New York Law Journal
March 20, 2000

DISCOVERY IN SUMMARY LANDLORD-TENANT PROCEEDINGS: SOME CONTROVERSIES STILL EXIST[1]

Although discovery in summary proceedings must be obtained with leave of the Court, for almost two decades, it has been well-settled that disclosure in a landlord-tenant non-primary residence proceedings is to be granted liberally. Cox v. J.D. Realty Assoc., 217 A.D.2d 179, 637 N.Y.S.2d 27 (1st Dept. 1995) citing New York University v. Farkas, 121 Misc.2d 643, 468 N.Y.S.2d 808 (Civil Ct. N.Y. Co. 1983), solely for the proposition that in *non-primary residence actions, a presumption in favor of disclosure should be made* by a court.

The reason that the issue of discovery in non-primary residence proceedings was not raised prior to 1983 is that, until the Omnibus Housing Act of 1983 (L. 1983, ch.403), non-primary residence actions were within the exclusive subject matter jurisdiction of the New York City Conciliation and Appeals Board ("CAB")(the predecessor agency to the NYS Division of Housing and Community Renewal ["DHCR"]) or the Office of Rent Control. In 1983 the Legislature transferred jurisdiction to the courts. When these matters were before the administrative agency, the agency demanded that the tenant produce volumes of documentary evidence in order to document their primary residence. The agency would then send copies of these documents to the landlords for response. Once jurisdiction was transferred to the courts, then CPLR §408 governed discovery and the production of this material.

In establishing the now well-settled rule of law concerning disclosure in non-primary residence holdover proceedings, the courts have modified the standards of the earlier test. Before non-primary residence actions became judicial proceedings, an early case asked whether the petitioner in a summary

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[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 March 20, 2000.

proceeding demonstrated "ample need" for the information sought. See Antillian Holding Co. v. Lindley, 76 Misc.2d 1044, 352 N.Y.S.2d 557 (Civil Ct. N.Y. Co., 1973).

Thereafter, the Civil Court's decision of New York University v Farkas, *supra*, carved out a six (6) point test to determine if ample need has been satisfied. However, neither the Appellate Term nor Appellate Division in the First department have cited Farkas for this six point test.

Rather, the Appellate Term early on adopted and endorsed the view that disclosure is favored in a non-primary residence action. See Jennifer Towers Apts. v. Halpern, N.Y.L.J., January 11, 1985, p.6., co.1 (A.T., 1st Dept.) In Filali v. Gronowicz, N.Y.L.J., November 19, 1985, p.7, col. 1 (A.T., 1st Dept.) the Appellate Term held:

> In summary proceedings based upon allegations of non-primary residence, applications for disclosure under CPLR Section 408 should be liberally reviewed. (Emphasis added).

Moreover, the Appellate Term has explained that the test of "ample need" is satisfied when the information relevant to the proceeding is particularly within the knowledge of the tenant. Joseph Saverese Real Estate Corp.v. Stone, N.Y.L.J., June 19, 1985, p.6 col.2 (AT, 1st) ("Since much of the information relevant to the prosecution of this proceeding is particularly within the knowledge of the tenant, the Court below should have granted landlord's motion..."); see also 85th Estates Company v. Kalsched, N.Y.L.J., May 18, 1992, p.27, col.4 (A.T., 1st Dept) (where evidence is particularly "within tenant's exclusive knowledge," ample need to conduct disclosure was adequately demonstrated). In Laufer v. Malmuth, N.Y.L.J. Sept. 18, 1995, p.27 col.2 (AT, 1st) the Appellate Term held:

> Finally, we have granted landlord leave to conduct disclosure which **is favored** in non-primary residence proceedings **where many of the particulars relating to the tenant's residence are within tenant's exclusive knowledge** (New York University v. Farkas, 121 Misc.2d 643; Hartsdale Realty v. Santos, 170 A.D.2d 260).
> (Emphasis added).

