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ANNUAL LANDLORD TENANT UPDATE

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January 25, 2017
Bridgehampton National Bank

ANNUAL LANDLORD & TENANT

LAW UPDATE

Suffolk County Bar Association
Hauppauge, New York

September 12, 2016

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1. Purpose: Award "Possession"

A summary proceeding is a special proceeding governed by the Real Property Actions and Proceedings Law (RPAPL) for the purpose of recovering lawful "possession" of the subject premises. Counsel should be mindful of the parties' often differing goals and priorities. Typically, a Landlord seeks to regain possession as soon as possible while the Tenant either wants to remain in possession and/or have additional time to relocate. With that in mind, typical of any litigation, summary proceedings generally lend themselves to amicable resolutions provided the parties demonstrate flexibility.

Although the Housing Part is the preferred forum for landlord and tenant disputes, the court has no authority to issue declaratory and/or injunctive relief (*see London Paint & Wallpaper Co., Inc. v. Kesselman*, 138 A.D.3d 632 (1st Dep't 2016)). A summary proceeding may be utilized to determine lawful "possession", but the Court/Housing Part lacks capacity to determine issues of "ownership" or "title" which may be heard in the Supreme Court. The Tenant in a summary proceeding may, however, assert as an affirmative defense that the Landlord is no longer the owner of the premises or has a superior possessory interest in the premises. The Tenant may further assert that it is the "owner" (if not previously acknowledged and accepted) but only as an affirmative defense (not as an affirmative claim) (*see Jacob Marion, LLC v. Bey*, 2016 N.Y. Misc. LEXIS 544, 2016 N.Y. Slip Op 50219(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 23, 2016)).

Ordinarily, the parties may litigate the issue of "title" following the completion of the summary proceeding. However, where the Respondent unsuccessfully asserts in the summary proceeding as an affirmative defense that he/she/it is the owner of the premises, for example, by adverse possession, the Respondent may be collaterally estopped from re-asserting the claim as an affirmative claim in a subsequent declaratory judgment action (*see Nissequogue Boat Club v. State of New York*, 14 A.D.3d 542, at 544 (App. Div., 2d Dep't 2005); *Jacob Marion, LLC, supra*). Where the Respondent asserts the defense and prevails in the summary proceeding, then the issue may be litigated in a subsequent action in the Supreme Court provided the action is commenced within sixty (60) days of entry of the Court's decision.

2. Types of Summary Proceedings

Two (2) types of proceedings comprise the overwhelming majority of summary proceedings: (1) nonpayment proceedings and (2) holdover proceedings. The requisite elements of each are different, and, as such, the Petitioner has the burden of commencing the proper type of proceeding. Otherwise, upon motion, or due to the failure to plead and/or establish a

meritorious claim at a hearing, the proceeding will typically be dismissed. Regardless of the type of proceeding, the occupant must be in possession at the time the summary proceeding is commenced (*see Clark v. Singletary*, 2016 N.Y. Misc. LEXIS 551, 2016 N.Y. Slip Op 50211(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016); *92 Bergenbrooklyn, LLC v. Cisarano*, 21 N.Y.S.3d 810 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

A. Nonpayment Proceeding

The purpose of a nonpayment proceeding, similar to a holdover proceeding, is to recover possession (*36 Main Realty Corp. v. Wang Law Office, PLLC*, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)). A nonpayment proceeding presupposes the parties have a valid Landlord and Tenant relationship when the summary proceeding is commenced, and the Landlord alleges the Tenant failed to pay all or a portion of the rent (*Underhill Ave. Realty, LLC v. Ramos*, 2015 N.Y. Misc. LEXIS 4453, 2015 N.Y. Slip Op 51804(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 8, 2015) (action dismissed where the Section 8 tenancy expired prior to commencement of nonpayment proceeding).

Of note, the Landlord and Tenant relationship is not terminated by the Landlord's rent demand or the commencement of the summary proceeding. Rather, where the Landlord prevails at a hearing on the merits, the Landlord and Tenant relationship continues until the Court "issues" (signs) the judgment. The rental agreement at that point is deemed to have been terminated as of the date the nonpayment proceeding was commenced. Accordingly, the money judgment would include rent arrears plus use and occupancy for the time following commencement of the proceeding that the tenant remains in possession (*see Madden v. Juillet*, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015); *Priegue v. Paulus*, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. 2014)).

Counsel should bear in mind that the Tenant may avoid the eviction by tendering the full amount awarded at any time prior to the Court's issuance (signing) of the judgment of possession and warrant of eviction.

B. Holdover Proceeding

A holdover proceeding presupposes the parties do not have a valid Landlord and Tenant relationship when the summary proceeding is commenced. In other words, if the parties at some point had a valid Landlord and Tenant relationship, the relationship either expired (and a new agreement was not reached) or was terminated. A holdover proceeding may further be proper depending on the circumstances where a Landlord and Tenant relationship never existed.

There are several recognizable relationships set forth in RPAPL §§ 711 and 713 that permit a holdover summary proceeding. These include, but are not limited to, (1) where the lease expired on its own terms and a new agreement was not reached; (2) a terminated rental agreement due to a breach of a substantial obligation specified within the lease; (3) termination

of a month-to-month tenancy; (4) revocation of a license agreement; (5) where illegal activity is conducted at the premises; (6) termination of a tenancy-at-will; (7) efforts to remove a squatter; and (8) seeking possession of post-foreclosed properties. Unlike a nonpayment proceeding, the occupant may not avoid the eviction by paying the amount awarded *prior* to the issuance of the judgment because the proceeding was commenced for reasons other than the nonpayment of rent.

3. Proper and Necessary Parties

The Landlord must name each and every Tenant in a summary proceeding. The Landlord may not pick and choose which Tenants to include even where some of the Tenants have paid their share of the rent. This is the case because a Tenant is both a "proper" and "necessary" party to the summary proceeding. The adult children of a Tenant, however, need not be named unless they have an independent possessory right to the subject premises, and minor children neither be named nor appear on the warrant of eviction. The general rule is that a spouse, family member, and tenant's guests may be evicted even where they are not named in the summary proceeding (*see JLNT Realty, LLC v. Liautaud*, 26 N.Y.S.3d 213 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

A Subtenant may be named (but it is not required) because a Subtenant is a "proper" but not a "necessary" party to a summary proceeding. The Landlord may not commence a summary proceeding directly against a Subtenant without also naming the Tenant(s) because the Landlord is not in privity with the Subtenant. It is typically in the Landlord's interest to name Subtenants because where the Landlord and Tenant relationship is properly terminated, as a matter of law, the subtenancy is also terminated. However, if a Subtenant is omitted from the summary proceeding, then the Subtenant will not appear on the warrant of eviction. Under such a scenario, after the Tenant vacates the premises, the Subtenant may become a Tenant at Sufferance which requires a Thirty-Day predicate notice pursuant to Real Property Law § 228 before a separate summary proceeding may be brought against the Subtenant.

Counsel should be mindful that the Sheriff may altogether refuse to perform the eviction, including against the named Tenant, if persons other than those named on the warrant of eviction are present in the premises. If the Landlord names a "John Doe" or "Jane Doe", then the Landlord must move to amend the caption to reflect the "Doe's" proper name once learned.

It is worth noting that although the Landlord/Petitioner is typically the "owner" of the rental premises, ownership is not a required element. Rather, the Petitioner must merely demonstrate by a fair preponderance of the evidence that it has a "superior possessory interest" in the premises over the Respondent. It is for this reason that a Tenant may commence a summary proceeding against a Subtenant.

Parenthetically, it has been determined that although an individual may represent him- or

herself, corporations and limited liability companies must appear by counsel (*Inland Diversified Real Estate Service, LLC, Agent for Inland Diversified White Plains City Ctr., LLC v. Keiko New York, Inc.*, 2016 N.Y. Misc. LEXIS 1470, 2016 N.Y. Slip Op 50613(U) (App. Term, 9th & 10th Jud. Dists. April 11, 2016)). In 2015, the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts held that partnerships and limited liability partnerships must also appear by counsel in a summary proceeding (*Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov*, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

4. Predicate Notice

Except where the lease agreement expires on its own terms, the Landlord is generally required to provide the occupants with a predicate notice prior to commencing a summary proceeding (*see 620 Dahill, LLC v. Berger*, 27 N.Y.S.3d 315 (2d Dep't 2016) (no predicate notice required following expiration of a tenancy of a fixed duration where the tenant continues to occupy the premises without paying additional money and/or entering into a new rental agreement)).

The issue of predicate notice is important for several reasons. First, an occupant must be afforded sufficient notice of the allegations and an adequate opportunity to be heard on petitioner's claims. Second, the type and length of the predicate notice is dependent upon the proper identification of a recognizable Landlord and Tenant relationship. A mistake in the identification of the relationship, which occurs days, weeks or perhaps months prior to the commencement of the summary proceeding, may result in an improper predicate notice, which, in turn, upon motion, may result in a dismissal. From the Tenant's perspective, this information is required to assess the validity of the predicate notice and whether a motion to dismiss is in order. The defense may be waived unless timely asserted.

The parties should consult their lease agreement for any restrictions or heightened obligations regarding predicate notices because such lease provisions are generally enforceable. (*see, e.g., 1626 Second Ave., LLC v. Notte Rest. Corp.*, 880 N.Y.S.2d 225 (N.Y. Cnty. Civ. Ct. 2008)).

5. Answer

Pursuant to RPAPL § 743, a Tenant is generally not required to interpose an Answer to the Petition. Rather, the Tenant may, within his/her discretion, assert an Answer on the return date either orally or in writing. However, except as set forth in RPAPL § 732 regarding nonpayment proceedings in New York City, if the Notice of Petition and Petition are served no fewer than eight (8) days before the return date and the Landlord demands an Answer at least three (3) days prior thereto, then the failure to interpose a timely Answer may result in a default (*see* N.Y. Uniform Rules for Trial Courts [22 N.Y.C.R.R.] § 212.42[c]; *cf. Development*

Strategies Co., LLC v. Ditmars Roofing and Sheetmetal Contractors, Inc., 924 N.Y.S.2d 308 (App. Term, 9th & 10th Jud. Dists. 2011) (Petition did not demand that the Respondent serve an Answer)).

The failure to assert a personal jurisdiction defense due to improper service is waived where the defense is not asserted in the original answer or timely raised on the return date (*Chen v. Ray*, 26 N.Y.S.3d 212 (App. Term, 1st Dep't 2015)). Interestingly, a respondent was precluded from asserting the defense for the first time in an amended answer even where the amended answer was timely (*see Iodice v. Academics R Us, Inc.*, 26 N.Y.S.3d 724 (App. Term, 1st Dep't 2015)).

6. Adjournments

A *pro se* Tenant's request for an adjournment for the purpose of retaining counsel extends the time to answer (*see In-Towne Shopping Ctrs. Co. v. DeMotties*, 851 N.Y.S.2d 70 (App. Term, 9th & 10th Jud. Dists. 2007); *City of New York v. Caldelario*, 601 N.Y.S.2d 371 (App. Term, 2d & 11th Jud. Dists. 1993) (same), *aff'd in part and rev'd in part on other grounds*, 223 A.D.2d 617 (App. Div., 2d Dep't 1996)).

Notwithstanding RPAPL § 745(1), which limits adjournments in summary proceedings outside New York City to ten (10) days, the Court has "inherent authority to grant a continuance" of longer duration (*see Paladino v. Sotille*, 835 N.Y.S.2d 799 (App. Term, 9th & 10th Jud. Dists. 2007)). Rules regarding adjournments in New York City are set forth at RPAPL § 745(2). The Court may consider factors such as whether the request was "made for the purpose" of delaying the proceedings or the failure to exercise due diligence (*see Tuscan Realty Corp. v. O'Neill*, 731 N.Y.S.2d 830 (App. Term, 2d & 11th Jud. Dists. 2001)).

7. The Court's Award – Judgment of Possession, Money Judgment and Warrant of Eviction

In a summary proceeding, the Court may award a prevailing Landlord the following: (1) judgment of possession; (2) money judgment; and (3) warrant of eviction.

A. Judgment of Possession and Warrant of Eviction

In a nonpayment proceeding, the judgment of possession and warrant of eviction terminate the Landlord and Tenant relationship and authorize an eviction should the occupants named on the warrant refuse to vacate. In a holdover proceeding, since the Landlord and Tenant relationship was terminated or expired prior to the commencement of the summary proceeding, if one ever existed, these documents formalize petitioner's entitlement to legal "possession" and once again authorize the eviction.

B. Money Judgment

In a summary proceeding, a prevailing Landlord is entitled to recover, without regard to amount, unpaid rent arrears, use and occupancy and/or any reasonable item denominated within a written lease as "added rent" or "additional rent". There is no dollar limit on the amount awarded because the Court's maximum dollar jurisdiction is not applicable in summary proceedings (*see* Uniform District Court Act § 204; Uniform Justice Court Act § 204).

The Appellate Term for the Ninth and Tenth Judicial Districts has held that a general, catch-all lease provision which states that "all costs that tenant is obligated to incur pursuant to the lease are deemed 'additional rent'" encompasses the other provisions within the lease even those that do not specify the costs as "added" or "additional" rent (*Inland Diversified Real Estate Service, LLC, Agent for Inland Diversified White Plains City Ctr., LLC v. Keiko New York, Inc.*, 2016 N.Y. Misc. LEXIS 1470, 2016 N.Y. Slip Op 50613(U) (App. Term, 9th & 10th Jud. Dists. April 11, 2016) (petition dismissed because petitioner failed to demonstrate the items were owed, but otherwise the catch-all "additional rent" provision would have been enforced)). On the other hand, although the parties may negotiate any item and further the courts generally will defer to the will of the parties absent fraud, duress, mistake, coercion or unfair advantage, some agreed upon provisions simply may not be enforced (*see, e.g., 270 E. 95 Props, LLC v. Kent*, 18 N.Y.S.3d 260 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (notwithstanding lease provision to the contrary, dismissing petition because late and legal fees may not be considered "rent" for a rent stabilized apartment)).

1. Rent/Use and Occupancy and "Additional Rent"

"Rent" is the dollar amount the parties agree to occupy a particular area(s) for a specific duration. "Use and occupancy", on the other hand, is the fair and reasonable value to occupy the space without a valid rental agreement (*London Paint & Wallpaper Co., Inc. v. Kesselman*, 138 A.D.3d 632 (1st Dep't 2016)). Rent and use and occupancy may be equivalent in value but the terms are not interchangeable. Rent relates to the period the parties have/had a valid rental agreement. Use and occupancy pertains to the period where the parties do not have a valid agreement because the lease expired, was terminated or such a relationship never existed. If, however, the parties previously had a lease agreement that either expired or was terminated, landlord need not prove the reasonable value for occupying the premises because use and occupancy "may properly be assessed at the rent reserved in an expired lease" (*see Siodlak v. Light*, 2016 N.Y. Misc. LEXIS 564, 2016 N.Y. Slip Op 50202(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)).

Typical "additional rent" items include (1) attorney's fees and (2) utilities (electricity, oil, cable/telephone). The Petitioner must demonstrate that these items are listed in the rental agreement as "added rent", are reasonable and have been incurred. Otherwise, they may not be recovered in a summary proceeding, but instead may be sought in a subsequent plenary action for damages.

With respect to attorney's fees, petitioner must submit the lease agreement to verify the attorney's fees are delineated in the rental agreement as "additional" or "added" rent (*Oakwood Terrace Hous. Corp. v. Monk*, 2016 N.Y. Misc. LEXIS 542, 2016 N.Y. Slip Op 50198(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)). In addition, an award of attorney's fees may not be awarded in favor of Landlord against the Subtenant because the Subtenant is not a party to the rental agreement, and, as a result, there is no privity that would create either a statutory or contractual obligation to pay Landlord's attorney's fees (*see Oakdale Manor Owners, Inc. v. Raimondi*, 2015 N.Y. Misc. LEXIS 4364, 2015 N.Y. Slip Op 51754(U) (App. Term, 9th & 10th Jud. Dists. Nov. 30, 2015)).

Interestingly, it has been held that the Housing Part may deny attorney's fees to the prevailing Landlord where "fairness" requires such a result or landlord acted in "bad faith" or the "unfairness is manifest" (*Greenbrier Garden Apts. v. Eustace*, 2016 N.Y. Misc. LEXIS 561, 2016 N.Y. Slip Op 50210(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016) (landlord refused to negotiate certain rent payments and failed to respond to the tenant's inquiries)).

Where the parties' rental agreement for residential property includes a one-sided Landlord attorney's fee provision, then the lease is automatically deemed to contain a similar provision in favor of the Tenant should the Tenant be the prevailing party (*see* Real Property Law § 234). The same does not apply to commercial leaseholds.

RPL 234 is intended to "level the playing field" between Landlords and Tenants by encouraging resolution without unnecessary expense. A Tenant's attorney's fees may only be awarded where the Tenant prevails "in a [Landlord-Tenant] controversy that has reached an `ultimate outcome'" (*J.P. & Assocs. Props. Corp. v. Krautter*, 128 A.D.3d 963 (2d Dep't 2016)). However, notwithstanding the clear language of the statute, the Court may deny a prevailing Tenant's attorney's fees where (1) the award would be manifestly unfair or (2) the Tenant engaged in bad faith (*251 CPW Hous. LLC v. Pastreich*, 124 A.D.3d 401 (1st Dep't 2015) (where the Landlord may have asserted a colorable claim but was ultimately unsuccessful on the merits, Tenant should have been awarded attorney's fees under RPAPL 234)).

Late fees have been the source of substantial discussion. Both 5% and 10% late fee provisions, even where delineated within the rental agreement as "additional rent", have been held to be excessive, unconscionable and are not recoverable where they do not reasonably reflect any actual harm Landlord has sustained as a result of the late payment of rent (*see Wilsdorf v. Fairfield Northport Harbor, LLC*, 950 N.Y.S.2d 494 (App. Term, 9th & 10th Jud. Dists. 2012) (10% late fee); *67-26 Dartmouth St. Corp. v. Silberman*, N.Y.L.J., Apr. 2, 1996, at 30, col. 1 (App. Term, 2d & 11th Jud. Dists. 1996) (5% late fee)). More recently, and consistent with earlier rulings, a 13% late fee was held unenforceable because the fee was grossly disproportionate to any damages that could had resulted due to the late payment of rent (*Diversified Equities, LLC v. Russell*, 2016 N.Y. Misc. LEXIS 472, 2016 N.Y. Slip Op 50177(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 10, 2016)).

An item not identified within a written rental agreement as either "added rent" or "additional rent" may not be recovered in a summary proceeding (*see, e.g., Saunders Street Owners, Ltd. v. Broudo*, 936 N.Y.S.2d 61 (App. Term, 2d, 11th & 13th Jud. Dists. 2011) (sublet fees)). Property damage, damages, future rent/accelerated rent and unpaid security deposits are similarly not recoverable, whether following a hearing or on consent in a Stipulation of Settlement (*see, e.g., Kings Park 8809, LLC v. Stanton-Spain*, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (damages are *not* recoverable)).

In addition, the Court may not issue a judgment or render a monetary award against a Guarantor unless the Guarantor has an independent possessory right to the subject premises (*MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd.*, 2016 N.Y. Misc. LEXIS 111, 2016 N.Y. Slip Op 50048(U) (App. Term, 9th & 10th Jud. Dists. Jan. 12, 2016)). The Landlord may, however, seek these amounts in a plenary action following the Tenant's vacating of the premises provided the rental agreement includes a survival clause that provides the Tenant's obligations for rent payments continue even where the rental agreement has been terminated (*see H.L. Realty, LLC v. Edwards*, 131 A.D.3d 573 (2d Dep't 2015)).

2. Costs and Disbursements

The money judgment may include pre-judgment interest where there is a breach of a lease obligation because such claims "sound[] in contract" (*see* CPLR § 5001(a); *Solow v. Wellner*, 86 N.Y.2d 582 (1995) (nonpayment proceeding)). Statutory costs and disbursements that may be awarded include service of the pleadings on each "necessary" party, and, in the event the Respondent fails to appear, an additional $5.00 for an affidavit from the process server stating the Respondent is not presently in the military ($1.50 in the Justice Courts) (*see, e.g.*, Uniform District Court Act § 1906-a, 1908; Uniform Justice Court Act § 1903(d), (m)). Some Courts have adopted the approach that the filing fee is recoverable only where the prevailing Landlord appears *pro se* (but not if represented by counsel) (*see* Formal Op. No. 90-F6, 1990 N.Y. Op. Attny Gen. 25 (Aug. 8, 1990)).

3. Counterclaims

A Tenant is generally entitled to a money judgment on its successful counterclaims, without regard to amount, in a summary proceeding. However, in the Justice Courts, where counterclaims may not exceed $3,000, any dollar amount on a counterclaim above $3,000 is deemed waived (*see* Uniform Justice Court Act § 208; *2094-2096 Boston Post Road, LLC v. Mackies American Grill, Inc.*, 2016 N.Y. Misc. LEXIS 1975, 2016 N.Y. Slip Op 50844(U) (App. Term, 9th & 10th Jud. Dists. May 25, 2016)).

A lease provision barring counterclaims will generally be enforced (i.e., requiring a plenary action in a court of competent jurisdiction) unless the counterclaims are "inextricably intertwined" with the Landlord's underlying claims, such as a counterclaim for the breach of the warranty of habitability or the diminution in parking at a commercial premises (*2094-2096*

Boston Post Road, LLC, supra; *William J. Garry, As Receiver v. Ryan & Henderson, P.C.*, 2016 N.Y. Misc. LEXIS 2408, N.Y. Slip Op 26210 (Nassau Cnty. Dist. Ct. June 29, 2016)). The counterclaim must be timely asserted or it will be waived, thereby requiring a separate plenary action for such relief (*see LGS Realty Partners LLC v. Kyle*, 26 N.Y.S.3d 725 (App. Term, 1st Dep't Nov. 18, 2015)).

8. Stipulation of Settlement

A. General Matters

Stipulations of Settlement are favored and typically enforced. However, upon a sufficient showing of fraud, overreaching, unconscionable conduct, mistake or illegality, the Court may refrain from enforcing the Stipulation (*see Banana Kelly Union HDFC v. Chambers*, 2016 N.Y. Misc. LEXIS 1898, 2016 N.Y. Slip Op 50812(U) (App. Term, 1st Dep't May 25, 2016); *Hallock v. State of New York*, 64 N.Y.2d 224 (1984)). The Court may further relieve a party from strict compliance with the Stipulation where there has been "substantial compliance" and enforcement "would be unjust or inequitable, or would permit the other party to gain an unconscionable advantage" (*see generally Chauncey Ave. Trust v. Whitaker*, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)).

For good cause pursuant to RPAPL § 749(3), the Court may vacate a warrant of eviction (*see Harvey 1390 LLC v. Bodenheim*, 2012 N.Y. Slip Op 5116 (App. Div., 1st Dep't June 26, 2012)). However, the Court is not required to enforce a provision that states "any" default of the Stipulation is deemed to be a "material" default (*see 135 Amersfort Assoc., LLC v. Jones*, 20 N.Y.S.3d 292 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

1. Amending the Petition to Include a Larger Dollar Amount

Where the dollar amount of the judgment is greater than the amount sought in the Petition, regardless of the reason, Petitioner's counsel should make oral application (or in writing) move to amend the Petition to include the higher dollar amount and provide a rationale for the amendment (e.g., an additional month's rent has since become due following commencement of the proceeding). A pragmatic reason for this approach is that in the event there is a future dispute regarding enforcement of the Stipulation of Settlement, the Court may only enforce the amount set forth in the Petition and any amendments. Of course, the amount amended must actually be due and owing at the time of the amendment.

2. *Pro Se* Litigants (RPAPL § 746)

Where one (1) or more of the parties to the Stipulation appears *pro se*, the Court must "fully describe" the terms of the Stipulation to the *pro se* party. In other words, a *pro se* litigant wishing to settle a summary proceeding must appear in Court. Otherwise, the Court cannot

accept the Stipulation but may instead adjourn the matter to another date when the *pro se* litigant will appear. If the *pro se* party fails to appear again, then the Court may dismiss the proceeding or grant a default judgment depending on whether the Landlord or Tenant failed to appear.

RPAPL § 746 does not specify the manner in which the Court must "fully describe" the terms of the Stipulation. Moreover, it does not appear the provisions under this section may be waived by a *pro se* party.

3. Multiple Tenants (Only Some Appear in Court)

The Court may only accept a Stipulation involving parties present in Court and/or are represented by counsel. Individuals may represent themselves, but corporations and limited liability companies must appear by counsel (*see* CPLR § 321). In 2015, the Appellate Term held that partnerships and limited liability partnerships must also be represented by counsel (*see Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov*, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

If the Tenants are spouses and only one (1) spouse appears, then the Stipulation of Settlement may only bind the appearing spouse and has no legal effect on the non-appearing spouse (*see* General Obligations Law § 3-305). The Court will typically enter a default judgment against the non-appearing spouse along the same terms agreed to by the appearing spouse provided proper service is alleged. Counsel should be mindful that any amendments for an increased dollar amount may not be included in the money judgment against the non-appearing spouse because amendments for a higher dollar amount are typically not permitted against a non-appearing party (*see Mustafa v. Plein*, 950 N.Y.S.2d 492 (App. Term, 2d, 11th & 13th Jud. Dists. 2012) (holdover proceeding); *Port Chester Hous. Auth. v. Turner*, 734 N.Y.S.2d 805 (App. Term, 9th & 10th Jud. Dists. 2001) (nonpayment proceeding)).

The same principles apply where the Tenants are not married. In such a situation the Court may require that the Petitioner place on the Record and/or in the Stipulation that he/she will not seek to enforce the default judgment against the non-appearing Tenant(s) provided the appearing Tenant(s) fully complies with the Stipulation.

B. Completing the Stipulation of Settlement Form

The Suffolk County District Courts encourage the parties, whether represented by counsel or appearing *pro se*, to utilize the Court's pre-printed Stipulation of Settlement form. Although not applicable in every situation, this form is useful in a majority of the circumstances presented in a summary proceeding.

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Proper completion of the Stipulation is imperative to ensure the intentions of the parties are accurately reflected and enforced. Further, this may avoid unnecessary confusion and/or delay because a misstatement may result in a subsequent vacating of the judgment of possession and/or dismissal of the action.

As a practical matter, the proceeding is not "finished" merely because the Court has accepted a Stipulation of Settlement. Rather, the parties may continue to move the Court for appropriate relief until such time as there has been a lawful vacating of the premises or, in a nonpayment proceeding, the payment in full of the rent arrears (prior to the issuance of the judgment). Where the Tenant fails to vacate the premises by the date agreed upon in the Stipulation of Settlement, the Tenant may bring an *ex parte* Order to Show Cause for additional time to remain in possession and/or to vacate the judgment and warrant. Parenthetically, the Sheriff must provide 72-Hour Notice prior to performing the eviction (*see* RPAPL § 749(2)).

Where it is agreed the Landlord is to be awarded immediate "possession" of the premises, the parties typically concern themselves with the amount of the money judgment and how long of a stay, if any, there will be on the execution of the warrant of eviction.

Of note, the money judgment may not include either future rent or an unpaid security deposit. Any additional terms may also be addressed within the Stipulation in the space provided at the bottom. Counsel should be mindful that the Landlord may need to amend the Petition to include additional monies that have since become due following commencement of the summary proceeding.

For example, assume the parties to a residential lease agreed on September 7, 2016 that the Landlord is entitled to an immediate judgment of possession, a money judgment in the amount of $5,000, and a warrant of eviction but the execution of the warrant will be stayed for two (2) months (i.e., November 6, 2016). Further assume the Landlord amended the Petition for the September 2016 rent which has since come past due. To avoid subsequent vacating of the judgment and warrant if the Landlord accepts payment for the month of September (or any subsequent month), the Landlord may seek to insert either of the following provisions in the Stipulation of Settlement: "*Future moneys paid are not intended to revive the tenancy*" or "*All future moneys are considered use and occupancy*".

The reason for including this language is twofold. First, future moneys may not be awarded in a summary proceeding. Second, the Landlord's acceptance of a future month's rent following issuance of the judgment generally terminates the judgment of possession and warrant of eviction without effecting the money judgment. However, the Landlord may typically accept use and occupancy at any time without vitiating the judgment or creating a new Landlord and Tenant relationship because, as stated previously, "use and occupancy" presupposes the parties do not have a valid Landlord and Tenant relationship. Thus, the parties may be inclined to represent that the Landlord may be paid use and occupancy for the additional time the Tenant remains in possession following the issuance of the judgment without establishing a new

Landlord and Tenant relationship.

Of note, in *368 Chauncey Ave. Trust v. Whitaker*, the Appellate Term upheld a Stipulation provision which stated future post-judgment payments for the residential party were to be applied to the then current month's "rent" (*368 Chauncey Ave.*, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)). This case appears to create an exception by permitting post-judgment payments for future months' "rent" involving residential parties when agreed within a Stipulation. If the premises is a commercial property, then the Landlord may accept future month's rents without fear of vitiating the warrant/judgment provided there is no intent to revive the tenancy (*see Crystal Run Newco, LLC v. United Pet Supply, Inc.*, 70 A.D.3d 1418 (App. Div., 4th Dep't 2010); *First Citizens Nat'l Bank v. Koronowski*, 46 A.D.3d 1474, 848 N.Y.S.2d 494 (App. Div., 4th Dep't 2007)).

Another frequent resolution involves the Tenant's acknowledgment that rent is owed and before a judgment and warrant may be issued, the Tenant may remain in possession while paying the arrears. If the payments are made as agreed, then the tenancy continues. Otherwise, the Landlord is entitled to a judgment of possession, money judgment for the arrears and a warrant of eviction.

In this situation, the parties typically memorialize the payment plan for the arrears (dollar amounts and dates). The dollar amount may only include rent arrears and/or other items identified within the rental agreement as "additional" or "added" rent that are reasonable and due and owing at the time of the Stipulation (*see Walden Ctr. Assocs., L.P. v. Cardenas*, 930 N.Y.S.2d 177 (App. Term, 9th & 10th Jud. Dists. 2011)). This amount may <u>not</u> reflect future rents.

Since a judgment of possession is <u>not</u> being awarded as the parties seek to amicably resolve their dispute, the petitioner will typically seek to include a remedy in the event the Tenant fails to comply with the payment schedule. This generally takes the form in a provision stating the Landlord may submit an *ex parte* Affidavit of Noncompliance which entitles the Landlord to an immediate judgment of possession, a money judgment for the amount of rent arrears (less credit for any partial payments) and the issuance of a warrant of eviction. Otherwise, the Landlord will <u>not</u> be able to obtain a judgment of possession where there is noncompliance (*see Gloria Homes Apts. LP v. Wilson*, 2015 N.Y. Misc. LEXIS 1508, 2015 N.Y. Slip Op 50665(U) (App. Term, 1st Dep't May 7, 2015)). Any additional terms may similarly be addressed within the Stipulation.

In addition, to account for the situation where new months' rent payments will become due <u>prior</u> to full satisfaction of the rent arrears, the Landlord may consider including in the Stipulation a provision that states "*Future payments shall first be applied towards the current month's rent*". As a result, the Tenant <u>must</u> remain current on the monthly rent going forward to be in compliance because future payments are applied first to the current month's rent with the balance towards the arrears. The omission of such language would result in future payments first

being applied towards the arrears.

Be mindful that noncompliance may only be based upon the failure to pay rent arrears, and not for the failure to pay a subsequent month's rent. Thus, it may be in the Tenant's interest to pay the rent arrears as soon as possible.

9. Maintaining Order and Courtroom Decorum

In all cases, the Judge has a responsibility to not only be faithful to the law, but to maintain "order and decorum in the proceedings" (*see* 22 N.Y.C.R.R. § 100.3(B)(1),(2)). The Judge must also be "patient, dignified and courteous" and ensure that the attorneys, court staff and all others subject to the Judge's direction and control act in a similar manner (*see* 22 N.Y.C.R.R. § 100.3(B)(3)).

Although settlement discussions are common, in the event an agreement is not reached, the Court must conduct a hearing with sworn testimony. The Court may not simply listen to the Tenant's defenses and, if it finds that the defenses have not been established or are otherwise without merit, award in favor of the petitioner without first eliciting testimony from the petitioner and petitioner's witnesses because petitioner has the burden of establishing a prima facie case by a preponderance of the evidence (*1764 Majors Path Corp. v. Petrinolis*, 2016 N.Y. Misc. LEXIS 1146, 2016 N.Y. Slip Op 50465(U) (App. Term, 9th & 10th Jud. Dists. March 7, 2016)). In addition, CPLR 4213 requires that the Court sets forth the essential facts that it relied upon in reaching its decision (*see 129th St. Cluster Assocs. v. Levy*, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015); *RBD Realty Consultants, Inc. v. Espinal*, 949 N.Y.S.2d 565 (App. Term, 1st Dep't 2012)). Although generally not a problem in a summary proceeding, the Court must render its decision within sixty (60) days of being fully submitted (CPLR 4213[c]).

The determination by the Housing Part following a hearing on the merits will be afforded "great deference" on appeal and remain unchanged unless the result was unobtainable under a "fair interpretation" of the evidence (*see Mautner-Glick Corp. v. Glazer*, 2016 N.Y. Misc. LEXIS 234, 2016 N.Y. Slip Op 50090(U) (App. Term, 1st Dep't Jan. 27, 2016)). Every person with a "legal interest" in the proceeding has a right to be heard at the hearing (*see* 22 N.Y.C.R.R. § 100.3(B)(6)). The Court has within its discretion the right to implement its own rules and procedures to effectuate the above standards. Obviously, the de-escalation of an emotionally charged situation or individual is preferable. Using, condoning or tolerating intolerant speech or action may constitute a violation of the above rules.

A. *Pro se* Litigants

Pro se litigants proceed at their own peril (*Tanenbaum Assocs., L.L.P. v. Yudenfreund*, 831 N.Y.S.2d 363 (App. Term, 2d & 11th Jud. Dists. 2006) (denied untimely demand for jury trial)). While unrepresented litigants may be afforded some "latitude", with respect to the

merits, they are held to the same standard of proof as those represented by counsel (*Callender v. Titus*, 791 N.Y.S.2d 868 (App. Term, 2d & 11th Jud. Dists. 2004) (denying Tenant's counterclaim due to the lack of evidence)). Moreover, the Judge is not responsible for advising *pro se* litigants as to the burden of proof or the admissibility of evidence (*Limani Realty, LLC v. Zayfert*, 970 N.Y.S.2d 345 (App. Term, 2d, 11th & 13th Jud. Dists. 2012) (*pro se* occupant failed to submit evidence establishing the premises was his primary residence which may have triggered succession rights under the Rent Stabilization Code)).

B. Judge's Role During the Hearing

A trial judge may take "an active role in the examination of witnesses where proper or necessary to facilitate or expedite the orderly progress of the trial" (*Accardi v. City of New York*, 121 A.D.2d 489 (2d Dep't 1986) (civil case)). The Judge may further ask witnesses to clarify vague or otherwise indirect responses (*Kaminester v. Foldes*, 51 A.D.3d 528 (1st Dep't 2008) (civil case concerning guardian)) and during cross-examination request clarification of a material fact for the purpose of expediting the trial (*Tonkin v. Lofthouse*, 34 A.D.3d 1309 (4th Dep't 2006) (breach of contract claim)).

However, the Judge may not make an inappropriate inquiry that deprives a party of a "fair and unprejudiced consideration of the evidence" (*see Schrager v. New York Univ.*, 227 A.D.2d 189 (1st Dep't 1996) (judgment affirmed in part and reversed in part where the Court repeatedly interrupted examinations, sustained objections not made and asked pointed questions favoring some of the defendants)). Similarly, the Judge may not display hostility towards a party that denies a fair trial (*Hubrecht v. Terrassault*, 178 N.Y.S.2d 225 (App. Term, 1st Dep't 1958) (Landlord and Tenant summary proceeding)).

Further, the Judge may not summarily deny a claim or defense that raises a triable issue of fact without conducting a hearing/trial (*Development Strategies Co., LLC*, 924 N.Y.S.2d 308 (App. Term, 9th & 10th Jud. Dists. 2011); *Concord Mgmt. Ltd. v. Kaplan*, 2002 N.Y. Misc. LEXIS 1835 (App. Term, 9th & 10th Jud. Dists. 2002)). The witnesses must be sworn (*see Tello v. Dylag*, 15 N.Y.S.3d 715 (App. Term, 9th & 10th Jud. Dists. 2015); *but see Evans v. Tracy*, 951 N.Y.S.2d 85 (App. Term, 9th & 10th Jud. Dists. 2012) (affirming final judgment of possession and money judgment in favor of Petitioner without sworn testimony where there were no disputed material facts after Tenant admitted she owed the rent arrears)).

C. Evidentiary Matters

There is no discovery in a summary proceeding without a Court Order pursuant to CPLR 408 except where the parties mutually agree to participate. Landlord may be permitted discovery where a (1) cause of action has been demonstrated; (2) the proposed discovery is related to the central dispute; (3) the discovery sought is in the exclusive control of tenant; and (4) there is no resulting prejudice (*see Zada Assocs. v. Melucci*, 28 N.Y.S.3d 651 (App. Term, 1st Dep't Oct. 30, 2015); *72A Realty Assocs. v. Lucas*, 26 N.Y.S.3d 216 (App. Term, 1st Dep't Oct.

27, 2015) (tenant permitted to conduct discovery)). Counsel should seek a Court Order before participating in voluntary discovery with a *pro se* litigant (*Missionary Sisters, Inc. v. Fauerbach*, 2016 N.Y. Misc. LEXIS 1942, 2016 N.Y. Slip Op 50829(U) (App. Term, 1st Dep't May 31, 2016)).

The following section discusses common evidentiary issues in summary proceedings.

1. Documents/Records

A. Predicate Notice (Landlord)

If a predicate notice was required, the notice may be introduced at the hearing following a proper foundation and demonstrated relevancy from a person with firsthand knowledge of the service (i.e., process server). The Petitioner may further seek to introduce proof of delivery and/or receipt. If the occupant timely and credibly objects to service, then the Landlord must elicit testimony from the process server. Petitioner may not simply rely upon the affidavit of service (*Bham v. Wilson*, 809 N.Y.S.2d 776 (App. Term, 9th & 10th Jud. Dists. 2005); 2 Dolan, Rasch's Landlord and Tenant Including Summary Proceedings § 32:15 (4th ed. 2010)).

B. Lease Agreements

The Landlord will typically seek to introduce the lease as a contract between the parties by laying a proper foundation and authenticating the signature(s) of those sought to be charged under the terms of the lease (*see Tuscan Realty Corp. v. O'Neill*, 731 N.Y.S.2d 830 (App. Term, 2d & 11th Jud. Dists. 2001)).

C. Business Records

Commercial Landlords may also introduce the lease as a business record exception to the hearsay rule through the testimony of a property manager/agent (*Lowell Assocs. v. Barney Mac, LLC*, 824 N.Y.S.2d 755 (App. Term, 1st Dep't 2006)). The business record exception requires the testimony of a person with personal knowledge of the corporation's business records and record keeping procedures, including that the document was made in the regular course of business and it was the regular course of the business to make such a document at the time of the occurrence and the document was found in the business file (*see* CPLR § 4518; *APF 286 MAD, LLC v. Chittur & Assocs., P.C.*, 28 N.Y.S.3d 647 (App. Term, 1st Dep't 2016) (computer printouts admitted as business records)). A computer lease was introduced into evidence as a business record where the drafter of the lease was not called to testify (*see, e.g., Intercontinental Leasing Assocs., Inc. v. Barington Capital Group*, 2003 N.Y. Slip Op. 51255U (App. Term, 1st Dep't 2003)).

D. Best Evidence Rule (original document)

This section applies to lost or destroyed leases (*B.N. Realty Assocs. v. Lichtenstein*, 96 A.D.3d 434 (App. Div., 1st Dep't 2012) (holding that although the denial of the introduction of the lease was proper because no reason was given for its non-production, the lease should have been allowed under other grounds)). Federal Rules of Evidence § 1004 provides that an original of the writing, recording or photograph sought to be introduced is not required where:

(1) all of the originals are lost or destroyed, and not by the proponent acting in bad faith;

(2) an original cannot be obtained by any available judicial process;

(3) the non-moving party (1) had control of the original; (2) was at that time put on notice that the original would be a subject of proof at the trial or hearing; and (3) failed to produce it at the trial or hearing; or

(4) the writing, recording, or photograph is not closely related to a controlling issue.

E. Photo Copies (CPLR § 4539)

A copy of the original lease may be introduced where a proper business foundation is provided (*see 174 LLC v. Roberts*, 809 N.Y.S.2d 482 (N.Y. Civ. Ct. Bronx Cty. 2005)). An exception to the Best Evidence Rule permits the introduction of a substitute or secondary source (e.g., testimony or other form of proof) where the moving party (1) sufficiently explains the unavailability of the original document; (2) demonstrates the original was neither lost nor destroyed in bad faith; and (3) demonstrates the reliability of the accuracy of the secondary evidence (*B.N. Realty Assocs.*, *supra*, 96 A.D.3d at 434) (notwithstanding the lack of an explanation for the non-production of the lease, the lost or destroyed lease was admissible based on secondary proof, namely the Tenant's counterclaim was founded upon specific provisions within the lease and the Tenant admitted owing rent pursuant to the lease); *Schozer v. William Penn Life Ins. Co.*, 84 N.Y.2d 639 (1994)).

F. Rent Roll and Other Proof of Rent Owed

Rent rolls establishing rent and "added rent" for apartment complexes may be introduced as business records with a proper foundation. However, an "unverified document prepared under unspecified circumstances" without an adequate foundation is not admissible, and, even if considered, a judgment (including small claims) may not be based exclusively on hearsay alone (*see Hudson House, LLC v. Pointdujour*, 799 N.Y.S.2d 161 (App. Term, 2d & 11th Jud. Dists. 2004) (small claims action for unpaid rent)). Parenthetically, even if not admissible, a witness

could be shown a Rent Roll/Ledger or any other document for the purpose of Refreshing the Witness' Recollection.

G. Photographs (photos, cell phones, laptops etc.)

Photographs are admissible provided they "fairly and accurately" depict the condition of the subject matter on the date in question (*Read v. Ellenville Nat'l Bank*, 20 A.D.3d 408 (2d Dep't 2005); *Lott-Coakley v. Ann-Gur Realty Corp.*, 886 N.Y.S.2d 67 (Bronx Cty. Sup. Ct. 2009)). If the movant did not take the photograph but identifies the contents and the truthfulness and accuracy of the depiction at the time of the incident, then the Court may admit the photograph regardless of when the photograph was taken or by whom (*cf. Leven v. Tallis Dept. Store*, 178 A.D.2d 466 (2d Dep't 1991)).

