New York Law Journal
September 25, 1995

RENT OVERCHARGE CLAIMS BY NEW YORK CITY TENANTS; WHO PRESIDES OVER DISPUTES[1]

Since 1983, practitioners advising their clients as to the most effective method for prosecuting or defending rent overcharge claims made by tenants covered by the rent Stabilization Law have faced a litany of ambiguous and conflicting interpretations of the statute governing the ability of a forum to hear such a claim.

Today, both the courts and the New York State Division of Housing and Community Renewal (DHCR) routinely exercise what has come to be termed "concurrent" jurisdiction over rent overcharge complaints. Surprisingly, this dual system of jurisdiction arises only from case law; there is no statutory authority for either the Civil Court or the supreme Court to exercise jurisdiction. In fact, the relevant statute appears to be unambiguous.

Background

The statutory provision governing jurisdiction of rent overcharge is §§12 of the State Emergency Tenant Protection Act (ETPA). This section confers jurisdiction differently depending on whether the city where the tenant resides has a population of less than or more than one million people. Section 12b of the statute expressly states that:

> Within a city having a population of one million or more, the state division of housing and community renewal shall have such powers to enforce this act [ETPA] as shall be provided in the New York City Rent Stabilization Law of nineteen hundred sixty-nine as amended, or as shall otherwise be provided by law.

This brief, straightforward statutory provision amply demonstrates the State Legislature's intent that the DSHR have exclusive and not concurrent subject matter jurisdiction of rent overcharge complaints in New York City. This language is contrasted with that of ETPA §§12a(1)(f), which expressly provides that in cities with a population of less than one million, the local court may hear a complaint of rent overcharge, provided that there is no pending complaint with the DHCR.

The Legislature's intent to confer exclusive jurisdiction on the DHCR in larger cities is further evidenced by the significant expansion of the administrative agency that took place simultaneously with the passage of the Omnibus Housing Act of 1983. (Ch. 403, Laws 1983). That piece of legislation transferred jurisdiction to hear a tenant's overcharge complaint from New York City's Conciliation and Appeals Board (CAB) to New York State's DHCR. To assist with this transition and to provide the funds necessary to adjudicate the claims of the State's largest city (and the only city to have its own rent regulatory law), the State Legislature increased the DHCR's budget almost fivefold.

---

[1] This legal article, authored by Alan D. Kucker, Esq., a member of the Kucker & Bruh, LLP law firm, was printed in the New York Law Journal on September 25, 1995.

Today, the DHCR has the second largest legal staff of any state agency and an annual budget of approximately $ 40 million. An inquiring practitioner, in discovering this historical progression, would surely ask and would be compelled to argue: Why would the Legislature expand the DHCR to mega-agency proportions to administer rent stabilization issues unless it intended the agency to have exclusive jurisdiction over such matters?

Despite the rhetorical nature of such a question, it appears that courts situated within New York City have answered in an unexpected say. Indeed, the court system has established the existence of "concurrent" jurisdiction between itself and the DHCR.

The misconception that "concurrent" jurisdiction exists regarding rent overcharge claims began with a misplaced reliance on §§12a(1)9f) of the ETPA. For example, an often-cited case for the proposition that the supreme Court has jurisdiction over rent overcharge proceedings is Smitten v. 56 MacDougal Street Co., 167 A.D.2d 205, 561 N.Y.S.2d 585 (1st Dept. 1990). In Smitten the court incorrectly relied on ETPA §§12a(1)(f) for the proposition that jurisdiction exists. However, as discussed above, that section applies only to cities with a population of less than one million. As it is highly unlikely that the court concluded that New York City's population does not exceed the threshold of one million, it can only be concluded that the statute was misread.

It is easy to understand how such a mistake can be made; the paragraph regarding cities of less than one million (ETPA §§12a(1) is easily overlooked since it is so far removed from where §§12a(1)(f) appears. Smitten gave birth to a proliferation of further decisions relying on its holding. Indeed, the constraint placed upon the lower courts by the Smitten decision has so far precluded further examination of the jurisdiction issue by those lower courts. To date, it seems that the Appellate Division has not specifically reexamined the statutory dichotomy which appears to exist between the law relevant to cities of less than one million versus the law relevant to cities of more than one million.