In short, it is now well-settled that in a non-primary residence case a presumption in favor of disclosure should be made and is subject to a liberal review. Cox v. J.D. Realty Associates, 217 AD 2d 179, 637 N.Y.S.2d 27 (1st Dept., 1995); Hartsdale Realty v. Santos, 170 AD2d 260, 565 N.Y.S. 2d 527 (1st Dept., 1991); 390 West End Assoc. v. Fried, N.Y.L.J., September 4, 1996, p.25, col. 3) (App. Tm., 1st Dept.); Laufer v. Malmuth, supra, Melohn v. Eckert, N.Y.L.J., September 20, 1995, p.25, col. 3 (AT, 1st); Price v. Chelsmere Apt., N.Y.L.J., March 8, 1996, p.25, co. 2 (AT, 1st); 615 Company v. Axelrod, N.Y.L.J., January 17,1 996, p. 29, col. 2 (AT, 1st); Perlbinder v. Levey, N.Y.L.J., June 28, 1995, p.25, col. 3 (AT, 1st) ("in non-primary proceeding ample need is inherently shown").[2]

The Appellate courts have consistently applied this standard for disclosure in other types of holdover proceedings as well. 122 East 103 St. Assoc. v. Albert, N.Y.L.J., June 7, 1993, p.28, col.6 (AT, 1st),(succession rights); Hartsdale Realty Co. v. Santos, supra (subletting).

The Appellate Division, First Department has stated its approval for the granting of discovery in Civil Court in certain types of summary proceedings. In Cox v. J.D. Realty Associates, *supra*, the Court specifically wrote:

> **The availability of discovery in a summary proceeding of this type has been recognized from the outset. Shortly after the Emergency Tenant Protection Act was amended to include non-primary residence as a basis for eviction (L 1974, ch 576, §4, as amended by L 1983, ch 403), it was held that "a presumption in favor of disclosure" should be made** (New York Univ. v. Farkas, 121 Misc.2d 643, 468 N.Y.S.2d 808) as an exception to the general sentiment that "discovery is antithetical to the purposes of a summary proceeding" (CPLR 408; 65 Central Park W. v. Greenwald, 127 Misc 2d 547, 551, 486 N.Y.S.2d 668 [non-party witness], citing

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[2] See also, Eicherbaum v. Mulberry, N.Y.L.J., March 10, 1994, p.24, col.4 (AT, 1st); Melohn v. Parker, N.Y.L.J., November 22, 1993, p. 29, col.2 (AT, 1st); 90th Realty Co. v. Winter, July 28, 1994, p.22, col. 1 (AT, 1st); 205 East 78th St. Assoc. v. Casidy, September 27,1 991, p.21, col.4 (AT, 1st); RSP Realty Assoc. v. Sachs, January 2, 1991, p.21, col.4 (AT, 1st); M&R Mgmt Co. v. Black, December 28, 1990, p.21, col. 5 (AT, 1st).

Dubrowsky v. Goldsmith, 202 App Div 818, 195 N.Y.S. 67). ***The availability of discovery in actions pursuant to the Real Property Actions and Proceedings Law is recognized by this court (McQueen v. Grinker 158 A.D.2d 355, 359, 551 N.Y.S.2d 493).***

Although the general rule has been established, controversies continue to arise in the following areas; supervision of disclosure; pre-answer discovery; and discovery in owner occupancy proceedings.

SUPERVISION OF DISCLOSURE

Once disclosure is granted, then the rules of Article 31 of the CPLR should take control and be utilized by the parties in order to govern, limit or protect litigants from intrusive disclosure.

Recently, however, there has been a trend for courts to try to limit such applications, before the determination of entitlement to discovery is made. For instance, some judges in the Civil Court have denied applications for discovery, without prejudice to renew, based upon the failure of the movant to annex a proposed notice to produce documents to the motion. *See e.g.* Nagel v. Harte, n.o.r., November 1, 1999, Index No. L&T 88807/99 (Civ. Ct., N.Y. Cty.). A reading of the applicable controlling statutes however should lead to a contrary conclusion.

CPLR § 408 states in relevant part that "leave of court shall be required for disclosure . . . ". Accordingly, once the movant has shown that the information relevant to the proceeding is particularly within the knowledge of opposing party, thus satisfying the "ample need" test (see *supra*), disclosure should be awarded and Article 31of the CPLR should govern.

To that end, a notice to produce documents at the examination could be served pursuant to CPLR § 3111 or § 3120. Thereafter, if the deponent has any concerns regarding the propriety of the notice under the aforementioned section, then said deponent may move for a protective order under CPLR § 3103 or state his objections to the notice under CPLR § 3122. Thus, the CPLR anticipated

any potential problems with requests for documents and provides the mechanisms to address any perceived objections.

Inevitably, what occurs when the movant attaches the proposed notice of discovery with the application for discovery is that the parties, and at times the court, get bogged down with the propriety of the notice as the basis of the granting discovery, even before the issue of whether disclosure should be granted at all is reached. Thus, inasmuch as the CPLR is the proper and appropriate vehicle to address the issue of discovery notice, the Courts should effectuate the plain and precise words of the statute and give effect to the plain meaning of its words used therein.