H. Bills/Receipts

With respect to counterclaims, the Tenant may testify as to the amount paid for repairs and other damages and further introduce a copy of the check. However, absent consent from the non-movant, the introduction of a paid invoice requires proper authentication from the preparer of the receipt or another person familiar with the vendor's business record keeping (*see generally Tofa Jewelry, Inc. v. Silver Stars, Inc.*, 885 N.Y.S.2d 713 (N.Y. Civ. Ct. 2009)). The "small claims standard" which permits the introduction of a paid receipt or two (2) itemized estimates without a foundation from the preparer is not applicable to summary proceedings.

Parenthetically, the Tenant's assertion of a counterclaim unrelated to the claims set forth in the Petition may constitute a waiver of a personal jurisdiction defense (*see ROL Realty Co., LLC v. Gordon*, 920 N.Y.S.2d 244 (App. Term, 1st Dep't 2010) (withdrawing the counterclaim does not revive the jurisdictional objection)).

I. Audio Recordings (cell phones and tape recordings)

It is lawful to record a conservation where at least one (1) party to the conversation consents to the recording (*see* Penal Law § 250; *People v. Lasher*, 58 N.Y.2d 962 (1983)). The recording may be done by a participant and without notice to the other participant(s). To be admitted into evidence, the movant must lay a proper foundation regarding the relevancy, authenticity and accuracy of the recording. This is typically accomplished through a participant or witness to the conversation and/or recording (e.g., recording is an accurate representation of the conversation and was not altered) (*see Samra v. Messeca*, 2015 N.Y. Misc. LEXIS 1758, 2015 N.Y. Slip Op 50825(U) (App. Term, 1st Dep't May 22, 2015) (tape recordings of conversations between Landlord's agent and Tenant were admitted into evidence where the Tenant testified the recordings were a fair and accurate representation of the conversations and the recordings had not been altered)).

Hearsay may preclude the admission of all or portions of the recording. An admission by

a party to the litigation, however, may be admissible as an exception to the hearsay rule (*see Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223 (2d Dep't 1980)). If the conversation is recorded or obtained illegally in violation of Penal Law § 250.05 (eavesdropping), then the recorded conversation is inadmissible (*see* CPLR § 4506(1)).

2. Testimony

Hearsay and exceptions to the hearsay rule for out-of-court statements are applicable (*cf. Haff v. FNJ Transmissions Inc.*, 798 N.Y.S.2d 344 (App. Term, 9th & 10th Jud. Dists. 2004) (small claims action)). For example, out-of-court testimony offered not for its truth but rather as evidence of the witness' state of mind may be admissible (*see Benitez v. Whitehall Apts. Co., LLC*, 862 N.Y.S.2d 813 (N.Y. Cnty. Sup. Ct. 2008)). If an objection to hearsay is not timely raised, then the objection is waived and the Court, as with any particular evidence, may consider the testimony and give it the appropriate weight, if any (*see generally Tracy v. Tracy*, 309 A.D.2d 1252 (4th Dep't 2003)).

Parenthetically, *pro se* litigants may request that the Court issue a subpoena duces tecum and subpoena duces tecum ad testificandum. An adjournment may be granted in the discretion of the Court for the purpose of calling a witness to rebut testimony.

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II. RECENT CASES

1. AFFIRMATIVE DEFENSES

36 Main Realty Corp. v. Wang Law Office, PLLC, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Constructive Eviction)

Tenant must abandon the impacted area/areas of the subject premises to establish a constructive eviction. Here, since the tenant did not allege in the answer that it vacated the premises and there was no testimony during the hearing to support the claim, the defense was not sustainable.

William J. Garry, As Receiver v. Ryan & Henderson, P.C., 2016 N.Y. Misc. LEXIS 2408, N.Y. Slip Op 26210 (Nassau Cnty. Dist. Ct. June 29, 2016) (Constructive Eviction)

Neither partial actual eviction nor constructive eviction due to the severely diminished available parking for the commercial premises was a plausible defense because petitioner did not vacate the impacted area. Respondent's remedy was to seek damages due to petitioner's alleged failure to make timely repairs. Moreover, the counterclaim was permitted notwithstanding a lease provision barring counterclaims because it was "inextricably intertwined" with petitioner's rent clam.

Brookwood Coram I, LLC v. Oliva, 15 N.Y.S.3d 710 (App. Term, 9th & 10th Jud. Dists. 2015) (Defective Pleading)

Dismissing action where the petition failed to state the Section 8 tenant's interest in the premises and sufficient facts upon which the holdover proceeding was based in violation of RPAPL 741. Specifically, the petition failed to allege that the premises was Section 8 regulated although required because the regulatory status "may determine the scope of the tenant's rights". Further, the petition omitted any facts or explanation why the length of the initial rental agreement was for six (6) months, as opposed to one-year as required by the federal regulations (24 CFR 982.309(a)(1)).

Hickey v. Trahan, 2016 N.Y. Misc. LEXIS 375, 2016 N.Y. Slip Op 50141(U) (App. Term, 9th & 10th Jud. Dists. Feb. 5, 2016) (Failure to raise during hearing)

In a nonpayment proceeding, tenants' failure to raise either the warranty of habitability or issues regarding the adequacy of the rent demand during the hearing constitutes a waiver. Accordingly, tenant may not raise these defenses for the first time on appeal.

Pugliese v. Pugliese, 2016 N.Y. Misc. LEXIS 1446, 2016 N.Y. Slip Op 50614(U) (App. Term, 2d, 11th & 13th Jud. Dists. April 11, 2016) (Familial Relationship)

On appeal, petition dismissed where petitioner attempted to evict his mother in a holdover proceeding alleging that he and his mother had entered into a tenancy-at-will pursuant to an oral agreement. A summary proceeding may be maintained against a family member where possession is obtained via a recognizable landlord and tenant-type relationship as opposed to the familial relationship. The lower court had ruled in favor of petitioner concluding a tenancy-at-will was created and that petitioner properly terminated the tenancy via service of a 30-day notice. The Appellate Term reversed and directed dismissal of the action because a review of the hearing record demonstrated that respondent vehemently denied the claim (i.e., she was there by virtue of the familial relationship) and petitioner failed to introduce any evidence in support of an oral agreement.

JLNT Realty, LLC v. Liautaud, 26 N.Y.S.3d 213 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Family Members of Tenant not named in Petition)

Father of tenant not named in the petition may be evicted based upon judgment and warrant obtained against the tenant because a spouse, family members and guests may be evicted even where they were not made a party to the summary proceeding.

Casilia v. Webster LLC, 32 N.Y.S.3d 494 (1st Dep't 2016) (Illegal Apartment)

The undisputed fact that the landlord failed to obtain a certificate of occupancy for the catering hall does not eliminate tenant's obligation to pay rent. The Appellate Division noted that the lease did not require landlord to obtain the certificate and there was no indication of fraud or mistake.

Thomas v. Brown, 2015 N.Y. Misc. LEXIS 4696, 2015 N.Y. Slip Op 51907(U) (App. Term, 1st Dep't Dec. 28, 2015) (Illegal Apartment)

Noting that the landlord may be awarded a money judgment for an illegal basement apartment except where the property is a multiple dwelling (i.e., building occupied or intended to be occupied by 3 or more families independently) in a municipality with at least 325,000 residents (*see* Multiple Dwelling Law 302(1)(b), 325(2)).

Tello v. Dylag, 15 N.Y.S.3d 715 (App. Term, 9th & 10th Jud. Dists. 2015) (Joint Venture)

Holding that a joint venture which provided that the parties formed a "[u]nion for the purposes of repairing, maintaining and occupying said property for the further purpose of selling same for profit to be shared among them" and further respondent would have exclusive possession of the property during the first year and pay the mortgage and taxes for the premises failed to establish a recognizable landlord - tenant relationship that would permit a summary proceeding.

Underhill Ave. Realty, LLC v. Ramos, 2015 N.Y. Misc. LEXIS 4453, 2015 N.Y. Slip Op 51804(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 8, 2015) (Lease Expired Prior to Commencing Nonpayment Proceeding)

Nonpayment proceeding properly dismissed where it was undisputed that the rent-stabilized lease between landlord and the section 8 tenant expired before commencement of the nonpayment proceeding. A nonpayment proceeding is predicated upon the premise that the parties had a valid landlord - tenant relationship at the time the summary proceeding is commenced. Instead, the appropriate remedy is for former landlord to commence a plenary action for use and occupancy as damages.

Priegue v. Paulus, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. April 14, 2014) (Not in possession when summary proceeding commenced)

Where tenants failed to notify landlord that they were vacating early and further they did not return the keys, a legal surrender did not occur, and, as a result, tenants continue to remain liable pursuant to the lease terms.

Eastside Exhibition Corp. v. 210 East 86th Street Corp., 18 N.Y.3d 617 (2012) (Partial Actual Eviction - Commercial)

Landlord's taking of a *de minimis* portion of the commercial premises without tenant's permission was so "trifling" that the taking did not constitute a partial actual eviction thereby rendering a complete rent abatement unjustified. As a result, tenant must continue to pay the full amount of the rent notwithstanding landlord's seizure of a portion of the rented premises without tenant's consent. Landlord took approximately twelve (12) feet of the 15,000 - 19,000 square foot movie theater for construction purposes. The Court of Appeals, without setting forth a bright-line rule regarding size and square footage, held that a taking "must interfere in some, more than trivial, manner with the tenant's use and enjoyment of the premises" to invoke rent abatement measures. The court reasoned that to permit a complete rent abatement for such a trivial taking would be unjust especially since tenant's remedy for the taking was to pursue a claim for damages against the landlord in a plenary action.

Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d 101 (1st Dep't 2013) (Partial Actual Eviction - Residential)

Holding that the landlord's taking of a *de minimis* portion of a residential premises does not constitute irreparable harm, and therefore precludes issuance of a preliminary injunction. The Appellate Division emphasized that it was not relying on the **Eastside Exhibition** decision because commercial property invokes different concerns than residential property. Nonetheless, the Appellate Division similarly concluded that the tenant's remedy was to seek damages in a plenary action.

Paskov v. Kreshitchki, 954 N.Y.S.2d 760 (App. Term, 2d, 11th & 13th Jud. Dists. 2012) (Partial Actual Eviction)

In a small claims action to recover unpaid rent, the Appellate Term held that since the landlord's taking of the backyard, which was included in the rental agreement, was not *de minimis*, the taking constituted a partial actual eviction which entitled tenant to a complete rent abatement for the duration of the eviction.

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Bergenbrooklyn, LLC v. Cisarano, 21 N.Y.S.3d 810 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Payment Following Filing but Before Service)

Holding that the landlord's acceptance of "rent" for a period after termination of the month-to-month tenancy and the filing of the summary proceeding, but *prior to* service of the notice of petition and petition, vitiates the termination notice. The Appellate Term devoted significant time analyzing filing- and service-courts. The court concluded that in the context of the acceptance of rent, the commencement of the proceeding is to be deemed at the time of "service" (as opposed to filing) particularly since the tenant may not know whether a summary proceeding was filed until after it had been served. Thus, acceptance of money following filing of the action, but prior to service of the papers, which occurred here, constitutes rent which creates a month-to-month tenancy and vitiates the termination notice. The previous rule had been that the landlord's acceptance of money after filing (regardless of whether service had been effectuated) was deemed use and occupancy which did not create a new tenancy and the landlord may accept without vitiating the notice. The Appellate Term further reaffirmed that the tenant must be in possession of the premises at the time the summary proceeding is commenced.

270 E. 95 Props, LLC v. Kent, 18 N.Y.S.3d 260 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (NYC - Rent Stabilized - Added Rent)

Dismissing petition where landlord, in accordance with the lease, applied rent payments to late and legal fees for the rent stabilized apartment. The lease identified these items as "additional rent". The court held that late and legal fees may not be considered "rent" for a rent stabilized apartment even where the parties agreed to such in the rental agreement.

T & S Realty Corp. v. Lee, 28 N.Y.S.3d 651 (App. Term, 1st Dep't 2015) (NYC - Succession Rights)

Affirming dismissal of holdover proceeding where respondent, the wife of the decedent tenant in the rent control property, established her succession rights pursuant to New York City Rent and Eviction Regulations [9 NYCRR] 2204.6(d). The evidence demonstrated that respondent moved into the apartment in 1996 following her marriage to the tenant and she remained there until his death five (5) years later, and thereafter continued to reside in the premises as her primary residence.

Jacob Marion, LLC v. Bey, 2016 N.Y. Misc. LEXIS 544, 2016 N.Y. Slip Op 50219(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 23, 2016) (Tenant claims she is the owner)

In granting tenant's motion to vacate default judgment, the Appellate Term held that tenant's assertion that she is the owner of the subject premises was a potentially meritorious defense that the Housing Part would have to consider.

Clark v. Singletary, 2016 N.Y. Misc. LEXIS 551, 2016 N.Y. Slip Op 50211(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016) (Tenant Not in Possession When Action Commenced)

Reaffirming that a nonpayment proceeding may not be maintained where the tenant no longer resides at the premises when the summary proceeding was commenced. This case was a small claims action by the joint tenant seeking to recover the proportionate share of the rent arrears owed from the other joint tenant, plaintiff's former spouse.

Magal Props. LLC v. Gritsyk, 2015 N.Y. Misc. LEXIS 4178, 2015 N.Y. Slip Op 51651(U) (App. Term, 1st Dep't Nov. 19, 2015) (Time barred)

Dismissing holdover proceeding where the basis for termination was the landlord's dissatisfaction with alterations completed more than sixteen (16) years earlier. Notably, since the predecessor landlord had given written consent for the alterations at the time they were performed, successor landlords are bound by that agreement.

Koppelman v. Barrett, Jr., 17 N.Y.S.3d 584 (App. Term, 9th & 10th Jud. Dists. 2015) (Vendor - Vendee)

Dismissing holdover proceeding where landlord and tenant had entered into a purchase agreement for the sale of the residential property. At execution of the sales contract, the landlord and tenant relationship was terminated and the parties' relationship evolved into vendor - vendee in possession which does not form the basis for a summary proceeding. The exception, which did not apply in this case, is where performance of the sales contract is to be completed within ninety (90) days and the occupant remains in possession without the former vendor's permission. Under that limited circumstance, the petitioner may seek possession in a holdover proceeding pursuant to RPAPL 713(9).

LGS Realty Partners LLC v. Kyle, 26 N.Y.S.3d 725 (App. Term, 1st Dep't 2015) (Warranty of Habitability)

Holding tenant was not entitled to a rent abatement under the warranty of habitability during the period tenant "did not cooperate with [landlord's] attempts to make repairs" which resulted in additional delays.

Jacob v. Sealey, 28 N.Y.S.3d 648 (App. Term, 1st Dep't 2015) (Warranty of Habitability)

Tenant entitled to an abatement of rent where the "defective" stove emitted a gas smell rendering the stove inoperable.

2. AGENT

Inland Diversified Real Estate Service, LLC v. Keiko New York, Inc., 2016 N.Y. Misc. LEXIS 1470, 2016 N.Y. Slip Op 50613(U) (App. Term, 9th & 10th Jud. Dists. April 11, 2016)

Petitioner limited liability company was required to obtain counsel because RPAPL 721 does not authorize the agent of a limited liability company to maintain a summary proceeding.

Oakwood Terrace Hous. Corp. v. Monk, 2016 N.Y. Misc. LEXIS 542, 2016 N.Y. Slip Op 50198(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016) (co-tenant wife; united in interest)

Where a *pro se* non-attorney files an appeal on behalf of herself, she is not authorized to appear on behalf of her co-tenant husband (*see* CPLR 321). However, based upon the Appellate Term's finding that the judgment and warrant should be vacated and the petition dismissed due to the landlord's failure to prove or plead that a rent demand had been made prior to commencement of the nonpayment proceeding, the court dismissed the petition against both tenants because they are united in interest. (Note: the tenants' unified interest arose from the same rental agreement which imposes joint and several liability and, as such, their claims are identical in that they will either prevail or lose together).

Priegue v. Paulus, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. April 14, 2014) (co-tenant brother; united in interest)

Where the brother respondents appeared *pro se* in the underlying action and only one (1) appealed the Housing Part's decision, the appealing brother could not appear on behalf of the other (*see* CPLR 321). However, based upon the Appellate Term's finding that the respondent correctly asserted that the money judgment should be reduced, the court reduced the money judgments against both respondents because they are unified in interest.

Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Limited Liability Partnerships and Partnerships)

Holding that limited liability partnerships and partnerships must appear by counsel. Although CPLR 321(a) does not explicitly refer to partnerships and limited liability partnerships, the Appellate Term reasoned that they are required to appear by counsel because they were "largely subsumed within the definition of voluntary associations", which in many jurisdictions require representation by counsel. In this nonpayment proceeding, petitioner was a limited partnership which appeared by one of its partners who was not an attorney. After the case was dismissed on other grounds, petitioner appealed seeking an order that the proceeding was a nullity because the limited partnership was required to be represented by counsel. Although the Appellate Term agreed that the limited partnership required counsel, it did not change the result (dismissal on the merits) because the limited partnership sought the action to be dismissed ab initio and without prejudice so that it could commence another summary proceeding on the same allegations. The court reasoned that the rule against penalizing an adverse party for the opposing party's misconduct (not appearing by counsel) applies to a landlord, and, as a result, left the decision unchanged.

O'Kelly, as Administrator of the Estate of Magdy O'Kelly v. John Doe, 2016 N.Y. Misc. LEXIS 981, 2016 N.Y. Slip Op 50386(U) (App. Term, 2d, 11th & 13th Jud. Dists March 18, 2016)

A "friend" of the "John Doe" lacks standing to file a motion to vacate the default judgment on behalf of the "John Doe".

3. APPEALS

Parkchester Preservation Co., L.P. v. Adams, 2016 N.Y. Misc. LEXIS 164, 2016 N.Y. Slip Op 50066(U) (App. Term, 1st Dep't Jan. 20, 2016)

Appeal of judgment in favor of petitioner following a hearing on the merits was rendered moot where tenant voluntarily vacated the premises while the appeal was pending. Apparently, the issue raised on appeal was whether petitioner was motivated by retaliation for a lawful or otherwise permissible conduct by the tenant.

New York City Hous. Auth. v. Martinez, 26 N.Y.S.3d 725 (App. Term, 1st Dep't 2015)

Reversing Housing Part's holding in favor of the landlord in the interests of justice and remitting the matter to the Housing Part for a new hearing before a different judge. On appeal, the Appellate Court's authority is "as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts". Here, the landlord commenced the holdover proceeding based upon the allegation that the public housing apartment was being used for illegal drug activity. The Appellate Term noted that the Housing Part's findings of facts were only part correct based upon the evidence. While more than a dozen bags of cocaine and in excess of $1,000 cash was found in the roommate's bedroom, there was not adequate proof for the Housing Part to reach the conclusion that the apartment was used for "packaging cocaine". Under these circumstances, the Appellate Term reversed the judgment and directed a new hearing.

4. COUNTERCLAIMS

2094-2096 Boston Post Road, LLC v. Mackies American Grill, Inc., 2016 N.Y. Misc. LEXIS 1975, 2016 N.Y. Slip Op 50844(U) (App. Term, 9th & 10th Jud. Dists. May 25, 2016)

Tenant's counterclaims may be heard in a summary proceeding even where the rental agreement contains a "no counterclaim provision" provided the counterclaims are "inextricably intertwined" with the landlord's primary claim or the tenant's defenses. In the Justice Court, unlike other Housing Parts, the maximum dollar amount that may be awarded on a counterclaim

is $3,000 (UJCA 208), and, as a result, if pursued, any dollar amount in excess of the $3,000 limit on the counterclaim is deemed waived. Accordingly, the Appellate Term directed the Justice Court to provide the tenant with an opportunity to withdraw its counterclaims without prejudice to seeking same in a subsequent plenary action.

Siodlak v. Light, 2016 N.Y. Misc. LEXIS 564, 2016 N.Y. Slip Op 50202(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)

Same as *2094-2096 Boston Post Road, LLC v. Mackies American Grill, Inc.* above.

LGS Realty Partners LLC v. Kyle, 26 N.Y.S.3d 725 (App. Term, 1st Dep't Nov. 18, 2015)

Holding Housing Part properly denied tenant's motion on the eve of the hearing to amend his answer to assert a counterclaim. Since no excuse was proffered for the delay in making the request, the tenant waived the claim in the summary proceeding regardless of the adequacy of the proposed counterclaim seeking interest on a judgment from a prior proceeding.

5. DISCOVERY

Missionary Sisters, Inc. v. Fauerbach, 2016 N.Y. Misc. LEXIS 1942, 2016 N.Y. Slip Op 50829(U) (App. Term, 1st Dep't May 31, 2016)

Holding that counsel's informal gathering of discovery from a *pro se* 86-year old tenant without a Court Order pursuant to CPLR 408 was troubling. However, the sanction of disqualification and suppression was unwarranted where there was no indication that counsel obtained confidential and/or privileged information from the tenant and the majority of the documents would have routinely been disclosed in the summary proceeding had formal discovery been conducted. Accordingly, the Appellate Term modified the suppression order by holding it was "without prejudice" to a proper discovery motion.

Zada Assocs. v. Melucci, 28 N.Y.S.3d 651 (App. Term, 1st Dep't Oct. 30, 2015)

Reversing Housing Part's denial of landlord's motion to conduct discovery pertaining to photographs of alleged unauthorized alterations and renovations. Discovery was determined to be warranted because (1) landlord set forth facts to demonstrate a cause of action; (2) the renovations were the main issue at dispute; (3) the discovery sought was in the exclusive control of tenant; and (4) there is no prejudice since the delay resulting from discovery impacts landlord's own case.

72A Realty Assocs. v. Lucas, 26 N.Y.S.3d 216 (App. Term, 1st Dep't Oct. 27, 2015)

Affirming Housing Part's granting of tenant's motion for discovery related to her rent overcharge claim, including a review of rental history records necessary to determine the appropriate base rent.

Hyatt Ave. Assocs., LLC v. Rahman, 17 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Notice to Admit)

Affirming Housing Part's denial of tenant's motion to deem admitted assertions contained in tenant's Notice to Admit. The purpose of the Notice to Admit is to narrow the breadth and scope of disputed issues at the hearing/trial by seeking an admission from the recipient that would remove the burden of proving certain facts. The request for an admission on the ultimate issue or a detail "going to the heart of the matter" to be determined by the trier of the facts is improper. Pursuant to CPLR 408, the recipient's responses must be served no more than one (1) day prior to the hearing. Here, since the request to deem admitted included (1) the number of days respondent lived in the apartment which is germane to the ultimate conclusion in the non-primary residence holdover case, and (2) the authenticity of photocopies of documents in the exclusive control and knowledge of other entities, tenant's request was denied.

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6. EARMARKED FUNDS

Greenbrier Garden Apts. v. Eustace, 2016 N.Y. Misc. LEXIS 561, 2016 N.Y. Slip Op 50210(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)

Landlord must apply earmarked rent payments to the month or months specified on the tenant's check. The funds may not be applied to earlier arrears.

7. EVIDENCE

APF 286 MAD, LLC v. Chittur & Assocs., P.C., 28 N.Y.S.3d 647 (App. Term, 1st Dep't Jan. 4, 2016) (business records)

Holding computer printouts were admissible as business records where it was demonstrated that the landlord entered the rent payment information into the computer in the regular course of landlord's business (*see* CPLR 4518).

Samra v. Messeca, 2015 N.Y. Misc. LEXIS 1758, 2015 N.Y. Slip Op 50825(U) (App. Term, 1st Dep't May 22, 2015)

In affirming dismissal of holdover proceeding, the Appellate Term concluded that the tape recordings of conversations between an agent of landlord and the tenant were properly admitted into evidence where the recordings were a fair and accurate representation of the conversations and the recordings had not been altered.

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8. HEARINGS

1764 Majors Path Corp. v. Petrinolis, 2016 N.Y. Misc. LEXIS 1146, 2016 N.Y. Slip Op 50465(U) (App. Term, 9th & 10th Jud. Dists. March 7, 2016)

Housing Part erred by directing the tenant to state all affirmative defenses without first requiring the landlord to put forth its case at the hearing. Following the tenant's testimony, and without the elicitation of any sworn testimony from petitioner to establish its case, the Housing Part awarded the landlord possession on the grounds that the tenant failed to establish a defense. The judgment was vacated and the case was remitted to the Housing Part for a new hearing for the appealing tenant. Significantly, the default judgments of the two (2) non-appealing occupants (squatters) remained unaffected because no appeal lies from a default judgment (CPLR 5511). There may only be an appeal of the denial of a motion to vacate a default. (Note: presumably, since it was alleged that all three occupants were squatters, the occupants were not unified in interest because their rights (or lack thereto) to the premises did not come from a common document or agreement creating an identical and/or similar interest).

Mautner-Glick Corp. v. Glazer, 2016 N.Y. Misc. LEXIS 234, 2016 N.Y. Slip Op 50090(U) (App. Term, 1st Dep't Jan. 27, 2016)

Determination by the Housing Part following a hearing on the merits is afforded "great deference" on appeal and will generally remain unchanged unless the result was unobtainable under a "fair interpretation" of the evidence. This is particularly the case where the findings are based largely on an assessment and determination of the credibility of the witnesses. Here, dismissal of the holdover petition was affirmed because the landlord failed to prove by a preponderance of the evidence that the predicate notice was served. The tenant denied receiving the notice and the process server could not independently recall performing the service.

129th St. Cluster Assocs. v. Levy, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015)

Holding in abeyance the appeal of the possessory judgment because the Housing Part's "terse" decision was devoid of any evidentiary facts upon which it relied. CPLR 4213 provides that the court's decision may be oral or in writing, but it must "state the facts it deems essential" and relied upon (CPLR 4213(b)). The decision must be made within sixty (60) days after the matter is fully submitted (CPLR 4213[c]).

Hyatt Ave. Assocs., LLC v. Rahman, 17 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Affirming final judgment in favor of petitioner. The Appellate Term concluded that the taking of documents into evidence and allowing a party to re-open its case after resting lies within the "sound discretion" of the Housing Part. Here, the Appellate Term determined that the Housing Part was within its right to deny tenant's request to re-open his case because the purpose was to introduce documents which had previously been denied by the court.

BRG 321 LLC v. Hirschhorn, 2016 N.Y. Misc. LEXIS 2334, 2016 N.Y. Slip Op 50975(U) (App. Term, 1st Dep't June 27, 2016)

In this non-primary residence holdover proceeding, affirming Housing Part's dismissal of the action where the tenant credibly established that the rent stabilized apartment was her primary residence. The documentary evidence demonstrated that tenant sleeps "most nights in the apartment" and receives her mail there. She also listed the apartment's address on her driver's license, voter registration information, W-2 statements and bank and credit cards.

Kalikow Family Partnership, LP v. Seidemann, 18 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Affirming final judgment in favor of petitioner where a reasonable interpretation of the evidence could result in the conclusion that the tenant lacked a sufficient nexus to establish the regulated apartment was his primary residence. Tenant, a professor, testified that he resided in the apartment approximately 120 to 160 days per year to teach a college class and otherwise he spent the rest of his time in Connecticut where he owned a home and his wife and children primarily reside. The Appellate Term further held that the court's unspecified interaction and conduct during the hearing did not rise to a level of depriving tenant a fair hearing.

Tello v. Dylag, 15 N.Y.S.3d 715 (App. Term, 9th & 10th Jud. Dists. 2015)

Housing Part erred because where triable issues of fact are raised, a hearing on the merits must be held in which the witnesses provide sworn testimony. Here, the parties were not sworn. Judgment in favor of petitioner was vacated, and the tenant's motion to dismiss the petition was

granted on appeal because petitioner failed to establish a recognizable landlord - tenant relationship that would permit a summary proceeding.

9. JURISDICTION

London Paint & Wallpaper Co., Inc. v. Kesselman, 138 A.D.3d 632 (1st Dep't 2016)

Although the Housing Part is the preferred forum for landlord and tenant disputes, the court has no authority to issue declaratory and/or injunctive relief. Since the Supreme Court has concurrent jurisdiction, that court may (not always) be the appropriate forum for resolving a landlord and tenant dispute where declaratory relief is sought.

32-05 Newtown Ave,. Assocs., LLC v. Caguana, 22 N.Y.S.3d 139 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Specific to New York City, the residential holdover summary proceeding was dismissed because the proceeding was commenced in the commercial landlord-tenant part. Landlord was required to commence the proceeding in the Housing residential part.

10. JURY WAIVER

Inwood Gardens, Inc. v. Udoh, 26 N.Y.S.3d 213 (App. Term, 1st Dep't 2015)

Lease provision waiving a hearing by jury generally will be enforced. The Appellate Term granted tenant's motion to vacate the default judgment but affirmed Housing Part's decision to deny discovery because the tenant's request was overbroad and sought irrelevant information.

11. LEASE INTERPRETATION

Inland Diversified Real Estate Service, LLC v. Keiko New York, Inc., 2016 N.Y. Misc. LEXIS 1470, 2016 N.Y. Slip Op 50613(U) (App. Term, 9th & 10th Jud. Dists. April 11, 2016)

Appellate Term vacated stipulation of settlement and dismissed the nonpayment proceeding. The court reasoned that a catch-all lease provision stating "all costs that tenant is obligated to incur pursuant to the lease are deemed 'additional rent'" is enforceable where another provision in the lease states a particular item is the responsibility of the tenant but does not utilize the term "added" or "additional" rent. The court determined it was permissible to read the provisions together and in conjunction with one another. However, the case was dismissed because landlord failed to demonstrate it was entitled to an award for any of the items.

46 Warren LLC v. Lynch, 18 N.Y.S.3d 578 (App. Term, 1st Dep't 2015)

Reversing order granting landlord's motion for summary judgment in nonpayment proceeding where material issues of fact existed regarding tenant's warranty of habitability claim. The Appellate Term held that notwithstanding both parties' intention to enter into a commercial lease, the rental agreement unequivocally stated the premises was to be used for residential purposes, landlord was required to supply heat and water in the bathroom and kitchen sink, and tenant could enforce her rights under the warranty of habitability – all factors indicative of a residential property. Landlord further acknowledged that he did not seek to amend the certificate of occupancy which states the premises were to be utilized as an apartment, and tenant testified the premises was furnished as a residence. Under these circumstances, the Appellate Term reasoned there was no need to disregard the express lease terms agreed upon in their written agreement. Moreover, the court was reluctant to relieve the parties of their lease obligations because the parties knew what they intended and how those terms were applied on a day-to-day basis. Landlord's assertion that the warranty of habitability was unavailable because this was a commercial premises, contrary to the lease and actions of the parties, was unpersuasive.

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12. LEASE MODIFICATION

Latin Events, LLC v. Doley, 120 A.D.3d 501 (2d Dep't 2014)

Reversing order of Supreme Court granting tenant's motion for summary judgment because questions of fact existed as to whether the parties orally modified their written rental agreement. Generally, a written agreement that prohibits oral modification may only be changed by a written agreement signed by the party against whom enforcement of the change is sought (*see* General Obligations Law 15-301[1]). However, an oral modification may be permitted in such a circumstance where there is clear "partial performance of the oral modification" and the part performance is "unequivocally referable to the modification".

13. MONEY JUDGMENTS

A. ADDITIONAL RENT

Inland Diversified Real Estate Service, LLC v. Keiko New York, Inc., 2016 N.Y. Misc. LEXIS 1470, 2016 N.Y. Slip Op 50613(U) (App. Term, 9th & 10th Jud. Dists. April 11, 2016)

On appeal, challenge by tenant to vacate stipulation of settlement and resulting judgment granted where petitioner failed to demonstrate that the "additional rent" items (electricity and gas charges) had been incurred and/or paid. Tenant was apparently represented by counsel when it agreed to pay such sums in the stipulation.

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B. ATTORNEY'S FEES

Greenbrier Garden Apts. v. Eustace, 2016 N.Y. Misc. LEXIS 561, 2016 N.Y. Slip Op 50210(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)

Affirming Housing Part's denial of the prevailing petitioner's application for attorney's fees (which were denominated in the rental agreement as "additional rent"). Holding that the court may deny a prevailing landlord's request for attorney's fees "based on equitable considerations and fairness", and further where the landlord acted in "bad faith" or "unfairness is manifest". Here, the landlord and its agents apparently refused to negotiate certain rent payments and failed to respond to the tenant's inquiries.

125-127 Allen St. Assocs. v. Lin, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015)

Dismissing landlord's appeal seeking a higher award of attorney's fees (had been awarded $26,950 in counsel fees) as the prevailing party in the summary proceeding. The Appellate Term opined that the landlord had the opportunity but "declined to participate" on the hearing date regarding attorney's fees, and, as a result, the Housing Part properly relied upon the parties' submissions which were found sufficient to reasonably assess the appropriate value of the services. Here, the amount awarded for the seven (7) court appearances, hearing and "extensive" motion practice was found adequate.

Oakwood Terrace Hous. Corp. v. Monk, 2016 N.Y. Misc. LEXIS 542, 2016 N.Y. Slip Op 50198(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)

Judgment vacated and nonpayment proceeding dismissed where landlord failed to prove or plead a rent demand had been made and further landlord was not entitled to a money judgment for attorney's fees where the rental agreement was not submitted.

Madden v. Juillet, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015)

Attorney's fees were denied due to "mixed outcome" of the nonpayment proceeding. The

Appellate Term held that the landlord was not the prevailing party where she sought $2,400 in the nonpayment proceeding but was awarded only $800. Significantly, the attorney's fees were further denied because there was no evidence that she had in fact paid the fees sought.

40-50 Brighton First Road Apts. Corp. v. Henderson, 27 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 8, 2015)

Prevailing landlord's attorney's fees request denied, in part, because the landlord is not entitled to recoup attorney's fees defending a Supreme Court action brought by the subtenant against the landlord and tenant. The lease specifically provided that landlord's rights to attorney's fees was limited to "instituting any action or proceeding based on [tenant's] default, or defending or asserting a counterclaim in any action or proceeding brought by tenants". Neither element was presented in the subtenant's Supreme Court action.

Oakdale Manor Owners, Inc. v. Raimondi, 2015 N.Y. Misc. LEXIS 4364, 2015 N.Y. Slip Op 51754(U) (App. Term, 9th & 10th Jud. Dists. Nov. 30, 2015)

A prevailing petitioner is not entitled to a money judgment for attorney's fees against a subtenant. Since the subtenant is not a party to the rental agreement between landlord and tenant, there is no statutory or contractual obligation for the subtenant to pay petitioner's attorney's fees in the summary proceeding.

C. ATTORNEY'S FEES (Tenant) (RPL § 234)

251 CPW Hous. LLC v. Pastreich, 124 A.D.3d 401 (1st Dep't 2015)

The reciprocal attorney's fees provision (RPL 234) is intended to "level the playing field" between landlords and tenants by encouraging resolution without unnecessary expense. However, the court is afforded limited discretion to deny tenant's attorney's fees even where the tenant is the prevailing party. These circumstances are (1) where the award would be manifestly unfair or (2) the prevailing tenant engaged in bad faith. The Appellate Division expressly held that the fact the landlord may have asserted a colorable claim, although it was ultimately

unsuccessful, is not a suitable justification for the denial of tenant's claim for attorney's fees. However, the attorney's fees awarded by the Housing Part are limited to the fees incurred in the summary proceeding, and does not extend to Division of Housing and Community Renewal and Article 78 proceedings, even where those proceedings are related to the summary proceeding.

J.P. & Assocs. Props. Corp. v. Krautter, 128 A.D.3d 963 (2d Dep't 2016)

Reciprocal attorney's fees in favor of a residential tenant may be awarded only where the tenant prevails "in a [landlord-tenant] controversy that has reached an 'ultimate outcome'". The Appellate Division affirmed the Appellate Term's refusal to award tenant of the rent-stabilized apartment attorney's fees where the tenant's motion to dismiss the summary proceeding was granted without prejudice in deference to the ongoing rent overcharge action pending before the Division of Housing and Community Renewal.

Megan Holding LLC v. Conason, 18 N.Y.S.3d 579 (App. Term, 1st Dep't 2015)

Reducing overall award of tenant's attorney's fees from $49,471.25 to $33,576.25. The Appellate Term held that the tenant was entitled to reasonable fees for successfully defending both the underlying action and subsequent appeal by landlord. However, the Court reduced the award because tenant may not recover for the five (5) unsuccessful motions and cross-motions tenant made in the Appellate Term to dismiss the appeal.

D. DAMAGES

Kings Park 8809, LLC v. Stanton-Spain, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

On appeal of dismissal of small claims action, holding that damages are not recoverable in a summary proceeding.

E. INTEREST

APF 286 MAD, LLC v. Chittur & Assocs., P.C., 28 N.Y.S.3d 647 (App. Term, 1st Dep't Jan. 4, 2016)

In commercial holdover proceeding, affirming Housing Part's decision to award the prevailing landlord interest for the period the tenant remained in possession.

F. LATE FEES

Diversified Equities, LLC v. Russell, 2016 N.Y. Misc. LEXIS 472, 2016 N.Y. Slip Op 50177(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 10, 2016)

Vacating default judgment in nonpayment proceeding because the lease and rent-concession rider, which had fluctuating monthly rents based upon when the rent was paid, amounted to a 13% late fee. The Appellate Term reasoned that the late fee could not be enforced because the fee was grossly disproportionate to any damages that could had resulted due to the late payment of rent.

Jacob v. Sealey, 28 N.Y.S.3d 648 (App. Term, 1st Dep't 2015)

On appeal of the nonpayment proceeding, the Appellate Term increased the late fee awarded (unspecified amount) to the prevailing petitioner.

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G. USE AND OCCUPANCY

Madden v. Juillet, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015)

In a nonpayment proceeding where the petitioner prevails, the tenancy is terminated upon issuance of the judgment and warrant. The termination date, however, is deemed to be "the date the proceeding was commenced". Accordingly, the moneys owed in this subsequent small claims action for the tenants' continued occupancy of the premises during the pendency of the summary proceeding was considered use and occupancy, rather than rent. Since the rule against apportionment applies to rent, and not use and occupancy, the tenants were responsible for use and occupancy for the actual days they remained in possession.

Priegue v. Paulus, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. April 14, 2014)

Same as *Madden v. Juillet* above.

London Paint & Wallpaper Co., Inc. v. Kesselman, 138 A.D.3d 632 (1st Dep't 2016)

'Use and occupancy' is computed by determining the fair market value for occupying the commercial premises.

Siodlak v. Light, 2016 N.Y. Misc. LEXIS 564, 2016 N.Y. Slip Op 50202(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016)

Where the tenant previously paid and landlord accepted monthly rent payments, landlord may seek use and occupancy for the period tenant remained in possession following the lease expiration and/or rent payments. In such a circumstance, landlord need not prove the reasonable value for occupying the premises because use and occupancy "may properly be assessed at the rent reserved in an expired lease" and in this particular case, the regular rent payments absent a written rental agreement.

14. MOTION PRACTICE

Clark Stores, Inc. v. Young Girl 15, LLC, 2016 N.Y. Misc. LEXIS 2286, 2016 N.Y. Slip Op 50965(U) (awarding relief not sought in motion) (App. Term, 2d, 11th & 13th Jud. Dists. June 15, 2016)

On appeal of the order granting commercial tenant and subtenant's unopposed motion to dismiss the summary proceeding due to a defect in service of the three-day rent demand, the Housing Part erred when it awarded, *sua sponte*, tenant's attorney's fees. There is no basis to grant relief the tenant did not seek in the motion papers. In addition, the dismissal due to the defective rent demand is "without prejudice".

Zevrone Realty Corp. v. Gumaneh, 2016 N.Y. Misc. LEXIS 1515, 2016 N.Y. Slip Op 50653(U) (breach of a substantial obligation of lease - chronic nonpayment) (App. Term, 1st Dep't April 26, 2016)

Allegation within the petition that the tenant's repeated nonpayment of rent resulted in six (6) nonpayment proceedings in 4 ½ years constituted a cognizable possessory claim that withstood tenant's motion to dismiss.

13775 Realty, LLC v. Foglino, 2016 N.Y. Misc. LEXIS 853, 2016 N.Y. Slip Op 50335(U) (App. Term, 1st Dep't March 21, 2016)

Landlord's motion for summary judgment denied where the evidence failed to establish that the tenant participated in rent profiteering (sublet overcharges) in violation of the NYC Rent Stabilization Code. Section 2525.6(b) of the Rent Stabilization Code provides that the rent charged to a subtenant may not exceed the regulated rent plus a 10% surcharge where the premises is fully furnished. Subtenant is entitled to treble damages for a violation by the tenant.

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1935 Andrews Ave. Equities v. Diaz, 2016 N.Y. Misc. LEXIS 512, 2016 N.Y. Slip Op 50191(U) (App. Term, 1st Dep't Feb. 22, 2016)

Denying summary judgment where the parties' rental agreement demonstrated that the agreed upon monthly rent was higher than the amount tenant alleged. Accordingly, where there is a material issue of fact, summary judgment must be denied. The fact that landlord relied upon the rental agreement, without submitting an accompanying affidavit, was of no consequence.

Iodice v. Academics R Us, Inc., 26 N.Y.S.3d 724 (App. Term, 1st Dep't 2015)

Respondent waived the defense of lack of personal jurisdiction due to improper service where the defense was not asserted in the original answer or timely raised on the return date. As a consequence of the waiver, respondent was further precluded from asserting the defense in an amended answer even where the amended answer was timely. Lastly, the court held that the process server's affidavit constituted prima facie evidence of service and opposing counsel's affirmation was insufficient to raise a question regarding a material issue of fact.

Chen v. Ray, 26 N.Y.S.3d 212 (App. Term, 1st Dep't 2015) (waiver – standing)

Respondent waived the ability to challenge petitioner's standing to commence the holdover proceeding where the defense was not raised in either the answer or a pre-answer motion.

15. PLEADINGS

1346 Park Place HDFC v. Wright, 2016 N.Y. Misc. LEXIS 997, 2016 N.Y. Slip Op 26093 (App. Term, 2d, 11th & 13th Jud. Dists. March 18, 2016)

An attorney may verify the petition even where counsel resides within the same county as petitioner (*see* RPAPL 741). It is noteworthy, however, that even had the petition not been verified and/or the verification was improper (which was not the case), the court noted that the defect is not considered a jurisdictional defect. The tenant may, however, pursuant to CPLR

3022, deem the pleading a "nullity" provided tenant "immediately" raises an objection within 24 hours. The notice of objection allows the petitioner to correct the defect and/or seek relief from the court if necessary.

Oakwood Terrace Hous. Corp. v. Monk, 2016 N.Y. Misc. LEXIS 542, 2016 N.Y. Slip Op 50198(U) (App. Term, 9th & 10th Jud. Dists. Feb. 22, 2016) (co-tenant wife; united in interest)

Judgment vacated and nonpayment proceeding dismissed on appeal where landlord failed to prove and/or plead a rent demand had been made, the petition failed to specify which portion of the amount sought was for items other than rent, and failed to sufficiently state the facts upon which the proceeding was based (*see* RPAPL 741).

