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A New Direction

More Decisions Favor Landlords Over Tenants

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◆ CIVIL COURT ◆

Without any riots, bloodshed, or major legislative changes, the overwhelming number of anti-landlord courts and decisions of the late 1970s to the mid-1990s have given way to new trends slowly wearing away at the rock of procedural and substantive protections meant to enable tenants to keep their tenancies despite alleged violations of their obligations. A number of landlord and tenant decisions handed down in recent years demonstrate the degree the courts are moving beyond procedure to the substance of the cases and judging the merits themselves in a vastly more pro-landlord manner.

The 1996 case of *Hughes v. Lenox Hill Hospital*[1] seems to mark the start of movement away from a rabidly anti-landlord judicial system in parts of New York City.[2] Indeed, there were a couple of decades starting in the late 1970s when landlords' counsel checked the rotation schedule for judges to know how to schedule their litigation.

While many judges now sitting on the appellate benches had their start in those days, few are the seated appellate judges who had any reputation at all for being distinctly pro-landlord or pro-tenant. The courts cannot control an elected judge's predilections in a trial part, but the process that promotes judges to higher positions of authority apparently has barred from promotion judges whose predilections are too plainly obvious.

The result has been a string of appellate cases that have dramatically altered the distribution of power in the Civil Court. In the hornbook literature, one finds subtle but unmistakable references to the movement away from tenant-friendly courts.

The hornbook most designed for representing tenants, Scherer and Fisher's, "Residential Landlord-Tenant Law in New York,"[3] notes at §7-64 "[T]here appears to be a *trend* to consider defects to be amendable (notwithstanding the traditional view…)" (emphasis supplied).

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At §10:51, Justice Fisher writes, "The availability of the defense of subject matter jurisdiction *has been so severely eroded* in both first and second departments to the point that there is not much to waive." (emphasis supplied).[4]

Notice in both of these quotations the language of movement by the appellate courts away from previous views. While the law is always evolving, what is remarkable in this evolution in doctrine is that it fits a pattern of both substantive law and procedure being adjusted to be distinctly more pro-landlord.[5]

Conservative Movement

When it comes to procedure, this movement is aptly described as "conservative," both politically and legally. It is politically conservative in that the movement is in favor of property-owning interests—landlords. It is legally conservative in that it is in favor of restricting the procedures employed in landlord-tenant litigation to the procedures promulgated by the Legislature itself with no room for individual judge's rules.

Where the anti-landlord predilection became most clear among the Civil Court judges of the 1970s and early 1980s was with regard to the issuance of default judgments.[6] For some of these judges, the issuance of a judgment on default on papers alone was simply not going to happen, no matter how meritorious the papers. The Appellate Term, First Department, began to circumscribe that particular abuse of the system with the landmark decision in *Central Park Gardens Inc. v. Ramos*, in which the court rendered a written opinion on an unopposed application for a default judgment which had been refused by a Civil Court judge.[7] In words that would prove prescient of later language used by the Court of Appeals, the Appellate Term wrote:

> We note in more general terms that Civil Court judges assigned the task of entertaining applications for entry of default final judgments in nonpayment proceedings do not function as mere automatons. They should examine the pleadings, check affidavits of service, and identify patterns of fraud which may become apparent in the course of dealing with large numbers of proceedings. In so doing, however, uniform rules of civil procedure and substantive law must be applied so as to avoid an intolerable spectacle of matters being determined more upon the basis of which judge may be presiding in a given case than upon the bases of such uniform rules of

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civil procedure and substantive law.

This decision was fought hard, with a legal services organization suing the Appellate Term to stop it from entering default judgments over the literally rubber-stamped denials[8] of the Civil Court's anti-landlord judges.[9] In response to *Central Park Gardens*, a number of judges came up with ways of avoiding directly refusing the entry of a judgment—an order which gave the Appellate Term authority under CPLR 5701(b) to enter the judgment itself—instead devising additional procedures to barricade the entry of most judgments. These procedures included the ordering of inquests on nonpayment proceedings, requiring landlord's counsel to submit additional affirmations and affidavits, and requiring still further mailings to the tenants than the published statutes and court rules already called for.