Prior to Smitten, the stance taken by the judiciary was one of "primary jurisdiction." based upon policy considerations rather than a statutory analysis, this theory held that DHCR was, if not the exclusive forum, at least the preferred forum for the resolution of rent overcharge complaints. The seminal case for this proposition is Melohn Foundation v. Gerald Bruck Jr., *NYLJ*, Nov. 20, 1986, p.11, col. 1.

In Melohn the Appellate Term held that primary jurisdiction for rent overcharge complaints lay with the DHCR. The court stated: "[The] DHCR has specialized expertise and access to information necessary to resolve rent overcharge disputes." The court further held that in non-payment proceedings, no stay would be granted to the tenant pending a determination of a rent overcharge complaint by the DHCR. Thus, the case stands for two main propositions: (1) DHCR has primary jurisdiction over rent overcharge complaints; and (2) no stay should be granted to tenants in summary proceedings pending administrative determinations.

Melohn has not been universally followed, having been overshadowed by the decision in Smitten. However, the practitioner should note that overshadowed does not mean overruled, and short of advancing a case to the Court of Appeals for a final analysis of whether ETPA §§12a(1)(f) applies to New York City, it is still possible to persuade a lower court to defer to the DHCR's jurisdiction.

What Type Jurisdiction?

To be sure, the view that DHCR was the preferred forum for the resolution of rent overcharge complaints has been watered down by the cases following Melohn. It has become apparent that a practitioner representing a tenant will often have to advise his or her client on making a critical

decision as to the choice of forum in which to pursue a rent overcharge claim.

It has been held that "[the] doctrine of primary jurisdiction does not require the court to sever a counterclaim for rent overcharge; calculation of whether rent claimed is lawful is neither difficult nor complex." H & L Hotel Corp. v. Ramos, *NYLJ*, Oct. 31, 1990, p. 23, col. 4 (Civ. Ct. N.Y. Co.); Bozzi v. Goldblatt, 60 A.D.2d 647, 559 N.Y.S.2d 264 (1st Dept. 1990).

However, as Justice Fern Fisher Brandveen advises: "Rent overcharges can be difficult to calculate. Counsel should provide the court with all rent orders. After a trial, counsel should also submit a request for a finding of facts to the court with a full breakdown of how the rent overcharge should be calculated." Scherer, *Residential Landlord-Tenant Law in New York* §§4:199 (1995).

Of course, deciding whether the calculation of an overcharge is "complex" can only be done on a case-by-case basis. However, as landlord-tenant practitioners often find, resolution of such an issue usually reaches the litigation stage not because the parties themselves cannot calculate the difference between the "legal rent" and the "rent charged," but because the establishment of the "legal rent" is itself in issue. Given the fact that the voluminous administrative precedents issued by both DHCR and its predecessor, the CAB, are not reported, it would be a rare case where the judiciary is as well suited to handle such a complaint as the administrative agency specializing in the interpretation of the statutes and created expressly for this purpose.

Despite the underlying foundation of administrative law, i.e., agency expertise, the prevailing case law today seems to be one of concurrent rather than primary jurisdiction. Rather than stating that the DHCR is the preferred forum for adjudication of overcharge complaints, the courts have stated that unless there is a prior complaint pending at the agency, the court exercises concurrent jurisdiction and may consider the claim. See, e.g., 310 West End Ave. Owners Corp. v. Rosenberg, *NYLJ*, Aug. 28, 1991, p. 21, col. 4 (Civil Court has concurrent jurisdiction over overcharge unless tenant has filed overcharge complaint with DHCR): Franklin Assoc. v. Klusman, *NYLJ*, Jan. 7, 1992, p. 21, col. 4 (Civil Court has jurisdiction to entertain overcharge claim); Cvetichann v. Trapezoid Land Co., *NYLJ*, Feb. 21, 1992, p. 22, col. 2 (Supreme Court to have subject matter jurisdiction over overcharge complaints); 1460 Grand Concourse Assoc v. Martinez, *NYLJ*, May 6, 1994, p. 29, col. 1 (Housing Court to have jurisdiction to hear overcharges and particularly should do so when there is no pending administrative proceeding).