East Ramapo Centr. Sch. Dist. v. Mosdos Chifetz Chaim, Inc., 2016 N.Y. Misc. LEXIS 2295, 2016 N.Y. Slip Op 26195 (App. Term, 9th & 10th Jud. Dists. June 15, 2016)

Holding that petitioner's mistaken use of the term "rent" in the petition of the holdover proceeding does not imply that the petitioner concedes a valid landlord-tenant relationship exists, which would require dismissal of the action because the proceeding brought pursuant to RPAPL 713(7) (licensee) presumes a landlord - tenant relationship does not exist. The court reasoned that instead of overanalyzing each term, the lease and supporting documents should be considered as a whole to ascertain the parties' respective interests. Parenthetically, the court further noted as a general matter that no predicate notice is required where the leasehold of a fixed duration expires without a new agreement or the payment of additional moneys.

Tenth St. Holdings, LLC v. McKowen, 2016 N.Y. Misc. LEXIS 509, 2016 N.Y. Slip Op 50194(U) (Answer – waiver) (App. Term, 1st Dep't Feb. 22, 2016)

In this chronic rent delinquency holdover proceeding, Housing Part properly granted summary judgment in favor of landlord. Tenant's motion to renew and reargue were denied because tenant raised on this motion the defense of waiver for the first time. The court held that the failure to assert the defense either in the answer and/or in opposition to the original motion precluded tenant from doing so on a motion to renew.

16. POST-JUDGMENT MOTIONS TO ENFORCE/VACATE WARRANT/STIPULATION

In re Lafayette Boynton Housing Corp., 135 A.D.3d 518 (1st Dep't 2016)

As a general matter, a court may vacate a warrant of eviction prior to execution for "good cause" pursuant to RPAPL 749(3). Here, the Appellate Division, citing the Court of Appeals decision in **Brusco v. Braun**, 84 N.Y.2d 674 (1994), held that the disabled tenant *who was already evicted* may be restored to possession where he acted in good-faith, paid all of the arrears, including the costs of the summary proceeding, and some of the delays in payment were attributable to the landlord.

A. STIPULATIONS OF SETTLEMENT

Banana Kelly Union HDFC v. Chambers, 2016 N.Y. Misc. LEXIS 1898, 2016 N.Y. Slip Op 50812(U) (App. Term, 1st Dep't May 25, 2016)

Landlord's motion to vacate stipulation of settlement resolving the underlying nonpayment proceeding eleven (11) months earlier was denied where landlord failed to demonstrate either "good cause", such as fraud, collusion, mistake or accident, or a satisfactory explanation for the delay.

Gerard Court Assocs., LLC v. Hamer, 2016 N.Y. Misc. LEXIS 231, 2016 N.Y. Slip Op 50087(U) (App. Term, 1st Dep't Jan. 27, 2016)

The Appellate Term exercised its discretion in extending stay on execution of the warrant of eviction because the stipulation of settlement did not include a "time is of the essence" clause and tenant submitted proof that the Department of Social Services approved payment of the rent arrears.

2701 Grand Assoc. LLC v. Morel, 2016 N.Y. Misc. LEXIS 434, 2016 N.Y. Slip Op 50163(U) (App. Term, 1st Dep't Feb. 17, 2016)

The Appellate Term exercised its discretion in granting tenant's motion, now represented by counsel, to vacate the stipulation of settlement in which she acknowledged owing rent arrears for the rent stabilized apartment because she had a possible rent overcharge claim against the landlord (88% rent increase over the amount charged the prior tenant). The court further vacated the default judgment against the tenant's daughter because she mistakenly believed her mother, a non-attorney, could stand in her place.

191 Street Assocs. LLC v. Cruz, 2016 N.Y. Misc. LEXIS 601, 2016 N.Y. Slip Op 50116(U) (App. Term, 1st Dep't Feb. 5, 2016)

In reversing the Housing Part, the Appellate Term upheld the strict language of the stipulation of settlement - which was followed by ten (10) orders to show cause and stays – because four (4) years after the action was commenced, tenant had only paid $688 of the $2,036.30 due. The court noted that strict enforcement was warranted because "[p]arties to a civil dispute are free to chart their own litigation course . . . [that] is essential to the management of court calendars and the integrity of the litigation process". Although the tenant's motion was denied, the court extended the stay on the execution of the warrant an additional sixty (60) days.

Serencha Realty Corp. v. A.M. Two In One, Inc., 2016 N.Y. Misc. LEXIS 73, 2016 N.Y. Slip Op 50024(U) (App. Term, 1st Dep't Jan. 13, 2016)

The Appellate Term affirmed the Housing Part's denial of tenant's motion for a further stay on execution of the warrant because tenant failed to strictly comply with the stipulation of settlement; i.e., tenant failed to replace the awning in front of the store as agreed. Strict enforcement of the stipulation was based upon the premise that "the parties to a civil dispute are free to char their own litigation course".

Thomas v. Brown, 2015 N.Y. Misc. LEXIS 4696, 2015 N.Y. Slip Op 51907(U) (App. Term, 1st Dep't Dec. 28, 2015)

Reversing the Housing Part and directing entry of judgment in favor of petitioner where tenant

admitted to remaining in the premises beyond the agreed vacate date. Strict enforcement of the stipulation was considered appropriate to maintain "the integrity of the litigation process".

59-61 East 3rd Street, LLC v. Said, 2015 N.Y. Misc. LEXIS 4579, 2015 N.Y. Slip Op 51846(U) (App. Term, 1st Dep't Dec. 18, 2015)

Awarding a final possessory judgment in favor of the commercial landlord where tenant failed to provide "free and unfettered" access to complete renovations as agreed.

35 Jackson House Apts. Corp. v. Yaworski, 2015 N.Y. Misc. LEXIS 4681, 2015 N.Y. Slip Op 51887(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 15, 2015)

Enforcing two-attorney stipulation of settlement in favor of landlord where tenant failed to substantially comply. Specifically, tenant did not provide landlord with the licenses of workers (plumber, electrician and architect) hired to make repairs to bring the property up to code standards. Following the tenant's third default, the Housing Part lifted the stay on the execution of the warrant of eviction.

1250, LLC v. Augustin, 2016 N.Y. Misc. LEXIS 2458, 2016 N.Y. Slip Op 51035(U) (App. Term, 2d, 11th & 13th Jud. Dists. June 23, 2016)

Where the warrant of eviction is executed upon pursuant to the parties' stipulation of settlement, the summary proceeding is terminated and the petitioner may not restore the case to the calendar for the purpose of obtaining a new judgment to include arrears that were conditionally waived. Here, the stipulation of settlement included a provision that petitioner could recoup the arrears in the event respondent defaults in either payment or surrender. However, that relief would have to be sought in a separate plenary action and not in a motion to restore the summary proceeding to the Housing Part's calendar.

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Caring Communities Assocs. HDFC v. Boffa, 2016 N.Y. Misc. LEXIS 114, 2016 N.Y. Slip Op 50040(U) (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 8, 2016)

The Appellate Term affirmed the Housing Part's denial of landlord's motion to vacate the "probationary stay" agreed upon in the stipulation of settlement. Landlord sought vacatur after tenant allegedly attempted to break into a restricted portion of the property's basement. The Appellate Term, which must give "substantial deference" to the Housing Part where its decision is largely based upon the assessment of credibility, reasoned the Housing Part deemed the tenant's testimony credible and, as a result, the decision was consistent with a fair interpretation of the evidence.

Skeete v. Bah, 2015 N.Y. Misc. LEXIS 4635, 2015 N.Y. Slip Op 51866(U) (App. Term, 1st Dep't Dec. 22, 2015)

Affirming denial of *pro se* tenant's motion to vacate the So-Ordered stipulation of settlement because the record established that the tenant understood the terms and received consideration for his agreeing to vacate the property. The Appellate Term further held that the unsubstantiated claims of intimidation and discrimination were insufficient to vacate the parties' agreement.

135 Amersfort Assoc., LLC v. Jones, 20 N.Y.S.3d 292 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Housing Part is <u>not</u> necessarily bound to enforce a provision within the stipulation of settlement that states "any" default of the stipulation is deemed to be a "material" breach. Rather, the court for good cause has within its discretion the ability to vacate a warrant prior to its execution. Here, since the tenant was compliant for 21 months and the late payment at issue was tendered four (4) days late due to tenant not being paid until after the scheduled payment date, the Housing Part acted within its discretion by extending the stay. Parenthetically, the Appellate Term noted that the court may <u>not</u> unilaterally change the terms of the parties' stipulation.

Gloria Homes Apts. LP v. Wilson, 2015 N.Y. Misc. LEXIS 1508, 2015 N.Y. Slip Op 50665(U) (App. Term, 1st Dep't May 7, 2015)

Where the stipulation of settlement fails to include a provision entitling landlord to a judgment

of possession in the event tenant breaches the stipulation, the petitioner may not be awarded a judgment of possession due to a breach because that would require the court to presume and "read into" the minds of others to ascertain the parties' intent under such a circumstance. Since the intent of the parties was undeterminable from the stipulation itself, the Housing Part most likely will need to conduct additional hearings, if necessary, to fashion an appropriate remedy.

B. DEFAULT JUDGMENTS

Hope Founders v. Williams, 2016 N.Y. Misc. LEXIS 1593, 2016 N.Y. Slip Op 50685(U) (App. Term, 1st Dep't May 3, 2016)

Affirmed Housing Part's denial of tenant's motion to vacate default judgment where tenant failed to set forth a possible meritorious defense for the nonpayment of rent. The standard for vacating a default judgment is (1) a reasonable explanation for the default and (2) the possibility of a meritorious defense. In addition, good cause for vacatur was not demonstrated prior to execution of the warrant pursuant to RPAPL 749(3).

Jacob Marion, LLC v. Bey, 2016 N.Y. Misc. LEXIS 544, 2016 N.Y. Slip Op 50219(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 23, 2016)

Reversing Housing Part's denial of tenant's motion to vacate default judgment where the tenant moved to vacate the default within hours of its granting and asserted she was late due to a housing agency's inspection of the premises (held a reasonable explanation). The tenant further asserted that she is the owner of the subject premises, not the petitioner, thereby demonstrating the possibility of a meritorious defense.

Deutsche Bank Nat'l Trust Co. v. Quinones, 114 A.D.3d 719 (2d Dep't 2016)

On appeal of this foreclosure action, the Appellate Division reversed the granting of defendant's motion to vacate the default judgment and dismiss the action due to lack of personal jurisdiction. The Appellate Division held that although the process server's initial affidavit of service failed to establish prima facie proof that service was properly effectuated via service upon a person of

suitable age and discretion, the process server submitted a satisfactory supplemental affidavit. The Court further reasoned that the occupant's "bare and unsubstantiated denial . . . [which lacked] factual specificity and detail" was insufficient to rebut the affidavits of service.

O'Kelly, as Administrator of the Estate of Magdy O'Kelly v. John Doe, 2016 N.Y. Misc. LEXIS 981, 2016 N.Y. Slip Op 50386(U) (App. Term, 2d, 11th & 13th Jud. Dists March 18, 2016)

Movant's conclusory statement he was "never served with any documents" was inadequate to rebut the presumption of service set forth in the process server's affidavit of service, and, as a result, failed to raise an issue of fact that would warrant a traverse hearing.

Birchwood Court Owners, Inc. v. Toner, 2016 N.Y. Misc. LEXIS 1149, 2016 N.Y. Slip Op 50467(U) (App. Term, 2d, 11th & 13th Jud. Dists. March 7, 2016)

Although tenant asserted a conclusory denial of service and failed to establish a potential meritorious defense, the Appellate Term held that due to the long-term nature of the tenancy in addition to the absence of bad faith on the tenant's part and the potential loss of equity in the premises, good cause had been shown to vacate the warrant of eviction. The court directed the landlord to restore tenant to possession within twenty (20) days of tenant's payment of the arrears and use and occupancy. Parenthetically, the court held that the omission of the name of the village where the property was located within the petition was <u>not</u> a fatal defect.

502 Ave. P Corp. v. AM & R Auto Repair Shop, 2015 N.Y. Misc. LEXIS 4679, 2015 N.Y. Slip Op 51889(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 15, 2015)

Reversing denial of the commercial tenant's motion to vacate the default judgment where the movant's supporting affidavit contained a nonconclusory denial of service and raised factual questions regarding the legitimacy of the service. The Appellate Term directed the Housing Part to conduct a traverse hearing.

Oakdale Manor Owners, Inc. v. Raimondi, 2015 N.Y. Misc. LEXIS 4364, 2015 N.Y. Slip Op 51754(U) (App. Term, 9th & 10th Jud. Dists. Nov. 30, 2015)

Credible excuse of law office failure (unspecified in the decision) provided a reasonable explanation for the default. Since there was a possibility of a meritorious defense, the default judgments against the tenant and subtenant were vacated.

17. PREDICATE NOTICE

620 Dahill, LLC v. Berger, 27 N.Y.S.3d 315 (2d Dep't 2016) (Lease Expiration)

No predicate notice required before commencing a holdover summary proceeding following expiration of a tenancy of a fixed duration.

36 Main Realty Corp. v. Wang Law Office, PLLC, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Rent Demand)

Affirming judgment and holding that a landlord need not make an additional rent demand to recover rents that have become due following commencement of the nonpayment proceeding. Moreover, leave to amend the petition shall be freely given absent prejudice or surprise. Of note, to make the amendment to the petition, case law has established that the new rent sought must be past due and further respondent must be present at the time of the amendment **(Mustafa v. Plein, 950 N.Y.S.2d 492 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); Port Chester Hous. Auth. v. Turner, 734 N.Y.S.2d 805 (App. Term, 9th & 10th Jud. Dists. 2001)).**

Lee v. Kucker & Bruh, LLP, 958 F. Supp.2d 524 (S.D.N.Y. 2013) (Rent Demand)

Partial summary judgment on liability granted against landlord's attorney for making an unintentional, but material, misrepresentation (wrong dollar amount) within the written three-day rent demand (*see* Federal Debt Collection Practices Act (FDCPA), 15 USC 1692 et seq.). The rent demand counsel signed mistakenly claimed $1,125.23 was past due when the correct amount

was approximately $724.50. When asked to verify the debt, petitioner's attorney forwarded a one-page document obtained from the landlord's managing/billing staff which stated $1,525.95 was due. Apparently, the billing error was due to the staff mistakenly adding a payment received to the outstanding balance as opposed to deducting the partial payment. The nonpayment of rent for a residential property is considered a consumer debt, and the FDCA imposes strict liability on debt collectors for making a "false representation of the character, amount, or legal status of any debt" (15 USC 1692e(2)(A)). Any person whose principal purpose is to collect "any debts" is considered a debt collector (15 USC 1692a(6)). The 'bona fide error defense' is available to debt collectors where (1) the misrepresentation regarding the debt was unintentional; (2) the misrepresentation resulted from a bona fide error; and (3) the debt collector maintained procedures "reasonably adapted" to avoid such errors. Here, defendant attorney failed to implement reasonable procedures to safeguard against the misrepresentation and, as a result, liability attached which include attorney's fees under the federal statute.

Hickey v. Trahan, 2016 N.Y. Misc. LEXIS 375, 2016 N.Y. Slip Op 50141(U) (App. Term, 9th & 10th Jud. Dists. Feb. 5, 2016) (Month-to-Month Tenancy)

A month-to-month tenant who vacates during the month is responsible for paying the full month's rent because both the landlord and tenant must give one month's notice (30 days in New York City) to terminate a month-to-month tenancy.

1346 Park Place HDFC v. Wright, 2016 N.Y. Misc. LEXIS 997, 2016 N.Y. Slip Op 26093 (App. Term, 2d, 11th & 13th Jud. Dists. March 18, 2016) (Notice to Cure)

Holding the notice to cure was sufficient where the notice informed tenants of the alleged conditions to be cured and the specific lease provisions regarding same. Here, the notice (1) set forth a basis for the eviction; (2) identified how and in what manner tenants had violated the lease; and (3) sufficiently advised tenants so they could prepare a defense.

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Mansfield Owners, Inc. v. Phillip, 2016 N.Y. Misc. LEXIS 383, 2016 N.Y. Slip Op 50148(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 5, 2016) (Notice to Cure - extension of cure period)

Affirming dismissal of illegal-sublet holdover proceeding where landlord failed to demonstrate the alleged violation had not been cured within the cure period. The Appellate Term reasoned that due to the parties' mutual conduct, which included the parties engaging in "extensive settlement negotiations" including payment by tenants and submission of a sublet application, the cure period was extended through commencement of the holdover proceeding.

T.D. Bank, N.A. v. Yeshiva Chofetz Chaim, Inc., 2015 N.Y. Misc. LEXIS 2102, 2015 N.Y. Slip Op 50912(U) (App. Term, 9th & 10th Jud. Dists. June 11, 2015) (Post-foreclosure -re-service of notice)

Reversing the granting of summary judgment in favor of petitioner in this post-foreclosure holdover proceeding. In his answer, the occupant challenged the service of the ten-day notice to quit. After conferencing with the Housing Part, it was agreed that petitioner would re-serve the ten-day predicate notice, and, after doing so, the court granted petitioner's motion for summary judgment. On appeal, the Appellate Term concluded that the re-service of the notice to quit was improper because the petitioner must allege in the petition that respondent remained in possession following the passage of the ten-days. Due to the re-service after the proceeding was commenced, petitioner could not truthfully allege that occupant remained in possession beyond the noticed date. However, since petitioner maintained that the original predicate notice was properly served (which respondent denied), the case was remitted to the Housing Part to render a decision on petitioner's motion.

Robrish v. Watson, 26 N.Y.S.3d 216 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Rent Regulated – Multiple Apartments)

Dismissing holdover proceeding because the landlord's renting of ten (10) rooms in his NYC home, which was built prior to 1974, to ten (10) different people subjected the premises to Rent Stabilization. Housing accommodations in any building built prior to January 1, 1974 containing more than six (6) units are regulated (RSC [9 NYCRR] 2520.11). A housing accommodation is defined as "[t]hat part of any building or structure, occupied or intended by one or more individuals as a residence, home, dwelling unit or apartment" (RSC [9 NYCRR] 2520.6(a)). Here, the petition was dismissed because landlord failed to serve notices required under the Rent Stabilization Code.

149th Partners LP v. Watts, 2015 N.Y. Misc. LEXIS 3877, 2015 N.Y. Slip Op 51576(U) (App. Term, 1st Dep't Oct. 30, 2015) (Rent Regulated – Non-party to lease)

Notice provisions required pursuant to the Rent Stabilization Code are applicable only to the tenant. Thus, the court held that a landlord need not serve a non-party occupant with the notices required under that statute prior to commencing a summary proceeding.

69 E.M. LLC v. Mejia, 2015 N.Y. Misc. LEXIS 4386, 2015 N.Y. Slip Op 51765(U) (App. Term, 1st Dep't Dec. 4, 2015) (Rent Regulated – Nuisance)

Dismissing nuisance holdover proceeding due to the vagueness of the termination notice which contained broad, unspecific and conclusory allegations that neither (a) afforded the tenant an opportunity to prepare a defense nor (b) satisfied the notice requirements of Rent Stabilization Code 2524.2(b). The alleged nuisance violations included one (1) specific allegation – "damaged the walls and floors ... due to the removal of the molding" – and generic, unspecific misconduct including "anti-social, disruptive, destructive, dangerous and/or illegal behavior"; damage to unidentified fixtures; and nondescript conduct purportedly resulting in a safety and fire hazard. Applying a "reasonableness" standard, the Appellate Term concluded the notice was insufficient.

Peters v. Owens, 18 N.Y.S.3d 581 (App. Term, 1st Dep't 2015) (Rent Regulated – Nuisance)

Affirming award of possession in favor of landlord where tenant's pattern of "objectionable behavior" over a period of years constituted a nuisance in violation of Rent Stabilization Code [9 NYCRR] 2524.3(b). Specifically, the misconduct included the tenant's verbal and physical abuse of the property manager, which resulted in a harassment conviction and the property manager securing her own security guard, in addition to exhibiting an overall "belligerent and aggressive behavior" towards tenants and staff.

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18. PROCEDURE & PROTOCOL

1346 Park Place HDFC v. Wright, 2016 N.Y. Misc. LEXIS 997, 2016 N.Y. Slip Op 26093 (App. Term, 2d, 11th & 13th Jud. Dists. March 18, 2016) (adjournments)

Adjournments are left to the discretion of the Housing Part. However, where the adjournment request is made because (1) "the evidence to be presented is material"; (2) is not made for the purpose of delay; and (3) the requesting party has "acted with due diligence to protect its interest", denial of the adjournment request is an improper exercise of discretion. Here, during the pendency of the hearing, tenant's attorney, who was engaged in another trial, advised both the court and petitioner's counsel the previous day of his unavailability. The Housing Part denied the adjournment and further provided an ultimatum to tenant – she could either discharge her attorney and participate in the continued hearing or otherwise she would be precluded from being involved. Tenant opted not to discharge her attorney and petitioner was ultimately awarded a possessory judgment. On appeal, the Appellate Term reversed the judgment and remanded the case to the Housing Part for a new hearing because tenant's request for an adjournment was not a dilatory tactic and notice was provided the previous day. This was the ruling notwithstanding the fact tenant's attorney did not submit a formal affidavit of actual engagement.

Chen v. Ray, 26 N.Y.S.3d 212 (App. Term, 1st Dep't 2015) (adjournments)

Affirming Housing Part's decision to deny respondent's request for an adjournment where tenant's delays previously resulted in a mistrial.

80th Inc. v. Witter, 2015 N.Y. Misc. LEXIS 3079, 2015 N.Y. Slip Op 51258(U) (App. Term, 1st Dep't Aug. 21, 2015) (dismissal)

Reversing dismissal of holdover proceeding in which the Housing Part concluded, *sua sponte*, that the landlord failed to serve a proper termination notice on the occupant where illegal drug activity was alleged. The respondent did not raise the defense and petitioner was not afforded an opportunity to be heard. The Appellate Term, in its scathing opinion, stated that the courts are "not in the business of blindsiding litigants, who expect us to decide their [cases] on rationales advanced by the parties, not arguments their adversaries never made". Accordingly, the matter was remitted to the Housing Part to conduct necessary proceedings.

Koppelman v. Barrett, Jr., 17 N.Y.S.3d 584 (App. Term, 9th & 10th Jud. Dists. 2015) (holdover - lease expired)

In dismissing the holdover proceeding due to the parties' vendor-vendee relationship, the Appellate Term noted that a holdover tenancy (month-to-month) is not created merely by the occupants remaining in possession following the termination or expiration of the rental agreement. The occupants must further offer and landlord must accept payment for a period following termination/expiration to establish a tenancy.

150 West 21st LLC v. "John Doe", 2016 N.Y. Misc. LEXIS 464, 2016 N.Y. Slip Op 50169(U) (App. Term, 1st Dep't Feb. 18, 2016) (nuisance)

Affirming decision granting tenant's motion to dismiss the holdover petition following completion of landlord's case at the hearing. Landlord failed to prove on its case-in-chief that the alleged objectionable conduct resulted in tenants reasonably being fearful for their safety, and, as a result, the nuisance holdover petition could not be sustained.

191 Street Assocs. LLC v. Cruz, 2016 N.Y. Misc. LEXIS 601, 2016 N.Y. Slip Op 50116(U) (App. Term, 1st Dep't Feb. 5, 2016) (default)

Although the tenant filed an answer to the petition, the failure to appear on the return date without a reasonable explanation constitutes a default.

2094-2096 Boston Post Road, LLC v. Mackies American Grill, Inc., 2016 N.Y. Misc. LEXIS 1975, 2016 N.Y. Slip Op 50844(U) (App. Term, 9th & 10th Jud. Dists. May 25, 2016) (stay pending another action in Supreme Court)

Justice Court erred by staying the summary proceeding pending resolution of tenant's previously commenced action for damages in Supreme Court. The Justice Court stayed the proceeding to avoid inconsistent rulings. In reversing that decision, the Appellate Term noted there is a "strong rule against staying a summary proceeding pending the determination of an action in another court". Moreover, tenant's claims in the Supreme Court action constituted defenses to landlord's claim for unpaid rent and tenant further could have had its counterclaims considered in the summary proceeding notwithstanding the lease provision barring counterclaims since they

were "inextricably intertwined" with the tenant's defenses. Significantly, since the dollar amount limit on counterclaims in the Justice Court is $3,000 (and any amount above that would be deemed waived), the Appellate Term directed that the lower court give the tenant the option of withdrawing its counterclaims without prejudice before ruling.

Elnazer v. Quoquoi, 17 N.Y.S.3d 267 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (withdrawal)

Holding that the petitioner's "withdrawal" of the summary proceeding is the equivalent to a "discontinuance" without prejudice which permits the landlord to bring another action.

19. PROPER PARTIES

H.L. Realty, LLC v. Edwards, 131 A.D.3d 573 (2d Dep't 2015)

Guarantor, without an independent possessory interest in the premises, is not a proper party in a summary proceeding. Rather, the guarantor may be sued in a plenary action for damages.

MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd., 2016 N.Y. Misc. LEXIS 111, 2016 N.Y. Slip Op 50048(U) (App. Term, 9th & 10th Jud. Dists. Jan. 12, 2016)

Where the commercial nonpayment proceeding is dismissed against a guarantor who was improperly included within the caption, the Housing Part continues to maintain jurisdiction over the remainder of the summary proceeding.

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1234 Broadway LLC v. Ying, 2016 N.Y. Misc. LEXIS 510, 2016 N.Y. Slip Op 50190(U) (App. Term, 1st Dep't Feb. 22, 2016)

Where a summary proceeding is dismissed against the subtenant, the proceeding may continue against the tenant because a subtenant is a "proper" but not a "necessary party". The action was dismissed against the subtenant because he was improperly identified as a "John Doe" in the petition even though his proper name and address were known.

Sow v. Thanvi, 2016 N.Y. Misc. LEXIS 108, 2016 N.Y. Slip Op 50045(U) (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 8, 2016)

Tenant may commence a summary proceeding against a subtenant. Here the proceeding was dismissed because the tenant's lease with the landlord expired prior to the month for which unpaid rent was sought against the subtenant. A nonpayment proceeding is improper where the lease expired or was terminated prior to the commencement of the summary proceeding. With regard to a sublease, the sublease may not extend beyond the termination of the primary lease.

Salanitro Family Trust v. Gorina, 2015 N.Y. Misc. LEXIS 4446, 2015 N.Y. Slip Op 51785(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 2, 2015)

Holdover proceeding dismissed because the express trust is an improper party. Legal title in an express trust vests in the trustee, and, as such, only the trustee may sue or be sued.

20. RES JUDICATA

Hodge v. 26 Court Assocs., LLC, 2015 N.Y. Misc. LEXIS 4682, 2015 N.Y. Slip Op 51884(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 14, 2015)

Affirming the granting of commercial landlord's summary judgment motion dismissing the civil complaint where the tenant asserted identical counterclaims in a prior nonpayment summary proceeding.

21. SERVICE

Doji Bak, LLC v. Alta Plastics, 2016 N.Y. Misc. LEXIS 1851, 2016 N.Y. Slip Op 50792(U) (App. Term, 9th & 10th Jud. Dists. May 12, 2016)

In a commercial nonpayment proceeding, two (2) unsuccessful attempts at service at the vacant premises when landlord was aware of tenant's principal place of business (at a different location) did not constitute a "reasonable application" of attempted personal or substituted service before resorting to conspicuous place service (nail and mail). The fact that the rental agreement explicitly provided notices were to be delivered at the subject premises was an inadequate basis for "attempting" service at the known vacant premises. The petition was dismissed.

322 West 47th St. HDFC v. Loo, 2016 N.Y. Misc. LEXIS 574, 2016 N.Y. Slip Op 50227(U) (App. Term, 1st Dep't Feb. 25, 2016)

Where the process server's progress was impeded by the building's exterior door, the outer bounds of the tenant's dwelling place was deemed to extend to that exterior door. The Appellate Term affirmed the Housing Part's determination at a traverse hearing that service of the termination notice in this fashion by nail and mail service was adequate.

22. STAYS

Gordon v. 476 Broadway Realty Corp., 129 A.D.3d 547 (1st Dep't 2015) (Objectionable Conduct)

In New York City, tenants are not entitled to a stay on execution of the warrant of eviction to cure the breach where the tenancy was terminated due to tenants' pattern of objectionable conduct pursuant to RPAPL 753(3),(4).

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Volunteers of America-Greater New York, Inc. v. Carr, 2015 N.Y. Misc. LEXIS 3928, 2015 N.Y. Slip Op 51589(U) (App. Term, 1st Dep't Nov. 4, 2015) (Objectionable Conduct)

Housing Part erred by staying execution of warrant for a one-year probationary period because the tenant, whose conduct was "manifestly `objectionable'", was not entitled to an opportunity to cure the breach pursuant to RPAPL 753. The objectionable conduct included threatening landlord's employees, stealing furniture from the premises and damaging the building and common areas which interfered with the other occupants' safety and enjoyment of the premises.

DiStasio v. Macaluso, 16 N.Y.S.3d 791 (App. Term, 9th & 10th Jud. Dists. 2015) (Tenant-at-Will)

Holding it was an abuse of discretion for the Housing Part to stay a summary proceeding due to the pendency of a divorce proceeding between respondent and petitioner's nephew. The Appellate Term noted that the petitioner was not a party to the divorce proceeding and, as such, the issues here could not be fully litigated in the Supreme Court action.

23. SUCCESSOR LANDLORDS

Magal Props. LLC v. Gritsyk, 2015 N.Y. Misc. LEXIS 4178, 2015 N.Y. Slip Op 51651(U) (App. Term, 1st Dep't Nov. 19, 2015)

Holdover proceeding based upon an alleged breach of the lease for alterations completed sixteen (16) years earlier dismissed, in part, because the predecessor landlord had given written consent to the alterations at the time the alterations were performed

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24. SURVIVAL CLAUSE

H.L. Realty, LLC v. Edwards, 131 A.D.3d 573 (2d Dep't 2015)

Although the termination of the lease generally terminates the duties and obligations under the agreement, in this plenary action summary judgment was granted in favor of landlord against the guarantor because the lease contained a survival clause which stated the tenant remained liable for monetary obligations arising under the rental agreement. Accordingly, even though the landlord and tenant had entered into a stipulation of settlement in the summary proceeding terminating the lease, that agreement neither removed the guarantor's obligations nor the tenant's ongoing obligation to pay for damages following lease termination.

Kings Park 8809, LLC v. Stanton-Spain, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Dismissing small claims action for post-judgment rent/use and occupancy following tenant's surrender of possession. Neither the parties' stipulation of settlement in the summary proceeding nor the rental agreement for the residential property included a provision continuing to impose responsibility for post-termination rents and/or damages (i.e., there was no survival clause). Accordingly, the tenant had no obligation for ongoing rents under the now-terminated lease.

25. TYPES OF PROCEEDINGS

Cey Realty Assocs., LLC v. Pettway, 2015 N.Y. Misc. LEXIS 4385, 2015 N.Y. Slip Op 51766(U) (App. Term, 1st Dep't Dec. 4, 2015) (bankruptcy)

Affirming the granting of summary judgment in favor of petitioner in this nonpayment proceeding because even though the tenant's bankruptcy discharged her personal liability for the unpaid rent arrears, landlord may pursue and obtain possession based upon the tenant's/debtor's unpaid rent. However, where the tenant subsequently paid and landlord accepted without condition all of the rent arrears (notwithstanding not being personal liable due to the bankruptcy), the Appellate Term exercised its discretion and permanently stayed enforcement of the warrant of eviction (*see* RPAPL 753(4)).

C & A 483 Broadway, LLC v. KLMNI, Inc., 26 N.Y.S.3d 723 (App. Term, 1st Dep't Nov. 24, 2015) (holdover proceeding for the nonpayment of rent)

Affirming Housing Part's award of a possessory judgment in favor of commercial landlord for the nonpayment of rent in a holdover proceeding. Where the rental agreement provides that the nonpayment of rent constitutes a material default which terminates the lease if not cured within the cure period, the proper proceeding is a holdover proceeding because the landlord - tenant relationship is terminated prior to commencement of the summary proceeding.

Priegue v. Paulus, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. April 14, 2014)

Where the parties' rental agreement expired but the respondent remained in possession and continued to pay rent without entering into a new rental agreement, a month-to-month tenancy is created on the same terms as those of the expired lease. In Nassau and Suffolk Counties, a landlord has the option of terminating a month-to-month tenancy by commencing either a nonpayment or holdover proceeding. In New York City, the landlord may only commence a holdover proceeding. Moreover, the tenants to a rental agreement are joint and severally liable for moneys owed pursuant to the agreement.

Kurek v. Luszcyk, 28 N.Y.S.3d 550 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 8, 2015) (life estate)

Nonpayment proceeding dismissed due to the petitioner's lack of standing where the occupant had a life estate in the apartment. A life estate may be created by trust, deed or will and is more than a mere right to possession, but rather the life tenant has the right to exclusive possession and control for the duration of his or her life. The life tenant may further exclude all others from possession including the remainderman. Here, the life estate was created by deed. Although the parties apparently entered into a "clarification" document years following the creation of the life estate which stated, in part, that the life tenant would pay monthly rent, that document was not considered a deed upon which a life estate may be created (or in this case amended), and it failed to state that the life tenant forfeited any of her rights granted in the original deed or that it superseded the original deed (which was complete, clear and unambiguous). Parenthetically, a life estate is terminated by the death of the life tenant, surrender of the premises by the life tenant or a contingency set forth in the instrument establishing the life estate.

150 West 21st LLC v. "John Doe", 2016 N.Y. Misc. LEXIS 464, 2016 N.Y. Slip Op 50169(U) (App. Term, 1st Dep't Feb. 18, 2016) (rent regulated – nuisance)

Holding that a handful of obnoxious complaints during the calendar year to a neighbor regarding "noise" in the rent regulated apartment did not constitute a "recurring or continuing pattern of objectionable conduct that threatens the comfort and safety of others in the building". Accordingly, the Appellate Term affirmed the dismissal of the holdover proceeding.

1806 Caton, LLC v. Ngyuen, 2015 N.Y. Misc. LEXIS 4452, 2015 N.Y. Slip Op 51792(U) (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 8, 2015) (rent regulated – nuisance)

Affirming dismissal of holdover summary proceeding following a hearing on the merits where the evidence failed to substantiate landlord's nuisance claim; i.e., that the tenant had used a washing machine in the apartment that flooded and caused water damage to another apartment (vacant) and the basement of the building.

Definitions Personal Fitness, Inc. v. 133 E. 58th St. LLC, 107 A.D.3d 617 (1st Dep't 2013) (rent stabilized – breach of a substantial obligation of lease - chronic nonpayment)

For rent stabilized properties in NYC, petitioner may bring a holdover proceeding for the "chronic nonpayment" of rent without any predicate notice. Chronic nonpayment is different from the occasional failure to pay rent. Here, tenant's repeated nonpayment of rent resulted in ten (10) nonpayment proceedings over seven (7) years.

Zevrone Realty Corp. v. Gumaneh, 2016 N.Y. Misc. LEXIS 1515, 2016 N.Y. Slip Op 50653(U) (App. Term, 1st Dep't April 26, 2016) (rent stabilized – breach of a substantial obligation of lease - chronic nonpayment)

In reversing the granting of tenant's motion to dismiss the holdover summary proceeding regarding the rent stabilized property, the Appellate Term held that the repeated nonpayment of rent resulting in six (6) nonpayment proceedings in 4 ½ years constituted a cognizable possessory claim that withstands a motion to dismiss.

Tenth St. Holdings, LLC v. McKowen, 2016 N.Y. Misc. LEXIS 509, 2016 N.Y. Slip Op 50194(U) (App. Term, 1st Dep't Feb. 22, 2016) (rent stabilized – chronic nonpayment)

Holding that summary judgment in favor of the landlord in this holdover proceeding was proper because the landlord commenced five (5) nonpayment proceedings over 3½ years which all were resolved in landlord's favor and without any affirmative defenses asserted.

Kalikow Family Partnership, LP v. Seidemann, 18 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Affirming final judgment in favor of petitioner where the Housing Part reasonably interpreted the credible evidence to reach its conclusion that the tenant lacked a sufficient nexus to establish the regulated apartment was his primary residence. Tenant, a professor, testified that he resided in the apartment approximately 120 to 160 days per year, he spent 20 - 25 hours per week doing research in Connecticut, and did not possess a New York driver's license. Pursuant to 9 NYCRR 2520.6(u) "no single factor" is determinative in deciding primary residence.

Ansonia Assocs. L.P. v. Unwin, 130 A.D.3d 453 (1st Dep't 2015) (rent stabilized – primary residence – tax returns)

Citing the Court of Appeals' holding in **Katz Park Ave. Corp. v. Jagger**, 11 N.Y.3d 314 (2008), the Appellate Division, First Department held that a party may not take a position in litigation that is "logically incompatible" to a position asserted within the person's income tax return. Accordingly, the Appellate Division granted summary judgment in favor of the landlord where the tenant swore in her tax return that the premises was not used for personal use (i.e., deducted rent payments as a business expense). Rent Stabilization Code, 9 NYCRR 2520.6(u) provides that "no single factor" is determinative in deciding primary residence. The factors that may be considered under the RSC include, but are not limited to, (1) another address listed on a tax return, motor vehicle registration, license or other document filed with a public agency; (2) identification of another address for voting purposes; (3) occupying the premises in the aggregate for fewer than 183 days in the most recent calendar year, unless temporary housing; and (4) subletting the premises.

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Goldman v. Davis, 17 N.Y.S.3d 264 (App. Term, 1st Dep't 2015) (rent stabilized – primary residence – tax returns)

Granting judgment in favor of petitioner where the tenant's defense that the rent stabilized apartment was his primary residence was contradicted by the tenant's tax returns. The Appellate Term concluded that since the tenant deducted 100% of his rent as a business expense on the sworn federal tax returns, which only permit such deductions for the portion of a home used as a"business", tenant was precluded from claiming in the summary proceeding that the property was his "primary residence". A litigant may not assert a position contrary to his/her position in an income tax return.

Hyatt Ave. Assocs., LLC v. Rahman, 17 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (rent stabilized – primary residence – tax returns)

Affirming final judgment in favor of petitioner where the Housing Part, which is in the best position to assess credibility, determined that tenant failed to rebut the landlord's showing that the tenant did not utilize the rent stabilized apartment as his primary residence in contravention of Rent Stabilization Code [9 NYCRR] 2524.4[c]. In a non-primary residence holdover proceeding, landlord has the burden of demonstrating by a preponderance of the evidence that the tenant was not utilizing the apartment as his primary residence. The Appellate Term restated the factors the court may consider in making this determination as detailed in **Ansonia Assocs., L.P.** above. The tenant may rebut the prima facie proof by establishing "an ongoing, substantial physical nexus with the subject premises showing purposes of actual living".

DiStasio v. Macaluso, 16 N.Y.S.3d 791 (App. Term, 9th & 10th Jud. Dists. 2015) (Tenant-at-Will)

Holding that the Housing Part abused its discretion by staying the licensee summary proceeding during the pendency of the divorce proceeding between respondent and petitioner's nephew. The Appellate Term noted that petitioner was not a party to the divorce proceeding and, as such, the issues here could not be fully litigated in the Supreme Court action. Moreover, respondent's defenses, including the issue of title, may be litigated in a summary proceeding and further if respondent had exclusive possession of the premises, then she presumably was a tenant-at-will and not a licensee as alleged in the petition.

Martinez v. Ulloa, LLC, 22 N.Y.S.3d 787 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Unlawful Entry – self-help by Landlord RPAPL 713(10))

Reversing the Housing Part's granting of petitioner-tenants' unlawful and entry detainer summary proceeding to be restored to possession because a commercial landlord, under limited circumstances such as those present in this case, may utilize self-help to regain possession provided it is done peacefully. The parties' commercial lease allowed for self-help provided a five-day notice to cure and three-day notice of termination were properly served. Tenants' petition failed to allege that the tenants were in compliance with the lease, that the predicate notice had not been served or that the landlord's re-entry was not performed in a peaceful manner. Accordingly, the petition was dismissed. Respondent-landlord's undisputed counterclaim for a judgment of possession was also dismissed because during the pendency of the appeal, the tenants called the police and with the assistance of the police, the landlord was required to allow entry by the tenants. The majority held that if it agreed with the landlord that the tenants became squatters when they re-entered, albeit with the assistance of the police, then the counterclaim of landlord had to be dismissed because the tenants were not provided a ten-day notice following re-entry as required by RPAPL 713(3). The Appellate Term reasoned that the utilization of self-help comes with "uncertainty" and that the pleading requirements of the statute should not be abandoned in an effort to restore landlord to possession.

26. WAIVERS

8 Beach St. Realty Inc. v. Blagg, 20 N.Y.S.3d 291 (App. Term, 1st Dep't 2015) (Rent Stabilization)

Vacating stipulation of settlement reached in prior summary proceeding more than a decade earlier that granted tenant a ten-year unregulated rental agreement on a regulated apartment with a five-year renewal option in consideration for tenant's waiver of protections and rights under the Rent Stabilization Law. When tenant failed to timely give notice of his intent to exercise the lease renewal, landlord commenced a new holdover proceeding alleging the premises were unregulated. The Appellate Term held that the deregulation of rent regulated premises may only be done by legislation and any agreement by the parties to the contrary is void. The matter was remitted to the Housing Part for a determination whether tenant was entitled to attorney's fees.

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36 Main Realty Corp. v. Wang Law Office, PLLC, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (No Waiver Provision in Commercial Lease)

Holding that a clear and unambiguous "no waiver" provision in a commercial lease will generally be enforced. Here, the no waiver provision applied to the lease requirement that tenant make certain repairs and that the failure to make the repairs would not constitute a basis for a rent abatement. Tenant thus was not entitled to an abatement of rent due to the lack of repairs (which tenant was obligated to perform anyway).

27. YELLOWSTONE INJUNCTION

River Park Residences, LP v. Richman Plaza Garage Corp., 2015 N.Y. Misc. LEXIS 2262, 2015 N.Y. Slip Op 50975(U) (App. Term, 1st Dep't June 30, 2015)

Supreme Court's denial of tenant's motion for a *Yellowstone* injunction on the grounds that tenant failed to make the application before the cure period expired was neither an adjudication on the merits nor constituted the law of the case in a related summary proceeding.

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III. SELECTED STATUTES

CIVIL PRACTICE LAW AND RULES § 321[c]

Where counsel becomes deceased or is physically or mentally incapacitated, suspended, disabled or removed from the case prior to a final judgment, no further action may be taken against that counsel's client until after at least thirty (30) days notice to appoint another attorney is personally served (or in another manner directed by the court) upon the adversely effected party.

CIVIL PRACTICE LAW AND RULES § 4213

The court in rendering a decision, whether oral or in writing, must "state the facts it deems essential" and relied upon in reaching the holding (CPLR 4213(b)). The decision must be made within sixty (60) days after the matter is fully submitted (CPLR 4213[c]).

