

**SHOULD RENT DEPOSITS BE REQUIRED
FOR TENANTS?
PROVISIONS ARE EVENHANDED,
REFLECT APPELLATE AUTHORITY¹**

By virtue of the Rent Regulation Reform Act of 1997 (L. 1997, ch. 116), effective Oct. 19, 1997, RPAPL §§ 745(2) now requires, in most instances, tenants to make rent deposits during the litigation of both residential and commercial summary proceedings.

A year and a half ago, the authors discussed the way tenants used withholding of rent as a tactic to obtain leverage against landlords. See "Mandatory Rent Deposits? Tenants Use Delaying Tactic to Gain Edge in Current System," *NYLJ*, March 11, 1996, p. S3. This earlier discussion was a result of two events that were shaping the debate: (1) proposed legislative amendments; and (2) an organized attempt by landlords to enforce the existing rent deposit laws, termed "Justice Week."

However, apparently in response to the landlord's efforts, the Civil Court enforced what in labor parlance could be termed a "rule book slowdown," instituting arduous procedural requirements. The result was that one spent numerous hours in court (and a significant amount of money in legal fees) simply to make the application. By the end of Justice Week, only 48 applications had been made city-wide. (*NYLJ*, Jan. 30, 1996, p. 1 (News Update)).

In the ensuing year, the real estate industry quietly renewed its efforts to secure amendment to the RPAPL, finally using the battle over the expiration of the rent regulation laws to obtain the long-sought rent deposit legislation.

The New Amendments

RPAPL §§ 745(2) now provides that in a summary proceeding upon a tenant's application for a second adjournment or 30 days after the first appearance, whichever is earlier, the court must direct the tenant to deposit into court the rent or use and occupancy which accrues from the date the notice of petition and petition were served, and to continue to deposit all rent or use and occupancy which becomes due pendente lite unless the tenant can establish, at an "immediate" hearing, four defenses:

- (1) the petitioner is not a proper party entitled to maintain the proceeding pursuant to RPAPL §§ 721;

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- (2) actual eviction, partial eviction or constructive eviction, and the tenant has quit the premises;
- (3) a defense pursuant to §§ 143-b of the Social Services Law, which provides for the withholding of rent by the public welfare department where rent subsidies to welfare recipients are involved and there are building violations for hazardous conditions; or
- (4) lack of jurisdiction.

An order to deposit the rent, however, will only be available provided the notice of petition contains language yet to be promulgated informing the tenant of the new provisions. Effectively, therefore, it probably will not be until mid-November 1997 that the first such orders are issued.

The amendments also provide that a tenant in a building with 12 or fewer units will have to pay undisputed sums directly to the landlord rather than into court. This reflects the Legislature's recognition of the need to allow landlords of smaller properties the actual use of the funds to operate their properties during litigation.

From the perspective of the landlord's bar, the most important aspect of the amendments is the penalties for non-compliance with a rent deposit order. If the tenant fails to make the payment, the court must, on a landlord's application, dismiss the tenant's affirmative defenses and counterclaims "without prejudice." Further, if the tenant makes the initial deposit or payment but fails to make the additional payments which may come due, then the administrative judge must order "an immediate trial" on a landlord's application.

Finally, the Legislature has limited the court's discretion on certain matters. The amendments provide that there can be no adjournments absent a landlord's consent; that any stay of a trial must be conditioned on payment of rent/use and occupancy and that, absent the owner's consent, the court cannot extend the time for the tenant to make the deposit or waive the new provisions.

Indeed, the Legislature has entirely removed the court's discretion where a tenant seeks a stay of eviction after judgment. The court formerly granted the overwhelming majority of these "order to show cause" applications seeking such stays. Now such a stay can only be granted where the tenant deposits all the rent arrears due and owing or proves by documentary evidence that all the rent has been paid.

The new amendments therefore are largely the result of a judiciary reluctant to enforce RPAPL §§ 745 as it existed. In fact, RPAPL §§ 745(2)(b) expressly provided that on any request for an adjournment, the court had the discretion and authority to direct rent payments.

However, most judges currently 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) provided in part 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 waiver 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.

It is apparent that the failure of the courts to properly exercise their judicial discretion in this matter led to the Legislature's removal of that discretion.

While at first glance, and as will no doubt be argued by the tenant's bar, the above provisions seem harsh, on closer examination they are much more evenhanded and actually reflect appellate authority.

First, it has long been the law that the failure to accumulate the funds necessary to pay the rent is not a defense to a summary non-payment proceeding. Columbus Manor v. Carroll, *NYLJ*, Jan. 12, 1983, p. 6, col. 1 (1st Dept.). Therefore, a tenant should never legally be heard to complain that it simply did not have the funds.