However, there are a few lower court decisions which have declined to follow the general rule and have gone to the other extreme, implying that the Housing Court is the preferred forum. See Woltall Apartments Inc. v. BYRD, *NYLJ*, April 2, 1993, p. 26, col. 3 (Civ. Ct. N.Y. Co.) (it is preferable that the Civil Court swiftly determine an overcharge claim rather than wait for the DHCR to act); Doubledown Realty v. Dry, *NYLJ*; Dec. 28, 1994, p. 236, col 4 (Civ. Ct. N.Y. Co.) (overcharge complaint filed with DHCR after interposition of answer in counterclaim is not an election of remedies barring the prosecution of the counterclaim).

Therefore, attorneys must advise their clients to be prepared to litigate overcharge complaints within the context of summary proceedings wherever a complaint is not pending with the DHCR. One issue still left largely unresolved by the judiciary is whether the agency's issuance of an order stating that the tenant has withdrawn his or her complaint has a prejudicial effect on the determination of jurisdiction of the claim in a subsequent summary proceeding.

Stays

The second holding of Melohn, supra, regarding the denial of a stay to a tenant defending a summary proceeding pending determination of a complaint at the agency, has also been weakened by subsequent case law. The current state of case law appears to support the granting of a stay in

cases where special circumstances are found to exist. Such stays are conditioned upon the payment of some amount of "use and occupancy" pending the stay.

One case often cited for the proposition that a stay should be granted is 24 Fifth Avenue Associates v. Marder, *NYLJ*, Feb. 24, 1989, p. 22, col. 2 (A.T. 1st Dept.). However, Marder and its progeny often involves issues requiring more than just a determination of legal rent. Such cases usually involve the issue of the regulatory status of the apartment or of the tenancy. For instance, Marder involved the reclassification of the building from hotel status to residential apartment status.

Courts hold that these issues are so basic that they must be decided before relief can be awarded to the landlord in the form of payment of rent, and rely upon the agency to make those determinations. McMahon v. Vachon, *NYLJ*, June 12, 1989, p. 25, col. 2 (the court stayed a holdover proceeding until the administrative agency could determine whether the subject space from which eviction was sought was an "ancillary service" under the RSC); Newman v. Sirkin, *NYLJ*, April 22, 1992, p. 22, col. 6 (Civ. Ct. N.Y. Co.) (determination of illusory prime tenancy and an occupant's rent regulatory status); Fink v. Rygelis, *NYLJ* April 22, 1992, p. 22, col. 6 (interim multiple dwelling status and Loft Law protection and status).

The practitioner is thus faced with an ironic but telling dichotomy: While demonstrating a clear intent to adjudicate claims of rent overcharge, the courts often require that a decision be reached by DHCR. Rather than directing the complaining tenant to DHCR and permit a landlord to recover unpaid rent, the court may instead suspend a case it chooses not to hear while awaiting a decision by the agency. Therefore, the practitioner must be prepared to proceed in either forum, whether or not there was an expectation that the matter would only be heard in the forum chosen by the landlord or that chosen by the complaining tenant.

Regardless of where the issue is ultimately decided, the practitioner would do well to become familiar with the administrative and judicial precedents relied upon by both forums to establish the legal regulated rent.

A separate consideration exists where a tenant has already obtained a determination fro DHCR that he or she has been overcharged and where the landlord has obtained a partial stay of the effect of that order via the filing of a Petition for Administrative Review (PAR). Section 2529.12 of the Rent Stabilization Code provides in relevant part that:

The filing of a PAR against an order, other than an order adjusting, fixing or establishing the legal regulated rent, shall stay such order until the final determination of the PAR by the Commissioner. Notwithstanding the above, that portion of an order fixing a penalty pursuant to section 2526.1(a) of this Title . . . shall also be stayed by the timely filing of a PAR.

Therefore, the landlord should be able to institute a summary proceeding to recover any rent arrears owed by the tenant during the pendency of the PAR even though the tenant has been awarded a refund of the rent.

In 3410 Kingsbridge Associates v. Martinez, 161 Misc.2d 163, 612 N.Y.S.2d 549 (Civ. Ct. Bronx Co. 1994), the Housing Court entered a final judgment for the full amount of rent arrears despite its recognition of the fact that "an unjust result may occur if the respondent is unable to satisfy a judgment, is thereafter evicted and is subsequently successful in her overcharge claim. . . ."