NYC ADMINISTRATIVE CODE § 27-2009.1(b) (Multiple Dwellings - Pets)

In New York City, where the lease for an apartment in a multiple dwelling prohibits a pet but the tenant "openly and notoriously" harbors a pet (not otherwise prohibited by the multiple dwelling law or other applicable law) and the landlord fails to bring a summary proceeding to enforce the "no pet" provision for a period of at least three (3) months, then the lease provision is deemed waived and tenant may keep the pet. Typically, the basis of the holdover proceeding is that the violation of the "no pet" rule created a nuisance. The purpose of the legislation is to dissuade landlords/owners who are aware of a pet violation from either holding the "threat" of litigation over the tenant's head or using it at an unspecified future date as a pretext for an otherwise unjustified eviction. *See* **149th St., LLC v. Rodriguez, 2016 N.Y. Misc. LEXIS 385, 2016 N.Y. Slip Op 50146(U) (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 5, 2016)** (affirming dismissal of holdover proceeding because knowledge that the tenant was harboring a dog prohibited by the lease for longer than three (3) months was imputed upon the landlord where landlord's agents, in this case building employees, had knowledge of the pet including conversations about the dog with the superintendent and further had made direct observation of the dog while maintenance work was performed within tenant's apartment).

REAL PROPERTY ACTIONS & PROCEEDINGS LAW § 711(5) (Illegal Activity)

A summary holdover proceeding is proper to remove a tenant where "any part" of the premises is used or occupied as a bawdy-house, a place for lewd persons or prostitution, any illegal trade or manufacture, or other illegal business. Case law requires that the tenant had "knowledge" or "reason to know" the illegal activity was taking place. The unlawful conduct must be something more than an isolated incident, and it further appears that service of a Ten-Day Notice to Quit is the appropriate predicate notice.

In 855-79 LLC v. Salas, 40 A.D.3d 553, 837 N.Y.S.2d 631 (1st Dep't 2007), the petition was dismissed because there was no evidence from which it could reasonably be concluded that the tenant "knew" or had "reason to know" the illegal activity was taking place. The tenant, who was elderly and had severe medical ailments that effected her hearing, vision and memory, did not testify at the hearing. The Appellate Division concluded it was improper to speculate that had the tenant testified she would have admitted knowing of, or at least, had reason to know of, the illegal activity.

Waterside Plaza Ground Lessee, LLC v. Hirsch, 18 N.Y.S.3d 582 (N.Y. Civ. Ct. 2015) (awarding landlord a judgment of possession and warrant of eviction (stayed ten (10) days) where the tenant "knew" or reasonably "should have known" his son was selling narcotics from the premises).

436-38 Assocs. v. Alvarado, 981 N.Y.S.2d 636 (N.Y. Civ. Ct. 2013) (the illegal conduct cannot be an isolated incident, but rather must tend to be customarily or habitually occurring at the premises) (holding the Ten-Day Notice to Quit was not adequately specific regarding the alleged illegal activity).

REAL PROPERTY ACTIONS & PROCEEDINGS LAW § 715(1) (Law Enforcement Notice - Illegal Activity)

Where the premises is used for illegal activity or business, law enforcement (e.g., District Attorney's Office) may cause to have personally served a five-day written notice upon the landlord or landlord's agent directing same to make application to have the occupant(s) removed. If the landlord fails to make such application within the five-day period or if it does so, but a good faith effort is not made to prosecute the action, then the law enforcement agency may commence its own action as if it was the landlord and such action takes precedence over any subsequent action that may be commenced by the landlord. Of note, where the landlord commences such a proceeding and prosecutes in good faith but the action is dismissed, the law

enforcement agency may not require the landlord appeal the dismissal or pursue its own appeal **(37-01 31st Ave. Realty Corp. v. Mohammed, 906 N.Y.S.2d 679 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)** (District Attorney may neither file its own appeal nor require landlord seek an appeal where the petitioner landlord and City of New York settled the summary proceeding)).

REAL PROPERTY LAW § 235-f (The Roommate Law)

235-f(3) provides that any residential lease entered into by a tenant automatically allows for the occupancy of the tenant and the tenant's immediate family, plus one (1) additional occupant and the dependent children of the occupant provided the tenant or tenant's spouse occupies the premises as his/her primary residence **(1890 Adam Clayton Powell LLC v. Penant, 216 N.Y. Misc. LEXIS 2203, 2016 N.Y. Slip Op 26190 (App. Term, 1st Dep't June 16, 2016)** (petitioner prevailed in this non-residence holdover proceeding where the three (3) unrelated individuals at issue occupied the apartment in violation of the lease which specified that only immediate family members in accordance with RPL 235-f could take possession)).

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IV. PRACTITIONER'S CHECKLIST (Things to Consider)

Practitioners should pay particular attention to the following before the case is called. The list is not exhaustive.

A. Is the subject premises located within the geographical jurisdiction of the Court?

B. What type of proceeding was commenced: non-payment or holdover?

Or is it a special proceeding to be restored to the subject premises or other type of permitted action?

B1. What is the identifiable Landlord and Tenant relationship?

Examples:

Landlord-Tenant
Lease expired
Lease terminated
Month-to-Month Tenancy
Licensee
Tenant-at-Will
Squatter
Post-foreclosure
Manufactured/Mobile Home
Tenancy by Sufferance

C. How many times has the case appeared on the Calendar? Has there been a "final marking" against either party?

D. If required, was the appropriate predicate notice served in a timely fashion and in an appropriate manner? A lease provision imposing more stringent service requirements than those set forth by statute will generally be enforced.

D1. If the subject premises is Section 8 or regulated pursuant to another government funded residency program, was the governing agency simultaneously served the predicate notice?

E. Was the Tenant/Occupant in possession of the subject premises at the time the summary proceeding was commenced?

F. Does the Petition include (1) a description of the premises; (2) the petitioner's interest in the premises; (3) the respondent's interest in the premises; (4) the relationship between the parties; (5) the facts upon which the proceeding is based; and (6) the relief sought.

F1. If the subject premises is Section 8 or pursuant to another government funded residency program, is this fact alleged in the petition?

F2. If a predicate notice was required, is the type of notice and date served alleged within the petition? Is a copy of the notice attached to the petition? (If the predicate notice is not attached, petitioner may provide a copy in opposition to a motion to dismiss.)

G. Is the Petition verified? Counsel may verify the petition even if located within the same county as the petitioner.

H. Is it alleged that the notice of petition and petition were properly served and service was completed no fewer than five (5) days but not more than twelve (12) days before the return date (RPAPL § 733(1))? Review the affidavit of service.

I. Was an answer required, and, if so, was an answer provided? (A request by a *pro se* litigant for an adjournment for the purpose of seeking counsel extends the time to answer.)

II. What affirmative defenses have been asserted and are they applicable? (e.g., the warranty of habitability only applies to residential nonpayment proceedings).

J. Is the Tenant/Occupant disputing service? If yes, does the petitioner have the process server available to testify at either a traverse hearing or a hearing on the merits?

K. Were counterclaims asserted, and, if so, is there a lease provision barring counterclaims? (Such a provision is generally enforceable unless the counterclaims are "inextricably intertwined" with the petitioner's underlying claims).

L. Is there a timely demand for a jury trial and the appropriate jury trial fee paid? If yes, is there a lease provision barring a jury trial? (Such a provision is generally enforceable).

M. Does petitioner seek to amend the petition, whether to add additional dollar amounts for rent or use and occupancy accrued following commencement of the summary proceeding, to insert the proper name of a "John/Jane Doe" and/or to correct the property address/description, etc?

N. Have the parties discussed an amicable resolution?

Notes:

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TOWN OF SOUTHAMPTON
CHAPTER 270

Town of Southampton, NY
Friday, January 20, 2017

Chapter 270. Rental Properties

[HISTORY: Adopted by the Town Board of the Town of Southampton 8-28-2007 by L.L. No. 40-2007; amended in its entirety 1-8-2008 by L.L. No. 3-2008. Subsequent amendments noted where applicable.]

GENERAL REFERENCES
Building construction — See Ch. **123**.
Unsafe buildings — See Ch. **128**.
Fire prevention — See Ch. **164**.
Affordable housing — See Ch. **216**.
Manufactured home communities — See Ch. **220**.
Property maintenance — See Ch. **261**.
Zoning — See Ch. **330**.

§ 270-1. Definitions.

As used in this chapter, the following terms shall have the meanings indicated: [1]

DWELLING UNIT
As defined in § **330-5**.

ENFORCEMENT AUTHORITY
The town agency or official charged with issuing rental permits and enforcing the provisions of this chapter. Said agency or official shall be designated by resolution of the Town Board but must be one of the following: the Chief Building Inspector or his designee, the Chief Fire Marshal or his designee, or investigators/officers assigned to the Town Attorney Investigation Unit.
[Added 5-13-2014 by L.L. No. 15-2014]

FAMILY
One of the following:

A. One, two or three persons occupying a dwelling unit; or

B. Four or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family.

(1) Evidence that four or more persons living in a single dwelling unit who are not related by blood, marriage or legal custody

shall create a rebuttable presumption that such persons do not constitute the functional equivalent of a traditional family.

(2) The foregoing presumption may be rebutted by submitting evidence to the Chief Building Inspector that all of the following are present:

(a) The group is one which in theory, size, appearance, structure and function resembles a traditional family unit;

(b) The occupants share the entire dwelling unit and live and cook together as a single housekeeping unit. A unit in which various occupants act as separate roomers is not deemed to be occupied by the functional equivalent of a traditional family;

(c) The group shares expenses for food, rent or ownership costs, utilities and other household expenses;

(d) The group is permanent and stable. Evidence for such permanency and stability may include:

[1] The presence of minor dependent children regularly residing in the household who are enrolled in local schools;

[2] Members of the household have the same address for purposes of voter registration, driver's license, motor vehicle registration and filing of taxes;

[3] Members of the household are employed in the area;

[4] The household has been living together as a unit for a year or more whether in the current dwelling unit or other dwelling units;

[5] There is common ownership of furniture and appliances among the members of the household; and

[6] The group is not transient or temporary in nature.

(e) Any other factor reasonably related to whether the group is the functional equivalent of a family.

(3) An appeal from the Chief Building Inspector's determination may be taken to the Licensing Review Board, by written request, within 30 days of such determination. The Licensing review Board shall hold a public hearing on such appeal within 30 days after receipt of written notice of such appeal and, after such hearing, shall make written findings and a decision either sustaining or reversing such determination within 30 days after close of such public hearing.

IMMEDIATE FAMILY

The owner's spouse, children, parents, siblings, grandparents or grandchildren.

MANAGING AGENT
Any individual, business, partnership, firm, corporation, enterprise, trustee, company, industry, association, public entity or other legal entity responsible for the maintenance or operation of any rental property as defined within this chapter.

OWNER
Any person, individual, association, entity or corporation whose name is listed as grantee on the last deed of record for the property, as recorded with the Suffolk County Clerk.

PERSON
Includes any individual, business, partnership, firm, corporation, enterprise, trustee, company, industry, association, public entity or other legal entity.

PUBLISH
Promulgation of an available rental property to the general public or to selected segments of the general public, in a newspaper, magazine, flyer, handbill, mailed circular, bulletin board, sign or electronic media.

RENEWAL RENTAL PERMIT
A permit which is to be issued to the owner of the rental property where such dwelling unit has been the subject of a rental permit continuously prior to the date of the application for the permit.

RENT
A return, in money, property or other valuable consideration (including payout in kind or services or other thing of value), for the use and occupancy or the right to the use and occupancy of a rental property, whether or not a legal relationship of landlord and tenant exists between the owner and the occupant or occupants thereof.

RENTAL PERMIT
A permit issued by the enforcement authority issued to the owner to allow the use or occupancy of a rental property.
[Amended 5-13-2014 by L.L. No. 15-2014]

RENTAL PROPERTY
A dwelling unit which is occupied for habitation as a residence by persons, other than the owner or the owner's immediate family, and for which rent is received by the owner, directly or indirectly, in exchange for such residential occupation. For purposes of this chapter, the term "rental property" shall mean all non-owner-occupied single-family residences, two-family residences, and townhouses, and shall exclude:

A. A dwelling unit lawfully and validly permitted as an accessory apartment in accordance with Article IIA of Chapter **330** of the Code of the Town of Southampton; or

B. Properties used exclusively for nonresidential commercial purposes in any zoning district; or

C. Any legally operating commercial hotel/motel business or bed-and-breakfast establishment operating exclusively and catering to

transient clientele, that is, customers who customarily reside at these establishments for short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel business.

TENANT

An individual who leases, uses or occupies a rental property.

TRANSIENT

A rental period of 14 days or less.

[Amended 5-14-2013 by L.L. No. 10-2013]

[1] *Editor's Note: The former definition of "Chief Building Inspector," which immediately followed, was repealed 5-13-2014 by L.L. No. 15-2014.*

§ 270-2. Applicability; more restrictive provisions to prevail.

A. Scope. This chapter shall apply to all rental properties located within the unincorporated area of the Town, whether or not the use and occupancy thereof shall be permitted under the applicable use regulations for the zoning district in which such rental property is located.

B. Applicability. The provisions of this chapter shall be deemed to supplement applicable state and local laws, ordinances, codes and regulations; and nothing in this chapter shall be deemed to abolish, impair, supersede or replace existing remedies of the Town, county or state or existing requirements of any other applicable state or local laws, ordinances, codes or regulations. In case of conflict between any provision of this chapter and any applicable state or local law, ordinance, code or regulation, the more restrictive or stringent provision or requirement shall prevail. The issuance of any permit or the filing of any form under this chapter does not make legal any action or statement of facts that is otherwise illegal under any other applicable legislation. For the purposes of the issuance of appearance tickets pursuant to the New York State Criminal Procedure Law and Southampton Town Code Chapter 5, Appearance Tickets, a violation of this chapter shall be deemed a violation of a Building Code.

C. The name of the tenant, date of birth of the owner(s), and the telephone number of the owner(s) information provided in an application for a rental permit under this chapter shall be deemed personal and private in nature, and the release or disclosure of said information pursuant to public request shall be deemed to constitute an unwarranted invasion of personal privacy under New York State Public Officers Law, Article 6, §§ 84 through 90, and shall not be authorized.

§ 270-3. Rental permit required.

A.

Effective January 1, 2008, no owner shall cause, permit or allow the occupancy or use of a dwelling unit as a rental property without a valid rental permit.

B. Effective January 1, 2008, no person shall occupy or otherwise use a dwelling unit as a rental property without a valid rental permit being issued for the dwelling unit.

C. A rental permit issued under this chapter shall only be issued to the owner(s) of the real property at issue.

§ 270-4. Term of permits and renewal.

A. All permits issued pursuant to this chapter shall be valid for a period of two years from the date of issuance.

B. A renewal rental permit application signed by the owner shall be completed and filed with the enforcement authority before the expiration of any valid rental permit. The renewal rental permit application shall contain the following:
[Amended 5-13-2014 by L.L. No. 15-2014]

(1) An official copy of the prior valid rental permit;

(2) A signed and sworn affidavit by the owner affirming that the rental property, to the best of his/her knowledge, fully complies with all of the provisions of the Code of the Town of Southampton and the New York State Uniform Fire Prevention and Building Code, that the structure has not been physically altered in any way, except in full conformance with a valid building permit, and the owner is not aware of the property being in violation of the Code of the Town of Southampton or the New York State Uniform Fire Prevention and Building Code.

C. In the event of a change in tenancy occurring during a permit term, the owner shall notify the enforcement authority, in writing, of the identity of the new tenants.
[Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-5. Application for rental permit.

A. Where a dwelling unit is to be used as a rental property, an application for a rental permit shall be filed with the enforcement authority before the term of the rental is to commence.
[Amended 5-28-2013 by L.L. No. 12-2013; 5-13-2014 by L.L. No. 15-2014]

(1) The owner of a rental property having failed to comply with the requirements of § **270-5A** shall file all appropriate rental application documents within 30 days of the receipt of actual notice of said failure to comply. Actual notice shall include but not be limited to

the issuance of a summons or notice of violation and/or written notice from any Southampton Town official.

B. The application shall contain the following:

(1) The name, date of birth, telephone number and address of the owner(s).

(a) Proof of the legal residence of each owner;

(b) In the event that the owner of the rental property is a corporation, partnership, limited liability company, or other business entity, the name, proof of legal residence, and telephone number of each owner, officer, principal shareholder, partner and/or member of such business entity shall be provided;

(c) A copy of the last deed of record for the rental property, as recorded with the Suffolk County Clerk, confirming the ownership of record of the rental property.

(2) The name, address and telephone number of the managing agent, if applicable.

(3) A writing, promulgated by the Office of the Town Attorney, executed by the owner(s) of the rental property, which designates either:

(a) A person, firm or corporation with an actual place of business, dwelling place, or usual place of abode located within the boundaries of the Town of Southampton; or

(b) The Town Clerk of the Town of Southampton as agent for service for criminal and civil process pursuant to CPLR Section 318. Every owner shall insure that the address for delivery of such process is current and shall advise the Town Clerk whenever the address is changed. The designated agent, upon receipt of service of process under this designation shall forthwith transmit by regular and certified mail to the owner(s) of the rental property at the address included on the owner(s) application.

(4) The location of the rental property, including the street address and the Suffolk County Tax Map parcel number.

(5) The number of tenants intended to occupy the rental property.

(6) [1]A copy of a contract with a carter providing for weekly pickup, at a minimum, of refuse and proof by letter from the carter indicating that full payment for the entire term of the rental has been made, or in the alternative, an affidavit from the owner acknowledging responsibility for refuse removal in a timely and efficient manner.

[1] *Editor's Note: Former Subsection B(6), regarding the names of tenants, was repealed 5-28-2013 by L.L. No. 12-2013. This local law also provided for the renumbering of former Subsection B(7) through (11) as Subsection B(6) through (10), respectively.*

(7) The period of the proposed occupancy.

(8) A floor plan depicting the location and size of each conventional bedroom.

(9) A copy of the certificate of occupancy or pre-existing certificate of occupancy for the rental property.

(10) Written certification from a licensed architect or licensed engineer that states that the rental property fully complies with all of the provisions of the Code of the Town of Southampton. The certification shall include, but not be limited to, the number of each bedroom, the square footage of each bedroom, and a description of every improvement indicated on the survey. In lieu of the provision of a certification, an inspection may be conducted by the enforcement authority.
[Amended 5-13-2014 by L.L. No. 15-2014]

C. The owner(s) of the premises and the managing agent, if applicable, shall submit an application that is signed, sworn to and notarized.

§ 270-6. Review of application; issuance of rental permit.

[Amended 5-28-2013 by L.L. No. 12-2013; 5-13-2014 by L.L. No. 15-2014]
The enforcement authority shall review each application for completeness and accuracy and shall make an on-site inspection of the proposed rental property unless the owner has elected to provide a certification from a licensed architect or a licensed engineer pursuant to **§ 270-5B(10)**. The enforcement authority shall not issue a rental permit, unless the application includes all of the requisite information and documents enumerated in § 270-5(B)(1) through (10). If satisfied that the proposed rental property fully complies with the New York State Uniform Fire Prevention and Building Code and the Code of the Town of Southampton and that such rental property would not create a nuisance to an adjoining nearby property, the enforcement authority shall issue the permit or permits. No rental permit shall be issued if there are any violations of the New York State Uniform Fire Prevention and Building Code and the Town of Southampton in existence at the premises.

§ 270-7. Register of permits.

[Amended 5-13-2014 by L.L. No. 15-2014]
It shall be the duty of the enforcement authority to maintain a register of permits issued pursuant to this chapter. Such register shall be kept by street address, showing the name and address of the permittee, the number of rooms in the rental property, and the date of expiration of the rental permit.

§ 270-8. Fees.

A. A nonrefundable biennial permit application fee, in the amount of $200, shall be paid upon the filing of an application for a rental permit or a renewal rental permit.

B. The nonrefundable biennial permit application fee shall be waived if the owner of a rental property leases for the entire rental term to low-, moderate-, or middle-income households, and in such rental amounts as adopted by the Town Board through the annual resolution which updates the rental formula multipliers for units reserved for income-eligible households pursuant to Chapter **216** of the Code of the Town of Southampton.

C. The nonrefundable biennial rental permit application fee shall be $100 if the owner of a rental property qualifies for any of the following real property tax exemptions at his or her primary residence located in the Town of Southampton:

   (1) Enhanced STAR;

   (2) Veterans exemption; or

   (3) Senior citizens exemption.

D. The nonrefundable biennial rental permit application fee shall be $100 if the owner of a rental property submits a sworn affidavit affirming that the rental property will be leased to any active member of a volunteer fire department or ambulance corps and/or is qualified for a volunteer firefighters and ambulance workers real property tax exemption.

E. The nonrefundable biennial rental permit application fee shall be $150 if the owner of a rental property elects to provide a written certification from a licensed architect or licensed engineer that states that the rental property fully complies with all of the provisions of the Code of the Town of Southampton pursuant to § 270-5B(11).

F. The nonrefundable biennial rental permit application fee shall be $100 if the owner of a rental property submits a sworn affidavit affirming that the rental property will be leased to a senior citizen, as defined in § **330-5** of the Town Code, or a qualified disabled person, as defined in § **216-2** of the Town Code.

G. If an owner of a rental property is found by any court of competent jurisdiction to have violated this chapter, the nonrefundable biennial rental permit application fee will be $500.

§ 270-9. Regulations.

A. A rental property shall only be leased, occupied or used by a family.

B.

No rental property shall be occupied by more than the number of persons permitted to occupy the dwelling unit under Section 404 of the Property Maintenance Code of the New York State Uniform Fire Prevention and Building Code.

C. A transient rental is prohibited.

D. No more than two bedrooms shall be permitted in the basement of a rental property.

E. The selling of shares to tenants where they obtain rights for use and/or occupancy in a dwelling for less than a month shall be prohibited.

F. The leasing, occupancy or use by a tenant of less than the entire rental property is prohibited.

G. The owner(s) and tenant(s) shall ensure that all applicable parking regulations provided for in the Code of the Town of Southampton are satisfied.

H. A rental property shall only be occupied or otherwise utilized in accordance with the certificate of occupancy issued for the dwelling unit.

I. The owner(s) and tenant(s) shall ensure that all property maintenance regulations provided for in Chapter **261** of the Code of the Town of Southampton are satisfied.

J. Dumpsters shall be prohibited in the required front yard and right-of-way. The enforcement authority is authorized to promulgate additional site-specific conditions associated with dumpsters, screening facilities, and off-street parking requirements for rental properties regulated under this chapter. Any such conditions shall be in writing and attached to the rental permit.
[Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-10. Inspections.

[Amended 5-13-2014 by L.L. No. 15-2014]
The enforcement authority and Town personnel who are engaged in the enforcement of the provisions of this chapter are authorized to make or cause to be made inspections to determine the condition of rental properties to safeguard the health, safety, and welfare of the public. The enforcement authority and Town personnel who are engaged in the enforcement of the provisions of this chapter are authorized to enter upon any rental property, with the consent of the owner or managing agent if the rental property is unoccupied or upon consent of the occupant if the rental property is occupied.

§ 270-11. Application for search warrant authorized.

[Amended 5-13-2014 by L.L. No. 15-2014]
The enforcement authority and Town personnel who are engaged in the enforcement of the provisions of this chapter are authorized to make application for the issuance of a search warrant in order to conduct an inspection of any rental property where the owner or tenant refuses or fails to allow an inspection of its premises and where there is reasonable cause to believe that a violation of this chapter has occurred. The application for a search warrant shall in all respects comply with the applicable laws of the State of New York.

§ 270-12. Revocation of permit.

A. The enforcement authority shall revoke a rental permit when he or she finds that the permit holder has caused, permitted or allowed to exist and remain upon the rental property a violation of any provision of the Code of the Town of Southampton for a period of 14 days or more after written notice has been given to the permit holder, managing agent, or tenant of such rental property.
[Amended 5-13-2014 by L.L. No. 15-2014]

B. An appeal from such revocation may be taken by the permit holder to the Licensing Review Board, by written request, made within 30 days from the date of such revocation. The Licensing Review Board shall hold a public hearing on such appeal within 30 days after receipt of written notice of such appeal and, after such hearing, shall make written findings and a decision either sustaining such permit revocation or reinstating such permit within 30 days after close of such public hearing.

§ 270-13. Collection of rent.

The following shall be conditions precedent to the collection of rent for the use and occupancy of a rental property:

A. The existence of a valid rental permit for the rental property.

B. The tendering of a written receipt in exchange for any rent payment offered in cash.

§ 270-14. Presumptive evidence dwelling unit is being used as rental property.

A. The presence or existence of any of the following shall create a presumption that a dwelling unit is being used as a rental property:

(1) The property is occupied by someone other than the owner or his/her immediate family;

(2)

Voter registration, motor vehicle registration, a driver's license, or any other document filed with a public or private entity which states that the owner of the rental property resides at an address other than the rental property;

(3) Utilities, cable, phone or other services are in place or requested to be installed or used at the premises in the name of someone other than the record owner;

(4) Persons residing in the dwelling unit represent that they pay rent to occupy the premises;

(5) A dwelling unit which has been published as being available for rent;

(6) Any two of the features enumerated in § **270-15** exist at the dwelling unit.

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction. [Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-15. Presumptive evidence of multifamily occupancy.

A. It shall be presumed that a single- or one-family dwelling unit is occupied by more than one family if any two or more of the following features are found to exist on the premises:

(1) More than one mailbox, mail slot or post office address;

(2) More than one gas meter;

(3) More than one electric meter annexed to the exterior of the premises;

(4) More than one doorbell or doorway on the same side of the dwelling unit;

(5) More than one connecting line for cable television service;

(6) More than one antenna, satellite dish, or related receiving equipment;

(7) There are three or more motor vehicles registered to the dwelling and each vehicle owner has a different surname;

(8) There are more than three waste receptacles, cans, containers, bags or boxes containing waste from the premises placed for pickup at least twice during a weekly garbage pickup area;

(9) There are separate entrances for segregated parts of the dwelling;

(10) There are partitions or internal doors which may serve to bar access between segregated portions of the dwelling, including but not limited to bedrooms;

(11) There exists a separate written or oral lease or rental arrangement, payment or agreement for portions of the dwelling among the owner and/or occupants and/or persons in possession thereof;

(12) Any occupant or person in possession thereof does not have unimpeded and/or lawful access to all parts of the dwelling unit;

(13) Two or more kitchens, each containing one or more of the following: a range, oven, hotplate, microwave or other similar device customarily used for cooking or preparation of food and/or a refrigerator;

(14) There are bedrooms that are separately locked.

B. If any two or more of the features set forth in Subsection **A(1)** through **(13)** are found to exist on the premises by the enforcement authority or Town personnel engaged in the enforcement of the provisions of this chapter, a verified statement will be requested from the owner of the dwelling unit by the enforcement authority that the dwelling unit is in compliance with all of the provisions of the Code of the Town of Southampton, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York. If the owner fails to submit such verified statement, in writing, to the enforcement authority within 10 days of such request, such shall be deemed a violation of this chapter.
[Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-16. Presumptive evidence of owner's residence.

A. It shall be presumed that an owner of a rental property does not reside within said rental property if any of the following sets forth an address other than that of the rental property:

(1) Voter registration;

(2) Motor vehicle registration;

(3) Driver's license; or

(4) Any other document filed with a public or private entity.

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction.
[Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-17. Presumptive evidence of over-occupancy.

A. It shall be presumed that a bedroom is over-occupied if more than two mattresses exist in a bedroom.

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction. [Amended 5-13-2014 by L.L. No. 15-2014]

§ 270-18. General applicability of presumptions.

The presumptions set forth in §§ **270-14, 270-15, 270-16**, and 270-17, subject to the limitations contained therein, shall also be applicable to the enforcement and the prosecution of building and zoning Town Code violations.

§ 270-19. Penalties for offenses.

A. A violation of this chapter by the owner(s) and/or tenant(s) shall be punishable as follows: [Amended 5-28-2013 by L.L. No. 12-2013]

(1) A violation of § **270-5A** is hereby declared to be an offense punishable by a fine not less than $150 nor more than $1,500 or imprisonment for a period not to exceed 15 days, or both, for a conviction of a first offense;

(2) A violation of § **270-5A(1)** is hereby declared to be an offense punishable by a fine not less than $1,500 nor more than $8,000 or imprisonment for a period not to exceed 15 days, or both, for a conviction of a first offense;

(3) A violation of any section of this chapter other than § **270-5A** and/or § **270-5A(1)** is hereby declared to be an offense punishable by a fine not less than $3,000 nor more than $15,000 or imprisonment not to exceed a period of six months, or both, for a conviction of a first offense.

(4) A second or subsequent violation of this chapter within an eighteen-month period is hereby declared to be an offense punishable by a fine not less than $8,000 nor more than $30,000 or imprisonment not to exceed a period of six months, or both.

(5) For the purpose of conferring jurisdiction upon courts and judicial officers in general, violations of this chapter, other than § **270-5A** and/or § **270-5A(1)**, shall be deemed misdemeanors and, for such purpose only, all provisions of law relating to misdemeanors shall apply. Each day's continued violation shall constitute a separate additional violation.

(6) In addition to any fines imposed, anyone convicted pursuant to this chapter shall be required to pay a mandatory community housing opportunity surcharge of $100. The community housing opportunity surcharge shall be paid to the Clerk of the Court or administrative tribunal that rendered the conviction. Within the first 10 days of the month following collection of the mandatory

surcharge, the collecting authority shall then pay such money to the Town Comptroller, who shall then deposit such money in accordance with the provisions of § **216-6** of the Town Code.
[Added 10-25-2016 by L.L. No. 12-2016]

B. Additionally, in lieu of imposing the fines authorized in § **270-19A**, in accordance with Penal Law § 80.05(5), the court may sentence the defendant(s) to pay an amount, fixed by the court, no less than the applicable minimum statutory fine permitted under § **270-19A** nor more than double the amount of the rent collected over the term of the occupancy.
[Amended 5-28-2013 by L.L. No. 12-2013]

C. The court may dismiss the violation or reduce the minimum fine imposed where it finds that the defendant had cooperated with the Town of Southampton in the investigation and prosecution of a violation of this chapter. Factors which the court may consider include, but are not limited to, a report from the office of the Town Attorney confirming that the defendant did in fact cooperate and whether:

(1) The defendant reported the violation(s) to the Town of Southampton;

(2) The defendant assisted the Town of Southampton in investigating and prosecuting the violation(s);

(3) The defendant provided access to the rental property;

(4) The defendant promptly pursued his/her/its own rights under the lease to remedy the violation or adequately pursued an eviction proceeding;

(5) All violations existing at the rental property have been promptly remediated.

D. Where authorized by a duly adopted resolution of the Town Board, the Town Attorney may bring and maintain a civil proceeding, in the name of the Town, in the Supreme Court, to permanently enjoin the person or persons conducting, maintaining or permitting said violation. The owner and tenants of the residence wherein the violation is conducted, maintained or permitted may be made defendants in the action.

(1) If a finding is made by a court of competent jurisdiction that the defendants or any of them has caused, permitted, or allowed a violation of this chapter, a penalty to be jointly and severally included in the judgment may be awarded at the discretion of the court in an amount not to exceed $1,000 for each day it is found that the defendants or any one of them individually caused, permitted or allowed the violation. Upon recovery, such penalty shall be paid into the Town Attorney's Enforcement Fund.

CASELAW FINDING IMPLIED PRIVATE RIGHT OF ACTION
TOWN CODE §270-13 COLLECTION OF RENT

135 A.D.3d 671
Supreme Court, Appellate Division,
Second Department, New York.

Julie ADER, et al., respondents,
v.
Joe GUZMAN, appellant, et al., defendants.

Jan. 13, 2016.

Synopsis

Background: Tenants brought action against landlord, seeking to rescind residential lease and recover the amount paid to landlord pursuant to the lease on grounds that the premises lacked a valid rental permit as required by town code. The Supreme Court, Suffolk County, Pitts, J., granted tenants' motion for summary judgment and denied landlord's motion for summary judgment. Landlord appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] implied private right of action existed under town code provision requiring valid rental permit, and

[2] lease was rendered illegal and unenforceable as a result of landlord's violation of town code.

Affirmed.

West Headnotes (7)

[1] **Action**
Statutory rights of action

Landlord and Tenant
Property which may be leased

Implied private right of action existed under town code provision requiring a valid rental permit for residential rental properties; provision was intended to benefit occupants of rental properties by requiring owners to obtain valid rental permit as a condition precedent to the collection of rent, recognition of private right of action promoted the legislative purpose by preventing owners from profiting from rental properties that were overcrowded, substandard, or otherwise in violation of state and town laws, and creation of a private right of action was consistent with the legislative scheme of protecting the health, safety, and well-being of persons renting homes.

Cases that cite this headnote

[2] **Action**
Statutory rights of action

Where a statute does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history.

Cases that cite this headnote

[3] **Action**
Statutory rights of action

Inquiry of whether a statute affords implied private right of action involves three factors: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.

Cases that cite this headnote

[4] **Action**
Statutory rights of action

Where the legislature clearly contemplated administrative enforcement of a statute, the question in determining whether implied private right of action exists under the statute then becomes whether, in addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme.

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Cases that cite this headnote

[5] **Landlord and Tenant**
⇐ Property which may be leased

Residential lease was rendered illegal and unenforceable as a result of landlord's violation of town code provision requiring a valid rental permit; overriding concern of provision was to protect the safety and well-being of occupants of rental properties, it would be against public policy to permit landlord to retain tenants' rental payments and to profit from his wrongdoing, and there was no indication that tenants were raising the argument of illegality for personal gain.

Cases that cite this headnote

[6] **Contracts**
⇐ Enforcement of contract in general

The violation of a statute which is merely malum prohibitum will not necessarily render a contract illegal and unenforceable if that statute does not expressly provide that its violation will deprive the parties of their right to sue under the contract, and the denial of relief is wholly out of proportion to the requirements of public policy.

Cases that cite this headnote

[7] **Contracts**
⇐ Enforcement of contract in general

Contracts
⇐ Discharge of contract by breach

Forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for the public good; allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law.

Cases that cite this headnote

Attorneys and Law Firms

**293 Richard Lavorata, Jr., Lindenhurst, N.Y., for appellant.

Lieb at Law, P.C., Center Moriches, N.Y. (Dennis C. Valet of counsel), for respondents.

REINALDO E. RIVERA, J.P., CHERYL E. CHAMBERS, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

*671 In an action, inter alia, to rescind a lease, the defendant Joe Guzman appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Pitts, J.), dated September 2, 2014, as granted that branch of the plaintiffs' motion which was for summary judgment on the complaint insofar as asserted against him and denied his cross motion for summary judgment dismissing the complaint insofar as asserted against him.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The defendant Joe Guzman is the owner of a parcel of residential property located in the Town of Southampton (hereinafter the premises). On or about February 28, 2013, the plaintiffs entered into a lease agreement with Guzman to rent the premises from May 21, 2013, until September 5, 2013, for the sum of $180,000. Pursuant to the lease, the plaintiffs also paid a security deposit in the sum of $18,000 and a utility **294 deposit in the sum of $18,000. Shortly after the term of the lease commenced, the plaintiffs allegedly learned that the premises lacked a valid rental permit as required by section 270–3 of the Town Code of the Town of Southampton (hereinafter Town Code). In a letter dated June 5, 2013, the plaintiffs notified Guzman that the lease was illegal and unenforceable, and demanded the return of all sums paid to him pursuant to the lease. In a letter dated June 13, 2013, Guzman rejected the plaintiffs' demand, stating that the plaintiffs had willingly executed the lease "after having sufficient opportunity to investigate whether or not [the premises] had a rental permit."

The plaintiffs thereafter commenced this action against, among others, Guzman to rescind the lease and recover

the sum of $216,000, representing the amount paid by the plaintiffs *672 to Guzman pursuant to the lease. The plaintiffs subsequently moved for summary judgment on the complaint insofar as asserted against Guzman. The plaintiffs argued that it was illegal for Guzman to lease the premises without a rental permit and that a valid rental permit was a condition precedent to the collection of rent pursuant to section 270–13 of the Town Code. Guzman cross-moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that his violation of Town Code § 270 was merely malum prohibitum and did not render the lease unenforceable. The Supreme Court, inter alia, granted the plaintiffs' motion and denied Guzman's cross motion.

Resolution 2007–1184 was adopted by the Town Board of the Town of Southampton on August 28, 2007, to enact section 270 *et seq.* of the Town Code, based on a determination that: "there exists in the Town of Southampton serious conditions arising from the rental of non-owner occupied residential dwelling units that are (i) overcrowded and dangerous, (ii) in violation of various State and Town laws, (iii) inadequate in size to accommodate the number of occupants, and (iv) substandard. The Town Board recognizes that the renting and occupancy of such dwelling units pose a serious threat to the health, safety and welfare of the occupants and the neighbors."

Pursuant to Town Code § 270–3, "no owner shall cause, permit or allow the occupancy or use of a dwelling unit as a rental property without a valid rental permit." Section 270–5 provides that, "an application for a rental permit shall be filed with the enforcement authority before the term of the rental is to commence." Importantly, section 270–13 provides that a valid rental permit shall be a condition precedent to the collection of rent. The penalties for violating section 270 include monetary fines or imprisonment.

[1] [2] [3] [4] Contrary to Guzman's contention, Town Code § 270 affords an implied private right of action and, therefore, the plaintiffs may assert claims against him for his alleged violation of that statute (*see Schwartz v. Torrenzano*, 49 Misc.3d 943, 16 N.Y.S.3d 697; *but see Liu v. Asselbergs*, 2013 WL 6916379 [Sup.Ct., N.Y. County 2013]). Where, as here, a statute "does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of action is 'fairly implied' in the statutory provisions and their legislative history" (*Brian Hoxie's Painting Co. v. Cato–Meridian Cent. School Dist.*, 76 N.Y.2d 207, 211, 557 N.Y.S.2d 280, 556 N.E.2d 1087, quoting *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18, 541 N.E.2d 18). This inquiry involves three factors: *673 " '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) **295 whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' " (*Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207, 211, 981 N.Y.S.2d 739, quoting *Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 644 N.Y.S.2d 678, 667 N.E.2d 328; *see Sheehy v. Big Flats Community Day*, 73 N.Y.2d at 633, 543 N.Y.S.2d 18, 541 N.E.2d 18). The third factor is often noted to be the "most important" (*Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70, 979 N.Y.S.2d 257, 2 N.E.3d 221; *see Brian Hoxie's Painting Co. v. Cato–Meridian Cent. School Dist.*, 76 N.Y.2d at 211, 557 N.Y.S.2d 280, 556 N.E.2d 1087; *Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d at 211, 981 N.Y.S.2d 739). Where, as here, the legislature clearly contemplated administrative enforcement of the statute, " '[t]he question then becomes whether, in addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme' " (*AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 16, 867 N.Y.S.2d 169, quoting *Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32, 40, 698 N.Y.S.2d 609, 720 N.E.2d 886).

The plaintiffs satisfied the first and second factors here. Town Code § 270 is intended to benefit the occupants of rental properties in the Town of Southampton by requiring owners to obtain a valid rental permit as a condition precedent to the collection of rent (*see* Town Code § 270–13). Moreover, the legislative purpose is promoted by preventing owners from profiting from the rental of properties that are overcrowded, substandard, or otherwise violate State and Town laws.

The third factor, requiring that a private cause of action under a statute be consistent with the legislative scheme, has also been satisfied. As the Supreme Court correctly observed, Town Code § 270 is directed toward protecting the health, safety, and well-being of persons renting homes in the Town of Southampton. In that regard, Town Code § 270–6 requires that prior to the issuance of a rental

permit, the enforcement authority must "make an on-site inspection of the proposed rental property" to ensure that the property "complies with the New York State Uniform Fire Prevention and Building Code and the Code of the Town of Southampton" (Town Code § 270–6). Although Town Code § 270 is intended to be enforced by designated Town officials and provides for penalties and fines, "without the threat of recoupment of rent, aside from the possibility of administrative enforcement, there is no incentive for a landlord to obtain a license, which is an overriding concern of the Town" (*Schwartz v. Torrenzano*, 49 Misc.3d at 952, 16 N.Y.S.3d 697).

[5] [6] [7] *674 Moreover, contrary to Guzman's contention, the Supreme Court properly determined that the lease was rendered illegal and unenforceable as a result of his violation of Town Code § 270. "The violation of a statute which is merely malum prohibitum will not necessarily render a contract illegal and unenforceable if that statute does not expressly provide that its violation will deprive the parties of their right to sue under the contract, and the denial of relief is wholly out of proportion to the requirements of public policy" (*R.A.C. Group, Inc. v. Bd. of Educ.*, 21 A.D.3d 243, 248, 799 N.Y.S.2d 559; *see Benjamin v. Koeppel*, 85 N.Y.2d 549, 553, 626 N.Y.S.2d 982, 650 N.E.2d 829; *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 127, 589 N.Y.S.2d 396, 603 N.E.2d 246; *Simaee v. Levi*, 22 A.D.3d 559, 562, 802 N.Y.S.2d 493). Furthermore, "forfeitures by operation of law are disfavored, **296 particularly where a defaulting party seeks to raise illegality as 'a sword for personal gain rather than a shield for the public good' ... Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law" (*Simaee v. Levi*, 22 A.D.3d at 562, 802 N.Y.S.2d 493, quoting *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d at 128, 589 N.Y.S.2d 396, 603 N.E.2d 246). The Court of Appeals has observed that, "[w]here the procuring of a license is merely for the purpose of raising revenue it would seem that acts performed without securing a license would be valid. But where the statute looks beyond the question of revenue and has for its purpose the protection of public health or morals or the prevention of fraud, a non-compliance with its terms would affect the legality of the business" (*Benjamin v. Koeppel*, 85 N.Y.2d at 553, 626 N.Y.S.2d 982, 650 N.E.2d 829 [internal quotations marks omitted]; *see Village Taxi Corp. v. Beltre*, 91 A.D.3d 92, 99–100, 933 N.Y.S.2d 694).

Here, as noted above, although Town Code § 270 is, in part, revenue raising, the overriding concern of the statute is to protect the safety and well-being of occupants of rental properties in the Town of Southampton. Accordingly, under the circumstances of this case, it would be against public policy to permit Guzman to retain the plaintiffs' rental payments and to profit from his wrongdoing (*see R.A.C. Group, Inc. v. Board of Educ. of City of N.Y.*, 21 A.D.3d at 248, 799 N.Y.S.2d 559; *Schwartz v. Torrenzano*, 49 Misc.3d 943, 950–951, 16 N.Y.S.3d 697).