Although there has yet to be an appellate case that has directly addressed this issue, the issue was before the court in a matter entitled Hart v. Blackwood, July 23, 1998, pg. 21, col. 2 (A.T. 1st Dept.). In that proceeding, the Civil Court had denied the landlord's request for disclosure. In opposition to the appeal, the tenant argued in its brief that no disclosure notices were included in the motion and that it is incumbent upon a party in a summary proceeding to specify the discovery devices sought to be used and if at all possible, to identify what specific category of documents are sought to enable the court to issue an order that reasonably apprises the opposing party of the information sought to be produced. Notwithstanding the tenant's arguments, the Appellate Term reversed, implicitly rejecting the Respondent's arguments, and succinctly, but yet unequivocally, held:

> Order entered Dec. 9. 1997. . . **unanimously reversed**, . . . and landlord's motion for leave to conduct discovery in this non-primary residence proceeding is granted.
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> **In view of the presumption in favor of discovery recognized in non-primary residence cases** (see, Cox. v J.D. Realty Assoc., 217 AD2d 179, 183-184; Hughes v. Lenox Hill Hosp., 226 AD2d 4, 18 lv

> denied 90 NY2d 829), **the petitioner-landlord application for disclosure should have been granted.** No prejudice will inure to the tenant, since it is the landlord's own case which will be delayed, if at all, by the requested relief (Hartsdale Realty Co. v. Santos, 170 AD2d 260). (emphasis added)

Accordingly, pursuant to the unequivocal language of the applicable statutory authority, and the implicit ruling of the Appellate Term in Hart v. Blackwood, *supra*, it appears that it is procedurally improper to deny motion for discovery in summary proceedings solely because the movant failed to attach proposed discovery documents. The issue as to what documents can be sought should only be addressed once the question of the suitability of disclosure has been determined.

PRE-ANSWER DISCOVERY MOTIONS

Another area of controversy is where a landlord makes the discovery motion before issue has been joined. Again, many courts have been denying such requests as premature, reasoning that until it is known if the tenant disputes the allegations of the petition, a request for disclosure is premature. Said courts were apparently relying on the case Dubow v. Ames Home Publ. Co., 2 A.D.2d 675, 152 N.Y.S.2d 875 (1st Dept. 1956) (hereinafter "Dubow") which held that the motion for discovery was premature inasmuch as issue had yet to be joined. However, Dubow predated the CPLR which was enacted in 1963 and which has since allowed for pre-answer discovery motions.

Apparently, the court in Dubow relied on Civil Practice Act (hereinafter "CPA") § 288 which explicitly held that examination before trial could not be held until joinder of issue. Indeed, § 288 of the CPA was explicit in permitting examination only "after service of an answer."

However, since the effective date of § 3106 (a) of the superseding CPLR was enacted (Sept. 1, 1963), a notice of examination may be served **before** issue is joined -- at any time "after an action is commenced."

In interpreting this statute, the courts have set their firm imprimatur on the well settled, if not proverbial rule, that:

> CPLR 3106 (subd. [a]) does **not** prevent the service of a notice of examination before answer; **pretrial examination may proceed prior to the joinder of issue**. Nor is there any necessity of showing special circumstances. (emphasis added)

William v. Griffen & Co. Inc., 28 A.D.2d 976, 283 N.Y.S.2d 449 (1st Dept. 1967); *See also*, In re Welsh, 24 A.D.2d 986, 265 N.Y.S.2d 198 (1st Dept. 1965) (" CPLR § 3106 [a] permits pretrial examination prior to the joinder of issue . . ."); Greene v. New England Mutual Life Insurance Co., 108 Misc.2d 540, 437 N.Y.S.2d 844 (Sup. Ct., N.Y. Cty. 1981) ("it should be noted, however, that even if issue had not been joined pretrial discovery would have been available to defendant"); Van Valkenburgh v. Rider, 46 Misc.2d 321, 259 N.Y.S.2d 580, *modified*, 24 A.D.2d 437, 260 N.Y.S.2d 691 (1st Dept. 1965); Siegal, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR, C3106:1, pg. 430 stating "It is plain that joinder of issue (i.e., the service of the defendant's answer) is not a condition precedent to disclosure.[3]