However, this decision is in stark contrast to the decisions in Yanni v. Bruce Brandwen Productions, 160 Misc.2d 109, 609 N.Y.S.2d 759 (Civ. Ct. N.Y. Co. 1994) and 176 West 87th

Equities v. Amador, 151 Misc.2d 234, 573 N.Y.S.2d 221 (Civ. Ct. N.Y. Co. 1991).

In Yanni the court vacated a final judgment entered before the DHCR's resolution of a PAR in the tenant's favor, finding that relegating a tenant to a plenary action to recover the overcharge while enforcing the earlier final possessory judgment would be manifestly unjust.

In Amador, since the landlord had not challenged the overcharge finding in its entirety and since the undisputed amount of rent overcharge exceeded the amount in the nonpayment petition, the court conditioned the stay on the payment of future rent at the amount set by the DHCR after crediting the tenant for the undisputed amount.

Even more dramatic is the conundrum faced by the courts where a non-payment proceeding and PAR are pending simultaneously. This occurred in ANF Co. v. Senhouse, *NYLJ*, Aug. 10, 1994, p. 21, col. 1 (1st Dept.). In that case a non-payment proceeding was permitted to continue while the DHCR was deciding a tenant's PAR. The non-payment case was settled by stipulation which included an order of eviction. The DHCR subsequently issued an order in the tenant's favor.

The Appellate Term vacated the order of eviction and remanded the proceeding to the Housing Court for an order permanently staying the execution of the warrant of eviction. Subsequently, however, the landlord instituted an Article 78 proceeding to review the DHCR's PAR determination, which was resolved by DHCR's agreement to remand the appeal. However, on a motion for renewal and reargument, the Appellate Term adhered to the view that the tenant's eviction should be stayed if the tenant recovers overcharges exceeding the amount of the arrears.

More recently in Gardner v. Division of Housing and Community Renewal, *NYLJ*, July 1 2, 1995, p. 26, col. 4 (Sup. Ct. Bronx Co.), a tenant received an order from the District Rent Administrator awarding him an overcharge and treble damages. The landlord filed a timely PAR of only so much of the overcharge that granted treble damages, thus staying any refund to the tenant. When the tenant refused to pay rent, the landlord commenced a non-payment which resulted in a final judgment on default. When the Civil Court refused to vacate the default, the tenant commenced an Article 78 proceeding based on the DHCR's failure to timely render a decision on the PAR.

Justice George Friedman enjoined the landlord from proceeding with the eviction, stating:

> In this court's view, a mechanical adherence to a rule that the Rent Administrator's determination is relevant only insofar as it affects the collection of prospective rents is unreasonable and unjust, and we decline to follow the result in *3410 Kingsbridge Associates* (supra). Certainly, where there is not question but that the tenant will be entitled to recover a substantial, albeit undetermined, rent overcharge as was the case in *176 West 87th Street Equities* (supra), equity, justice and plain common sense support the view the resolution of the Civil Court proceeding abide the final determination of DHCR. This is to even if there does not exist a 'final' administrative determination entitled to the conclusiveness of the doctrine of res judicata. The tenant may be compelled, in fashioning the stay in an equitable manner, to reduce the rent arrears, and to pay prospective rent, but should not be constrained to pay the full amount of rent arrears without the benefit of an anticipated set off.

Gardner is somewhat unusual in that there was no question that there was an overcharge and a basic refund was owed to the tenant. As the only issue was whether the award should be trebled, the court held that it would be inequitable to go forward with the eviction since the tenant was unquestionable entitled to a rent offset. In most cases, the landlord challenges both the overcharge

and the treble damages award. In such case the result in Gardner would not apply.

Conclusion

Representing landlords or tenants of rent stabilized apartments is nothing short of walking through a minefield because of the myriad of applicable statutes, regulations, case law and administrative rulings that exist. To make matters more difficult, as this article shows, practitioners often do now know where the minefield will appear or whether it will shift. Practitioners are well advised to walk with their clients very carefully when dealing with these issues.