Finally, Guzman failed to submit any evidence demonstrating that the plaintiffs were raising the argument of illegality for personal gain. In that regard, in opposition to the plaintiffs' prima facie showing that they surrendered possession of the premises shortly after the lease commenced, and abandoned any personal belongings remaining on the premises, Guzman *675 failed to raise a triable issue of fact demonstrating that the plaintiffs remained on the premises for the entire term of the lease or for any additional time thereafter (*see* CPLR 3212[b]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *cf. Summer Fun Leasing v. Bienen*, 2010 N.Y. Slip Op. 30836[U], 2010 WL 1536286 [Sup.Ct., Suffolk County 2010]).

Based on the foregoing, the Supreme Court properly granted summary judgment in favor of the plaintiffs.

All Citations

135 A.D.3d 671, 23 N.Y.S.3d 292, 2016 N.Y. Slip Op. 00137

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74 N.Y. Jur. 2d Landlord and Tenant § 53

New York Jurisprudence, Second Edition
November 2016 Update
Landlord and Tenant

Russell J. Davis, J.D., M.A., John A. Gebauer, J.D., Alan J. Jacobs, J.D., John R. Kennel, J.D., of the staff of the National Legal Research Group, Inc., Andrew Lee, J.D., Todd M. Nielsen, J.D., and Caralyn M. Ross J.D.

II. Leases and Agreements for Lease
D. Validity or Legality of Lease
2. Legality of Purpose or Use

§ 53. Failure to obtain or comply with certificate of occupancy

Topic Summary Correlation Table References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant ⇐29, 105

A lease is not void for illegality merely because the premises are not covered by a certificate of occupancy; rather, the lease will be considered a valid contract if the bar to the legal use of premises is readily correctable and the language used in the lease indicates that the parties intended that the defect be corrected and the premises legally occupied. [1] A lease is not void for illegality merely because the use of part of the premises for the purpose specified in the lease is not authorized under the existing certificate of occupancy. [2] Accordingly, a lease may not be avoided by a tenant in possession solely because the landlord has failed to obtain a certificate of occupancy. Rather, the tenant must show that the landlord has violated some provision of law which directly and substantially concerns the public health, safety, and welfare or that the use of the premises is thereby precluded or restricted. [3] Similarly, a landlord's act of permitting individuals to reside in a basement apartment without obtaining a proper certificate of occupancy for the premises precluded the landlord's recovery of use and occupancy. [4]

Where a tenant illegally occupies, as a residence, leased commercial premises, such a violation precludes the tenant's claims against the landlord for alleged breach of covenant of quiet enjoyment and nuisance. [5]

CUMULATIVE SUPPLEMENT

Cases:

Residential lease was rendered illegal and unenforceable as a result of landlord's violation of town code provision requiring a valid rental permit; overriding concern of provision was to protect the safety and well-being of occupants of rental properties, it would be against public policy to permit landlord to retain tenants' rental payments and to profit from his wrongdoing, and there was no indication that tenants were raising the argument of illegality for personal gain. Ader v. Guzman, 135 A.D.3d 671, 23 N.Y.S.3d 292 (2d Dep't 2016).

[END OF SUPPLEMENT]

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Footnotes

1 Progressive Image Gruppe, Inc. v. 162 Charles Street Owners, Inc., 272 A.D.2d 66, 707 N.Y.S.2d 98 (1st Dep't 2000); Kosher Konvenience, Inc. v. Ferguson Realty Corp., 171 A.D.2d 650, 567 N.Y.S.2d 131 (2d Dep't 1991).
Tenant could not claim that a shopping center lease was void because no certificate of occupancy was issued for the property, where lease specifically provided that tenant would procure and maintain a certificate of occupancy at its own expense if one was required by any governmental authority. Gannett Suburban Newspapers v. El-Kam Realty Co., 306 A.D.2d 312, 760 N.Y.S.2d 553 (2d Dep't 2003).

2 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 186 N.Y.S.2d 583, 159 N.E.2d 150 (1959), adhered to on reh'g, 7 N.Y.2d 752, 193 N.Y.S.2d 665, 162 N.E.2d 747 (1959); Cutler-Hammer, Inc. v. One Lincoln Associates., 79 A.D.2d 512, 433 N.Y.S.2d 455 (1st Dep't 1980); Schwalben v. Cholowaczuk, 75 Misc. 2d 98, 347 N.Y.S.2d 402 (Sup 1973).
A tenant did not unlawfully occupy the demised premises under temporary and permanent certificates of occupancy where the tenant was never served with a notice of violation by the Department of Buildings of the City of New York, and it will not be presumed that the tenant violated either certificate by its occupancy or that the department failed to do its duty in discovering violations. Frank B. Hall and Co. of New York, Inc. v. Orient Overseas Associates, 65 A.D.2d 424, 411 N.Y.S.2d 233 (1st Dep't 1978), judgment aff'd, 48 N.Y.2d 958, 425 N.Y.S.2d 66, 401 N.E.2d 189 (1979).
As to certificates of occupancy, generally, see N.Y. Jur. 2d, Buildings, Zoning, and Land Controls §§ 52 to 54.

3 Robitzek Investing Co. v. Colonial Beacon Oil Co., 265 A.D. 749, 40 N.Y.S.2d 819 (1st Dep't 1943); Euclid Holding Co. v. Schulte, 153 Misc. 832, 276 N.Y.S. 533 (App. Term 1934); Mesfree Realty Corp. v. Huyler's, 153 Misc. 667, 275 N.Y.S. 816 (App. Term 1934); Schwalben v. Cholowaczuk, 75 Misc. 2d 98, 347 N.Y.S.2d 402 (Sup 1973); Herzog v. Thompson, 50 Misc. 2d 488, 270 N.Y.S.2d 469 (N.Y. City Civ. Ct. 1966); Salmon v. D.A. Schulte, Inc., 154 Misc. 139, 276 N.Y.S. 535 (Mun. Ct. 1934); Minton v. D.A. Schulte, Inc., 153 Misc. 195, 274 N.Y.S. 641 (Sup 1934).

4 Hart-Zafra v. Singh, 16 A.D.3d 143, 790 N.Y.S.2d 129 (1st Dep't 2005).

5 Caldwell v. American Package Co., Inc., 57 A.D.3d 15, 866 N.Y.S.2d 275 (2d Dep't 2008).

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135 A.D.3d 668
Supreme Court, Appellate Division,
Second Department, New York.

Julie ADER, et al., appellants,
v.
Joe GUZMAN, defendant,
Corcoran Realty Group, LLC, et al., respondents.

Jan. 13, 2016.

Synopsis
Background: Tenant's brought action for negligence against landlord and landlord's agents in connection with lease of residential property without valid rental permit required by town code. Landlord's agents moved to dismiss. The Supreme Court, Suffolk County, Pitts, J., granted the motion. Tenants appealed.

[Holding:] The Supreme Court, Appellate Division, held that statute setting forth requirements for landlord-tenant disclosure form imposed no duty on landlord's agents to investigate whether premises had a valid rental permit, and thus landlord's agents had no negligence liability for listing premises for residential rental without valid permit.

Affirmed.

West Headnotes (2)

[1] **Landlord and Tenant**
Property which may be leased

Statute setting forth requirements for landlord-tenant disclosure form imposed no duty on landlord's agents to investigate whether premises that landlord leased to tenants had a valid rental permit, and thus landlord's agents had no negligence liability for listing premises for residential rental without valid permit; statute did not alter the application of the common law of agency with respect to residential real estate transactions, and thus landlord's agents had no liability for failing to disclose lack of permit, absent any conduct by agents constituting active concealment. McKinney's Real Property Law § 443(4)(b).

Cases that cite this headnote

[2] **Brokers**
Delegation of authority

Real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal.

Cases that cite this headnote

Attorneys and Law Firms

**577 Lieb at Law, P.C., Center Moriches, N.Y. (Dennis C. Valet of counsel), for appellants.

Margolin & Pierce, LLP, New York, N.Y. (Philip Pierce and Errol F. Margolin of counsel), for respondents.

REINALDO E. RIVERA, J.P., CHERYL E. CHAMBERS, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion
*668 In an action, inter alia, to recover damages for negligence and breach of fiduciary duty, the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Pitts, J.), dated December 18, 2013, which granted the motion of the defendants Corcoran Realty Group, LLC, N.R.T., LLC, and Corcoran Group Real Estate pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

The defendant Joe Guzman is the owner of a residential property located in the Town of Southampton (hereinafter the premises). On or about February 19, 2013, Guzman retained the defendants Corcoran Realty Group, LLC, N.R.T., LLC, and Corcoran Group Real Estate (hereinafter collectively the Corcoran defendants) as his agent to negotiate a lease for the premises for the summer rental season. On or about February 28, 2013, the plaintiffs entered into a lease agreement with Guzman to rent the premises from May 21, 2013, until

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September 5, 2013, for the sum of $180,000, $18,000 of which was forwarded to the Corcoran defendants as their commission. *669 Prior to entering into the lease, the plaintiffs and Guzman executed a New York State Disclosure Form for Landlord and Tenant (hereinafter the disclosure form), pursuant to which the plaintiffs expressly acknowledged that the Corcoran defendants were acting as Guzman's agent. Shortly after the term of the lease commenced, the plaintiffs allegedly learned that the premises lacked a valid rental permit as required by section 270–3 of the Town Code of the Town of Southampton.

In June 2013, the plaintiffs commenced this action against Guzman and the Corcoran defendants. As relevant to this appeal, the plaintiffs' fourth and fifth causes of action were asserted against the Corcoran defendants. In their fourth cause of action, the plaintiffs alleged that the Corcoran defendants negligently listed the premises for residential rental when the premises lacked a valid rental permit. The plaintiffs additionally claimed that the Corcoran defendants, in their role as a landlord's agent in a landlord-tenant transaction, had violated the duty under Real Property Law § 443(4)(b) to deal with the **578 plaintiffs honestly, fairly, and in good faith, and to disclose all facts known to them that materially affected the value and desirability of the premises. In their fifth cause of action, the plaintiffs alleged that the Corcoran defendants were also acting as their agent, and that in this role, the Corcoran defendants had breached their fiduciary duty by advising them that the premises were available for rent, notwithstanding that they lacked a rental permit. The Corcoran defendants subsequently moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them. The Supreme Court granted the motion, and the plaintiffs appeal.

"A motion to dismiss made pursuant to CPLR 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 37, 827 N.Y.S.2d 231; *see 25–01 Newkirk Ave., LLC v. Everest Natl. Ins. Co.*, 127 A.D.3d 850, 851, 7 N.Y.S.3d 325). Moreover, "a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d at 37, 827 N.Y.S.2d 231; *see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Behar v. Glickenhaus Westchester Dev., Inc.*, 122 A.D.3d 784, 785, 996 N.Y.S.2d 678).

[1] The Supreme Court correctly granted that branch of the *670 Corcoran defendants' motion which was to dismiss the fourth cause of action for failure to state a cause of action. Contrary to the plaintiffs' contention, Real Property Law § 443(4)(b) did not impose a duty upon the Corcoran defendants, as a landlord's agent, to investigate whether the premises had a valid rental permit (*see Rosenblum v. Corcoran Group Eastside Inc.*, 2013 N.Y. Slip Op 31700[U] [Sup.Ct., N.Y. County 2013]; *2004 Bowery Partners, LLC v. E.G. W. 37th LLC*, 32 Misc.3d 1210[A], 932 N.Y.S.2d 763, 2011 N.Y. Slip Op. 51243[U], 2011 WL 2651792 [Sup.Ct., N.Y. County 2011]; *Pappas v. New 19 W., LLC*, 18 Misc.3d 1138[A], 859 N.Y.S.2d 897, 2008 N.Y. Slip Op. 50361[U], 2008 WL 509087 [Sup.Ct., N.Y. County 2006]; *see also Rallis v. Brannigan*, 2008 N.Y. Slip Op. 30164[U] [Sup.Ct., Nassau County 2008]). Real Property Law § 443(4)(b), which sets forth the content of the disclosure form that must be provided in certain landlord-tenant transactions, does not "alter the application of the common law of agency with respect to residential real estate transactions" (Real Property Law § 443(6); *see Rallis v. Brannigan*, 2008 N.Y. Slip Op. 30164[U] [Sup.Ct, Nassau County 2008]). Under the common law, New York adheres to the doctrine of caveat emptor and imposes no liability on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment (*see Hecker v. Paschke*, 133 A.D.3d 713, 19 N.Y.S.3d 568; *Schottland v. Brown Harris Stevens Brooklyn, LLC*, 107 A.D.3d 684, 685, 968 N.Y.S.2d 90; *Daly v. Kochanowicz*, 67 A.D.3d 78, 87, 884 N.Y.S.2d 144; *Jablonski v. Rapalje*, 14 A.D.3d 484, 485, 788 N.Y.S.2d 158; *Platzman v. Morris*, 283 A.D.2d 561, 562, 724 N.Y.S.2d 502; *Glazer v. LoPreste*, 278 A.D.2d 198, 198, 717 N.Y.S.2d 256). Here, the complaint is bereft of any allegation that the Corcoran defendants engaged in any conduct constituting active concealment. Accordingly, **579 the fourth cause of action does not set forth a viable basis upon which to impose liability against the Corcoran defendants.

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[2] Further, the Supreme Court correctly granted that branch of the Corcoran defendants' motion which was to dismiss the fifth cause of action, which sought to recover damages for breach of fiduciary duty. "[A] real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340, 728 N.Y.S.2d 413, 752 N.E.2d 850; *see Cornwell v. NRT N.Y. LLC*, 95 A.D.3d 637, 637–638, 944 N.Y.S.2d 132; *Daly v. Kochanowicz*, 67 A.D.3d at 95, 884 N.Y.S.2d 144). Here, although the complaint alleged that the Corcoran defendants acted as the plaintiffs' agent in connection with the subject transaction, the documentary evidence submitted by the Corcoran defendants in support of their motion utterly refuted this claim, thus conclusively establishing a defense to this cause of action as a *671 matter of law (*see Goshen v. Mutual Life Ins. Co. of N. Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Air & Power Transmission, Inc. v. Weingast*, 120 A.D.3d 524, 525, 992 N.Y.S.2d 46).

The plaintiffs' remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the Corcoran defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them.

All Citations

135 A.D.3d 668, 22 N.Y.S.3d 576, 2016 N.Y. Slip Op. 00136

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49 Misc.3d 943
Supreme Court, Suffolk County, New York.

Deborah A. SCHWARTZ, Plaintiff,
v.
Richard TORRENZANO, Defendant.

Aug. 7, 2015.

Synopsis

Background: Tenant filed suit against landlord alleging violation of town's rental permit law, excessive and usurious late fees, breach of warranty of habitability, breach of contract and unjust enrichment. Following transfer, landlord moved to dismiss, and tenant moved for summary judgment and an award of sanctions.

Holdings: The Supreme Court, Suffolk County, Thomas F. Whelan, J., held that:

[1] town's rental permit law created a private right of action by implication;

[2] voluntary payment doctrine did not bar tenant's claim for return of rental payments; but

[3] genuine issue of material fact as to whether tenant waived landlord's violation of town's rental permit law by continuing to pay rent precluded summary judgment.

Ordered accordingly.

West Headnotes (13)

[1] **Landlord and Tenant**
Constitutional and statutory provisions

For a tenant to bring an action against a landlord for violation of a town's rental permit law, she is required to demonstrate that the law creates an express or implied private right of action.

1 Cases that cite this headnote

[2] **Action**
Statutory rights of action

Not every violation of a statutory provision is actionable by a person aggrieved by the breach.

Cases that cite this headnote

[3] **Action**
Statutory rights of action

Landlord and Tenant
Constitutional and statutory provisions

Even though town's rental permit law, which required the existence of a valid rental permit as a condition precedent to landlord's collection of rent, did not explicitly provide for a private right of action, it created a private right of action by implication, thus allowing tenant's suit against landlord for violation of the law; tenant, as occupant of dwelling, was a party the town intended to benefit by enacting ordinance that protected the health, safety, and well-being of renters, a private right of action promoted the town's purpose of preventing landlords from profiting from the rental of substandard or dangerous housing, and a private right of action was fully consistent with the town's enforcement scheme, which did not intend for the town's attorney to be involved in every landlord/tenant dispute.

1 Cases that cite this headnote

[4] **Action**
Statutory rights of action

Factors court must consider in determining whether an implied private right of action exists under a law include: (1) whether plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.

1 Cases that cite this headnote

[5] **Payment**
Voluntary Payments in General

The common law voluntary payment doctrine bars recovery of payments made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.

Cases that cite this headnote

[6] **Payment**
Character of payment in general

Voluntary payment doctrine did not bar tenant's claim against landlord seeking return of rental payments she had made for her dwelling, based on landlord's failure to have current permit under town's rental law, since when tenant made the payments to her landlord she had no knowledge of the town's permit requirement.

Cases that cite this headnote

[7] **Contracts**
Recovery of money paid or property transferred

A party has a claim in restitution for a performance rendered in return for a promise that is unenforceable on the grounds of public policy if he or she is not equally in the wrong with the promisor.

Cases that cite this headnote

[8] **Judgment**
Motion or Other Application

Remedy of summary judgment may not be made before issue is joined; it is thus not available against parties in default, and court is powerless to grant such a motion against such a party. McKinney's CPLR 3212(a).

Cases that cite this headnote

[9] **Judgment**
Landlord and tenant cases

Genuine issue of material fact as to whether tenant waived landlord's violation of town's rental permit law by continuing to pay rent despite landlord's lack of permit, precluded summary judgment in tenant's action against landlord seeking return of paid rent for four year period of lease under a theory of unjust enrichment.

Cases that cite this headnote

[10] **Judgment**
Landlord and tenant cases

Genuine issue of material fact as to the condition of the rental premises precluded summary judgment to tenant in action against landlord seeking return of security deposit.

Cases that cite this headnote

[11] **Judgment**
Landlord and tenant cases

Genuine issue of material fact as to who was responsible for expenses that were paid by tenant and then taken out of amount she owed to landlord for rent, precluded summary judgment to tenant in action against landlord seeking recovery of late fees assessed against her.

Cases that cite this headnote

[12] **Judgment**
Landlord and tenant cases

Genuine issue of material fact as to whether landlord had failed to provide adequate heat for rental unit, in violation of the warranty of habitability, precluded summary judgment to tenant in action against landlord seeking return of two months' paid rent on basis of constructive eviction.

Cases that cite this headnote

[13] **Judgment**
Landlord and tenant cases

Genuine issue of material fact as to whether problems in rental unit's heating system caused dead spots in the unit, or whether tenant was at fault for neglect, misuse,

or abuse of the heating system, precluded summary judgment to tenant in action against landlord seeking return of money tenant had paid to have the heating system repaired.

Cases that cite this headnote

Attorneys and Law Firms

**699 Deborah A. Schwartz, Esq., New York, Attorney for Plaintiff.

The Abramson Law Group, PLLC, New York, Attorney for Defendant.

Opinion

THOMAS F. WHELAN, J.

*944 It is

ORDERED that the branch of the motion (# 003) by defendant for dismissal of the first, second, third, fourth, fifth, and sixth causes of action in plaintiff's third amended verified complaint is denied; and it is further

ORDERED that the branch of the motion by defendant for an award of sanctions against plaintiff is denied; and it is further

ORDERED that the branch of the cross motion (# 004) by plaintiff for summary judgment on the fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, and fourteenth causes of action is denied; and it is further

ORDERED that the branch of the cross motion by plaintiff for an award of sanctions against defendant and his counsel is granted to the extent indicated.

Plaintiff commenced this action seeking a judgment for reimbursement of rental payments, security deposit, late fees, and other expenses incurred regarding a lease she entered into with defendant landlord, Richard Torrenzano, for premises he owns located at 12 Right of Way, Sag Harbor, New York. The third amended complaint alleges violation of Town of Southampton Code Chapter 270; excessive and usurious late fees; breach of warranty of habitability; breach of contract; unjust enrichment; and also seeks an award of attorney fees. Defendant now moves for dismissal of the first, second, third, fourth, fifth, and sixth causes of action. In support of the motion defendant submits, among other things, his own affidavit, the lease and its extensions, and a rental permit dated September 22, 2014. Plaintiff opposes the motion and cross moves for summary judgment and an award of sanctions. However, no answer has been served addressed to the third amended complaint, as defendant has moved to dismiss pursuant to CPLR 3211.

The initial lease dated October 30, 2010, called for annual rent in the amount of $35,000.00 from November 8, 2010 through November 7, 2011. The lease required a security deposit of $3,500.00 to be held in a segregated account, the landlord to make *945 all necessary repairs, and late fees of 5% of the amount of the past due rent. A lease extension continued the tenancy from November 8, 2011 through November 7, 2012. A new lease dated November 15, 2012, was executed for November 18, 2012 through November 17, 2013 increasing the annual rent to $36,000.00 and the security deposit to $6,000.00. Overdue rent required a penalty of $250.00 and a fee of $100.00 per week. That lease was extended for a term ending November 17, 2014. That extension, a copy of which was not provided by either party, required the $36,000.00 in rent to be paid in advance. It was paid on September 27, 2013, by **700 check " without prejudice to the pending lawsuit." On September 15, 2014, the tenant vacated the premises, with two months still remaining on the lease.

Plaintiff commenced this action in New York County in May of 2013. The action was transferred to Suffolk County by Order dated July 15, 2013 (Mendez, J.S.C.). By prior order dated February 14, 2014, the then assigned Justice, the Hon. Jerry Garguilo, dismissed one cause of action and plaintiff withdrew another cause of action. Subsequently, there was an amended complaint and then a second amended complaint. In August 2014, plaintiff learned that Southampton Town Code Chapter 270 requires landlords to obtain a rental permit in order to legally rent property and collect rent in Southampton. Upon ascertaining that the landlord did not possess a permit, plaintiff assisted Southampton's code enforcement department in charging her landlord. Plaintiff was granted leave from this court on August 13, 2014, by then assigned Justice Jerry Garguilo, to amend her complaint to allege violations of Chapter 270. Before the Court is a third amended complaint, dated October 24, 2014, which is the subject of this motion. After the conference with

Justice Garguilo, the landlord, apparently without the assistance of counsel, applied for and received a rental permit, dated September 22, 2014. In that application, Torrenzano failed to notify the Town of the pending litigation which included claims of violations of the warranty of habitability and he expressly stated, "I do not have any knowledge of complaints from tenants or others regarding any existing code, safety or health violations at the property which is the subject of this rental permit application." At the very least, Torrenzano made a "mistake" in failing to notify the Town of Southampton of the pending litigation. It is noted that Torrenzano's counsel notarized the rental permit application but denied representing or advising the landlord regarding the application.

*946 Defendant now moves for dismissal of the first through sixth causes of action which rely on Southampton Town Code § 270 and which seek reimbursement for rent paid for four years on premises without the benefit of a rental permit. Defendant relies on *Liu v. Asselbergs*, 2013 WL 6916379 (Sup.Ct., N.Y. County, Dec. 31, 2013, Madden J.), for the proposition that the Southampton Code did not create a private cause of action, allowing plaintiffs to recoup rental payments.

Pursuant to CPLR § 3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiff (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*see Pacific Carlton Dev. Corp. v. 752 Pacific, LLC*, 62 A.D.3d 677, 878 N.Y.S.2d 421 [2d Dept.2009]; *Gjonlekaj v. Sot*, 308 A.D.2d 471, 764 N.Y.S.2d 278 [2d Dept.2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see Leon v. Martinez, supra; International Oil Field Supply Servs. Corp. v. Fadeyi*, 35 A.D.3d 372, 825 N.Y.S.2d 730 [2d Dept.2006]). A motion to dismiss will not be granted unless the moving papers conclusively establish that no cause of action exists (*see Chan Ming v. Chui Pak* **701 *Hoi et al.*, 163 A.D.2d 268, 558 N.Y.S.2d 546 [1st Dept.1990]). Finally, deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*see Amaro v. Gani Realty Corp.*, 60 A.D.3d 491, 876 N.Y.S.2d 1 [1st Dept.2009]).

[1] In order to establish a prima facie case of a violation of the Southampton Town Code Chapter 270, plaintiff must demonstrate that the Code creates an express or implied private right of action. The Town adopted the code provision since it had "determined that there exists in the Town of Southampton serious conditions arising from the rental of non-owner occupied residential dwelling units ..." (*see* Section 1 of the resolution which created Southampton Town Code Chapter 270). Pursuant to § 270–2, the local law applies to all rental properties within the unincorporated area of the Town. Section 270–3.A. states that "[e]ffective January 1, 2008, no owner shall cause, permit or allow the occupancy or use of a dwelling unit as a rental property without *947 a valid rental permit." Section 270–3.B. states that " [e]ffective January 1, 2008, no person shall occupy or otherwise use a dwelling unit as a rental property without a valid rental permit being issued for the dwelling unit." However, the local law makes clear that rental permits will only be issued to and may only be applied for and renewed by the owner (*see* § 270–3.C.; § 270–4; § 270–5). Additionally, all fees must be paid by the owner (*see* § 270–8). Importantly, § 270–13 specifically provides that a valid rental permit shall be a condition precedent to the collection of rent. A violation of the local law by the owner and/or the tenant is deemed to be a misdemeanor (*see* § 270–19.A.) and aside from certain monetary or imprisonment penalties, an alternative fine "not exceeding double the amount of the rent collected over the term of the occupancy" is set forth (*see* § 270–19.B.). The violation may be dismissed by a court upon a showing of cooperation and assistance in an investigation or prosecution or the prompt pursuance of one's rights under the lease to remedy the violation (*see* § 270–19.C.). Finally, aside from the criminal penalties, the local law authorizes the Town Attorney to bring a civil injunction proceeding, in the name of the Town, in Supreme Court, when directed to do so by the Town Board (*see* § 270–19.D.).

[2] [3] "It goes without saying that not every violation of a statutory provision is actionable by a person aggrieved by the breach" (*Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 A.D.3d 86, 90, 783 N.Y.S.2d 355 [1st Dept.2004]). The court in *Liu v. Asselbergs, supra*, found that Chapter

270 was not intended to create a private cause of action to enable plaintiffs to recoup rental payments. However, the plain language of the regulation, requires the existence of a valid rental permit as a condition precedent to the collection of rent. Where, as here, the local law "does not explicitly provide for a private right of action, recovery may be had under the statute only if a legislative intent to create such a right of action is fairly implied' in the statutory provisions and their legislative history" (*Brian Hoxie's Painting Co. v. Cato–Meridian Cent. School Dist.*, 76 N.Y.2d 207, 211, 557 N.Y.S.2d 280, 556 N.E.2d 1087 [1990], *citing Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18, 541 N.E.2d 18 [1989]).[1] Contrary to defendant's position and the reasoning in *Liu v. Asselbergs, supra*, it is determined that the Southampton **702 Town Code creates an implied private right of action.

[4] *948 Pursuant to *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18, 541 N.E.2d 18, *supra*, the Court of Appeals sets forth the three factors this court must consider in determining whether an implied private right of action exists: whether the plaintiff is one of the class for whose particular benefit the statute was enacted; whether recognition of a private right of action would promote the legislative purpose; and whether creation of such a right would be consistent with the legislative scheme.

Applying that test here, it is concluded that the plaintiff, as a tenant or "occupant," is a party the Town intended to benefit in enacting the ordinance. Specifically, "[t]he Town Board recognizes that the renting and occupancy of such dwelling units pose a serious threat to the health safety and welfare of the *occupants* and the neighbors ..." (*see* Section 1 of the resolution which created Southampton Town Code Chapter 270). While the holding in *Liu v. Asselbergs, supra*, focused on the issue of overcrowding, the Town Code also seeks to address the "violation of various State and Town laws" and rental properties that are "substandard" (*see* Section 1, Chapter 270). Moreover, the Town Board enacted the Local Law "in order to protect the health, safety and welfare of its residents" (*see* Section 4, Chapter 270). It is clear that plaintiff is part of the class which the Town Code was intended to benefit.

As to the second *Sheehy* factor, a private right of action promotes the legislative purpose preventing landlords from profiting from the rental of substandard or dangerous housing. The legislative purpose is promoted by holding landlords accountable by allowing tenants to commence civil actions to recover rents from unpermitted rental premises. As noted above, a rental permit is a condition precedent to the collection of rent, under the Town Code.

The third factor permits a finding of an implied private cause of action which is consistent with the legislative scheme. As noted in *Sheehy*, 73 N.Y.2d at 634–35, 543 N.Y.S.2d 18, 541 N.E.2d 18, *supra*, "a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme." However "[a] private right of action may at times further a legislative goal and coalesce smoothly with the existing statutory scheme" (*Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32, 40, 698 N.Y.S.2d 609, 720 N.E.2d 886 [1999]). This *Sheehy* factor, which is often noted to be the "most critical" (*see Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 644 N.Y.S.2d 678, 667 N.E.2d 328 [1996]), is usually not fulfilled where there exists a *949 comprehensive legislative enforcement scheme to regulate an industry (*see Brian Hoxie's Painting Co. v. Cato–Meridian Cent. School Dist.*, 76 N.Y.2d at 212–13, 557 N.Y.S.2d 280, 556 N.E.2d 1087, *supra; Cruz v. TD Bank*, 22 N.Y.3d 61, 979 N.Y.S.2d 257, 2 N.E.3d 221 [2013]; *Carrier v. Salvation Army*, 88 N.Y.2d 298, 644 N.Y.S.2d 678, 667 N.E.2d 328, *supra; Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d at 634–36, 543 N.Y.S.2d 18, 541 N.E.2d 18, *supra; Flagstar Bank FSB v. State*, 114 A.D.3d 138, 978 N.Y.S.2d 266 [2d Dept.2013]; *Signature Health Center, LLC v. State*, 92 A.D.3d 11, 935 N.Y.S.2d 357 [3d Dept.2011]; *Rhodes v. Herz*, 84 A.D.3d 1, 920 N.Y.S.2d 11 [1st Dept. 2011]; *Goldman v. Simon Prop. Group, Inc.*, 58 A.D.3d 208, 869 N.Y.S.2d 125 [2d Dept.2008]; *Theodoreu v. U.S. Cablevision Corp.*, 192 A.D.2d 847, 596 N.Y.S.2d 488 [3d Dept.1993]).

**703 Here, Town officials are tasked with enforcing the law, but that is not dispositive (*see Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207, 981 N.Y.S.2d 739 [2d Dept.2014]). Particularly in the Second Department, when a statute is not simply remedial in nature but is directed toward protecting the health and well-being of a particular class of individuals, a private right of action has been found to be fully consistent with the legislative enforcement scheme (*see Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207,

981 N.Y.S.2d 739, *supra*; *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 [2d Dept.2008]; *Maraia v. Orange Regional Med. Ctr.*, 63 A.D.3d 1113, 882 N.Y.S.2d 287 [2d Dept.2009]; *Henry v. Isaac*, 214 A.D.2d 188, 632 N.Y.S.2d 169 [2d Dept.1995]; *see also Lino v. City of New York*, 101 A.D.3d 552, 958 N.Y.S.2d 11 [1st Dept.2012]; *Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 A.D.3d 86, 783 N.Y.S.2d 355, *supra*.

The *Gerel Corp. supra*, holding is particularly instructive. As with the Attorney General in that case, here, the Town Board could not have intended that the Town Attorney be involved in every landlord/tenant rental agreement throughout the town. Where, as here (*see* Schwartz aff., January 12, 2015, par. 27), it is alleged that the Town does not have sufficient resources to fully enforce the law, an implied private right has been upheld (*see Gerel Corp.*, 12 A.D.3d at 93, 783 N.Y.S.2d 355, *supra*).

Here, the Town Code provision is directed toward protecting the health, safety, and well-being of a particular class of individuals, and is not primarily designed to provide a mechanism for the preventing harm to the public in general (*see Henry v. Isaac*, 214 A.D.2d 188, 193, 632 N.Y.S.2d 169, *supra*). The fact that penalties for violations of the Town Code include possible fines "not exceeding double the amount of the rent collected over the term of the occupancy" (*see* § 270–19.B.), demonstrates that the enactment was not intended as a general police regulation.

*950 Importantly, for purposes of this opinion, defendant's motion is premised on the single claim that the Town Code Chapter 270 does not provide for an implied private right of action. This Court holds that it does. Allowing a plaintiff to recoup rent paid, the actual sum to be determined on a case-by-case basis, would promote the legislative intent of the Town Board, that is, the attainment by a landlord of the mandatory rental permit.

At this early stage of the litigation, the Court is unwilling, with the limited record before it, to address any alternative argument that the plaintiff is not entitled to recoup rent monies paid, despite the violation of the Town Code. Such an argument is centered on the claim of absence of actual injury. While it is true that the failure of a plaintiff to identify a cognizable injury may prove fatal to his or her claim, here, plaintiff has submitted affidavits and documentation supporting her allegations of damages. While the fact that the plaintiff had the use and enjoyment of the premises, under separate yearly lease agreements, may fall under the common law understanding that one is not entitled to recoup monies already paid for work or services performed, particularly with regard to the first three rental periods, there are two or three classes of cases to which it will be necessary to refer in order to afford a clear understanding of the questions presented here.

[5] [6] The common law voluntary payment doctrine, which bars recovery of payments made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law (*see* **704 *Dillon v. U–A Columbia Cablevision of Westchester*, 100 N.Y.2d 525, 526, 760 N.Y.S.2d 726, 790 N.E.2d 1155 [2003], *Hedley's Inc. v. Airwaves Global Logistics, LLC*, 130 A.D.3d 872, 15 N.Y.S.3d 84 [2d Dept.2015]), may have no application here, since plaintiff insists that she had no knowledge of the Town Code prohibition at issue. [2]

[7] A second line of reasoning that may permit recovery is where a party has a claim in restitution for a performance rendered in return for a promise that is unenforceable on the grounds of public policy if he or she is not equally in the wrong with the promisor (*see Smith v. Pope*, 72 A.D.2d 913, 422 N.Y.S.2d 192 [4th Dept.1979]; *Irwin v. Curie*, 171 N.Y. 409, 64 N.E. 161 [1902]; *Tracy v. Talmage*, 14 N.Y. 162 [1856]; *Nadoff v. Club Central*, 2003 WL 21537405 [Dist.Ct., Nassau County, 2003]; *see also* *951 Restatement (Second) of Contracts § 198 [1981]). The sentiment of Judge Wilde, in *White v. Franklin Bank*, 22 Pick. 181, 188, 39 Mass. 181 (Sup.Jud.Ct.1839), upon the substituting of the word "landlord" in place of "bank", is the best expression of the principal:

> To decide, that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all [landlords] to violate the statute by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a [landlord] without any suspicion of the illegality of

> the transaction on the part of the [landlord].

Defendant argues that analogous to the situation here is the situation where a landlord violated the Multiple Dwelling Law ("MDL") by failing to obtain a Certificate of Occupancy. However, MDL § 325(2) expressly holds that where one voluntarily pays rent when one has a right to withhold same, "he shall not thereafter have any claim or cause of action to recover back the rent or installment of rent so paid." Caselaw has sought to harmonize that provision with MDL § 302(1)(b) (*see Goho Equities v. Weiss*, 149 Misc.2d 628, 572 N.Y.S.2d 836 [App.Term 1st Dept.1991]; *Baer v. Gotham Craftsman Ltd.*, 154 Misc.2d 490, 595 N.Y.S.2d 604 [App.Term 1st Dept.1992]; *Commercial Hotel, Inc. v. White*, 194 Misc.2d 26, 752 N.Y.S.2d 779 [App.Term 2d Dept.2002]). As such, the Court finds this line of cases to be unpersuasive.

There is another class of cases which hold that a home improvement contractor who is unlicensed in the municipality where the work is performed is barred from recovery in contract or under any contractual or quasi-contractual theory (*see Emergency Restoration Servs. Corp. v. Corrado*, 109 A.D.3d 576, 970 N.Y.S.2d 806 [2d Dept.2013]; *B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 563 N.Y.S.2d 40, 564 N.E.2d 650 [1990]). Older caselaw examining licensing statutes that make it unlawful to carry on a trade or business without first obtaining a license, have also noted that by reason of the illegality of the contract, the court should "leave the parties as they are" (*Johnston v. Dahlgren*, 166 N.Y. 354, 59 N.E. 987 [1901]; *Segrete v. Zimmerman*, 67 A.D.2d 999, 413 N.Y.S.2d 732 [2d Dept.1979]), particularly where the licensing statute does not itself provide grounds for a party to recoup fees already paid (*see Wildenstein v. 5H & Co. Inc.*, 97 A.D.3d 488, 950 N.Y.S.2d 3 [1st Dept.2012]). This notion of the illegality of the underlying contract and the refusal to aid a wrongdoer, as *952 expressed in **705 *Johnston v. Dahlgren*, 166 N.Y. 354, 59 N.E. 987, *supra* and *Schank v. Schuchman*, 212 N.Y. 352, 359, 106 N.E. 127 (1914), has given way to the holding that a contract with the unlicensed home improvement contractor is unenforceable as opposed to rescinded (*see B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 563 N.Y.S.2d 40, 564 N.E.2d 650, *supra; see also* Restatement (Second) of Contracts, § 181, Comment *d*, Illustration 5 [1981]).

Caselaw evolved to permit restitution for payments previously made for work that the unlicensed home improvement contractor failed to perform or for defective work (*see O'Malley v. Campione*, 70 A.D.3d 595, 896 N.Y.S.2d 49 [1st Dept.2010]; *Goldstein v. Gerbano*, 158 A.D.2d 671, 552 N.Y.S.2d 44 [2d Dept.1990]). Additionally, each licensing scheme must be closely examined. More recent caselaw holds that the licensing scheme for plumbers does not bar unlicensed plumbers from enforcing contract rights (*see Migdal Plumbing & Heating Corp. v. Dakar Devs, Inc.*, 232 A.D.2d 62, 67, 662 N.Y.S.2d 106 [1st Dept.1997] ["unless the licensing statute specifies such a draconian sanction"]; *Turner v. Parfumetics.Com*, 35 Misc.3d 131[A], 951 N.Y.S.2d 84, 2012 WL 1366757 [App.Term, 2d, 11th and 13th Dist.2012]). Here, not only is the Town Code a licensing statute, it clearly provides that a valid rental permit shall be a condition precedent to the collection of rent.

When viewed in that light and after the examination of the *Sheehy* factors noted above, coupled with the fact this is not an unlicensed home improvement contractor case, it appears to the Court that without the threat of recoupment of rent, aside from the possibility of administrative enforcement, there is no incentive for a landlord to obtain a license, which is an overriding concern of the Town.

Moreover, the plaintiff is not *in pari delicto* with defendant since plaintiff can rely upon the affirmative representation set forth in the various leases that defendant had "due power and authority" to rent the premises and, as noted above, the obligations regarding the application for, payment of, and renewal of the rental permit solely rests on the landlord (*see generally Tracy v. Talmage*, 14 N.Y. 162 [1856]). Here, plaintiff should have the opportunity to develop her claim predicated upon defendant's alleged misrepresentation that he had "due power and authority" to rent the premises (*see Allen v. Miller*, 1 Misc.2d 102, 150 N.Y.S.2d 285 [App.Term, 2d Dept.1955]). Caselaw surrounding General Obligations Law § 5-901 is similarly distinguishable, since the parties continued to knowingly and willingly to accept *953 the benefit of the leased equipment without compensating the lessor (*see Concourse Nursing Home v. Axiom Funding Group*, 279 A.D.2d 271, 719 N.Y.S.2d 19 [1st Dept.2001]; *Ludl Elecs. Prods., Ltd. v. Well Fargo Fin. Leasing, Inc.*, 6 A.D.3d 397, 775 N.Y.S.2d 59 [2d Dept.2004]; *see also Ovitz v.*

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Bloomberg L.P., 77 A.D.3d 515, 909 N.Y.S.2d 710 [1st Dept.2010]).

Defendant's motion to dismiss must be decided by accepting plaintiff's allegation as true that defendant failed to comply with the Town Code at issue (*see Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511, *supra*). In view of that limitation, the motion to dismiss the first cause of action which seeks recoupment of rent paid in October of 2010; the second cause of action for recoupment of rent paid in November 2011; and the third cause of action for recoupment of rent paid in November of 2012 is denied, as it is determined that a private right of action under Chapter 270 of the Town Code promotes the legislative goal and plaintiff's claims are premised on a cognizable legal theory. The fourth cause of action also **706 survives the motion to dismiss as rent was prepaid in full in November of 2013, "without prejudice to the pending lawsuit." That stipulation alone may make that rent subject to recoupment. It is also undisputed that plaintiff vacated the premises on September 15, 2014, therefore the fourth cause of action survives because the October 2014, and November 2014 rent, although "paid" by plaintiff, may be subject to recoupment pursuant to Town Code Chapter 270. Accordingly, defendant's motion to dismiss the fourth cause of action is denied.

The fifth cause of action demands return of the security deposit. Defendant does not cite a legal ground for dismissal, arguing only that the condition of the property upon the landlord's reentry was not acceptable. Defendant's motion to dismiss the fifth cause of action is denied.

The sixth cause of action demands return of late fees denominated as additional rent under the November 2013 lease and additional rent pursuant to a five-day notice. Those fees may not be "collected" pursuant to Chapter 270 of the Town Code, as they represent additional rent. Accordingly, the motion to dismiss the sixth cause of action is denied.

Defendant's motion for an award of sanctions against plaintiff is denied. Under Southampton Town Code § 270, a plaintiff may recoup rent based upon the implied private right of action which precludes a landlord from "collection of rent." Therefore, plaintiff's legal arguments are not frivolous. Rather, to the contrary, it is defendant, who has personally attacked plaintiff and her husband. In addition, defendant's *954 counsel misrepresented to the court that he did not represent plaintiff in the initial lease negotiations. Defendant's counsel now concedes via a sur-reply letter that it did represent defendant in the lease negotiations, despite Torrenzano's affidavit that plaintiff's allegations in this regard were an "outright fabrication." It is noted that counsel's correction occurred only after documentary proof of defendant's "misstatement" and counsel's subornation thereof was alleged.

[8] Turning to plaintiff's cross motion, summary judgment is requested on the fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth and fourteenth causes of action. However, as noted above, defendant has yet to answer the Third Amended Complaint. Accelerated judgments are provided for in Article 32 of the CPLR. The remedy of summary judgment is available only after the joiner of issue (*see* CPLR 3212[a]). It is thus not available against parties in default and the court is powerless to grant such a motion against such a party (*see Gaskin v. Harris*, 98 A.D.3d 941, 950 N.Y.S.2d 751 [2d Dept.2012]; *Shaibani v. Soraya*, 71 A.D.3d 1121, 898 N.Y.S.2d 72 [2d Dept.2010]).

Moreover, while this Court could consider defendant's motion to dismiss as one for summary judgment, upon proper notice (*see* CPLR 3211[c]), the Court declines to do so. The parties have not properly charted a course for summary judgment and, in any event, numerous issues of fact are present in the various submissions by the parties with regard to the causes of action which are the subject of the cross motion. For instance, with regard to the fourth cause of action, as factual issues in equity exist as to unclean hands, unjust enrichment on plaintiff's behalf and whether defendant committed fraud or perjury in ultimately obtaining the permit, plaintiff has not established her entitlement to summary judgment as to that claim. Moreover, factual issues exist as to whether there was a waiver of the rental permit which preclude summary judgment for the **707 period of time plaintiff resided at the property. The prepaid rent, for the period after plaintiff learned of the rental permit violation and vacated the premises is another matter. Arguments as to equity and waiver do not apply to this time period. In light of all of the above, the Court denies the cross motion to the extent asserted against the defendant who has not yet appeared herein by answer, as the remedy of summary is

not available against a defendant in default of answering (*see* CPLR 3212 [b]).