When these additional procedures were openly debated before the New York State Bar Association, advocates of the procedures asked, "Isn't it a good idea for tenants to get more notice of the proceedings against them?"

The Court of Appeals answered that question by saying that good idea or not, civil procedure was the province of the Legislature in devising one uniform set of rules, not of individual judges each with a unique set of requirements. In the main text of *Brusco v. Braun*,[10] the Court wrote, "The statute does not authorize the judges to fashion additional, individualized protections upsetting the legislative scheme." However, the real issue is in the footnote to that sentence, which reads, "The record indicates that the practice of Housing Court Judges is inconsistent. Some hold inquests and others do not. Thus, the process to which a petition is subjected depends, arbitrarily, on the judge calling the Default Judgment Calendar."

"Arbitrarily" was indeed the key. Precisely what one had to do to get a default judgment pre-*Brusco* varied from simple use of the statutory procedure for some judges to the individualized and contradictory procedures of others. Still, some Civil Court judges kept finding their own procedures to impose, but in *Mennella v. Lopez-Torres*,[11] the Court of Appeals finally ruled that a Civil Court judge lacks:

> the discretionary legal authority to thus fashion such an additional procedural safeguard, as a matter of policy, for the benefit of defaulting tenants in a rental nonpayment eviction proceeding, beyond the policy choices made by the Legislature in this regard.

It is for the Legislature to devise one uniform set of procedures, not for individual judges to make up their own.

Thus, procedurally, the Civil Court has become more pro-landlord, regardless of its judges' feelings.

Substantive Developments

On the substantive side, there can be little doubt that *Hughes v. Lenox Hill Hospital* really is the starting point of the more pro-landlord tendency of the modern Civil Court. Before *Lenox Hill*, the keynote case was *Chinatown Apartments Inc. v. Chu Cho Lam*,[12] with its holding that although petitions are amendable to cure whatever defects they have, termination notices are not so amendable. *Chu Cho Lam* held its termination notice defective for calling a "cube" a "partition" and directed that the case be dismissed.

Then, *Hughes v. Lenox Hill Hospital* decreed that predicate notices were to be sustained when reasonable in light of all the attendant circumstances. Gradually at first, but increasingly we saw a cascade of appellate cases finding various circumstances reasonable enough to sustain a predicate notice.[13]

The rule had long been that the acceptance of rent for a period of time after the issuance of a termination notice meant the vitiation of that notice unless that acceptance of rent took place after the commencement of a summary proceeding. On the practical level, this rule meant that over the course of an entire year, there was a three-week period when a landlord could not accept rent without a weakened position. While that may still be the rule in the Second Department, in the First Department, the rule is that such acceptance of rent only vitiates the notice when the landlord intends it to,[14] which is to say, never.

This is a major substantive change.

Evidentiary hearings contesting service of process[15] used to be absolutely standard fare in landlord-tenant litigation. Now, mere denial of propriety of service will not give rise to an order of such a hearing unless there is a specific factual denial of what the process server's affidavit claims took place.[16]

The other area worthy of our examination is the enforceability of stipulations. While working in everybody's favor, they most benefit the courts, as they save enormous amounts of judicial time and are, for the most part, appeal proof. However, from the viewpoint of the real estate industry as a whole they are most vital to landlord's interests. They save enormous inconvenience in dragging witnesses to court and often paper over weaknesses in the technical aspects of the landlord's case.

