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MANDATORY RENT DEPOSITS?; TENANTS USE DELAYING TACTICS TO GAIN EDGE IN CURRENT SYSTEM[1]

Probably the most hotly debated area of landlord-tenant litigation involves the decision of when a court should direct a tenant to deposit or pay rent during an ongoing litigation.

It is so important an issue to landlords that recently the real estate industry, led by the Community Housing Improvement Program, Inc. (CHIP) and the Rent Stabilization Association (RSA), declared January 22-26, 1996, to be "Justice Week." The purpose of Justice Week was to publicize the rights of a landlord to demand in every case where an adjournment was requested by a tenant, a rent payment pursuant to Real Property Actions and Proceedings Law (RPAPL) §§745(2)(b).

RPAPL §§745(2)(b) provides as follows:

> In any adjournment of a summary proceeding, other than on consent or at the request of the petitioner, the court shall at the petitioner's request state on the record why for good cause shown it is not directing the tenant to pay or post all sums demanded pursuant to a lease or rental agreement in the proceeding as rent and use and occupancy.

The reason pretrial rent payments are so important to landlords is that landlord-tenant proceedings have become so protracted, especially in Manhattan and Brooklyn, that most landlords no longer consider them to be summary. Any reasonably competent tenant's attorney, and in many instances the *pro-se* tenant as well, can prolong the proceeding for months or more, all the while not paying rent.

In some instances, the tenants will then "skip out," owing months of arrears with little chance of the landlord finding them to collect on a money judgment. In other situations, the tenant will use the arrears to negotiate a "buy-out" of the apartment in the form of a rent waiver. Frustrated with the delays, many landlords will go along with this just to cut their losses. The inequity is apparent when the tenant continues to occupy the apartment without paying rent while the landlord is required, by housing maintenance laws, to provide all services to the tenant.

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It is widely believed in the real estate industry that if tenants were required more often to pay the rent during the pendency of the proceedings, they would be less likely to employ dilatory motion practice or other delay tactics. The result would be that the cases would be resolved more quickly and on the merits.

Mandatory Deposits

Early in 1995, a resolution (No. 769-A) was proposed in the City Council to amend RPAPL art. 7 to require mandatory pretrial rent deposits.

In May 1995, a similar bill was proposed in the State Senate (S. 5019). Essentially, the proposal would mandate that when a tenant interposed an answer to the summary proceeding, a deposit of the monies demanded in the petition would have to be made. If the deposit was not made, then a judgment would automatically be entered in favor of the landlord.

Because of the draconian nature of this proposal, it is unlikely that it will be enacted in its original form. However, with some simple adjustments, a mandatory rent deposit bill has the potential to pass in the Legislature.

For instance, a notice of petition could inform tenants that when they interpose an answer, they would be required to make a rent payment or deposit. However, if the tenant does not or cannot, rather than default the tenant, the clerk would place the case on the court's calendar and mark the file with the notation "no adjournments." This way when the case is called for the first time in Part 18 (the general calendar part), absent a rent payment at that time, there would be no adjournments and the case would be immediately assigned to a housing part for trial. Tenants would still get their day in court and the proceeding would retain its summary nature, without forcing landlords to face mounting rent arrears.

Similarly, if a payment was initially made and the case adjourned, no further adjournments would be granted without a payment of any additional outstanding rent.

Current System

Currently, most judges rely on RPAPL §§745(2)(a) to deny a landlord's request for rent payment the first time (and often the second time) the case appears on the Part 18 calendar. RPAPL §§745(2)(a) provides as follows:

In a summary proceeding upon the second request by the tenant for an adjournment, the court shall direct that the tenant post all sums as they become due for future rent and use and occupancy, which may be established without the use of expert testimony, unless waived by the court for good cause shown. Two adjournments shall not include an adjournment requested by a tenant unrepresented by counsel for the purpose of securing counsel made on the initial return date of the proceeding. Such future rent and sue and occupancy sums shall be deposited with the clerk of the court or paid to such other person or entity, including the petitioner, as the court shall direct or shall be expended for such emergency repairs as the court shall approve.

However, as noted above, §§745(2)(b) clearly gives the court the power to direct rent payments on the first request for an adjournment.

In any instance, the landlord is entitled to require the court to state on the record its reasons for not ordering rent payments. As a practical matter, in order to be successful on such an application, the landlord must be in court ready to proceed to trial in the event that the court decides to deny the tenant's application for an adjournment. This means that the landlord must have its "*prima facie*" documents in order and have its witness in court or "on call" (available to appear on approximately a half-hour's notice). Of course, this presumes the landlord's counsel is ready for trial as well.

Rent Payment Ordered

When a court does order rent payments, it may be for the amount past due or for future rent accruing *pendente lite*. This occurs more often in holdover proceedings or in non-payment proceedings that are delayed an unusually long time.