[9] The seventh cause of action seeks return of paid rent for the four year period of the lease under a theory of unjust enrichment *955 on the basis that the landlord was in violation of the rental permit law. Factual issues, including plaintiff's alleged waiver of the requirement, preclude summary judgment as to this cause of action.

[10] The fifth and fourteenth causes of action demand return of plaintiff's $6,000.00 security deposit. Issues of fact, including the condition of the premises, preclude summary judgment as to this cause of action.

[11] The eighth cause of action demands return of not less than $400.00 in late fees on the basis they are punitive, a penalty, excessive, and usurious. Plaintiff has established that $350.00 was paid on January 11, 2013, as $250.00 plus $100.00 pursuant to the late fee provisions of the second lease. Plaintiff has also established that $1,150.00 was paid in January 2013 and $650.00 in February 2013 as "late penalty-paid under protest." In opposition, defendant has established that payment was late in January and February of 2013. Factual issues exist which preclude summary judgment as to whether any late fees were due based upon expenses incurred by plaintiff and as to who was responsible for those expenses.

[12] The ninth cause of action demands return of two months paid rent on the basis of constructive eviction for the landlord's failure to obtain a rental permit and for failure to provide adequate heat in violation of the warranty of habitability. Thus, factual issues exist that preclude summary judgment as to this cause of action.

[13] The sixth, twelfth, and thirteenth causes of action demand return of $997.63 paid "under protest." These bills relate to repairs regarding the heating system and may only be charged to the tenant for "fault, neglect, misuse or abuse." The best evidence of plaintiff's lack of fault is found in defendant's expert's affidavit stating that after multiple visits to the home in January 2014, and March 2014, on May 10, 2014, a "dead spot" in the thermostat was located which may account for the heating system failure, rather than defendant's counsel's theory that the ambient temperature in the home "is attributable to the polar vortex, not the heating system." Thus, issues of fact exist that preclude summary judgment as to each of these causes of action.

Plaintiff has demonstrated deceptive conduct by defendant in the collateral but related matter of his application to the Town of Southampton for a rental permit. His counsel, Irwin J. Cohen, Esq., a member of the Abramson Law firm, maintains *956 that although he notarized, the application, he did not advise defendant on the application or its contents. Moreover, plaintiff has demonstrated by documentary evidence that defendant falsely claimed to the Court that he was without legal representation at the time of the initial lease. The statements may have been suborned by counsel, whose own records would have shown defendant's affidavit to be false. Troubling is the affirmation of Adina T. **708 Glass, an associate with the Abramson Law Group, who affirmed that she reviewed the accompanying reply affidavit of Richard Torrenzano, sworn to on February 24, 2015, and asserted that the statements "are true to the best of my knowledge," when the law firm had to have been aware of their falsity.

In view of the foregoing, at the conclusion of the trial herein, Adina T. Glass and Irwin J. Cohen shall appear for a hearing pursuant to Part 130 of the Rules of the Chief Administrator to show cause why sanctions should not be imposed for their alleged frivolous conduct (*see* 22 NYCRR § 130–1.1 et seq.).

All Citations

49 Misc.3d 943, 16 N.Y.S.3d 697, 2015 N.Y. Slip Op. 25288

Footnotes

1 No legislative history was provided to the Court, aside from the Local Law which enacted the Town Code provisions (*compare Rhodes v. Herz*, 84 A.D.3d 1, 10, 920 N.Y.S.2d 11 [1st Dept.2011]).

2 CPLR 3005 modifies the common law rule by providing that "relief shall not be denied merely because the mistake is one of law rather than one of fact."

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2013 WL 6916379 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Part 11
New York County

Henry C.K. LIU, Plaintiff,
v.
Robert E. ASSELBERGS and Aldith E. Asselbergs, Defendants.

No. 157499/12.
December 31, 2013.

*1 Motion Date 12-12-13
Motion Seq. No.: 001

Trial Order

Joan A. Madden, Judge.

The following papers, numbered 1 to were read *to compel and cross-motion to dismiss* .

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

Cross-Motion: |x|Yes | | No

Plaintiff moves for an order compelling defendants to appear for deposition and for sanctions. Defendants oppose the motion and cross move to dismiss the second cause of action and upon such dismissal, transferring this action to the Civil Court of the City of New York.

This action arises out of lease agreement for the rental of house in the Town of Southampton. In his first cause of action, plaintiff seeks the return of their security deposit. In the second cause of action, which is at issue on this motion, plaintiff seeks the return of $347,313.26 for monies paid by plaintiffs in rent between May 1, 2008 and May 18, 2012, on the grounds that the rental was illegal as defendants failed to obtain a rental permit as required by § 270-3 of the Southampton Town Code.

The issue on the motion to dismiss the second cause of action is whether a private right of action exists based on a violation of the relevant regulation. The court finds that it does not and therefore the second cause of action must be dismissed.

It is well established that when a regulation is passed for the benefit of the public, no private wrong is committed from its breach. See *Ayala v. Jamaica Savings Bank*, 121 Misc2d 564 (Sup Ct Queens County 1983), *aff'd* 109 AD2d 723 (1985), *quotins Shaefer v. Joseph Breen, Inc.*, 263 AD 135, 138 (1st Dept 1941). In this connection, as the Court of Appeals recently noted the courts "have declined to recognize a private right of action where the Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself. *Cruz v. T.D. Bank, N.A.*, - N.E.2d - , 2013 WL 6096124 (N.Y.), 2013 N.Y. Slip Op. 07762 (November 21, 2013)(internal quotation and citation omitted).

Under this standard, the court finds that the regulation was not intended to create a private cause of action to enable plaintiffs to recoup rental payments. Legislative intent section provides, in relevant part, that "there exists in the Town of Southampton serious conditions arising from rental of non-owner occupied residential dwelling units that are (i)overcrowded and dangerous, (ii) in violation of various State and Town laws, (iii) inadequate size to accommodate the number of occupants, and are (iv) substandard." Furthermore, the regulation provides enforcement mechanisms, including the designation of official personnel such as the Chief Building Inspector, authorized Town personnel, and the Town Attorney, for the enforcement of the regulation. *See* Southampton Town Code § 270-10. The penalty section of the regulation provides for specific penalties, including a fine, imprisonment and/or a civil proceeding. § 270-19 (A). With respect to the civil proceeding, the regulation does indicate any intent to permit a private cause of action for damages, but instead authorizes only a proceeding brought by the Town Attorney seeking injunctive relief. [1]

*2 Next, contrary to plaintiff's position a private right of action cannot be implied based on the three-part test set forth in *Sheehy v. Big Flats Community Day, Inc.*, 73 NY2d 629 (1989). Under that test, "the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." Id., at 634. Here, it appears the plaintiff who is a tenant, was not the intended beneficiaries of the statute as the legislative scheme also prohibits tenants from occupying a rental dwelling without a permit. Moreover, to the extent the regulation was designed to protect tenants from overcrowding, it has no relevance to plaintiff. Thus, requiring defendants to recoup money already provided on the rental property would not achieve the legislative purposes of the statute. Finally, the creation of a private cause of action to recoup rental payments would not be consistent with the legislative scheme which provides for enforcement of the regulation by designated Town officials and provides for penalties, fines, and injunctive relief but not damages or recoupment of rents for the violation of the regulation.

In view of the above, it is

ORDERED that the motion to compel discovery is granted to the extent of setting this matter down for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on February 27, 2014 at 9:30 am; and it is further

ORDERED that the cross motion is granted and the second cause of action is dismissed and the remainder of the action shall continue.

Dated: December 18, 2013

<<signature>>

J.S.C.

Footnotes

1 Specifically, § 270-19 (D), provides, "[w]here authorized by a duly adopted resolution of the Town Board, the Town Attorney may bring or maintain a civil proceeding in the name of the Town, in the Supreme Court, to permanently enjoin the person or persons conducting, maintaining or permitting said violation..."

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TOWN OF EAST HAMPTON
CHAPTER 199

Town of East Hampton, NY
Friday, January 20, 2017

Chapter 199. Rental Registry

[HISTORY: Adopted by the Town Board of the Town of East Hampton 12-17-2015 by L.L. No. 38-2015. Amendments noted where applicable.]

GENERAL REFERENCES
Community Housing Opportunity Fund — See Ch. **160**.
Affordable Housing Credit Program — See Ch. **250**.
Zoning — See Ch. **255**.

§ 199-1-1. Definitions.

All terms used in this chapter shall have the meanings set forth below regardless of any inconsistent provisions elsewhere in the Town Code. Any terms not specifically defined herein shall have the same meaning as set forth in Chapter **255** (Zoning) or, if not so defined therein, shall be defined by common usage.

DWELLING UNIT
A building or part of a building where the unit consists of one or more rooms with provisions for cooking, living, sanitary and sleeping facilities designed exclusively for residential use and arranged or intended to be occupied by one individual household or family living independently of other individual households or families.

FAMILY

A. The following shall constitute a family hereunder:

(1) Any number of persons occupying a dwelling unit, provided that all are related by blood, marriage or legal adoption and provided that they live and cook together as a single housekeeping unit; or

(2) Any number of persons not exceeding four occupying a dwelling unit and living and cooking together as a single housekeeping unit, where not all are related by blood, marriage or legal adoption.

B. A group of persons whose association or relationship is transient or seasonal in nature, rather than of a permanent and domestic character, shall not be considered a family.

C. A group of unrelated persons numbering more than four and occupying a dwelling unit shall be presumed not to constitute a

family. This presumption can be overcome only by a showing that, under the standards enumerated in § 255-8-50 of the Town Code, the group constitutes the functional equivalent of a family. A determination as to the status of such group may be made in the first instance by the Building Inspector or, on appeal from an order, requirement, decision or determination made by him, by the Zoning Board of Appeals.

D. Persons occupying group quarters, such as a dormitory, fraternity or sorority house or a seminary, shall not be considered a family.

IMMEDIATE FAMILY

The owner's spouse, children, parents, siblings, grandparents or grandchildren.

OWNER

Any person, individual, association, entity or corporation whose name is listed as grantee on the last deed of record for the property, as recorded with the Suffolk County Clerk.

PERSON

Includes any individual, business, partnership, firm, corporation, enterprise, trustee, company, industry, association, public entity or other legal entity.

PRINCIPAL BUILDING INSPECTOR

The person holding the position of Principal Building Inspector for the Town of East Hampton or her designee.

PUBLISH

Promulgation of an available rental property to the general public or to selected segments of the general public, in a newspaper, magazine, flyer, handbill, mailed circular, bulletin board, sign, website, or electronic media.

RENT

A return, in money, property or other valuable consideration (including payout in kind or services or other thing of value), for the use and occupancy or the right to the use and occupancy of a rental property, whether or not a legal relationship of landlord and tenant exists between the owner and the occupant or occupants thereof.

RENTAL PROPERTY

A dwelling unit which is occupied for habitation as a residence by persons, other than the owner or the owner's immediate family, and for which rent is received by the owner, directly or indirectly, in exchange for such residential occupation. The term "rental property" shall include single-family houses, two-family houses, and apartments (other than those regulated under § 255-11-63, "Affordable accessory apartments") but shall not include:

A. Legally existing hotels, motels, and bed-and-breakfasts providing short-term transient accommodations;

B. Any housing owned or managed by the East Hampton Town Housing Authority or any affordable or senior multifamily dwelling unit

developments owned and/or managed by a not-for-profit organization;

C. Condominiums or residential cooperatives.

TENANT
An individual who leases, uses or occupies a rental property.

§ 199-1-2. Registration required.

A. Registration required. It shall be unlawful and a violation of this chapter for any person or entity owning, renting or leasing a rental property within the Town to rent, lease or permit the occupancy of such rental property, by other than the owner or owner's immediate family, without having first registered the property as a rental property with the Town Building Department by the filing of a rental property registration form or rental property registration renewal form deemed complete by the Principal Building Inspector.

B. Rental registration number required.

(1) It shall be unlawful and a violation of this chapter for any person or entity owning, renting or leasing a rental property within the Town to rent, lease or permit the occupancy of such rental property, by other than the owner or owner's immediate family, without first obtaining a rental registry number from the Building Department for the specific premises used as a rental property.

(2) It shall be unlawful and a violation of this chapter for any person to use a rental property that does not have a valid rental registry number from the Building Department for the specific premises used as a rental property.

C. Rental registration update required. It shall be unlawful and a violation of this chapter for any person or entity owning, renting or leasing a rental property within the Town to rent, lease or permit the occupancy of such rental property, by other than the owner or owner's immediate family, without having filed a rental registration update if there shall be a change in conditions as set forth in § 199-1-3C of this chapter.

D. Use prohibited. It shall be unlawful and a violation of this chapter for any person or entity to use or occupy a rental property without that property being validly registered as a rental property with the Town Building Department.

E. Failure to publish rental registry number. It shall be unlawful and a violation of this chapter for any person or entity to cause to be published any advertisement for the rental of any residential property in the Town of East Hampton, outside the incorporated villages located wholly or partially therein, without including the rental property registration number for said property.

§ 199-1-3. Registration Process.

A. Rental property registration form. Rental property registration forms shall be made in a sworn or affirmed writing by the property owner to the Building Department on a form provided therefor. To the extent the Town may make on-line registration available, applicants may utilize such system. Such application shall, at a minimum, set forth:

(1) The names, physical addresses, mailing addresses and telephone numbers of the property owner(s).

(2) The name, physical address, mailing address and telephone numbers of an agent designated by the owner to act in her stead, if any.

(3) The street address and Suffolk County Tax Map designation of the rental property.

(4) The length of tenancy and number of tenants, if known. Properties may be registered without a known tenancy or term. In the event a property is registered without tenant information, a rental property update form shall be filed when the number of tenancy and term of tenancy becomes known, but in any event prior to commencement of a rental tenancy.

(5) The number of rooms, the number of bedrooms, and the square footage of each respective bedroom in the rental property.

(6) A copy of the latest certificate of occupancy for the property issued by the Town of East Hampton.

(7) A completed and notarized rental property inspection checklist, in a form approved by the Town Building Department, sworn to by the property owner or a licensed architect, licensed engineer or licensed home inspector.

B. Rental registration number. Upon filing of a rental property registration form or rental property renewal form and it being deemed complete by the Principal Building Inspector, and the filing of the registration fee, each rental property will be assigned a unique rental registration number for the rental property.

C. Change in conditions. In the event that any information required on the rental property registration form should change during the effective period of the rental registration, including, but not limited to, the change in tenants, rental period or term, the commencement of a new rental period or term, the number of tenants, or the number of bedrooms, the property owner shall immediately notify the Town by delivering a sworn or affirmed written notice of such change, along with any requisite fees for such rental property registry update, to the Building Department, which shall include such notice in the records for the rental registry.

D. Change in ownership. A change in ownership of the rental property shall void the rental registration number. Any new owner will be required to file a new rental property registration form and provide a new registration fee.

Upon the Building Inspector finding the form complete and receiving the registration fee, the Building Inspector shall assign a new rental registration number.

E. Registration and update fees. All fees are nonrefundable, and the registration fee, renewal registration fee, and registry update fee shall be in an amounts established by the Town Board by resolution and amended from time to time as the Board may deem appropriate. All fees shall be paid upon the filing of a rental property registration form, rental property renewal form or rental property registry update.

F. Presumption of rental occupancy. Any single-family residence, or any other premises subject to the provisions of this chapter, shall be presumed to be a rental property if such premises is not occupied by the legal owner thereof. This presumption shall be rebuttable.

G. Maintenance of registry. It shall be the duty of the Principal Building Inspector to maintain the rental property registry pursuant to this section. Such register shall be kept by Tax Map number, rental property registration number, street address showing the name and address of the owner, the number of conventional bedrooms in the single-family residence at such street address, and the number of persons allowed to occupy that residence pursuant to the provisions of § 255-11-67A(9) of the Town Code.

H. Rental registration term. The registration of a rental property will expire two years after the date that the registration form is deemed complete by the Principal Building Inspector.

I. Rental property registration renewal form. Rental property registration renewal forms shall be made in writing by the property owner to the Building Department on a form provided therefor. To the extent the Town may make on-line registration available, applicants may utilize such system. Such application shall, at a minimum, set forth:

(1) The names, physical addresses, mailing addresses and telephone numbers of the property owner(s).

(2) The name, physical address, mailing address and telephone numbers of an agent designated by the owner to act in her stead, if any.

(3) The street address and Suffolk County Tax Map designation of the rental property.

(4) The length of tenancy and number of tenants, if known. Properties may be registered without a known tenancy or term. In the event a property is registered without tenant information, a rental property update form shall be filed when the number of tenancy and term of tenancy becomes known, but in any event prior to commencement of a rental tenancy.

(5) The number of rooms, the number of bedrooms, and the square footage of each respective bedroom in the rental property.

(6) A copy of the latest certificate of occupancy for the property issued by the Town of East Hampton.

(7) A completed and notarized rental property inspection checklist, in a form approved by the Town Building Department, sworn to by the property owner or a licensed architect, licensed engineer, or licensed home inspector.

(8) Any previous rental registration number of the rental property.

§ 199-1-4. Presumptive evidence dwelling unit is being used as rental property.

A. The presence or existence of any of the following shall create a presumption that a dwelling unit is being used as a rental property:

(1) The property is occupied by someone other than the owner or his/her immediate family.

(2) Voter registration, motor vehicle registration, a driver's license, or any other document filed with a public or private entity which states that the owner of the rental property resides at an address other than the rental property.

(3) Utilities, cable, phone or other services are in place or requested to be installed or used at the premises in the name of someone other than the record owner.

(4) Persons residing in the dwelling unit represent that they pay rent to occupy the premises.

(5) A dwelling unit which has been published as being available for rent or lease.

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction.

§ 199-1-5. Presumptive evidence of multifamily occupancy.

A. It shall be presumed that a single- or one-family dwelling unit is occupied by more than one family if any two or more of the following features are found to exist on the premises:

(1) More than one mailbox, mail slot or post office address.

(2) More than one gas meter.

(3) More than one electric meter annexed to the exterior of the premises.

(4) More than one doorbell or doorway on the same side of the dwelling unit.

(5) More than one connecting line for cable television service.

(6) More than one antenna, satellite dish, or related receiving equipment.

(7) There are more than four motor vehicles registered to the dwelling.

(8) There are separate entrances for segregated parts of the dwelling.

(9) There are partitions or internal doors which may serve to bar access between segregated portions of the dwelling, including but not limited to bedrooms.

(10) There exists a separate written or oral lease or rental arrangement, payment or agreement for portions of the dwelling among the owner and/or occupants and/or persons in possession thereof.

(11) Any occupant or person in possession thereof does not have unimpeded and/or lawful access to all parts of the dwelling unit.

(12) Two or more kitchens, each containing one or more of the following: a range, oven, hotplate, microwave or other similar device customarily used for cooking or preparation of food and/or a refrigerator.

(13) There are bedrooms that are separately locked.

B. If any two or more of the features set forth in Subsection **A(1)** through **(13)** directly above are found to exist on the premises by the enforcement authority or Town personnel engaged in the enforcement of the provisions of this chapter, a verified statement will be requested from the owner of the dwelling unit by the enforcement authority that the dwelling unit is in compliance with all of the provisions of the Code of the Town of East Hampton, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York. If the owner fails to submit such verified statement, in writing, to the enforcement authority within 10 days of such request, such shall be deemed a violation of this chapter.

§ 199-1-6. Presumptive evidence of owner's residence.

A. It shall be presumed that an owner of a rental property does not reside within said rental property if any of the following sets forth an address other than that of the rental property:

(1) Voter registration;

(2) Motor vehicle registration;

(3) Driver's license; or

(4) Any other document filed with a public or private entity.

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction.

§ 199-1-7. Presumptive evidence of over-occupancy.

A. It shall be presumed that a bedroom is over-occupied if the number of mattresses in a bedroom exceeds the maximum number of occupants permitted for the bedroom pursuant to § 255-11-67A(9).

B. The foregoing may be rebutted by evidence presented to the enforcement authority or any court of competent jurisdiction.

§ 199-1-8. General applicability of presumptions.

The presumptions set forth in §§ 199-1-4, 199-1-5, 199-1-6 and 199-1-7, subject to the limitations contained therein, shall also be applicable to the enforcement and the prosecution of building and zoning Town Code violations.

§ 199-1-9. Penalties for offenses.

A. A violation of this chapter by the owner(s) and/or tenant(s) shall be punishable as follows:

(1) A violation of § 199-1-2E (Failure to publish rental registry number) is hereby declared to be an offense punishable by a fine not less than $150 nor more than $1,500 or imprisonment for a period not to exceed 15 days, or both.

(2) A violation of any other section of this chapter is declared to be an offense punishable by a fine not less than $3,000 nor more than $15,000 or imprisonment not to exceed a period of six months, or both, for a conviction of a first offense.

(3) A second or subsequent violation of any section of this chapter within an eighteen-month period is hereby declared to be an offense punishable by a fine not less than $8,000 nor more than $30,000 or imprisonment not to exceed a period of six months, or both.

(4) For the purpose of conferring jurisdiction upon courts and judicial officers in general, violations of this chapter, other than § 199-1-2E, shall be deemed misdemeanors, and, for such purpose only, all provisions of law relating to misdemeanors shall apply. Each day's continued violation shall constitute a separate additional violation.

B. Additionally, in lieu of imposing the fines authorized in § 199-1-9A, in accordance with Penal Law § 80.05(5), the court may sentence the defendant(s) to pay an amount, fixed by the court, no less than the applicable minimum statutory fine permitted under § 199-1-9A nor more than double the amount of the rent collected over the term of the occupancy.

C. Upon motion of the prosecuting attorney, the court may dismiss the violation or reduce the minimum fine imposed where it finds that the defendant had cooperated with the Town of East Hampton in the investigation and prosecution of a violation of this chapter. Factors which the court may consider include, but are not limited to, a report from the office of the Town Attorney confirming that the defendant did in fact cooperate and whether:

(1) The defendant reported the violation(s) to the Town of East Hampton;

(2) The defendant assisted the Town of East Hampton in investigating and prosecuting the violation(s);

(3) The defendant provided access to the rental property;

(4) The defendant promptly pursued his/her/its own rights under the lease to remedy the violation or adequately pursued an eviction proceeding;

(5) All violations existing at the rental property have been promptly remediated.

D. Where authorized by a duly adopted resolution of the Town Board, the Town Attorney may bring and maintain a civil proceeding, in the name of the Town, in the Supreme Court, to temporarily, preliminarily and permanently enjoin the person or persons conducting, maintaining or permitting said violation. The owner and tenants of the residence wherein the violation is conducted, maintained or permitted may be made defendants in the action.

E. If a finding is made by a court of competent jurisdiction that the defendants, or any of them, have caused, permitted, or allowed a violation of this chapter, a penalty to be jointly and severally included in the judgment may be awarded at the discretion of the court in an amount not to exceed $1,000 for each day it is found that the defendants, or any one of them, individually, collectively, or in conjunction with other(s) caused, permitted or allowed the violation.

BUILDING DEPARTMENT
TOWN OF EAST HAMPTON
300 Pantigo Place – Suite 104
East Hampton, New York 11937
Phone (631) 324-4145
RentalRegistry@EHamptonNY.Gov

Rental Property Registration Form & Self-Inspection Checklist

To register your residential rental property and receive a Rental Registration Number, please complete the following:

1. Fill out the Rental Property Registration Form and the Rental Property Self-Inspection Checklist and have it notarized
2. Verify that a Certificate of Occupancy is on file with the Building Department
3. Pay the Rental Property Registration Fee of $100 for a two-year term via check

☐ Denotes Required Information

Date ☐

PROPERTY OWNER INFORMATION
Name(s) ☐
Physical Address ☐
Mailing Address ☐
Telephone Numbers ☐
Email Address ☐

AUTHORIZED DESIGNEE (if applicable)
Name(s) ☐
Physical Address ☐
Mailing Address ☐
Telephone Numbers ☐
Email Address ☐

RENTAL PROPERTY INFORMATION
Physical Address ☐
Suffolk County Tax Map # ☐
Number of Rooms in Rental Property ☐ Excluding Bathrooms
Number of Bedrooms ☐
Square Footage of each respective bedroom in the rental property, excluding closet space

Bedroom #1 ☐	Bedroom #3 ☐	Bedroom #5 ☐
Bedroom #2 ☐	Bedroom #4 ☐	Bedroom #6 ☐

If additional Bedrooms, please note ☐

TENANT INFORMATION (if known)
Length of Tenancy ☐
Rental Start Date ☐ Rental End Date ☐
Number of Tenants ☐

Please note: Properties may be registered without a known tenancy or term. In the event a property is registered without tenant information, a Rental Property Update Form shall be filed when the number of tenancy and term of tenancy becomes known, but in any event prior to commencement of a rental tenancy.

Sworn to before me this _____
_____ *day of* _____, *20*_____.
_____ (Notary Public)

_____
Owner or Authorized Designee

BUILDING DEPARTMENT
TOWN OF EAST HAMPTON
300 Pantigo Place – Suite 104
East Hampton, New York 11937
Phone (631) 324-4145
RentalRegistry@EHamptonNY.Gov

Rental Property Self-Inspection Checklist

All questions must be answered. Failure to answer any question will delay your issuance of a Rental Registry Number.

Please check ✓ if condition is met

EXTERIOR OF THE HOUSE

1. House # is posted in numerals a minimum of 4 inches tall. ☐
2. House # is visible from the street. ☐
3. Is there a swimming pool? YES ☐ NO ☐
   If NO, go to #8
4. There is a code compliant, 4 foot high fence around pool. ☐
5. Pool gates are self-closing, self-latching and lockable. ☐
6. There is a working alarm on every door to the pool area. ☐
7. There is an alarm in the pool. ☐

INTERIOR OF THE HOUSE

8. How many bedrooms are in the house? _____
9. How many levels, including a basement, if applicable, are in the house? _____
10. Is there a lower-level recreation area? YES ☐ NO ☐
11. Is there a lower-level sleeping area? YES ☐ NO ☐
12. There are handrails on all stairways. ☐
13. The electrical panel is properly marked. ☐

SMOKE DETECTORS/CARBON MONOXIDE DETECTORS

14. Smoke detectors are installed and working on every level. ☐
15. Carbon monoxide detectors are installed and working on every level. ☐
16. Smoke detectors are installed and working in every bedroom. ☐
17. Smoke detectors are installed and working in every sleeping area. ☐
18. Smoke detectors are installed within 10 feet of any bedroom door in the hallway. ☐
19. Smoke and carbon monoxide detector batteries are replaced regularly. ☐

FIREPLACE/WOOD BURNING STOVE

20. Does your home have a fireplace or wood-burning stove? YES ☐ NO ☐
    If YES, answer #21
21. The fireplace or wood-burning stove has a door(s) or screen(s). ☐

NOTICE: Only those structures and uses that have received a Certificate of Occupancy may be legally occupied pursuant to the East Hampton Town Code. The issuance of a Rental Registry number for a property does not mean that all structures, or portions thereof, on said property may be legally occupied. Please consult with the Building Department as to any questions about open building permits and legal uses.

_____
Owner, Licensed Architect, Engineer,
or Home Inspector

Sworn to before me this _____
_____ day of _____, 20_____.

_____
(Notary Public)

BUILDING DEPARTMENT
TOWN OF EAST HAMPTON
300 Pantigo Place – Suite 104
East Hampton, New York 11937
Phone (631) 324-4145
RentalRegistry@EHamptonNY.Gov

Rental Property Update Form

To update your residential rental property please provide the following:

1. The Rental Registration Number assigned to the rental property
2. Only the information that needs to be updated on the Rental Property Registration Update Form

☐ Denotes Required Information

Date ☐

Rental Registration Number ☐ - ☐

PROPERTY OWNER INFORMATION
Name(s) ☐
Physical Address ☐
Mailing Address ☐
Telephone Numbers ☐
Email Address ☐

AUTHORIZED DESIGNEE (if applicable)
Name(s) ☐
Physical Address ☐
Mailing Address ☐
Telephone Numbers ☐
Email Address ☐

RENTAL PROPERTY INFORMATION
Physical Address ☐
Suffolk County Tax Map # ☐
Number of Rooms in Rental Property ☐ Excluding Bathrooms
Number of Bedrooms ☐
Square Footage of each respective bedroom in the rental property, excluding closet space

Bedroom #1 ☐ Bedroom #3 ☐ Bedroom #5 ☐
Bedroom #2 ☐ Bedroom #4 ☐ Bedroom #6 ☐

If additional Bedrooms, please note ☐

TENANT INFORMATION
Length of Tenancy ☐
Rental Start Date ☐
Number of Tenants ☐ Rental End Date ☐

NOTICE: Only those structures and uses that have received a Certificate of Occupancy may be legally occupied pursuant to the East Hampton Town Code. The issuance of a Rental Registry number for a property does not mean that all structures, or portions thereof, on said property may be legally occupied. Please consult with the Building Department as to any questions about open building permits and legal uses.

Sworn to before me this _____
_____ day of _____, 20_____.
_____ (Notary Public)

_____
Owner or Authorized Designee

What is a Rental Registry?

Owners who rent their residential properties by the week, month, season, or year are required to register their rental properties with the Town and obtain a Rental Registry Number. The information required to register includes, but is not limited to: the property owner's name, address, and phone number, the location of the property, the number of rooms, bedrooms, and number of tenants, and the length of the rental term. A self-inspection checklist, confirmation by the Building Department that a Certificate of Occupancy is on file, and a $100 filing fee for a two-year term are also required. There is no charge to update the registration.

Why did the Town adopt a Rental Registry?

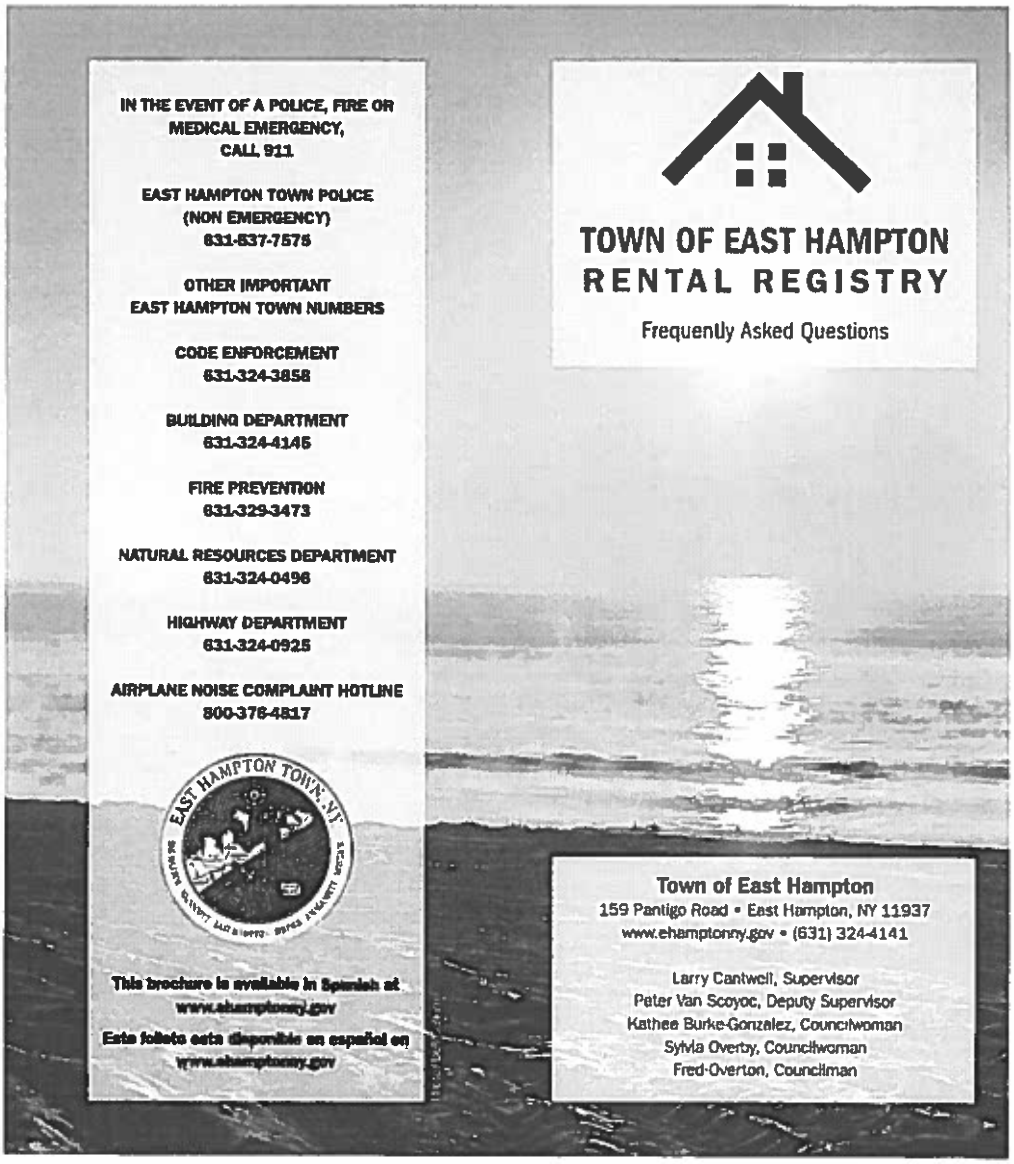
It has been a longstanding tradition for members of our community to rent their homes to help make ends meet. The Rental Registry preserves and does not interfere with those legal rights. Rather, it provides a mechanism to balance the needs of property owners with the needs of the community to preserve the quality of life in our residential neighborhoods and protect the safety of tenants and first responders, as well as to protect our drinking water.

The Rental Registry will provide the Town's Public Safety personnel with additional information to ensure compliance with the Town Code. This information, along with the better regulation of rental properties as provided by the Registry, will help protect the health, safety, and welfare of rental property occupants, as well as the community at large.

How do I register my property?

Property owners who rent their residential properties must obtain a Rental Registry Number, which the Building Department issues once owners have submitted the proper paperwork, including a notarized Rental Property Registration Form, a notarized Rental Property Self-Inspection Checklist, a copy of the latest Certificate of Occupancy or confirmation by the Building Department of such, and the $100 filing fee.

The Rental Property Registration Form, Rental Property Registration Update Form and the Rental Property Self-Inspection Checklist are available at the Building Department at 300 Pantigo Place and on the Town website, www.ehamptonny.gov, under "Rental Registry."



IN THE EVENT OF A POLICE, FIRE OR MEDICAL EMERGENCY, CALL 911

EAST HAMPTON TOWN POLICE (NON EMERGENCY) 631-537-7575

OTHER IMPORTANT EAST HAMPTON TOWN NUMBERS

CODE ENFORCEMENT 631-324-3858

BUILDING DEPARTMENT 631-324-4145

FIRE PREVENTION 631-329-3473

NATURAL RESOURCES DEPARTMENT 631-324-0496

HIGHWAY DEPARTMENT 631-324-0925

AIRPLANE NOISE COMPLAINT HOTLINE 800-376-4817

This brochure is available in Spanish at www.ehamptonny.gov

Esta folleto esta disponible en español en www.ehamptonny.gov

TOWN OF EAST HAMPTON RENTAL REGISTRY

Frequently Asked Questions

Town of East Hampton
159 Pantigo Road • East Hampton, NY 11937
www.ehamptonny.gov • (631) 324-4141

Larry Cantwell, Supervisor
Peter Van Scoyoc, Deputy Supervisor
Kathee Burke-Gonzalez, Councilwoman
Sylvia Overby, Councilwoman
Fred Overton, Councilman

What are the benefits of a Rental Registry?

The Rental Registry is designed to help the Town enforce our existing Code with respect to short-term rentals, share houses, overcrowded houses and unsafe conditions. It will also assure the consumer that the rental property has been registered in accordance with the law.

The requirement that the Rental Registry Number be included in any advertisements listing the respective property for rent will provide an invaluable tool for Code Enforcement investigating illegal uses of properties offering shares or multiple short-term rentals.

Why can't we just enforce the laws that were already on the books?

The information collected for the Rental Registry is designed to do just that. Often, Town enforcement personnel lack the information required to enforce the Code and must conduct extensive investigations to obtain enough evidence to support charges or respond to complaints. This law provides for the efficient use of the Town's limited resources to enable maximum enforcement and expedited investigations.

Do other municipalities require some form of a Rental Registry program?

Yes, many municipalities use Rental Registries to ensure that rental housing meets basic health, safety, and welfare standards. With the adoption of this law here in East Hampton, eight out of ten towns in Suffolk County have some form of Rental Registry or Permit. The Town of East Hampton's law does not apply to the incorporated villages of East Hampton and Sag Harbor.

How does the required home inspection work?

The applicant is required to submit a notarized Rental Property Self-Inspection Checklist. Items on the checklist include, but are not limited to: having the house number visible from the street, handrails on all stairways, properly marked electrical panels, smoke detectors installed and working in every bedroom, and fireplaces or wood-burning stoves having doors/screens, as well as pool safety requirements. The Rental Property Self-Inspection Checklist can be completed by the property owner or a licensed architect, licensed engineer or licensed home inspector.

Is there a fee to register my property? And will my registration expire?

Yes, there is a $100 filing fee. Your Rental Registry permit will expire two years from the date of issuance. There is no fee to update during this time period.

What if you don't have the tenant information at the time you register, or the tenants move out during the two-year registration term?

You can register your property and obtain a Rental Registry Number without tenant information. Once a tenant is selected, a Rental Property Registration Update Form can be filed to complete the information required on the Rental Property Registration Form.

Should any information required on the Rental Property Registration Form change during the two-year rental period, including, but not limited to: a change in the rental term, the start of a new rental term, or the number of tenants or bedrooms, the property owner will need to submit a notarized Rental Property Registration Update Form at no charge.

Do you need to register your home if you are the owner and you rent it to immediate family?

No. If immediate family members (the owner's spouse, children, parents, siblings, grandparents or grandchildren) are living in your home, you do not need to register your property.

Do you need to register your home if you are the owner and you live in the home and rent out one or two rooms?

No. If the home is owner occupied, you do not need to register your property.

What is the penalty if you don't register your property?

You will be in violation of the law. Should you be convicted of a first offense, the violation carries a fine that ranges from $3,000 to $15,000 or imprisonment for a period not to exceed six months, or both. A violation can be issued for every day that you fail to register.

Is there a violation if you don't publish the Rental Registry Number in advertisements?

Yes. Failure to publish the Rental Registry Number in advertisements is a violation of the law. Should you be convicted, the violation carries a fine that ranges from $150 to $1,500 or imprisonment for a period not to exceed 15 days, or both. This is not a criminal offense.

Is the tenant in violation of the law if the property owner doesn't register the rental property?

Yes. If a tenant is living in an unregistered rental property, the tenant can be found in violation of the law. Should they be convicted of a first offense, the violation carries a fine that ranges from $3,000 to $15,000 or imprisonment for a period not to exceed six months, or both.

Why are violations of this law considered misdemeanors?

The penalties in the law are consistent with the Town's zoning and building codes, which for jurisdictional and legal reasons, are unclassified misdemeanors.

Does the Rental Registry change any of the current laws?

No. Under the Code, a property owner can rent their residential property up to twice in six months if the rental period is less than two weeks. If the rental period is two weeks or longer, a property owner will still have no limit on the number of times they can rent their residential property for such a term. The following Code provisions also remain in effect: no more than four unrelated persons in a residential rental property and no more than four cars parked at a rental property that is not owner occupied.

TOWN OF EAST HAMPTON
RENTAL REGISTRY

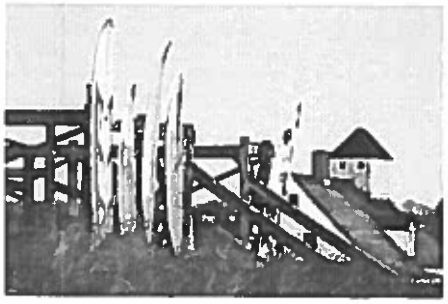
PROTECT YOUR INVESTMENT

Whether you are paying rent or a mortgage, your home is usually your biggest investment each month. It can also be your biggest liability if you don't follow the rules.

Check before you clear. To protect our drinking and surface waters, East Hampton has strict clearing restrictions. Before you clear, check with the Natural Resources or Building departments to make sure your plans comply.

Obtain the proper permits. Doing renovation work or adding an addition can increase the value of your home. Before beginning any project, check with the Building and Planning departments to ensure you have the proper permits.

Secure a Certificate of Occupancy. After completing your building project, make sure you have your final inspection and secure your Certificate of Occupancy. It is illegal to use the new space until you have received your Certificate of Occupancy.



IN THE EVENT OF A POLICE, FIRE OR MEDICAL EMERGENCY, CALL 911

EAST HAMPTON TOWN POLICE (NON EMERGENCY) 631-537-7575

OTHER IMPORTANT EAST HAMPTON TOWN NUMBERS

CODE ENFORCEMENT 631-324-3858

BUILDING DEPARTMENT 631-324-4145

FIRE PREVENTION 631-329-3473

NATURAL RESOURCES DEPARTMENT 631-324-0496

HIGHWAY DEPARTMENT 631-324-0925

AIRPLANE NOISE COMPLAINT HOTLINE 800-376-4817

This brochure is available in Spanish at www.ehamptonny.gov

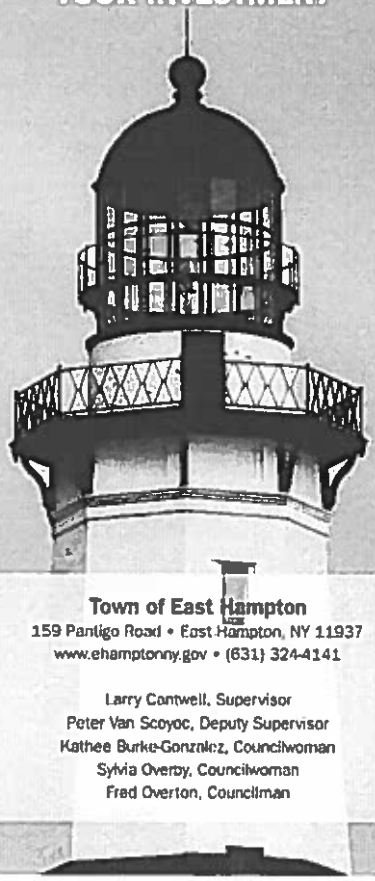
Este folleto esta disponible en español en www.ehamptonny.gov

Photos: Del Culkum

PROTECT YOUR FAMILY

PROTECT YOUR COMMUNITY

PROTECT YOUR INVESTMENT



Town of East Hampton
159 Pantigo Road • East Hampton, NY 11937
www.ehamptonny.gov • (631) 324-4141

Larry Cantwell, Supervisor
Peter Van Scoyoc, Deputy Supervisor
Kathee Burke-Gonzalez, Councilwoman
Sylvia Overby, Councilwoman
Fred Overton, Councilman

PROTECT YOUR FAMILY

Whether you just moved into your first home, are starting your summer rental, or are visiting for a weekend, there are some simple safety checks you should make immediately around your home to protect your family. Remember, accidents don't take vacations.