Second, the amendments now compel a court to exercise the authority it always had the discretion to exercise. Previously, where a tenant did not comply with an order to pay rent/use and occupancy, some courts held that the remedy was an expedited trial date. 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 held 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 is rarely effective.

However, three decisions by the First Department held that a tenant can be evicted for failing to pay use and occupancy. Apparently the Legislature agreed, at least to the extent of forcing immediate resolution of those cases where the tenant cannot or will not make the required deposits. See 61 West 62nd Owners Corp. v. Harkness Apartment Owners Corp., 202 AD2d 345, 609 NYS2d 226 (1st Dept. 1994); Calvert v. Letam Realty Corp., 118 AD2d 426, 499 NYS2d 89 (1st Dept. 1986); 313 West 57th Rest. Corp. v. 313 West 57th Assoc., 186 AD2d 466, 589 NYS2d 775 (1st Dept. 1992).

Most recently, in what may have been one court's way of addressing the debate, the First Department reversed the trial court's decision not to award use and occupancy in 300 East 34th Street Co. v. Palaeias, *NYLJ*, June 20, 1997, p. 25, col. 5 (1st Dept.):

In our view, the competing interests of the parties are more equitably balanced by directing that tenant pay use and occupancy as it accrues pending

resolution of the proceeding (*Eli Haddad Corp. v. Cal Redmond Studio*, 102 AD2d 730). The tenant retains legal possession of the apartment and landlord is required to maintain essential services. Nor is there any issue as to habitability or rent overcharge in this case. While the Civil Court must direct the payment of use and occupancy upon the second request by the tenant for an adjournment (RPAPL §§ 745[2]), the absence of an adjournment request does not preclude such an order where the summary proceeding is otherwise delayed by motion practice or disclosure. (Emphasis added).

In order to make the new law work for them, landlords must be in court ready to proceed to trial or an immediate hearing in the event the court denies the tenant's application or grants it on condition one of the above defenses can be proven. This means that a landlord and its counsel must be prepared to prove a prima facie case from the outset of the litigation and should have their witnesses in court or "on call." To do otherwise will likely result in a denial of the application for rent deposit or even a dismissal of its proceeding if the tenant is otherwise ready to proceed.

Landlords must also maintain accurate repair records and other documentary evidence in order to address the permitted statutory defenses. While the new law makes it harder for tenants to delay cases, it does not eliminate the landlord's burdens of proof.

Similarly, all is not lost for tenants. First, they are not deprived of their right to proceed to trial on the merits of any petition, defense or counterclaim. They are merely deprived of the ability to seek multiple adjournments or the incentive to employ dilatory tactics.

In fact, it would seem that where a tenant has suffered a breach of the warranty of habitability or a constructive, actual or partial eviction, the tenant would want to proceed to trial sooner rather than later.

Moreover, the dismissal of defenses or counterclaims for failure to comply with a rent deposit order is without prejudice. A tenant can still pursue them in a separate action. For instance, the Court of Appeals long ago held that a tenant can elect to enforce the statutory breach of the warranty of habitability (RPL §§ 235-b) in a plenary action. *Park West Management Corp. v. Mitchell*, 47 NY2d 316, 329, 418 NYS2d 310, 317 (1979).

Moreover, it is only rent accruing from the service of the notice of petition and petition that must be deposited or paid. Previously existing rent arrears are not subject to mandatory deposit upon a tenant's second request for an adjournment, an apparent acknowledgement of the concept of "laches" as a defense in summary non-payment proceedings. Obviously, this is likely to act as an incentive for landlords to commence legal proceedings with some alacrity, before large amounts of rent arrears accrue.

Further, by making the rent deposit, a tenant is less likely to be evicted after a trial since it will be easier to pay the difference between the judgment amount and the rent deposit. Depending on the outcome of the action and the amount, if any, of the rent abatement awarded to the tenant, the rent deposit amount in a non-payment proceeding may be more than enough to stay automatically

and permanently the issuance of a warrant of eviction pursuant to RPAPL §§ 751(1). In such cases the tenant may even be deemed to be the "prevailing party" in the litigation on the strength of Lynch v. Liebman, 177 AD2d 453, 576 NYS2d 550 (1st Dept. 1991).

Conclusion

There is an apocryphal story about the landlord who took the stand in a summary, non-payment proceeding and was asked the following question: "Do you want to evict the tenant or do you just want the rent?" When the landlord replied, "I just want the rent," the trial judge promptly dismissed the proceeding. The theory of the dismissal was that one must be seeking possession in a summary proceeding, and rent is only relevant when possession is being demanded.

However, possession obtained after the lengthy delays institutionalized in the current legal process offers only a pyrrhic victory when the rent arrears will never be collected. The mandatory rent deposit law is the Legislature's recognition that a landlord may not only "just want the rent," but be entitled to it as well.