What happens when the tenant fails to make the ordered payment? There are several different remedies allowed by the courts. Some courts have held that the remedy is an expedited trial date and entry of a money judgment. Harte v. Silverman, *NYLJ*, Feb 14, 1986, p. 12, col. 4. This is not always practical where, for instance, in certain holdovers the case is delayed pending a motion or for the parties to conduct discovery. Additionally, the only way to accelerate the return date for trial is for the landlord to make a motion, thus incurring more legal fees.

Other decisions hold that the only remedy is to enter a money judgment in favor of the landlord. Irving Place Assoc. v. Friend of a Farmer Corp., *NYLJ*, Dec 22, 1993, p. 22, col. 3. Again a landlord must make a motion for this relief. Moreover, a paper money judgment without the threat of eviction attached to it rarely has the intended effect of having the tenant pay. The collection of money judgments (CPLR art 51 and 52) is often time-consuming and will not result in the landlord obtaining the funds during the adjournment period or prior to trial.

However, three little publicized First Department decisions make clear that obtaining the money judgment is the first step towards securing a tenant's eviction for not complying with a court order to pay rent *pendente lite*.

In Calvert v. Le Tam Realty Corp., 118 A.D.2d 426, 499 N.Y.S.2d 89 (1st Dept. 1986), a summary holdover was commenced against the tenant (Calvert) for non-payment of rent and default under his cooperative subscription agreement. The tenant moved in Supreme Court for a preliminary injunction and for removal and consolidation of the summary proceeding. Special Term ordered the tenant to pay rent on a monthly basis pending final resolution on the merits

When the tenant failed to pay, the landlord moved for contempt, the entry of a money judgment and an order permitting the entry of a judgment of eviction if the judgement and an order permitting the entry of a judgment of eviction if the judgment was not satisfied or future payments were not made. The court denied the motion entirely with the proviso that if the money was not

paid, the landlord could sever the summary proceeding and return to Civil Court.

On appeal, the First Department modified by granting the owner a money judgment for the arrears and directed as follows:

Should Plaintiff fail to pay the judgment for use and occupancy to be entered herein within 30 days after service of a copy of the judgment with notice of entry, or thereafter default in the payment of monthly use and occupancy, the cooperative corporation may apply, upon due notice to Plaintiff and proof of default, for an order of repossession, pursuant to RPAPL article 6 or 7. Unless said corporation is afforded such opportunity, Plaintiff could remain in the apartment rent free indefinitely while ignoring, with impunity, the Court's mandate.

The First Department followed Calvert in 313 West 57th Rest. Corp. v. 313 West 57th Assoc., 186 A.D.2d 466, 589 N.Y.S.2d 775 (1st Dept. 1992). In that case the defendant-landlord moved for summary judgment when the tenant failed to pay use and occupancy. However, the lower court only granted the landlord a money judgment. The First Department modified that part of the lower court's order and awarded the landlord a possessory judgment.

A year later, the First Department issued a second order in 313 West 57th Rest. Corp. v. 313 West 57th Assoc., reported at 198 A.D.2d 159, 603 N.Y.S.2d 482 (1st Dept. 1993), wherein it noted, "Plaintiff was evicted because it did not pay use and occupancy not because of its failure to cure."

The Court of Appeals has apparently endorsed this rule since leave to appeal both decisions was denied. 83 N.Y.2d 952, 615 N.Y.S.2d 877, 639 NE2d 418 (1994).

More recently, the First Department reaffirmed its holding in 313 West 57th Rest Corp., supra, in the case of 61 West 62nd Owners Corp. v. Harkness Apartment Owners Corp., 202 A.D.2d 345, 609 N.Y.S.2d 226 (1st Dept. 1994), wherein the court held:

A party claiming a security interest in a lease must, as a condition for asserting its right in the litigation, comply with the court's directions to maintain the status quo or lose its interest in the property (see 313 W. 57 Rest. Corp v. 313 W. 57 Assocs., 186 A.D.2d 466 589 N.Y.S.2d 775; 194 A.D.2d 159, 603 N.Y.S.2d 482). The order and judgment of December 1, 1992, properly ejected Harkness after appellant failed to comply with the order of August 21, 1992.

Thus, the tenant in 61 West 62nd Owners Corp. was evicted for failure to pay use and occupancy, just as was the tenant in 313 West 57 Rest Corp., supra.

Accordingly, if rent payments are ordered and the tenant fails to comply, a landlord should be entitled to the entry of a money judgment together with a conditional order warning that if the tenant fails to pay the judgment, an order of eviction should be entered.

Finally, there is a benefit to tenants who make rent deposits or payments *pendente lite*. In Lynch v. Liebman, 177 A.D.2d 453, 576 N.Y.S.2d 550 (1st Dept. 1991), the First Department noted that the tenant's rent deposits removed any dispute over the rent and prevented the landlord from

obtaining the relive of eviction. This fact, together with the fact that the tenant was awarded a 20 percent rent abatement, was enough to have the court declare the tenant to be the prevailing party and award him legal fees.

Conclusion

Controversy over rent deposits is not likely to be resolved soon since the issue is a politically explosive one. Unless and until summary proceedings are restored to their true summary nature, the real estate industry will not be satisfied with the status quo, and the landlord-tenant relationship will continue along its historically stormy path.