Fire Safety. Home fires can start and spread quickly, which is why we all need to be careful and educated when it comes to fire safety. Just a little planning can make a big difference for your family.

- Check that all sleeping areas have working smoke detectors and that each level of the building has a carbon monoxide detector.
- Make sure that all sleeping areas have at least two ways to exit the room in the event of an emergency.
- Replace the batteries in your smoke and carbon monoxide detectors twice a year.
- Never leave a fire unattended. Make sure that your fireplace and/or wood-burning stove is properly screened or enclosed.
- Properly mark your home's electrical panel.
- Basement living space poses greater risks in the event of an emergency. Basement living space must have proper alternative egress and all necessary Town permits.
- Should you have questions or concerns, call the East Hampton Town Fire Marshals and/or Code Enforcement departments. They will gladly answer your questions.

Pool Safety. Drowning is the leading cause of death for children under 5 and can happen quickly and quietly in as little as 6 inches of water.

- Always watch your children when they are in or near a pool or spa.
- Make sure all pool fences are at least 4 feet high and that all pool gates are self closing, self latching, and lockable.
- Pools are required to have surface-monitoring alarms pursuant to New York State Law. Make sure the pool is in compliance.
- All doors leading to the pool area must have audible alarms that cannot be silenced.

Beach Safety. Debris left behind from beach fires, including items such as nails, wire, broken glass and hot smoldering coals creates a safety hazard for folks using the beach.

- Beach fires must be in a metal container, using clean wood (no pallets or nails).
- A 2-gallon bucket of water must be within 10 feet of the fire.
- Beach fires must be more than 50 feet from beach grass.
- No fires are allowed after midnight.

PROTECT YOUR COMMUNITY

While there has been a long standing tradition for members of our community to rent their homes, a balance needs to be struck between the needs of property owners and the needs of the community. To this end, the Town of East Hampton has launched a Rental Registry.

Register your rental property. The Rental Registry is specifically designed to identify which residential properties in the Town are being used as rental properties. Whether property owners rent their residential property by the week, month, season, or year, they are required to register their rental properties with the Town.

Registering a rental property is a simple process that requires filing a signed and notarized application form with the Building Department and having a Certificate of Occupancy. The application calls for you to provide:

- The property owner's name, address, and telephone number
- The address and tax map number of the rental property
- The number of rooms in the rental property (excluding bathrooms)
- The number and square footage (excluding closets) of each bedroom
- A Self-Inspection Checklist making sure the property has the basic safety features

If you are a landlord or tenant, it is your responsibility to make sure your rental property has a Rental Registry Number. Rental registration forms and instructions are available from the Building Department or at: www.shamptonny.gov.

When it comes to protecting our neighborhoods, be considerate of the following:

Excessive Noise. Controlling your dog's barking, not playing loud music, and restricting outdoor noise during nighttime hours is not just common courtesy; it's the law!

Single Family Occupancy. Unless you have one of the very few legal multifamily homes, zoning requires that your home can only be occupied as a Single Family Occupancy. This means you are limited to having no more than four unrelated persons residing at the premises at any one time, or you must meet the definition of "functional equivalent of family," as determined by the Building Department.

Share Houses. Share houses—use arrangements in which individuals obtain rights of occupancy in individual bedrooms, whether or not specifically identified, or rights to occupy all or part of a residence on particular days of the week, specifically weekends—are illegal. They degrade the quality of life in neighborhoods and cause wastewater, noise, and parking issues.

Overcrowding. For the safety of not only the occupants of a home, but the community at large, there are strict limits on how many people may occupy any bedroom. A bedroom occupied by one person must have a minimum of 70 square feet. A bedroom occupied by two persons must have a minimum of 100 square feet. For each additional bedroom occupant, there must be an additional minimum of 50 square feet.

Short-Term Rentals/Excessive Turnover. It is illegal to rent a property for less than two weeks more than twice in a six-month period.

Parking. No more than four motor vehicles may park overnight at any rental property.

Town of East Hampton
Long Island, NY

Resolution
RES-2015-1338

Adopted
Dec 15, 2015 10:00 AM

Establish Fees for Chapter 199 (Rental Registry)

Information

Department:	Town Attorney	**Sponsors:**	Councilman Fred Overton
Category:	Fees	**Functions:**	None

Attachments

Printout

Body

WHEREAS, the Town adopted a new Chapter 199 (Rental Registry) of the Town Code on December 15th, 2016; and,

WHEREAS, pursuant to Section 199-1-3(E), the Town Board may, by resolution, establish fees for registration, renewal registration, and registry update; now therefore be it

RESOLVED, that pursuant to Section 199-1-3(E), the Town Board hereby establishes and sets fees as follows:

Rental Registration Fee:	$100 per two year term
Rental Registration Update Fee:	No charge
Rental Registration Renewal Fee:	$100 per two year term

Meeting History

Dec 15, 2015 10:00 AM Video **East Hampton Town Board** **Work Session Meeting**

RESULT:	**ADOPTED [UNANIMOUS]**
MOVER:	Fred Overton, Councilman
SECONDER:	Kathee Burke-Gonzalez, Councilwoman
AYES:	Kathee Burke-Gonzalez, Peter Van Scoyoc, Sylvia Overby, Fred Overton, Larry Cantwell

Public Discussion

Add Comment

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US DEPARTMENTS OF JUSTICE & HOUSING AND URBAN DEVELOPMENT
GUIDANCE DOCUMENT ON THE
APPLICATION OF FAIR HOUSING ACT ON STATE AND LOCAL LAND USE LAWS

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Washington, D.C.
November 10, 2016

JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE

STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT

INTRODUCTION

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the Federal Fair Housing Act ("the Act"),[1] which prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status (children under 18 living with a parent or guardian), or national origin.[2] The Act prohibits housing-related policies and practices that exclude or otherwise discriminate against individuals because of protected characteristics.

The regulation of land use and zoning is traditionally reserved to state and local governments, except to the extent that it conflicts with requirements imposed by the Fair Housing Act or other federal laws. This Joint Statement provides an overview of the Fair Housing Act's requirements relating to state and local land use practices and zoning laws, including conduct related to group homes. It updates and expands upon DOJ's and HUD's Joint

[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601–19.

[2] The Act uses the term "handicap" instead of "disability." Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of "disability" in the Americans with Disabilities Act

Statement on Group Homes, Local Land Use, and the Fair Housing Act, issued on August 18, 1999. The first section of the Joint Statement, Questions 1–6, describes generally the Act's requirements as they pertain to land use and zoning. The second and third sections, Questions 7–25, discuss more specifically how the Act applies to land use and zoning laws affecting housing for persons with disabilities, including guidance on regulating group homes and the requirement to provide reasonable accommodations. The fourth section, Questions 26–27, addresses HUD's and DOJ's enforcement of the Act in the land use and zoning context.

This Joint Statement focuses on the Fair Housing Act, not on other federal civil rights laws that prohibit state and local governments from adopting or implementing land use and zoning practices that discriminate based on a protected characteristic, such as Title II of the Americans with Disabilities Act ("ADA"),[3] Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[4] and Title VI of the Civil Rights Act of 1964.[5] In addition, the Joint Statement does not address a state or local government's duty to affirmatively further fair housing, even though state and local governments that receive HUD assistance are subject to this duty. For additional information provided by DOJ and HUD regarding these issues, see the list of resources provided in the answer to Question 27.

Questions and Answers on the Fair Housing Act and State and Local Land Use Laws and Zoning

1. How does the Fair Housing Act apply to state and local land use and zoning?

The Fair Housing Act prohibits a broad range of housing practices that discriminate against individuals on the basis of race, color, religion, sex, disability, familial status, or national origin (commonly referred to as protected characteristics). As established by the Supremacy Clause of the U.S. Constitution, federal laws such as the Fair Housing Act take precedence over conflicting state and local laws. The Fair Housing Act thus prohibits state and local land use and zoning laws, policies, and practices that discriminate based on a characteristic protected under the Act. Prohibited practices as defined in the Act include making unavailable or denying housing because of a protected characteristic. Housing includes not only buildings intended for occupancy as residences, but also vacant land that may be developed into residences.

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is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

[3] 42 U.S.C. §12132.

[4] 29 U.S.C. § 794.

[5] 42 U.S.C. § 2000d.

2. What types of land use and zoning laws or practices violate the Fair Housing Act?

Examples of state and local land use and zoning laws or practices that may violate the Act include:

- Prohibiting or restricting the development of housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status, by, for example, placing a moratorium on the development of multifamily housing because of concerns that the residents will include members of a particular protected class.
- Imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals, by, for example, requiring an occupancy permit for persons with disabilities to live in a single-family home while not requiring a permit for other residents of single-family homes.
- Imposing restrictions on housing because of alleged public safety concerns that are based on stereotypes about the residents' or anticipated residents' membership in a protected class, by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected class are more likely to engage in criminal activity.
- Enforcing otherwise neutral laws or policies differently because of the residents' protected characteristics, by, for example, citing individuals who are members of a particular protected class for violating code requirements for property upkeep while not citing other residents for similar violations.
- Refusing to provide reasonable accommodations to land use or zoning policies when such accommodations may be necessary to allow persons with disabilities to have an equal opportunity to use and enjoy the housing, by, for example, denying a request to modify a setback requirement so an accessible sidewalk or ramp can be provided for one or more persons with mobility disabilities.

3. When does a land use or zoning practice constitute intentional discrimination in violation of the Fair Housing Act?

Intentional discrimination is also referred to as disparate treatment, meaning that the action treats a person or group of persons differently because of race, color, religion, sex, disability, familial status, or national origin. A land use or zoning practice may be intentionally discriminatory even if there is no personal bias or animus on the part of individual government officials. For example, municipal zoning practices or decisions that reflect acquiescence to community bias may be intentionally discriminatory, even if the officials themselves do not personally share such bias. (See Q&A 5.) Intentional discrimination does not require that the

decision-makers were hostile toward members of a particular protected class. Decisions motivated by a purported desire to benefit a particular group can also violate the Act if they result in differential treatment because of a protected characteristic.

A land use or zoning practice may be discriminatory on its face. For example, a law that requires persons with disabilities to request permits to live in single-family zones while not requiring persons without disabilities to request such permits violates the Act because it treats persons with disabilities differently based on their disability. Even a law that is seemingly neutral will still violate the Act if enacted with discriminatory intent. In that instance, the analysis of whether there is intentional discrimination will be based on a variety of factors, all of which need not be satisfied. These factors include, but are not limited to: (1) the "impact" of the municipal practice, such as whether an ordinance disproportionately impacts minority residents compared to white residents or whether the practice perpetuates segregation in a neighborhood or particular geographic area; (2) the "historical background" of the action, such as whether there is a history of segregation or discriminatory conduct by the municipality; (3) the "specific sequence of events," such as whether the city adopted an ordinance or took action only after significant, racially-motivated community opposition to a housing development or changed course after learning that a development would include non-white residents; (4) departures from the "normal procedural sequence," such as whether a municipality deviated from normal application or zoning requirements; (5) "substantive departures," such as whether the factors usually considered important suggest that a state or local government should have reached a different result; and (6) the "legislative or administrative history," such as any statements by members of the state or local decision-making body.[6]

4. **Can state and local land use and zoning laws or practices violate the Fair Housing Act if the state or locality did not intend to discriminate against persons on a prohibited basis?**

Yes. Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[7] The Court stated that "[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[8]

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[6] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

[7] ___ U.S. ___, 135 S. Ct. 2507 (2015).

[8] *Id.* at 2521–22.

A land use or zoning practice results in a discriminatory effect if it caused or predictably will cause a disparate impact on a group of persons or if it creates, increases, reinforces, or perpetuates segregated housing patterns because of a protected characteristic. A state or local government still has the opportunity to show that the practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. These interests must be supported by evidence and may not be hypothetical or speculative. If these interests could not be served by another practice that has a less discriminatory effect, then the practice does not violate the Act. The standard for evaluating housing-related practices with a discriminatory effect are set forth in HUD's Discriminatory Effects Rule, 24 C.F.R § 100.500.

Examples of land use practices that violate the Fair Housing Act under a discriminatory effects standard include minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification. Similarly, prohibiting low-income or multifamily housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.

5. **Does a state or local government violate the Fair Housing Act if it considers the fears or prejudices of community members when enacting or applying its zoning or land use laws respecting housing?**

When enacting or applying zoning or land use laws, state and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have about current or prospective residents because of the residents' protected characteristics. Doing so violates the Act, even if the officials themselves do not personally share such bias. For example, a city may not deny zoning approval for a low-income housing development that meets all zoning and land use requirements because the development may house residents of a particular protected class or classes whose presence, the community fears, will increase crime and lower property values in the surrounding neighborhood. Similarly, a local government may not block a group home or deny a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities or a particular type of disability. Of course, a city council or zoning board is not bound by everything that is said by every person who speaks at a public hearing. It is the record as a whole that will be determinative.

6. **Can state and local governments violate the Fair Housing Act if they adopt or implement restrictions against children?**

Yes. State and local governments may not impose restrictions on where families with children may reside unless the restrictions are consistent with the "housing for older persons" exemption of the Act. The most common types of housing for older persons that may qualify for this exemption are: (1) housing intended for, and solely occupied by, persons 62 years of age or older; and (2) housing in which 80% of the occupied units have at least one person who is 55 years of age or older that publishes and adheres to policies and procedures demonstrating the intent to house older persons. These types of housing must meet all requirements of the exemption, including complying with HUD regulations applicable to such housing, such as verification procedures regarding the age of the occupants. A state or local government that zones an area to exclude families with children under 18 years of age must continually ensure that housing in that zone meets all requirements of the exemption. If all of the housing in that zone does not continue to meet all such requirements, that state or local government violates the Act.

Questions and Answers on the Fair Housing Act and Local Land Use and Zoning Regulation of Group Homes

7. **Who qualifies as a person with a disability under the Fair Housing Act?**

The Fair Housing Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, developmental disabilities, mental illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance), and alcoholism.

The term "major life activity" includes activities such as seeing, hearing, walking breathing, performing manual tasks, caring for one's self, learning, speaking, and working. This list of major life activities is not exhaustive.

Being regarded as having a disability means that the individual is treated as if he or she has a disability even though the individual may not have an impairment or may not have an impairment that substantially limits one or more major life activities. For example, if a landlord

refuses to rent to a person because the landlord believes the prospective tenant has a disability, then the landlord violates the Act's prohibition on discrimination on the basis of disability, even if the prospective tenant does not actually have a physical or mental impairment that substantially limits one or more major life activities.

Having a record of a disability means the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

8. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning; land use and zoning officials and the courts, however, have referred to some residences for persons with disabilities as group homes. The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. A household where two or more persons with disabilities choose to live together, as a matter of association, may not be subjected to requirements or conditions that are not imposed on households consisting of persons without disabilities.

In this Statement, the term "group home" refers to a dwelling that is or will be occupied by unrelated persons with disabilities. Sometimes group homes serve individuals with a particular type of disability, and sometimes they serve individuals with a variety of disabilities. Some group homes provide residents with in-home support services of varying types, while others do not. The provision of support services is not required for a group home to be protected under the Fair Housing Act. Group homes, as discussed in this Statement, may be opened by individuals or by organizations, both for-profit and not-for-profit. Sometimes it is the group home operator or developer, rather than the individuals who live or are expected to live in the home, who interacts with a state or local government agency about developing or operating the group home, and sometimes there is no interaction among residents or operators and state or local governments.

In this Statement, the term "group home" includes homes occupied by persons in recovery from alcohol or substance abuse, who are persons with disabilities under the Act. Although a group home for persons in recovery may commonly be called a "sober home," the term does not have a specific legal meaning, and the Act treats persons with disabilities who reside in such homes no differently than persons with disabilities who reside in other types of group homes. Like other group homes, homes for persons in recovery are sometimes operated by individuals or organizations, both for-profit and not-for-profit, and support services or supervision are sometimes, but not always, provided. The Act does not require a person who resides in a home for persons in recovery to have participated in or be currently participating in a

substance abuse treatment program to be considered a person with a disability. The fact that a resident of a group home may currently be illegally using a controlled substance does not deprive the other residents of the protection of the Fair Housing Act.

9. In what ways does the Fair Housing Act apply to group homes?

The Fair Housing Act prohibits discrimination on the basis of disability, and persons with disabilities have the same Fair Housing Act protections whether or not their housing is considered a group home. State and local governments may not discriminate against persons with disabilities who live in group homes. Persons with disabilities who live in or seek to live in group homes are sometimes subjected to unlawful discrimination in a number of ways, including those discussed in the preceding Section of this Joint Statement. Discrimination may be intentional; for example, a locality might pass an ordinance prohibiting group homes in single-family neighborhoods or prohibiting group homes for persons with certain disabilities. These ordinances are facially discriminatory, in violation of the Act. In addition, as discussed more fully in Q&A 10 below, a state or local government may violate the Act by refusing to grant a reasonable accommodation to its zoning or land use ordinance when the requested accommodation may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling. For example, if a locality refuses to waive an ordinance that limits the number of unrelated persons who may live in a single-family home where such a waiver may be necessary for persons with disabilities to have an equal opportunity to use and enjoy a dwelling, the locality violates the Act unless the locality can prove that the waiver would impose an undue financial and administrative burden on the local government or fundamentally alter the essential nature of the locality's zoning scheme. Furthermore, a state or local government may violate the Act by enacting an ordinance that has an unjustified discriminatory effect on persons with disabilities who seek to live in a group home in the community. Unlawful actions concerning group homes are discussed in more detail throughout this Statement.

10. What is a reasonable accommodation under the Fair Housing Act?

The Fair Housing Act makes it unlawful to refuse to make "reasonable accommodations" to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling. A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others may sometimes deny them an equal opportunity to use and enjoy a dwelling.

Even if a zoning ordinance imposes on group homes the same restrictions that it imposes on housing for other groups of unrelated persons, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. What constitutes a reasonable accommodation is a case-by-case determination based on an individualized assessment. This topic is discussed in detail in Q&As 20–25 and in the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

11. Does the Fair Housing Act protect persons with disabilities who pose a "direct threat" to others?

The Act does not allow for the exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. Nevertheless, the Act does not protect an individual whose tenancy would constitute a "direct threat" to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others unless the threat or risk to property can be eliminated or significantly reduced by reasonable accommodation. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (for example, current conduct or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate or significantly reduce the direct threat. See Q&A 10 for a general discussion of reasonable accommodations. Consequently, in evaluating an individual's recent history of overt acts, a state or local government must take into account whether the individual has received intervening treatment or medication that has eliminated or significantly reduced the direct threat (in other words, significant risk of substantial harm). In such a situation, the state or local government may request that the individual show how the circumstances have changed so that he or she no longer poses a direct threat. Any such request must be reasonable and limited to information necessary to assess whether circumstances have changed. Additionally, in such a situation, a state or local government may obtain satisfactory and reasonable assurances that the individual will not pose a direct threat during the tenancy. The state or local government must have reliable, objective evidence that the tenancy of a person with a disability poses a direct threat before excluding him or her from housing on that basis, and, in making that assessment, the state or local government may not ignore evidence showing that the individual's tenancy would no longer pose a direct threat. Moreover, the fact that one individual may pose a direct threat does not mean that another individual with the same disability or other individuals in a group home may be denied housing.

12. Can a state or local government enact laws that specifically limit group homes for individuals with specific types of disabilities?

No. Just as it would be illegal to enact a law for the purpose of excluding or limiting group homes for individuals with disabilities, it is illegal under the Act for local land use and zoning laws to exclude or limit group homes for individuals with specific types of disabilities. For example, a government may not limit group homes for persons with mental illness to certain neighborhoods. The fact that the state or local government complies with the Act with regard to group homes for persons with some types of disabilities will not justify discrimination against individuals with another type of disability, such as mental illness.

13. Can a state or local government limit the number of individuals who reside in a group home in a residential neighborhood?

Neutral laws that govern groups of unrelated persons who live together do not violate the Act so long as (1) those laws do not intentionally discriminate against persons on the basis of disability (or other protected class), (2) those laws do not have an unjustified discriminatory effect on the basis of disability (or other protected class), and (3) state and local governments make reasonable accommodations when such accommodations may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling.

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to a certain number of unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission from the city. If that ordinance also prohibits a group home having the same number of persons with disabilities in a certain district or requires it to seek a use permit, the ordinance would violate the Fair Housing Act. The ordinance violates the Act because it treats persons with disabilities less favorably than families and unrelated persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together without violating the Act as long as the restrictions are imposed on all such groups, including a group defined as a family. Thus, if the definition of a family includes up to a certain number of unrelated individuals, an ordinance would not, on its face, violate the Act if a group home for persons with disabilities with more than the permitted number for a family were not allowed to locate in a single-family-zoned neighborhood because any group of unrelated people without disabilities of that number would also be disallowed. A facially neutral ordinance, however, still may violate the Act if it is intentionally discriminatory (that is, enacted with discriminatory intent or applied in a discriminatory manner), or if it has an unjustified

discriminatory effect on persons with disabilities. For example, an ordinance that limits the number of unrelated persons who may constitute a family may violate the Act if it is enacted for the purpose of limiting the number of persons with disabilities who may live in a group home, or if it has the unjustified discriminatory effect of excluding or limiting group homes in the jurisdiction. Governments may also violate the Act if they enforce such restrictions more strictly against group homes than against groups of the same number of unrelated persons without disabilities who live together in housing. In addition, as discussed in detail below, because the Act prohibits the denial of reasonable accommodations to rules and policies for persons with disabilities, a group home that provides housing for a number of persons with disabilities that exceeds the number allowed under the family definition has the right to seek an exception or waiver. If the criteria for a reasonable accommodation are met, the permit must be given in that instance, but the ordinance would not be invalid.[9]

14. How does the Supreme Court's ruling in *Olmstead* apply to the Fair Housing Act?

In *Olmstead v. L.C.*,[10] the Supreme Court ruled that the Americans with Disabilities Act (ADA) prohibits the unjustified segregation of persons with disabilities in institutional settings where necessary services could reasonably be provided in integrated, community-based settings. An integrated setting is one that enables individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. By contrast, a segregated setting includes congregate settings populated exclusively or primarily by individuals with disabilities. Although *Olmstead* did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent. The Fair Housing Act ensures that persons with disabilities have an equal opportunity to choose the housing where they wish to live. The ADA and *Olmstead* ensure that persons with disabilities also have the option to live and receive services in the most integrated setting appropriate to their needs. The integration mandate of the ADA and *Olmstead* can be implemented without impairing the rights protected by the Fair Housing Act. For example, state and local governments that provide or fund housing, health care, or support services must comply with the integration mandate by providing these programs, services, and activities in the most integrated setting appropriate to the needs of individuals with disabilities. State and local governments may comply with this requirement by adopting standards for the housing, health care, or support services they provide or fund that are reasonable, individualized, and specifically tailored to enable individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible. Local governments should be aware that ordinances and policies that impose additional restrictions on housing or residential services for persons with disabilities that are not imposed on housing or

[9] Laws that limit the number of occupants per unit do not violate the Act as long as they are reasonable, are applied to all occupants, and do not operate to discriminate on the basis of disability, familial status, or other characteristics protected by the Act.

[10] 527 U.S. 581 (1999).

residential services for persons without disabilities are likely to violate the Act. In addition, a locality would violate the Act and the integration mandate of the ADA and *Olmstead* if it required group homes to be concentrated in certain areas of the jurisdiction by, for example, restricting them from being located in other areas.

15. Can a state or local government impose spacing requirements on the location of group homes for persons with disabilities?

A "spacing" or "dispersal" requirement generally refers to a requirement that a group home for persons with disabilities must not be located within a specific distance of another group home. Sometimes a spacing requirement is designed so it applies only to group homes and sometimes a spacing requirement is framed more generally and applies to group homes and other types of uses such as boarding houses, student housing, or even certain types of businesses. In a community where a certain number of unrelated persons are permitted by local ordinance to reside together in a home, it would violate the Act for the local ordinance to impose a spacing requirement on group homes that do not exceed that permitted number of residents because the spacing requirement would be a condition imposed on persons with disabilities that is not imposed on persons without disabilities. In situations where a group home seeks a reasonable accommodation to exceed the number of unrelated persons who are permitted by local ordinance to reside together, the Fair Housing Act does not prevent state or local governments from taking into account concerns about the over-concentration of group homes that are located in close proximity to each other. Sometimes compliance with the integration mandate of the ADA and *Olmstead* requires government agencies responsible for licensing or providing housing for persons with disabilities to consider the location of other group homes when determining what housing will best meet the needs of the persons being served. Some courts, however, have found that spacing requirements violate the Fair Housing Act because they deny persons with disabilities an equal opportunity to choose where they will live. Because an across-the-board spacing requirement may discriminate against persons with disabilities in some residential areas, any standards that state or local governments adopt should evaluate the location of group homes for persons with disabilities on a case-by-case basis.

Where a jurisdiction has imposed a spacing requirement on the location of group homes for persons with disabilities, courts may analyze whether the requirement violates the Act under an intent, effects, or reasonable accommodation theory. In cases alleging intentional discrimination, courts look to a number of factors, including the effect of the requirement on housing for persons with disabilities; the jurisdiction's intent behind the spacing requirement; the existence, size, and location of group homes in a given area; and whether there are methods other than a spacing requirement for accomplishing the jurisdiction's stated purpose. A spacing requirement enacted with discriminatory intent, such as for the purpose of appeasing neighbors' stereotypical fears about living near persons with disabilities, violates the Act. Further, a neutral

spacing requirement that applies to all housing for groups of unrelated persons may have an unjustified discriminatory effect on persons with disabilities, thus violating the Act. Jurisdictions must also consider, in compliance with the Act, requests for reasonable accommodations to any spacing requirements.

16. Can a state or local government impose health and safety regulations on group home operators?

Operators of group homes for persons with disabilities are subject to applicable state and local regulations addressing health and safety concerns unless those regulations are inconsistent with the Fair Housing Act or other federal law. Licensing and other regulatory requirements that may apply to some group homes must also be consistent with the Fair Housing Act. Such regulations must not be based on stereotypes about persons with disabilities or specific types of disabilities. State or local zoning and land use ordinances may not, consistent with the Fair Housing Act, require individuals with disabilities to receive medical, support, or other services or supervision that they do not need or want as a condition for allowing a group home to operate. State and local governments' enforcement of neutral requirements regarding safety, licensing, and other regulatory requirements governing group homes do not violate the Fair Housing Act so long as the ordinances are enforced in a neutral manner, they do not specifically target group homes, and they do not have an unjustified discriminatory effect on persons with disabilities who wish to reside in group homes.

Governments must also consider requests for reasonable accommodations to licensing and regulatory requirements and procedures, and grant them where they may be necessary to afford individuals with disabilities an equal opportunity to use and enjoy a dwelling, as required by the Act.

17. Can a state or local government address suspected criminal activity or fraud and abuse at group homes for persons with disabilities?

The Fair Housing Act does not prevent state and local governments from taking nondiscriminatory action in response to criminal activity, insurance fraud, Medicaid fraud, neglect or abuse of residents, or other illegal conduct occurring at group homes, including reporting complaints to the appropriate state or federal regulatory agency. States and localities must ensure that actions to enforce criminal or other laws are not taken to target group homes and are applied equally, regardless of whether the residents of housing are persons with disabilities. For example, persons with disabilities residing in group homes are entitled to the same constitutional protections against unreasonable search and seizure as those without disabilities.

18. Does the Fair Housing Act permit a state or local government to implement strategies to integrate group homes for persons with disabilities in particular neighborhoods where they are not currently located?

Yes. Some strategies a state or local government could use to further the integration of group housing for persons with disabilities, consistent with the Act, include affirmative marketing or offering incentives. For example, jurisdictions may engage in affirmative marketing or offer variances to providers of housing for persons with disabilities to locate future homes in neighborhoods where group homes for persons with disabilities are not currently located. But jurisdictions may not offer incentives for a discriminatory purpose or that have an unjustified discriminatory effect because of a protected characteristic.

19. Can a local government consider the fears or prejudices of neighbors in deciding whether a group home can be located in a particular neighborhood?

In the same way a local government would violate the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities (see Q&A 5), a local government violates the law if it blocks a group home or denies a reasonable accommodation request because of neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers themselves do not have biases against persons with disabilities.

Not all community opposition to requests by group homes is necessarily discriminatory. For example, when a group home seeks a reasonable accommodation to operate in an area and the area has limited on-street parking to serve existing residents, it is not a violation of the Fair Housing Act for neighbors and local government officials to raise concerns that the group home may create more demand for on-street parking than would a typical family and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation, if a similar dwelling that is not a group home or similarly situated use would ordinarily be denied a permit because of such parking concerns. If, however, the group home shows that the home will not create a need for more parking spaces than other dwellings or similarly-situated uses located nearby, or submits a plan to provide any needed off-street parking, then parking concerns would not support a decision to deny the home a permit.

20. When does a state or local government violate the Fair Housing Act by failing to grant a request for a reasonable accommodation?

A state or local government violates the Fair Housing Act by failing to grant a reasonable accommodation request if (1) the persons requesting the accommodation or, in the case of a group home, persons residing in or expected to reside in the group home are persons with a disability under the Act; (2) the state or local government knows or should reasonably be expected to know of their disabilities; (3) an accommodation in the land use or zoning ordinance or other rules, policies, practices, or services of the state or locality was requested by or on behalf of persons with disabilities; (4) the requested accommodation may be necessary to afford one or more persons with a disability an equal opportunity to use and enjoy the dwelling; (5) the state or local government refused to grant, failed to act on, or unreasonably delayed the accommodation request; and (6) the state or local government cannot show that granting the accommodation would impose an undue financial and administrative burden on the local government or that it would fundamentally alter the local government's zoning scheme. A requested accommodation may be necessary if there is an identifiable relationship between the requested accommodation and the group home residents' disability. Further information is provided in Q&A 10 above and the HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act.

21. Can a local government deny a group home's request for a reasonable accommodation without violating the Fair Housing Act?

Yes, a local government may deny a group home's request for a reasonable accommodation if the request was not made by or on behalf of persons with disabilities (by, for example, the group home developer or operator) or if there is no disability-related need for the requested accommodation because there is no relationship between the requested accommodation and the disabilities of the residents or proposed residents.

In addition, a group home's request for a reasonable accommodation may be denied by a local government if providing the accommodation is not reasonable—in other words, if it would impose an undue financial and administrative burden on the local government or it would fundamentally alter the local government's zoning scheme. The determination of undue financial and administrative burden must be decided on a case-by-case basis involving various factors, such as the nature and extent of the administrative burden and the cost of the requested accommodation to the local government, the financial resources of the local government, and the benefits that the accommodation would provide to the persons with disabilities who will reside in the group home.

When a local government refuses an accommodation request because it would pose an undue financial and administrative burden, the local government should discuss with the requester whether there is an alternative accommodation that would effectively address the disability-related needs of the group home's residents without imposing an undue financial and administrative burden. This discussion is called an "interactive process." If an alternative accommodation would effectively meet the disability-related needs of the residents of the group home and is reasonable (that is, it would not impose an undue financial and administrative burden or fundamentally alter the local government's zoning scheme), the local government must grant the alternative accommodation. An interactive process in which the group home and the local government discuss the disability-related need for the requested accommodation and possible alternative accommodations is both required under the Act and helpful to all concerned, because it often results in an effective accommodation for the group home that does not pose an undue financial and administrative burden or fundamental alteration for the local government.

22. What is the procedure for requesting a reasonable accommodation?

The reasonable accommodation must actually be requested by or on behalf of the individuals with disabilities who reside or are expected to reside in the group home. When the request is made, it is not necessary for the specific individuals who would be expected to live in the group home to be identified. The Act does not require that a request be made in a particular manner or at a particular time. The group home does not need to mention the Fair Housing Act or use the words "reasonable accommodation" when making a reasonable accommodation request. The group home must, however, make the request in a manner that a reasonable person would understand to be a disability-related request for an exception, change, or adjustment to a rule, policy, practice, or service. When making a request for an exception, change, or adjustment to a local land use or zoning regulation or policy, the group home should explain what type of accommodation is being requested and, if the need for the accommodation is not readily apparent or known by the local government, explain the relationship between the accommodation and the disabilities of the group home residents.

A request for a reasonable accommodation can be made either orally or in writing. It is often helpful for both the group home and the local government if the reasonable accommodation request is made in writing. This will help prevent misunderstandings regarding what is being requested or whether or when the request was made.

Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, courts have decided that these procedures should ordinarily be followed. If no procedure is specified, or if the procedure is unreasonably burdensome or intrusive or involves significant delays, a request for a reasonable accommodation may,

nevertheless, be made in some other way, and a local government is obligated to grant it if the requested accommodation meets the criteria discussed in Q&A 20, above.

Whether or not the local land use or zoning code contains a specific procedure for requesting a reasonable accommodation or other exception to a zoning regulation, if local government officials have previously made statements or otherwise indicated that an application for a reasonable accommodation would not receive fair consideration, or if the procedure itself is discriminatory, then persons with disabilities living in a group home, and/or its operator, have the right to file a Fair Housing Act complaint in court to request an order for a reasonable accommodation to the local zoning regulations.

23. Does the Fair Housing Act require local governments to adopt formal reasonable accommodation procedures?

The Act does not require a local government to adopt formal procedures for processing requests for reasonable accommodations to local land use or zoning codes. DOJ and HUD nevertheless strongly encourage local governments to adopt formal procedures for identifying and processing reasonable accommodation requests and provide training for government officials and staff as to application of the procedures. Procedures for reviewing and acting on reasonable accommodation requests will help state and local governments meet their obligations under the Act to respond to reasonable accommodation requests and implement reasonable accommodations promptly. Local governments are also encouraged to ensure that the procedures to request a reasonable accommodation or other exception to local zoning regulations are well known throughout the community by, for example, posting them at a readily accessible location and in a digital format accessible to persons with disabilities on the government's website. If a jurisdiction chooses to adopt formal procedures for reasonable accommodation requests, the procedures cannot be onerous or require information beyond what is necessary to show that the individual has a disability and that the requested accommodation is related to that disability. For example, in most cases, an individual's medical record or detailed information about the nature of a person's disability is not necessary for this inquiry. In addition, officials and staff must be aware that any procedures for requesting a reasonable accommodation must also be flexible to accommodate the needs of the individual making a request, including accepting and considering requests that are not made through the official procedure. The adoption of a reasonable accommodation procedure, however, will not cure a zoning ordinance that treats group homes differently than other residential housing with the same number of unrelated persons.

24. What if a local government fails to act promptly on a reasonable accommodation request?

A local government has an obligation to provide prompt responses to reasonable accommodation requests, whether or not a formal reasonable accommodation procedure exists. A local government's undue delay in responding to a reasonable accommodation request may be deemed a failure to provide a reasonable accommodation.

25. Can a local government enforce its zoning code against a group home that violates the zoning code but has not requested a reasonable accommodation?

The Fair Housing Act does not prohibit a local government from enforcing its zoning code against a group home that has violated the local zoning code, as long as that code is not discriminatory or enforced in a discriminatory manner. If, however, the group home requests a reasonable accommodation when faced with enforcement by the locality, the locality still must consider the reasonable accommodation request. A request for a reasonable accommodation may be made at any time, so at that point, the local government must consider whether there is a relationship between the disabilities of the residents of the group home and the need for the requested accommodation. If so, the locality must grant the requested accommodation unless doing so would pose a fundamental alteration to the local government's zoning scheme or an undue financial and administrative burden to the local government.

Questions and Answers on Fair Housing Act Enforcement of Complaints Involving Land Use and Zoning

26. How are Fair Housing Act complaints involving state and local land use laws and practices handled by HUD and DOJ?

The Act gives HUD the power to receive, investigate, and conciliate complaints of discrimination, including complaints that a state or local government has discriminated in exercising its land use and zoning powers. HUD may not issue a charge of discrimination pertaining to "the legality of any State or local zoning or other land use law or ordinance." Rather, after investigating, HUD refers matters it believes may be meritorious to DOJ, which, in its discretion, may decide to bring suit against the state or locality within 18 months after the practice at issue occurred or terminated. DOJ may also bring suit by exercising its authority to initiate litigation alleging a pattern or practice of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

If HUD determines that there is no reasonable cause to believe that there may be a violation, it will close an investigation without referring the matter to DOJ. But a HUD or DOJ

decision not to proceed with a land use or zoning matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and DOJ encourage parties to land use disputes to explore reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation or conciliation of the HUD complaint. HUD attempts to conciliate all complaints under the Act that it receives, including those involving land use or zoning laws. In addition, it is DOJ's policy to offer prospective state or local governments the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

27. How can I find more information?

For more information on reasonable accommodations and reasonable modifications under the Fair Housing Act:

- HUD/DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

- HUD/DOJ Joint Statement on Reasonable Modifications under the Fair Housing Act, *available at* https://www.justice.gov/crt/fair-housing-policy-statements-and-guidance-0 or http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

For more information on state and local governments' obligations under Section 504:

- HUD website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504.

For more information on state and local governments' obligations under the ADA and *Olmstead*:

- U.S. Department of Justice website, www.ADA.gov, or call the ADA information line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).
- Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, *available at* http://www.ada.gov./olmstead/q&a_olmstead.htm.
- Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of *Olmstead*, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf.

For more information on the requirement to affirmatively further fair housing:

- Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).
- U.S. Department of Housing and Urban Development, Version 1, Affirmatively Furthering Fair Housing Rule Guidebook (2015), *available at* https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf.
- Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Vol. 1, Fair Housing Planning Guide (1996), *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

For more information on nuisance and crime-free ordinances:

- Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf.

OTHER EAST END MUNICIPALITIES

Town of Southold, NY
Monday, January 23, 2017

Chapter 280. Zoning

Article I. General Provisions

§ 280-4. Definitions.

[Amended 7-31-1973]

A. Word usage. Words used in the present tense include the future: the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as an individual; the word "lot" includes the word "plot"; the term "occupied" or "used," as applied to any building, shall be construed as though followed by the words "or intended, arranged or designed to be occupied or used."

B. Definitions and usages. Unless otherwise expressly stated, the following terms shall, for the purpose of this chapter, have the meanings as herein defined. Any word or term not noted below shall be used with a meaning as defined in Webster's Third New International Dictionary of the English Language, unabridged (or latest edition).
[Amended 10-26-1976 by L.L. No. 5-1976; 4-11-1978 by L.L. No. 2-1978; 2-1-1983 by L.L. No. 2-1983; 1-21-1986 by L.L. No. 1-1986; 5-17-1988 by L.L. No. 14-1988; 8-23-1988 by L.L. No. 20-1988; 1-10-1989 by L.L. No. 1-1989]

ACCESS
A physical entrance to property.

ACCESSORY APARTMENT
An apartment created in a presently existing one-family dwelling unit or accessory structure pursuant to § **280-13A(6)** or § **280-13B(13)**.
[Amended 6-15-2010 by L.L. No. 2-2010]

ACCESSORY BUILDING OR STRUCTURE
A building or structure detached from a principal building located on the same lot as and customarily incidental and subordinate to the principal building.

ACCESSORY USE
A use customarily incidental and subordinate to the main use on a lot, whether such "accessory use" is conducted in a principal or accessory building.

ADDITION

A building or buildings used primarily for the storage of goods and materials and available to the general public for a fee; for example, self-storage facilities. No sales (either wholesale or retail) are permitted in public warehousing.
[Added 10-14-1999 by L.L. No. 13-1999]

PUBLIC WATER: PUBLIC SEWER
Communal sewage disposal systems and communal water supply systems as approved by public agencies having jurisdiction thereof.

RECREATIONAL FACILITIES
Recreational uses characterized by predominately outdoor activities by patrons, including but not limited to stables and riding academies, regulation golf courses and golf-related activities, tennis and racquet sport clubs, platform sports, baseball batting and pitching cages and swimming pool facilities. It shall not include such activities as racing, jai alai and amusements parks.
[Added 4-28-1997 by L.L. No. 6-1997]

RECREATION FACILITY, COMMERCIAL
An indoor or outdoor privately operated business involving playing fields, courts, arenas or halls designed to accommodate sports and recreational activities, such as billiards, bowling, dance halls, gymnasiums, health spas, skating rinks, shooting ranges, tennis courts and swimming pools.

RECREATIONAL VEHICLE
A vehicular-type portable structure, without permanent foundation, which can be towed, hauled or driven and primarily designed as temporary living accommodation for recreational, camping and travel use, and including but not limited to travel trailer, truck campers, camping trailers and self-propelled motor homes.

RENTAL PERMIT
A permit issued by the Chief Building Inspector to the owner to allow use and occupancy of a lawfully existing accessory apartment.
[Added 6-15-2010 by L.L. No. 2-2010]

RESEARCH LABORATORY
A building for experimentation in pure or applied research, design, development and production of prototype machines or devices or of new products, and uses accessory thereto, wherein products are not manufactured for wholesale or retail sale, wherein commercial servicing or repair of commercial products is not performed and where there is no display of any materials or products.

RESIDENTIAL CLUSTER
An area to be developed as a single entity according to a plan, containing residential housing units and having a common or public open space.

RESTAURANT
Any premises other than take-out or formula food restaurants where food is commercially sold for on-premises consumption to patrons seated at tables or counters.
[Amended 5-16-1994 by L.L. No. 9-1994]

and other similar structures. A wireless communication facility attached to an existing building or structure shall be excluded from this definition. [Added 11-12-1997 by L.L. No. 26-1997]

TOURIST CAMP
Any lot, piece or parcel of ground where two or more tents, tent houses, camp cottages, house cars or house trailers used as living or sleeping quarters are or may be located, said camp being operated for or without compensation.[4]

TOURIST COTTAGE
A detached building having less than 350 square feet of cross-sectional area, designed for or occupied as living and sleeping quarters for seasonal occupancy.

TOWN BOARD
The Town Board of the Town of Southold.

TOWNHOUSE
A dwelling unit in a building containing at least three connected dwelling units divided by common vertical party walls with private entrances to each dwelling. A townhouse may include dwelling units owned in fee simple or in condominium or cooperative ownership or any combination thereof.

TRAILER OR MOBILE HOME
Any vehicle mounted on wheels, movable either by its own power or by being drawn by another vehicle and equipped to be used for living or sleeping quarters or so as to permit cooking. The term "trailer" shall include such vehicles if mounted on temporary or permanent foundations with the wheels removed and shall include the terms "automobile trailer" and "house car."

