

LANDLORD-TENANT PRACTICE REPORTER

Discrimination: **How Tenant Complaints Can Derail Evictions**

By Adam Leitman Bailey, Esq.

Many owners, managers and co-op boards assume that anti-discrimination laws apply only to screening and selecting new tenants and shareholders. In actuality, though, these Federal, State and local laws apply to *all* aspects of the landlord-tenant relationship.¹ A tenant or shareholder may file a discrimination complaint with the U.S. Department of Housing and Urban Development (HUD), the New York State Human Rights Commission, or a local agency such as the New York City Commission on Human Rights, at any point during the tenancy—even on the eve of eviction.

A growing number of tenants have done just that, and have then requested that the eviction proceeding against them be “stayed,” or postponed, pending a determination of the discrimination complaint by the agency. While courts share concurrent jurisdiction over complaints of discrimination with administrative agencies, judges presiding over summary proceedings often invoke the doctrine of “primary jurisdiction,”² and defer resolution of the dispute to the agency. As a result, the eviction proceeding is stayed³ while the tenant’s discrimination complaint is before the administrative agency.

In *Mora v. DiBartolo*,³ the Civil Court of the City of New York explained the doctrine of primary jurisdiction as follows:

The doctrine of primary jurisdiction is clearly applicable in summary proceedings. Where an administrative agency has “particular expertise” in considering an issue, and “ultimate disposition of the summary proceedings will necessarily infringe upon” the agency’s findings, a stay of the summary proceeding pending a factual determination by the administrative agency is preferable. (*Moskowitz v. Archer*, N.Y.L.J., 2/14/86, p. 12, col 6 [App.Term, 1st Dep’t]). While the court’s discretion to stay a summary proceeding should be exercised circumspectly ... where a claim of discrimination may constitute a valid defense to a summary proceeding pending resolution of the tenants’ administrative complaint before the Human Rights Commission may be appropriate.

This article reviews the types of discrimination complaints which have operated to stay summary eviction proceedings and examines the responsive options available to landlords.

Discriminatory Practice Must Be Valid Defense to Eviction

Not every allegation of discrimination will trigger the grant of a stay. The tenant's claim, if true, must constitute a valid defense to the summary proceeding.⁴ The following cases illustrate the required nexus between the ground for eviction and the claim of discrimination.

✓ **Occupancy incident to employment.** In *Boca Broadway Realty Co. v. Naim*,⁵ a landlord terminated a tenant's employment and subsequently obtained a final judgment after trial for possession of a basement apartment occupied by the respondent as an incident of her employment. The respondent thereafter filed a complaint against the owner with the New York City Commission on Human Rights alleging gender discrimination. The Appellate Term, First Department, affirmed a lower court stay of the enforcement of the judgment, pending the determination of the tenant's complaint against the landlord, deciding as follows:

If the Commission should determine that landlord engaged in unlawful discriminatory practices, and directs respondent's reinstatement (*see* Administrative Code § 8-109[2](c)), this eviction proceeding for possession of the premises occupied as a condition of the employment will not lie.

✓ **Unauthorized pet.** In *90-10 149th Street v. Badillo*,⁶ a landlord commenced a holdover proceeding against the tenant, on the grounds that the tenant breached a substantial obligation of the lease by harboring a dog in the apartment in violation of the lease. The tenant, who suffered from renal disease and retinal detachment (which had rendered her legally blind), claimed that the dog was a medically necessary "comfort animal." After the proceeding had begun, she filed a

(continued on page 13)

disability discrimination complaint with HUD (which was referred to the State Division of Human Rights), and requested that the eviction proceeding be stayed, pending a determination of the complaint. The court granted the stay, finding that if the Agency determined that the landlord engaged in discriminatory conduct, for the eviction proceeding would not lie.

✓ **Licensee proceeding.** In *170 West 85th Street HDFC v. Jones*,⁷ a mentally retarded man, who claimed to be the gay life partner of the tenant-shareholder of a cooperative apartment, filed a discrimination complaint with the New York City Commission on Human Rights alleging that the landlord and its employees had harassed the tenant because of his disability, sexual orientation and marital status. Thereafter, the landlord began a licensee holdover proceeding against the occupant. A *Guardian ad Litem*, acting on behalf of the occupant, sought a stay of the proceeding pending the determination of the occupant's discrimination complaint. The Court rationalized the grant of a stay during the pendency of the Commission's review in this manner:

The reasoning for this [tolling] is simple but compelling. An administrative law judge and the prosecutorial staff of the Commission are accustomed to these types of claims and possess more specialized knowledge of discrimination law than the Housing Part of Civil Court ... While Civil Court may properly consider respondent's discrimination claim as a defense to petitioners's claim, the court's equitable jurisdiction is limited ... "In contrast, the City of New York Commission on Human Rights has been vested with the authority [to] order broad equitable remedies upon a finding of discrimination. The Commission may require affirmative action of a party, including extension of 'full, equal and unsegregated accommodations,' and may seek injunctive relief and impose civil penalties." (Citations omitted.)

Responsive Options

Landlords aren't without options should a tenant seek a stay until the discrimination complaint is resolved. Here are some of the responses at their disposal.

The strongest argument against a stay is that, despite the tenant's complaint, the landlord has an adequate non-discriminatory basis for the eviction proceeding.

For example, in *Ennismore v. Gottlieb*,⁸ the respondents

were legal subtenants who had held over in a rent-stabilized apartment after the expiration of the sublease. The subtenants filed a discrimination complaint contending that the landlord had refused to offer them a lease in their own right because of their sexual orientation, and then sought a stay of the eviction proceeding. The Appellate Term, First Department, held that a claim of discrimination is not a defense to a summary holdover proceeding where there is "no legal basis for respondent remaining in possession." As the tenants lacked a bona fide entitlement to continue in possession after the expiration of their sublease, the court vacated the stay and granted the landlord's motion for summary judgment.

While it is unclear whether the discrimination complaint must precede the filing of the petition, a landlord may attempt to argue that the discrimination claim should have been filed *before* the landlord initiated its proceeding. Such a policy would prevent tenants from interposing baseless claims in order to delay an eviction. It should be noted, however, that this issue does not appear to have been addressed by New York Courts.

If a stay is granted, the cases are unanimous that the Landlord may collect "rent" or use and occupancy while the administrative complaint proceeds. This relief should be requested promptly upon the tenant's request for a stay.

Conclusion

Since available rental apartments are scarce and fair market rents are reaching astronomical heights, both tenants and landlords should be aware that a discrimination claim could preclude eviction proceedings from reaching an expeditious conclusion. While landlords may have a few responses at their disposal, tenants have numerous avenues available to them if such discrimination is prevalent. Severe sanctions are in place to combat discrimination and, if and when such activity persists, tenants should not hesitate to contact the appropriate authorities for remedial relief.

Adam Leitman Bailey, Esq., is a principal of the Law Firm of Adam Leitman Bailey, which specializes in real estate law and litigation.

Endnotes:

1. The Fair Housing Act and Fair Housing Amendments, 42 U.S.C. §§ 3601-3619, 3631 are enforced by the US Department of Housing and Urban Development. The New York State