However, there was a string of cases allowing tenants to vacate stipulations on the least pretext, in spite of the clear teaching of *State of New York Power Authority v. Hallock*,[17] holding such documents sacrosanct. However, with *1029 Sixth LLC v. Riniv Corp.*,[18] we see the courts taking a very different tack, holding stipulations strictly enforceable and extremely difficult to vacate. In short, *Riniv*, is a godsend to landlords. Now too, landlords may get money judgments on service of process by nail and mail,[19] adopting a line of thought first proposed in an oft cited New York Law Journal article in 1985.[20]

But rather than the exception, nowadays such godsends are the rule. The so-called "substantive" rules we have treated in this article are themselves actually the substance of landlord-tenant procedure, rather than the substance of the landlord-tenant relationship. However, even those latter laws have been shifting in a decidedly more pro-landlord direction.[21] For example, parties now may not contract for rent stabilization.[22]

In all matters, both as to the makeup of the bench and to the rulings coming down, landlords face a far friendlier atmosphere in New York City Civil Court than in decades gone by.

1. 226 AD2d 4 (First Dept. 1996).

2. Most practitioners find the five boroughs of the City of New York to be on or near the following scale of increasing landlord-friendliness (in order from the most pro-tenant to the most pro-landlord): Manhattan, Brooklyn, Queens, Bronx, Staten Island. Some would say that Queens and the Bronx are tied.

3. Chapter 10 is entitled "Core Defenses to Summary Proceedings." There is no corresponding chapter on how to win a summary proceeding.

4. Note that Justice Fisher uses the same "erosion" metaphor that began this article.

5. This article neither exults in nor complains of the trend, but simply reports it for what it is.

6. These were and are universally referred to as "warrant applications," but the warrant is actually an automatic accomplishment when one has received a default judgment. Possession of such a judgment is the sole qualification for obtaining a warrant.

7. 12 HCR 74C, NYLJ 4/9/84, 12:6 (AT1 1984).

8. Several judges reputed to be anti-landlord issued their denials of applications for default judgment with a rubber stamp they had made up for the purpose. These stamps would on occasion include legal citation to a decision by another rubber stamp wielding member of the same group of judges.

9. *MFY Legal Services Inc. v. Dudley*, 67 NY2d 706 (1986). The Court of Appeals rebuffed the suit, finding a lack of standing, and not speaking to the issue the Appellate Term raised. To this day, the Appellate Term occasionally issues default judgments over the objections of Civil Court judges.

10. 84 NY2d 674 (1994).

11. 91 NY2d 474 (1998).

12. 51 NY2d 786 (1980).

13. The rule against amendment of the body of the petition itself purportedly found in *Cal Cal Realty Corp. v. Taylor*, 67 Misc2d 903, (AT First Dept. 1970), was explicitly abjured by the same court in *Jackson v. NYCHA*, 88 Misc.2d 121 (1976), giving way to a rule that with regard to amendability, "a petition in a summary proceeding is no different than a pleading in any other type of civil case." *American Villa Assocs. II v. Kyokushin U.S.A. Inc.*, 28 HCR 5A, NYLJ 1/4/00, 22:1 (AT First Dept. 2000).

14. 8 *West 9th St., LLC v. Hunter*, 14 Misc3d 145 (AT1 2007).

15. Generally known as "traverse hearings," with the first word pronounced "TRAH-verse."

16. *Neighborhood Partnership Housing Development Fund Corp. v. Okolie*, 31 HCR 49B, NYLJ 1/30/03, 23:4 (AT 2&11 2003); *Browne v. Leino*, 6 Misc3d 131 (AT 9 & 10 2005); *Kelley v. Chavez*, 34 HCR 830A, 821 NYS2d 466 (2nd Dept. 2006).

17. 64 NY2d 224 (1984).

18. 9 AD3d 142 (First Dept. 2004).

19. *Avgush v. Berrahu*, NYLJ 11/2/07, 38:2, HCR Serial #00016856 (AT 9 & 10).

20. Treiman and Feder, "Default Money Judgments in Summary Proceedings," NYLJ, July 30, 1985, p. 1; cited inter alia, Siegel, "New York Practice 4th," p. 993 and *Dolan v. Linnen*, 195 Misc 2d 298 (Civ Richmond Lebovits).

21. This article is about judicial developments, but statutory changes have also been increasingly pro-landlord.

22. *HDFC v. Smalls*, 43 AD3d 7 (First Dept. 2007).