Thus, inasmuch as the information sought by the landlord is inherently within the tenant's exclusive possession, ample need is demonstrated. To the extent that a Court may feel that a motion for disclosure is premature because the tenant may admit the allegations in the petition, the CPLR

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[3] Apparently, the changes expressed in CPLR § 3106 (a) resulted from a conscious effort on the part of the Legislature to conform CPLR procedure to that of the Federal Rules. Since 1946, Federal practice has permitted pre-answer discovery (Fed. Rules Civ. Pro., rule 26, subd [a]); 4 Moore, Fed. Prac. [2d ed.], par. 26.09[1].

provides the tenant with certain relief. Specifically, any objection to possibly improper questions due to the tenant's possible admissions of an allegation, should be raised "during the examination or by motion for a protective order pursuant to CPLR § 3103 of the Civil Practice Law and Rules, if it becomes necessary." Revesz v. Geiger, 40 Misc.2d 818, 243 N.Y.S.2d 744 (Sup. Ct., N.Y. Cty. 1963).

Therefore, since joinder of issue is no longer a condition precedent to disclosure, pre-answer disclosure motions should not be denied on that basis alone.

DISCOVERY IN OWNER OCCUPANCY PROCEEDINGS

A type of case where tenants have been granted leave to conduct disclosure of a landlord occurs in proceedings commonly referred to as owner-occupancy holdovers. In such cases the landlord is seeking to recover possession of a rent regulated apartment based on the claim that the landlord or the landlord's immediate family will reside in the apartment. However, even in such cases, discovery is not routinely granted. Blane v Isles, N.Y.L.J. April 28, 1987, p. 5 col. 4 (AT 1st).

In such cases, the tenant usually claims that they need discovery to determine whether the landlord is acting in "good faith", which was the standard of review of such a case when the subject matter jurisdiction for such proceedings rested with the administrative agencies. However, in 1983 the Legislature expressly and intentionally removed this requirement from the statute, as is discussed further infra. Neither the Rent Stabilization Law ("RSL") nor the current Rent Stabilization Code ("RSL") require that the landlord show "good faith" prior to obtaining possession of a rent stabilized apartment based on owner occupancy. The RSL and RSL provide only that the landlord is **entitled** to possession when "he or she seeks to recover possession . . . [for] personal use and occupancy."

Thus, where the element of "good faith intent" once existed in the relevant statutes, it was removed and no longer exists in the applicable law.

While it may seem natural to require a landlord to prove good faith in an owner occupancy proceeding, a review of the amended statute shows that the Legislature intentionally eliminated the landlord's good faith as a precondition in an owner occupancy case. Instead, the Legislature provided for a severe penalty if, after obtaining possession based on owner occupancy, the landlord fails to occupy or his family the apartment.

The Rent Stabilization Law was substantially changed by the Omnibus Housing Act, Chapter 403, L of 1983. Previously, owner occupancy decisions were made by the rent agency. The CAB determined owner occupancy cases pursuant to the Rent Stabilization Code then in effect (hereafter the "old Code") which had been promulgated by the Rent Stabilization Association and approved by the New York City Department of Housing Preservation and Development.

The old Code provided that the landlord must show "good faith" in any proceeding to obtain an apartment based on owner occupancy. Thus, Section 54 of the old Code provided:

> The owner shall not be required to offer a renewal lease to a tenant only upon one of the following grounds:
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> B. Occupancy by owner or immediate family. ***The owner seeks in good faith*** to recover possession of a dwelling unit for his own personal use and occupancy or for the use and occupancy of his immediate family; the term "immediate family" includes a husband, wife, son, daughter, stepson, stepdaughter, father, mother, father-in-law or mother-in-law.

When the Legislature enacted the Omnibus Housing Act in 1983, it removed and eliminated the former requirement that the landlord show "good faith" as a condition to obtaining a rent stabilized apartment based on owner occupancy. Instead, the Legislature added a section which

provided, for the first time, the imposition of extensive penalties if the landlord failed to comply with the statute.

