other attorneys whose practices may be adversely affected at this time, caution in expanding these services should be exercised at this time.

The Committee notes that if the role of counsel in COVID-19 related cases is to assist in the navigation of the social service process and to obtain resources to pay rent, this work often can be performed by students, trained volunteers, social workers and others under the supervision of existing legal services, attorneys or court personnel if necessary.

Further, given that most of the tenants seeking assistance of counsel at this time will do so to avoid eviction from nonpayment of rent, recent changes in law noted supra afford protections which do not require counsel. Moreover, an emergency situation may not be the appropriate time to resolve issues other than payment and immediately hazardous conditions if the of the goal of recommendation is to manage the burden of the courts.

B. Recommendation II: Court Procedure

The Committee does not believe that proceedings should be adjourned for mandatory settlement conferences. While settlement of these claims is desirable, there will be instances where a landlord will realize that settlement efforts with a particular tenant will be futile— e.g., prior nonpayment litigation; deteriorated relationships; dealings with tenant prior to resort to litigation. The court should provide resources to both represented and unrepresented parties to mediate and assist in settlement in this period. If it appears that settlement is unlikely, the court should immediately fix a date for further proceedings and, in appropriate circumstances, utilize its inherent authority and statutory powers to direct the payment of use and occupancy without prejudice to the rights of the parties or ultimate outcome of the proceeding.

In addition, the length of any period for an adjournment should consider the volume of the specific court. Shorter period may be appropriate, for instance, in upstate courts. There should also be a way for small owners with demonstrable need to expedite court proceedings where settlement efforts have proven to be futile. A 60-day adjournment at the inception of all cases poses the risk of injustice in many cases.

The disclosure provision should be limited to records concerning payments and amounts due designed to assist a social service provider. This is not a time for extensive litigation concerning the legality of a regulated rent, which the items sought to be presented to tenant's counsel is designed to elicit. Such claims can be reserved and/or severed without prejudice in any settlement or court order. Further, a rent regulated tenant who believes their rent is incorrect may always pursue such claim in an administrative form.

It is noted that a tenant who is seeking to assert a COVID-19 defense is required by law to establish its entitlement to relief under L. 2020, Ch. 127. Efforts should be made so that the financial material required to be produced is accessible to the court and counsel, including landlord's counsel yet not be made part of a public court filing to protect tenant privacy.

Letter to Section Chair from Co-Chairs of Condominiums and Cooperatives Committee

July 8, 2020

Dear Mr. Goldenberg:

We have reviewed the COVID-19 Recovery Task Force's Housing Working Group's recommendations to the State of New York to address the current COVID-19-exacerbated housing crisis. While we believe the recommendations will provide much-needed protections to tenants at risk of eviction and address the needs of landlords facing hardship from lost rental income, we believe the report should explicitly state that cooperatives are not rental housing, and therefore are expressly excluded from the recommendations made in the report.

Cooperatives are a unique form of homeownership. Purchasers in cooperatives purchase (i) shares of an apartment corporation, which owns the apartment building, and (ii) rights to use and occupy apartments in the building pursuant to a long-term lease called a proprietary lease. Owners in cooperatives are referred to as tenant-shareholders since they are both tenants and owners.

The relationship between the apartment corporation and tenant-shareholders in cooperatives is very different from the relationship between a landlord and its tenants in rental buildings. For example, when an owner in a cooperative defaults on its obligation to pay monthly maintenance, the other owners effectively are burdened with making up the shortfall in operating costs and real estate taxes. In rental buildings, on the other hand, a tenant's rent default burdens the landlord, not the other tenants. As another example, owners in cooperatives have a say in how the building is run: they comprise the apartment cooperation's board of directors and vote their shares to elect the board. Tenants in rental buildings, by contrast, have no voice.

Because the recommendations refer to landlords and tenants without differentiating between rental buildings and cooperatives, to avoid application of these recommendations to owners in cooperatives we believe it would be appropriate for language to be included explicitly excluding cooperatives. This would be consistent with positions taken on the applicability of the Housing Stability and Tenant Protection Act of 2019, which failed to explicitly state that cooperatives were exempt from the law, prompting corrective legislation with widespread support.

Respectfully submitted,

Erica F. Buckley
Co-Chair of the Real Property Law Section's Condominiums and Cooperatives Committee and the Upstate New York Liaison

Ingrid C. Manevitz
Co-Chair of the Real Property Law Section's Condominiums and Cooperatives Committee and the Downstate New York Liaison

The Real Property Law Section Welcomes New Members

The following members joined the Section between June 4, 2020 – Nov. 1, 2020.

Khalid M. Azam
Yosi Joe Benlevi
Connor Blancato
Joshua B. Bogaty
Matthew Robert Braunstein
Megan Carbia
Thomas P. Casper
Danika Renee Chichester
Peggy Collen
Leland G. DeGrasse
Elise Denatale
Patrick D. Donnelly
Vasiliki Drogaris
Barbara Eckstein
Leor Oved Edo
Robert S. Elliott
Jjais A. Forde
Adam M. Faeth
John D. Famulari
Tina Marie Fassnacht
Stephen M. Forte
Robert I. Frenkel
Albert Gawer
David C. Goldstein
Jared A Grossman
Shingo Hattori
John Theodore Hilscher
Christine Marie Hogan
Samuel Holzberg
Michael Charles Hughes
Joan Iacono
Michael R. Kaufman
Julia Kathleen Klein
Christopher W. Konopka
Robert J. Lum
Ingrid Claire Manevitz
Teresa R. Martin
Lorna A. McGregor
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Antonio Moretta
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Jeffrey Schreiber
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Philip J. Tucker
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Brian Thomas Whipple
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The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.

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N.Y. Real Property Law Journal

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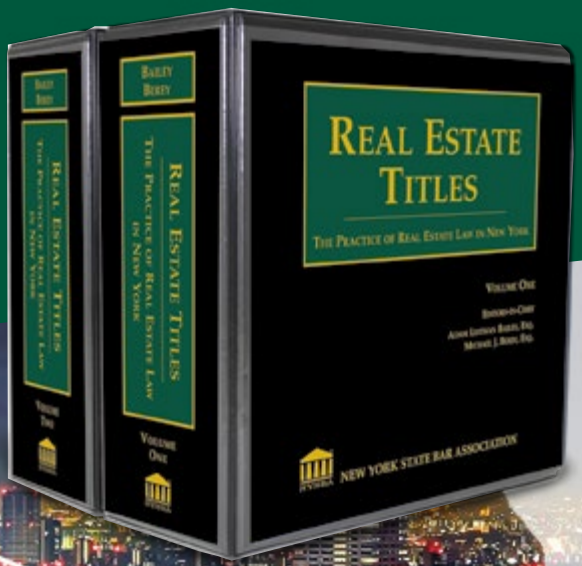

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