Section 50 of the Omnibus Housing Act amended Section 26-511 (formerly YY51-6.0) of the Rent Stabilization Law ("RSL") by adding a new provision for owner occupancy.[4] Thus, RSL §26-511(c)(9)(b) now provides:

> c. A code shall not be approved hereunder unless it appears to the department of housing preservation and development that such code:
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> (9) provides that an owner shall not refuse to renew a lease except:
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> (b) ***where he or she seeks to recover possession*** of one or more dwelling units for his or her own personal use and occupancy as his or her primary residence in the city of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York. (emphasis added)

RSL §26-511c(9)(b) is mirrored by the current Rent Stabilization Code ("RSC") §2524.4 which amended the old Code as of May 1, 1987 and which provides that the landlord may elect not to renew a stabilized tenant's lease based on "occupancy by owner or member of owner's immediate family." As with RSL §26-511c(9)(b), RSC §2524.4 eliminated the old Code's former requirement

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[4] Prior to the amendment made by the Omnibus Housing Act, the Rent Stabilization Law had no specific provision for allowing an owner to refuse to renew a stabilized tenant's lease based on owner occupancy. Section YY51-6.0c(9) of the City of New York Administrative Code provided solely that the Rent Stabilization Code could not be approved unless it allowed the owner the right to refuse to renew a tenant's lease "on specified grounds set forth in the code approved by the housing and development administration consistent with the purpose of this law." On July 20, 1982 section YY51-6.0c(9) was repealed pursuant to sections 6 and 10 of chapter 555 of the Laws of 1982, negating §54B of the CAB's Code, and from that date until April 1, 1984, the effective date of the Omnibus Housing Act, there was no lawful basis to refuse to renew a tenant's lease based on owner occupancy.

that the landlord show "good faith" prior to obtaining an apartment based on owner occupancy. However, the new code specifically provides for severe penalties if the landlord does not subsequently occupy the apartment after obtaining possession. The old code did not. RSC §2524.4(a)(5) provides:

> The failure of the owner to utilize the housing accommodation for the purpose intended after the tenant vacates, or to continue in occupancy for a period of three years, may result in a forfeiture of the right to any increases in the legal regulated rent in the building in which such housing accommodation is contained for a period of three years, unless the owner offers and the tenant accepts reoccupancy of such housing accommodation on the same terms and conditions as existed at the time the tenant vacated, or the owner establishes to the satisfaction of the DHCR that circumstances changed after the tenant vacated which prevented the owner from utilizing the housing accommodation for the purpose intended, and in such event, the housing accommodation may be rented at the appropriate guidelines without a vacancy allowance. This paragraph (5) shall not eliminate or create any claim that the former tenant of the housing accommodation may or may not have against the owner.

It must be inferred that when the Legislature passed the Omnibus Housing Act by eliminating "good faith" from the statute, it did so intentionally. Patrolman's Benevolent Ass' n v City of New York, 41 NY2d 205, 391 NYS2d 544; *See, also*, Pajak v. Pajak, Supra; City of New York v. New York Tel Co., 108 A.D.2d 372, 489 N.Y.S.2d 474 (1st Dept. 1984) appeal dismissed, 65 N.Y.S.2d 1052, 494 N.Y.S.2d 1060, 484 N.E.2d 1058 (1985); People v. Tychanski, 78 N.Y.2d 909, 573 N.Y.S.2d 454, 577 N.E.2d 1046 (1991); People v. Finnegan, 85 N.Y.2d 53, 623 N.Y.S.2d 546, 647 N.E.2d 758 (1995); 80-05 Grand Central Parkway Corp. v. Commissioner of Finance, 191 A.D.2d 239, 595 N.Y.S.2d 401 (1st Dept.1993).

Clearly, the Legislature traded good faith for the threat of severe penalties for noncompliance. The trade was for a concrete test to be applied after the fact (i.e. did the landlord actually take

occupancy and continue to reside there rather merely prove an intent to do so), rather than continue to employ what has been a rather arbitrary and subjective standard i.e. ("good faith")

Having eliminated good faith from the statute, it would appear then that the basis for granting discovery to tenants in owner occupancy proceedings has also been eliminated. As such, discovery requests in such actions should be closely scrutinized to determine whether the entitlement to discovery has been met. As noted above, even under the old Code, where good faith was the standard, discovery was not always granted. In Blane v Isles, *supra*, the Appellate Term affirmed the lower court where a tenant's request for discovery had been denied, holding:

> The tenant has not demonstrated, in this holdover proceeding predicated upon RSC 54-b, the existence of circumstances warranting disclosure.

CONCLUSION

In the face of well settled decisions concerning discovery in landlord-tenant summary proceedings, it is disturbing that these controversies continue to exist. The limited assets of the Housing Court are squandered in litigating these issues. Perhaps the time has arrived for the legislature to address these concerns. It has yet to do so in the seventeen (17) years since the enactment of the Omnibus Housing Act of 1983 which placed these issues squarely in the hands of the Housing Court on an almost daily basis.