TRANSIENT RENTAL PROPERTY
[Added 8-25-2015 by L.L. No. 7-2015]

(1) A dwelling unit which is occupied for habitation as a residence by persons, other than the owner or a family member of the owner, and for which rent is received by the owner, directly or indirectly, in exchange for such residential occupation for a period of less than 14 nights. For the purposes of this chapter, the term "transient rental property" shall mean all non-owner-occupied, single-family residences, two-family residences, and townhouses rented for a period of less than 14 nights and shall not include:

(a) Any legally operating commercial hotel/motel business or bed-and-breakfast establishment operating exclusively and catering to transient clientele; that is, customers who customarily reside at these establishments for short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel business.

(b)

A dwelling unit located on Fishers Island, due to the unique characteristics of the Island, including the lack of formal lodging for visitors.

(2) The presence of the following shall create a presumption that a dwelling unit is being used as a transient rental property:

(a) The dwelling unit is offered for lease on a short-term rental website, including Airbnb, HomeAway, VRBO and the like; or

(b) The dwelling unit is offered for lease in any medium for a period of less than 14 nights.

(3) The foregoing presumption may be rebutted by evidence presented to the Code Enforcement Officer for the Town of Southold that the dwelling unit is not a transient rental property.

USABLE OPEN SPACE

An unenclosed portion of the ground of a lot which is not devoted to driveways or parking spaces, which is free of structures of any kind, of which not more than 25% is roofed for shelter purposes only, the minimum dimension of which is 40 feet and which is available and accessible to all occupants of the building or buildings on the said lot for purposes of active or passive outdoor recreation.

USE

The purpose for which land or a structure is arranged, designed or intended or for which either land or a structure is or may be used, occupied or maintained.

USE, ACCESSORY

A use customarily incidental and subordinate to the main use on a lot, whether such accessory use is conducted in a principal or accessory building.

WIRELESS COMMUNICATION FACILITY

Antenna or antenna support structure and base equipment, either individually or together, including permanent or temporary movable facilities (i.e., wireless facilities mounted on vehicles, boats or other mobile structures) used for the provision of any wireless service.
[Added 11-12-1997 by L.L. No. 26-1997; amended 2-2-1999 by L.L. No. 3-1999; 10-20-2009 by L.L. No. 13-2009]

WIRELESS COMMUNICATIONS

Any radio transmission and/or receiving service or use, including, but not limited to, personal wireless services as defined in the Telecommunications Act of 1996, which includes FCC licensed commercial telephone services, personal communication services, specialized mobile radio, enhanced specialized mobile radio, paging and similar services that currently exist or that may in the future be developed.
[Added 11-12-1997 by L.L. No. 26-1997; amended 2-2-1999 by L.L. No. 3-1999]

YARD

Town of Southold, NY
Monday, January 23, 2017

Chapter 280. Zoning

Article XXII. Supplementary Regulations

§ 280-111. Prohibited uses in all districts.

[Amended 11-24-1992 by L.L. No. 26-1992; 8-8-2006 by L.L. No. 7-2015; 8-25-2015 by L.L. No. 7-2015]

A. Any use which is noxious, offensive or objectionable by reason of the emission of smoke, dust, gas, odor or other form of air pollution or by reason of the deposit, discharge or dispersal of liquid or solid wastes in any form in such manner or amount as to cause permanent damage to the soil and streams or to adversely affect the surrounding area or by reason of the creation of noise, vibration, electromagnetic or other disturbance or by reason of illumination by artificial light or light reflection beyond the limits of the lot on or from which such light or light reflection emanates; or which involves any dangerous fire, explosive, radioactive or other hazard; or which causes injury, annoyance or disturbance to any of the surrounding properties or to their owners and occupants; and any other process or use which is unwholesome and noisome and may be dangerous or prejudicial to health, safety or general welfare, except where such activity is licensed or regulated by other governmental agencies.

B. Artificial lighting facilities of any kind which create glare beyond lot lines.

C. Uses involving primary production of the following products from raw materials: charcoal and fuel briquettes; chemicals; aniline dyes; carbide; caustic soda; cellulose; chlorine; carbon black and bone black; creosote; hydrogen and oxygen; industrial alcohol; nitrates of an explosive nature; potash; plastic materials and synthetic resins; pyroxylin; rayon yarn; hydrochloric, nitric, phosphoric, picric and sulfuric acids; coal, coke and tar products, including gas manufacturing; explosives; gelatin, glue and size (animal); linoleum and oil cloth; matches; paint, varnishes and turpentine; rubber (natural or synthetic); soaps, including fat rendering; starch.

D. The following processes:

   (1) Nitrating of cotton or of other materials.

   (2) Milling or processing of flour.

   (3) Magnesium foundry.

   (4) Reduction, refining, smelting and alloying metal or metal ores.

(5) Refining secondary aluminum.

(6) Refining petroleum products, such as gasolines, kerosene, naphtha and lubricating oil.

(7) Distillation of wood or bones.

(8) Reduction and processing of wood pulp and fiber, including paper mill operations.

E. Operations involving stockyards, slaughterhouses and slag piles.

F. Storage of explosives.

G. Quarries.

H. Storage of petroleum products. Notwithstanding any other provisions of this chapter, storage facilities with a total combined capacity of more than 20,000 gallons, including all tanks, pipelines, buildings, structures and accessory equipment designed, used or intended to be used for the storage of gasoline, fuel oil, kerosene, asphalt or other petroleum products, shall not be located within 1,000 feet of tidal waters or tidal wetlands.

I. Encumbrances to public roads.

(1) No person shall intentionally discharge or cause to be discharged any water of any kind onto a public highway, roadway, right-of-way or sidewalk causing a public nuisance or hazardous condition, or resulting in flooding or pooling in or around the public area, including neighboring properties.

(2) No person shall place or cause to be placed obstructions of any kind, except the lawful parking of registered vehicles, upon a public highway, roadway, right-of-way or sidewalk that unreasonably interferes with the public's use of the public highway, roadway, right-of-way or sidewalk.

J. Transient rental properties.

Village of Sagaponack, NY
Monday, January 23, 2017

Chapter 245. Zoning

Article III. Seasonal Rentals

§ 245-14. Definitions.

In addition to the other definitions set forth in this chapter, the following definitions shall apply to this article:

SEASONAL RENTAL
An agreement, oral or in writing, whereby a dwelling is leased, used or occupied by a family for a period, any portion of which falls between May 15 and September 15 of any year, and for which compensation, cash or otherwise, is paid for, directly or indirectly.

SEASONAL RENTAL PERMIT
A permit issued for the use or occupancy of a dwelling as a rental.

TENANT
An individual who leases, uses or occupies a seasonal rental.

§ 245-15. Permit required; application procedure.

A. A dwelling shall not be occupied as a seasonal rental unless a seasonal rental permit has been issued by the Building Inspector.

B. Where a dwelling is to be used as a seasonal rental, an application for a seasonal rental permit shall be filed with the Building Inspector before the term of the seasonal rental is to begin.

C. The application shall be signed by each owner of the rental property and shall contain the following:

(1) The name and legal address and, if different, mailing address of the owner or owners.

(2) The location of the seasonal rental, including the Suffolk County Tax Map parcel number.

(3) The number of tenants requested.

(4)

A floor plan depicting the location and size of each conventional bedroom.

(5) A copy of a contract with a carter providing for weekly pickup, at a minimum, of refuse or proof by letter from the carter indicating that full payment for the entire term of the rental has been made or, in the alternative, an affidavit from the owner acknowledging responsibility for refuse removal in a timely and efficient manner.

(6) The name and legal address and, if different, mailing address of each tenant.

(7) The period of the proposed occupancy.

(8) A copy of the most recent deed and property tax bill, confirming the ownership of record of the rental property.

(9) An affidavit, signed by each owner and tenant named in the application, confirming that they have received copies of all Village laws and ordinances affecting seasonal rentals, noise, vehicle parking restrictions on residential lots and refuse disposal and that they agree to abide by the same.

D. A seasonal rental permit shall only be issued by the Building Inspector if the application for the permit complies with the relevant provisions of this article.

E. The seasonal rental permit shall expire on the last day of the rental period for which the permit use is granted.

§ 245-16. Regulations.

A. A dwelling utilized as a seasonal rental shall be leased only by a family pursuant to a permit issued in accordance with this article. In no event shall a seasonal rental be for a period less than 30 consecutive days excepting within any calendar year rentals of two weeks not more than twice is permitted. [Amended 12-17-2012 by L.L. No. 4-2012]

B. No seasonal rental shall have overnight occupants exceeding two persons per bedroom.

C. No seasonal rental shall be leased, occupied or used by any tenant who is not listed as such on the seasonal rental application pursuant to § **245-15** of this article. Where there is to be a change in the individual tenants who will be leasing, occupying or using the dwelling, the rental application shall be amended to indicate the name of the new tenant before the new tenant may occupy the dwelling.

D. The selling of shares to tenants where they obtain the rights of use and occupancy in a dwelling for less then the term of the rental shall be prohibited. The rent or compensation paid for a seasonal rental shall not be shared by more than the permitted number of tenants.

E. The leasing, use or occupancy by a tenant of less than the entire dwelling is prohibited.

F. All applicable parking regulations provided for in § **245-45** of this chapter and Chapter **215**, Vehicles and Traffic, shall be complied with.

§ 245-17. Notice of violation.

[Amended 1-14-2008 by L.L. No. 2-2008]
Upon service of a notice of violation to a tenant for a violation of this article, notice of such service of a notice of violation shall be given by the Village Clerk to each owner and lessor of the rental property. Said notice shall be sent by certified mail to each such owner and lessor at the mailing address set forth in the rental permit application. Notice shall be deemed complete upon the execution of an affidavit of mailing by the Village Clerk.

§ 245-18. Penalties for offenses.

A. Where authorized by a duly adopted resolution of the Village Board, the Village Attorney shall bring and maintain a civil proceeding, in the name of the Village, to permanently enjoin the person or persons conducting, maintaining or permitting said violation. Each owner and lessor of the dwelling wherein the violation is conducted, maintained or permitted shall be made a defendant in the action, and each tenant of such dwelling may be joined as defendants in the action.

   (1) Each person who is listed as an owner upon the rental permit application shall be presumed to be an owner thereof.

   (2) If, upon the trial of an action under this chapter or upon a motion for summary judgment in an action under this chapter, a finding is made that the defendants or any of them has conducted, maintained or permitted a violation of this article, a penalty to be included in the judgment may be awarded at the discretion of the court in an amount not to exceed $1,000 for each day it is found that the defendant or any one of them conducted, maintained or permitted the violation.

B. Where authorized by a duly adopted resolution of the Village Board, the Village Attorney shall bring and maintain a civil proceeding in the name of the Village to recover a civil penalty against any person conducting, maintaining or permitting a violation of this article. The amount of any civil penalty awarded or judgment entered pursuant to this article may be at the discretion of the court in an amount of $1,000 for each day the violation has been conducted, maintained or permitted. Upon recovery, such penalty shall be paid into the general funds of the Village.

§ 245-19. Enforcement.

A. Notwithstanding the provisions of § **245-84** of this chapter, any duly authorized police officer, peace officer, fire marshal, ordinance inspector or building inspector hereby is authorized to enforce the provisions of this article and shall be defined as an enforcement officer under this article.

B. Any enforcement officer is authorized to make or cause to be made inspections to determine the compliance of a dwelling with this article and to safeguard the health, safety, and welfare of the public. The enforcement officer is authorized to enter, upon the consent of the owner, lessor, tenant or lessee, any premises for the purpose of performing his duties under this article.

C. The enforcement officer is authorized to make application for the issuance of a search warrant in order to conduct an inspection of any rental covered by this chapter where an owner or tenant refuses or fails to allow an inspection of the property and where there is reasonable cause to believe that a violation of this article has occurred.

D. Nothing in this chapter shall be deemed to authorize any enforcement officer to conduct an inspection of any rental property subject to this chapter without the consent of an owner or tenant of the rental property or without a warrant duly issued by an appropriate court.

Village of East Hampton, NY
Monday, January 23, 2017

Chapter 278. Zoning

§ 278-1. Definitions; nonconforming buildings.

A. Definitions. For the purpose of this chapter, certain words and terms shall have the following meanings:

ACCESSORY USE, BUILDING OR STRUCTURE

A subordinate use, building or structure customarily incidental to and located on the same lot occupied by the main use, building or structure. The term "accessory building" or "accessory structure" may include a swimming pool, tennis court, garage, shed, pool house, greenhouse or other similar building, none of which shall be designed for cooking or sleeping purposes, except those permitted pursuant to § **278-2B(7)(d)**. [Amended 6-20-1997 by L.L. No. 13-1997; 3-15-2002 by L.L. No. 6-2002; 1-18-2013 by L.L. No. 1-2013]

ALTERATION

As applied to a building or structure, a change or rearrangement of the structural parts or in the exit facilities thereof; or an enlargement, whether by extending on a side or by increasing in height; or moving from one location to another. The term "alter" in its various modes and tenses and its participle form refers to the making of an alteration. As used in this chapter, "remodel" or "reconstruction" is synonymous with this definition. Repairs or routine maintenance are not synonymous with this definition. By way of example, the replacement of a roof or windows or doors in place and in kind or an interior renovation that does not involve the installation of new systems, such as plumbing, heating or electrical systems, would not constitute an alteration for purposes of this chapter, but the installation of new windows or doors that are not in the same place and of the same kind as the existing ones or the introduction of new kitchen or bath facilities or habitable space in an area of a building not previously used as such would constitute an alteration.
[Amended 1-20-2012 by L.L. No. 2-2012]

APARTMENT

A room or grouping of rooms arranged and designed with provisions for cooking, living, sanitary and sleeping facilities such that it is suitable for occupancy by a single family on a long-term basis as its principal residence during the period of such occupancy or which, however arranged or designed, is in fact being used on such basis for such purpose. An entire "single-family residence," as herein defined,

regardless of its actual occupancy or use, shall not constitute an "apartment" unit.

ATTIC

The unfinished space between the ceiling joists of the top story and the roof rafters.
[Added 3-15-2002 by L.L. No. 7-2002]

AWNING

An architectural projection that provides weather protection, identity and/or decoration and is wholly supported by the building to which it is attached. An awning shall be comprised of a lightweight, rigid or retractable skeleton structure over which a cloth fabric cover is attached. An awning shall be hung at least seven feet six inches above the sidewalk or grade. All awnings shall be made of fire-retardant materials. (See § **278-4G**.)
[Added 12-15-1995 by L.L. No. 31-1995]

BUILDING, AREA OF

The area computed at the maximum horizontal cross-section of a building, including the area of all roofed porches, breezeways and similar features.
[Added 11-17-2000 by L.L. No. 7-2000]

BUILDING, COMMERCIAL

A building devoted to a use permitted exclusively in the Commercial/Core Commercial Districts and/or the Manufacturing-Industrial District, regardless of the district in which the building is situated.
[Added 3-14-2008 by L.L. No. 3-2008]

BUILDING LINE

The line which is parallel or concentric to the street line of the street on which a residential building fronts and which passes through the point at which the building is nearest to said street.

CELLAR

That space of a building that is partly or entirely below grade, which has more than half of its height, measured from floor to ceiling, below the average established curb level or finished grade of the ground adjoining the building. No part of a cellar shall be permitted to extend beyond the exterior wall of the first story of the building in which it is located, and no cellar shall extend more than 12 feet below natural grade.
[Added 3-15-2002 by L.L. No. 7-2002; amended 6-19-2015 by L.L. No. 17-2015]

COVERAGE

In all residential districts, that percentage of lot area covered by the ground floor area of all buildings sited thereon, together with all other structures. In all other districts, that percentage of lot area covered by the ground floor of all buildings sited thereon, together with all other structures, including pavements and impermeable surfaces except for walkways located on the property which are available and open to the public and which connect public areas.[1]

DISH ANTENNA

A structure having as its main purpose the reception of radio signals from orbiting satellites or terrestrial sources. The term shall include all satellite earth stations of whatever configuration. Any base, pedestal, foundation, reflector, amplifier, lens, prism or other device located out of doors and connected to or used in conjunction with a dish antenna shall be deemed a part thereof.

FAMILY

[Added 11-19-1993 by L.L. No. 25-1993[2]]

(1) Any number of persons occupying a single-family residence, related by blood, marriage or legal adoption, living and cooking together as a single housekeeping unit.

(2) Any number of persons occupying a single-family residence, not exceeding three, living and cooking together as a single stable and bona fide housekeeping unit where all are not related by blood, marriage or legal adoption. A group of persons whose association or relationship is transient or seasonal in nature, rather than of a permanent and domestic character, shall not be considered a "family."

(3) Notwithstanding the provisions of Subsection **(2)** of this definition, a group of unrelated persons numbering more than three shall be considered a "family" upon a determination by the Zoning Board of Appeals that the group is functional equivalent of a family pursuant to the standards enumerated in Subsection **(5)** herein. Notwithstanding the above, a group of persons whose association or relationship is transient or seasonal in nature, rather than of a permanent and domestic character, shall not be considered a "family" under any circumstances.

(4) In determining whether a group of more than three unrelated persons constitutes a family for the purpose of occupying a single-family residence, as provided for in Subsection **(3)** of this definition, the Zoning Board of Appeals shall utilize the standards enumerated in Subsection **(5)** in making said determination. Before making a determination under this subsection, the Zoning Board of Appeals shall hold a public hearing, after public notice, in conformance with this Chapter **278** of the East Hampton Village Code.

(5) In making a determination under Subsection **(4)**, the Zoning Board of Appeals shall find that:

(a) The group is one which in theory, size, appearance and structure resembles a traditional family unit.

(b) The group is one which will live and cook together as a single housekeeping unit.

(c) The group is of a permanent nature and is neither a framework for transient or seasonal living nor merely an association or relationship which is transient or seasonal in

An accessory structure or a portion of an existing accessory structure customarily used in conjunction with a swimming pool. A pool house or any portion of an accessory structure dedicated to such use shall not exceed 250 square feet of gross floor area. Interior plumbing fixtures shall be limited to a small sink and water closet, while an outdoor shower may be installed. All plumbing fixtures shall drain to a sanitary system in a conforming location. The structure shall not be insulated and/or heated. Pool houses shall contain no kitchen, cooking or sleeping facilities.
[Added 6-20-1997 by L.L. No. 13-1997]

PROFESSIONAL SIGN

A sign bearing the name and profession of the resident practitioner which may not exceed two square feet in area.
[3]

RESTAURANT

A use in a building having as its sole purpose the preparation and serving of food for consumption on the premises within furnished dining areas, and including as a possible accessory the serving of alcoholic beverages with meals, but not including any form of live entertainment or dancing for guests. A restaurant shall not be construed to include any form of drive-in, open-front, curb-service or fast-food eating establishment or any form of tavern, bar, nightclub, discotheque or similar entertainment establishment.
[Added 7-31-2008 by L.L. No. 7-2008]

RETAIL FOOD STORE

A retail store for the sale of food, including a bakery, specialty food market, or store for the sale of retail food or beverage products, but not including a restaurant, fast-food establishment, delicatessen, drive-in, tavern, bar, nightclub or discotheque. A retail food store shall not include tables or chairs or counters for on-premises consumption, and on-premises consumption in any form shall not be permitted as an accessory use to a retail food store.
[Added 7-31-2008 by L.L. No. 7-2008

SETBACK

The distance which this chapter requires maintained between a property line, natural feature (including edge of wetlands, dunes and bodies of water) or other described place or thing and the nearest point thereto of any building, structure or other named improvement.

SIGN

Any advertising structure, display board, screen, structure, shadow box, poster, mannequin, banner, pennant, cloth, bill, bulletin, painting, printing or other device or object or part thereof used to announce, identify, declare, demonstrate, display or in any manner advertise or attract the attention of the public by means of letters, words, figures or colors. See § **278-4**.

SINGLE-FAMILY RESIDENCE

A residential use of land consisting of a detached and freestanding building, commonly called a "house," designed or arranged for

occupancy by one family, as defined herein, on a nontransient basis. A single-family residence which is rented to, or occupied by, a tenant or tenants for a term or terms of less than one month, excluding two two-week periods during any one calendar year, shall be deemed transient housing and is not permitted. A single-family residence may not contain more than two guest rooms, as defined herein, and may not contain more than one kitchen.
[Amended 9-17-1993 by L.L. No. 16-1993; 12-8-2009 by L.L. No. 13-2009]

SPECIAL PERMIT USE
A use permitted in one or more districts only if a special permit shall have been granted therefor, pursuant to § **278-7** of this Code.

STORY
That portion of a building which is between one floor level and the next higher floor level or roof. For the purpose of measuring height by stories under the provisions of this chapter, one additional story shall be added for any pilings, piers or other foundation which causes the building to be elevated more than four feet above average natural grade. In the case of a property located in a FEMA flood zone, the area between the adjacent natural grade and the minimum required first-floor elevation shall not be considered a story.
[Added 6-19-2015 by L.L. No. 16-2015]

STRUCTURE
Anything, including any building, which is constructed or erected on or under the ground or the water or upon another structure or building, including antennas, aerials, tennis courts, swimming pools, decks and patios (including those set in sand) or other improvements, whether or not intended to be temporary, seasonal or permanent, except for fences, driveways, walkways of not more than 48 inches in width (limited to one walkway per lot) leading from a driveway or from a street-front to a door of a dwelling, and dry wells and/or catch basins designed to catch surface water runoff (as opposed to pool drainage).
[Amended 4-17-1992 by L.L. No. 9-1992; 7-31-2013 by L.L. No. 16-2013; 12-18-2015 by L.L. No. 23-2015]

SWIMMING POOL
Any enclosure or container, either for public or private use, which encloses a body of water greater than six feet in any direction and contains water of a depth of 18 inches or more. See § **278-5**.[4]

TENT
Any structure, enclosure or shelter constructed of fabric or pliable material supported in any manner, including but not limited to a canopy, but not including an awning as that term is defined in this section.
[Added 2-18-2005 by L.L. No. 3-2005]

TIMBER-FRAME LANDMARK
An individual property that has been designated as one of the group of timber-frame landmarks, 1700 to 1850, designated by the East Hampton Village Board of Trustees pursuant to § **176-3A** of the Code (Preservation of Historic Areas).
[Added 1-18-2013 by L.L. No. 1-2013]

Town of Riverhead, NY
Monday, January 23, 2017

Chapter 263. Rental Dwelling Units

[HISTORY: Adopted by the Town Board of the Town of Riverhead 9-6-2006 by L.L. No. 34-2006 (Ch. 86 of the 1976 Code). Amendments noted where applicable.]

GENERAL REFERENCES

Buildings, building construction and improvements and housing standards — See Ch. **217**.

§ 263-1. Findings; intent.

The Town Board of the Town of Riverhead has determined that there exist in the Town of Riverhead serious conditions arising from the rental of dwelling units that are substandard or in violation of the New York State Uniform Fire Prevention and Building Code, Multiple Residence Law, Town of Riverhead Housing Code, Building Rehabilitation Code, Electrical Code, Fire Prevention Code, Plumbing Code and other codes and ordinances of the Town, are inadequate in size, overcrowded and dangerous, that such dwelling units pose hazards to life, limb and property of residents of the Town and others, tend to promote and encourage deterioration of the housing stock of the Town, create blight and excessive vehicle traffic and parking problems and overburden municipal services. The Board finds that current Code provisions are inadequate to halt the proliferation of such conditions and that the public health, safety, welfare and good order and governance of the Town will be enhanced by the enactment of the regulations set forth in this chapter, which regulations are remedial in nature and effect.

§ 263-2. Applicability; conflicting provisions.

A. Scope. This chapter shall apply to all rental dwelling units located within the Town of Riverhead, whether or not the use and occupancy thereof shall be permitted under the applicable use regulations for the zoning district in which such rental dwelling unit is located, as provided in this chapter. Any dwelling unit or any other premises subject to this chapter shall be presumed to be rented for a fee and a charge made if said premises are not occupied by the legal owner thereof.

B. Applicability. The provisions of this chapter shall be deemed to supplement applicable state and local laws, ordinances, codes and regulations. Nothing in this chapter shall be deemed to abolish, impair, supersede or replace existing remedies of the Town, county or state or

existing requirements of any other provision of local laws or ordinances of the Town or county or state laws and regulations. In case of conflict between any provisions of this chapter and any applicable state or local law, ordinance, code or regulation, the more restrictive or stringent provision or requirement shall prevail. The issuance of any permit or the filing of any form under this chapter does not make legal any action or state of facts that is otherwise illegal under any other applicable legislation.

§ 263-3. Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

ABANDONED HOUSEHOLD CONTENTS

Furniture, furnishings, housewares, appliances and other personal property customarily found in and used in residential dwellings, which are deposited at or along said dwelling's street frontage, in part or in whole, pursuant to a duly executed warrant of eviction by legally authorized law enforcement officers and/or personnel.

APARTMENT HOUSE

A dwelling for three or more families living independently of each other.

APARTMENTS, GARDEN

A group of buildings not more than 2 1/2 stories in height, each building containing not more than eight dwelling units. If buildings are attached, they shall not contain in the aggregate more than 16 dwelling units. No portion of any such building below the first story or above the second story shall be used for dwelling purposes.

AUTHORIZED AGENT

Any person, organization, partnership, association, corporation or other legally recognized entity given express written authorization by an owner to act on his behalf regarding this chapter and all state and local rules, regulations and ordinances referenced herein.

CODE ENFORCEMENT OFFICIAL

The official who is charged with the administration and enforcement of this chapter, or any duly authorized representative of such person, including but not limited to the Building Inspector, Chief Building Inspector, Principal Building Inspector, Senior Building Inspector, Building Permits Coordinator, Zoning Inspector, Electrical Inspector, Plumbing Inspector, Fire Marshal, Fire Marshal I, Fire Marshal II, Chief Fire Marshal, Town Investigator, Senior Town Investigator, Ordinance Enforcement Officer or Ordinance Inspector of the Town of Riverhead, and such person (s) shall be certified as a New York State Code Enforcement Official.

CONDOMINIUM

A dwelling unit in a housing complex of one-, two- or multiple-family dwelling units with an arrangement whereby the occupants or an occupant of each unit has full title to that particular unit and a joint ownership with all other title holders in the housing complex of certain common property.

DWELLING
A building designed exclusively for residential purposes and arranged or intended to be occupied by one individual or one family only.

DWELLING, MULTIPLE-FAMILY
A building, other than a garden apartment or apartment house, designed for and occupied as a residence by three or more families living independently of each other.

DWELLING, ONE-FAMILY
A detached building designed for and occupied exclusively as a home or residence by not more than one family.

DWELLING, TOWNHOUSE
A one-family dwelling in a row of at least three such units in which each unit has its own front and rear access to the outside, no unit is located over another unit and each unit is separated from any other unit by one or more common fire-resistant walls.

DWELLING, TWO-FAMILY
A building arranged, designed for or occupied exclusively as a home or residence for not more than two families living independently of each other.

DWELLING UNIT
A single unit within a building or structure providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.
[Amended 2-17-2016 by L.L. No. 7-2016]

FAMILY

A. One or more persons, whether or not related to each other by blood, marriage or adoption, all occupying a single, whole, legal single or one-family dwelling unit as a traditional family or the functional equivalent of a traditional family, shall be considered a family, and further provided that persons occupying group quarters, such as a dormitory, fraternity or sorority house or a seminary, shall not be considered a family, having access to and utilizing the whole of such dwelling unit, including but not limited to all rooms and housekeeping facilities, in common.

B. In determining whether individuals are living together as the functional equivalent of a traditional family, the following criteria must be present:

   (1) The group is one which in structure and function resembles a traditional family unit; and

   (2) The occupants must share the entire single or one-family dwelling unit and live and cook together as a single housekeeping unit. A unit in which the various occupants act as separate roomers may not be deemed to be occupied by the functional equivalent of a traditional family; and

   (3)

The adult occupants share expenses for food, rent, ownership costs, utilities and other household expenses; and

(4) The occupancy is permanent and stable. Evidence of such permanence and stability includes, but is not limited to:

(a) The presence of minor children regularly residing in the household who are enrolled in local schools;

(b) Members of the household have the same address for purposes of voter registration, driver's licenses, motor vehicle registration, filing of taxes and delivery of mail;

(c) Members of the household are employed in the area;

(d) The household has been living together as a unit for a year or more, whether in the current dwelling unit or in other dwelling units;

(e) Common ownership of furniture and appliances among the members of the household; and

(f) Any other factor reasonably related to whether or not the occupants are the functional equivalent of a family.

IMMEDIATE FAMILY

The immediate family of the owner of a dwelling unit consists of the owner's spouse, children, parents, grandparents or grandchildren.

MANAGING AGENT

Any individual, business, partnership, firm, corporation, enterprise, trust, company, industry, association, public utility or other legal entity responsible for the maintenance or operation of any rental property as defined within this chapter.

NEW PERMIT

A permit which is to be issued to the owner of an intended rental premises where such premises has not been the subject of a rental occupancy permit continuously prior to the date of application for the permit.

OCCUPANT

A natural person who leases, uses or occupies a dwelling unit.

OWNER

Any person or entity in whose name the real property upon which the dwelling unit is situated is recorded in the office of the Suffolk County Clerk. The person or entity in whose name the real property is recorded in the office of the Suffolk County Clerk shall be presumed to be the owner thereof.

RENEWAL RENTAL OCCUPANCY PERMIT

A permit which is to be issued to the owner of a rental dwelling unit where such premises has been the subject of a rental occupancy permit continuously prior to the date of application for the permit.

RENT

A return, in money, property or other valuable consideration (including payment in kind or for services or other thing of value), for the use and occupancy or the right to the use and occupancy of a dwelling unit, whether or not a legal relationship of landlord and tenant exists between the owner and the occupant or occupants thereof.

RENTAL DWELLING
A dwelling unit established, occupied, used or maintained for rental occupancy.

RENTAL OCCUPANCY
The occupancy or use of a dwelling unit by one or more persons as a home or residence under an arrangement whereby the occupant or occupants thereof pay rent for such occupancy and use.

RENTAL OCCUPANCY PERMIT
A permit which is issued upon application to the Code Enforcement Official and shall be valid for two years from the date of issuance.

RENTAL OCCUPANCY REGISTRATION
The registration of a rental dwelling on a form that is approved by the Code Enforcement Official.

TRANSIENT
A rental period of 29 days or less.
[Added 10-16-2013 by L.L. No. 17-2013]

§ 263-4. Rental occupancy permit required.

A. It shall be unlawful and a violation of this chapter for any person or entity who owns a dwelling unit in the Town to use, establish, maintain, operate, let, lease, rent or suffer or permit the occupancy and use thereof as a rental occupancy by someone other than the owner without first having obtained a valid rental occupancy permit therefor. Failure or refusal to procure a rental occupancy permit hereunder shall be deemed a violation.

B. A rental occupancy permit issued under this chapter shall only be issued to the owner(s) of the real property at issue.

C. In the event that the ownership of a rental dwelling is transferred, the new owner shall register the property within 30 days of the closing of title pursuant to the requirements set forth in this chapter, as a rental occupancy permit issued under this chapter is not transferable. If the rental dwelling is not registered as required by this chapter, there will be a presumption that said property is being utilized as rental property by the new owner(s) in violation of this chapter.

D. Transient rentals.
[Added 10-16-2013 by L.L. No. 17-2013]

(1) A transient rental is prohibited.

(2) The prohibition on transient rental shall not apply to the following: any legally operating commercial hotel/motel business or bed-and-

breakfast establishment operating exclusively and catering to transient clientele, that is, customers who customarily reside at these establishments for short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel business.

§ 263-5. Application for rental occupancy permit.

A. An application for a rental occupancy permit for a rental dwelling unit shall be made in writing to the Code Enforcement Official on a form provided therefor. Such application shall be filed and shall include the following:

(1) The name, address and telephone number of the owner of the dwelling unit intended for rental occupancy. In the event that said dwelling unit is owned by more than one individual or entity, each owner's name, address and telephone number shall be provided. In the event that the owner of the dwelling unit intended for rental occupancy is a corporation, partnership, limited-liability company or other business entity, the name, address and telephone number of each owner, officer, principal, shareholder, partner and/or member of such business entity shall be provided. In the event that the owner has an authorized agent acting on his behalf, that person's name, address and telephone number shall also be provided.

(2) Proof of residency of each owner.

(3) The street address and Tax Map designation (section, block and lot or lots) of the premises intended for rental occupancy or the premises in which the rental dwelling units intended for occupancy are located.

(4) A description of the structure, including the number of rental dwelling units in the structure.

(5) A floor plan depicting the location, use and dimension of each room situated within the dwelling unit.

(6) The number of persons intended to be accommodated by, and to reside in, each such rental dwelling unit.

(7) The name of each person that is and/or will be occupying the premises intended for rental occupancy. The name of each person that is and/or will be occupying the premises intended for rental occupancy shall not be required if:

(a) The rental dwelling unit only operates during a one-hundred-fifty-day period in the months of May, June, July, August and September and the person that is or will be occupying said rental dwelling unit shall not be occupying such rental dwelling unit for more than 30 consecutive days; or

(b) Said rental dwelling unit is a commercial hotel/motel business operating exclusively and catering to transient clientele, that is, customers who customarily reside at these establishments for

short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel operation. For the purposes of this chapter, a "short duration" shall be defined as not more than 21 consecutive days.

(8) A copy of the most recent deed and real property tax bill, confirming the ownership of record of the dwelling unit.

(9) A copy of the certificate of occupancy or certificate of existing use for the dwelling unit.

(10) A property survey of the premises drawn to scale not greater than 40 feet to one inch or, if not shown on the survey, a site plan, drawn to scale, showing all buildings, structures, walks, driveways and other physical features of the premises and the number, location and access of existing and proposed on-site vehicle parking facilities.

(11) A building permit application, properly prepared, for all proposed buildings, improvements and alterations to existing buildings on the premises, if any.

(12) Each application shall be executed by and sworn to under oath by the owner of the dwelling unit.

(13) If the owner or authorized agent of a dwelling unit resides or has his principal place of business located outside the County of Suffolk, he is required to designate an agent who resides in the County of Suffolk for the service of process of any notices set forth in this chapter or for the service of process of a violation of this chapter. The failure to provide the name and address of an agent for service of process shall be deemed a violation of this chapter.

B. New applications.

(1) A new application for a rental occupancy permit shall be filed whenever a dwelling unit or portion thereof, other than a rental dwelling unit that only operates during a one-hundred-fifty-day period in the months of May, June, July, August and September, has become vacant and the owner intends to permit a new tenant or other person to take up residence. No additional fee will be required if the owner is registering a change in tenancy only under an existing valid rental occupancy permit.

(2) A rental dwelling unit that only operates during a one-hundred-fifty-day period in the months of May, June, July, August and September shall be required to file a new application for a rental occupancy permit if any tenant occupies said rental dwelling unit for a period of 30 consecutive days or more. No additional fee will be required if the owner is registering a change in tenancy only under an existing valid rental occupancy permit.

C. In the case of a condominium unit, the application for a rental occupancy permit shall be accompanied by a scale drawing or floor plan of the condominium unit in lieu of a survey or site plan.

D. Each application for a rental occupancy permit shall be accompanied by an affidavit, signed by each owner and tenant named in the application, confirming that they have received copies of all Town laws and ordinances affecting rentals, noise, vehicle parking restrictions on residential lots and refuse disposal and agree to abide by the same.

E. Notwithstanding the above, no rental occupancy permit shall be required for agricultural worker housing as defined in § **301-3** of the Riverhead Town Code.

F. Notwithstanding the above, no rental occupancy registration or permit shall be required for a residential care facility established under federal, New York State or Suffolk County guidelines or for units where occupants are in an established care program.

G. Notwithstanding the above, no rental occupancy permit shall be required for any commercial hotel/motel business operating exclusively and catering to transient clientele, that, is customers who customarily reside at these establishments for short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel operation, except that the exemption in this Subsection **G** shall not apply to any commercial hotel/motel whose primary purpose is to provide permanent residences to its customers as defined in this chapter.
[Added 2-17-2016 by L.L. No. 7-2016]

§ 263-6. Fees.

[Amended 7-3-2007 by L.L. No. 22-2007; 2-17-2016 by L.L. No. 7-2016]

A. A nonrefundable biennial permit application fee shall be paid, upon filing an application for a rental occupancy permit or for a renewal rental occupancy permit, in accordance with the following schedule of rental dwelling units per structure:

Type of Dwelling	**Fee**
1-unit	$300
2-unit	$400
3-unit	$500
4-unit	$650
More than 4 units	$1,000, plus $100 for each unit in excess of 5

B. The fee required by this section shall be waived for any applicant who demonstrates that the dwelling unit is occupied by the immediate family of the owner of the dwelling unit as defined in this chapter.

C. Any commercial hotel/motel business operating exclusively and catering to transient clientele, that, is customers who customarily reside at these establishments for short durations for the purpose of vacationing, travel, business, recreational activities, conventions, emergencies and other activities that are customary to a commercial hotel/motel operation, shall be exempt from the fee required by this section. For the purposes of this

chapter, a "short duration" shall be defined as not more than 21 consecutive days. The exemption in this Subsection **C** shall not apply to any commercial hotel/motel whose primary purpose is to provide permanent residences to its customers, and they shall pay a biennial fee of $1,000 per application, plus $100 for each unit. For the purposes of this chapter, "permanent residence" shall be defined as more than 21 consecutive days.

D. Any rental dwelling unit that only operates during a one-hundred-fifty-day period in the months of May, June, July, August and September only shall pay a biennial fee of $50 per unit.

E. Notwithstanding any other section of this chapter, any violation of § **263-6** for the failure to obtain or timely renew a rental permit by the owner(s) and/or tenant(s) shall be punishable as follows:

(1) By a fine of not less than $250 and not exceeding $1,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of a first offense.

(2) By a fine of not less than $1,000 nor more than $3,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of the second of two offenses, both of which were committed within a period of five years.

(3) By a fine of not less than $2,000 nor more than $5,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of the third or subsequent offenses of a series of offenses, all of which were committed within a period of five years.

F. Each week's continued violation shall constitute a separate additional violation.

§ 263-7. Compliance with Town, county and state laws required.

A. No rental occupancy permit or renewal thereof shall be issued under any application unless the property shall be in compliance with all the provisions of the Code of the Town of Riverhead, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York.

B. Prior to the issuance of any rental occupancy permit or renewal thereof, the property owner shall provide a certification from a licensed architect, a licensed professional engineer or a Code Enforcement Official that the property which is the subject of the application is in compliance with all of the provisions of the Code of the Town of Riverhead, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York.

§ 263-8. Review of application; issuance of permit.

The Code Enforcement Official shall review each rental permit application for completeness and accuracy and shall make an on-site inspection of the proposed rental dwelling unit or units unless the property owner has chosen to provide a certification from a licensed architect or a licensed professional engineer that the property which is the subject of the application is in compliance with all of the provisions of the Code of the Town of Riverhead, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York. If satisfied that the proposed rental dwelling unit or units, as well as the premises in which the same are located, comply fully with all applicable state and local laws, ordinances, rules and regulations of the county and Town, and that such rental dwelling unit or units would not create an unsafe or dangerous condition or create an unsafe and substandard structure as defined in the Riverhead Town Code or create a nuisance to adjoining nearby property, the Code Enforcement Official shall issue the rental occupancy permit or permits.

§ 263-9. Term and renewal.

A. All rental occupancy permits issued pursuant to this chapter shall be valid for a period of two years from the date of issuance.

B. Renewals.

(1) A renewal rental occupancy permit application signed by the owner on a form provided by the Code Enforcement Official shall be completed and filed with the Code Enforcement Official no later than 60 days before the expiration of any prior valid rental occupancy permit. A renewal rental occupancy permit application shall contain a copy of the prior valid rental occupancy permit issued by the Code Enforcement Official.

(2) A renewal rental occupancy permit application shall contain a signed sworn statement setting forth the following:

(a) That there are no existing or outstanding violations of any federal, state or county laws, rules or regulations or of any Town of Riverhead local laws or ordinances pertaining to the property; and

(b) That there are no changes to any information as provided on the prior valid rental occupancy permit registration and application.

§ 263-10. Register of permits.

It shall be the duty of the Code Enforcement Official to maintain a register of the rental occupancy permits issued pursuant to this chapter. Such register shall be kept by Tax Map number, license number, receipt number and street address showing the name and address of the permittee, the number of rental dwelling units at such street address, the number of rooms in each such rental dwelling unit and the date that said rental occupancy permit expires for such unit.

§ 263-11. Authorization for inspections.

The Code Enforcement Official is authorized to make, or cause to be made, inspections to determine the condition of rental dwelling units to safeguard the health, safety and welfare of the public. The Code Enforcement Official is authorized to enter, upon consent of the owner if the unit is unoccupied, or upon consent of the occupant if the unit is occupied, any rental dwelling unit and the premises in which the same is located, at any reasonable time during daylight hours, or at such other time as may be necessary in an emergency, without consent of the owner, authorized agent and/or tenant for the purpose of performing his duties under this chapter.

§ 263-12. Application for search warrant.

The Code Enforcement Official is authorized to make application to any court of competent jurisdiction for the issuance of a search warrant in order to conduct an inspection of any premises covered by this chapter where the owner refuses or fails to allow an inspection of its rental premises and where there is reasonable cause to believe that a violation of this chapter has occurred. The application for a search warrant shall in all respects comply with the applicable laws of the State of New York.

§ 263-13. Search without warrant restricted.

Nothing in this chapter, except for provisions concerning emergency inspections, shall be deemed to authorize the Code Enforcement Official to conduct an inspection of any premises subject to this chapter without the consent of the owner of the premises and without a warrant duly issued by an appropriate court.

§ 263-14. Abandoned household contents.

A. Duty to keep frontage of dwelling unit property free and clear of abandoned household contents and Town's authority to remove. The owner, authorized agent, managing agent and/or occupant of a dwelling unit which is or was being used as a rental dwelling shall maintain such property frontage, including but not limited to the front yard and/or the contiguous right-of-way, free of abandoned household contents as

defined in this chapter. In the event that abandoned household contents as defined in this chapter are located upon or contiguous with the frontage and/or abutting right-of-way of a lot or parcel of land, for a period in excess of 48 hours, the Town is hereby authorized, as provided for herein, to enter upon such property, if necessary, to remove said abandoned household contents so located, to assess the cost and expense of such undertaking against the property and to establish a lien as herein provided.

B. Inspection and report. Upon notification that abandoned household contents are located on or along the property frontage of a rental dwelling unit and/or the right-of-way contiguous thereto, the Code Enforcement Official may make an inspection thereof and report his findings concerning the same to the Town Board.

C. Notice. If the Code Enforcement Official shall find that abandoned household contents are located on or contiguous to the frontage of rental dwelling unit property, he may make an order, directing notice to be served upon the owner of said property as appears in the records of the Receiver of Taxes of the Town.

D. Contents of notice. The notice shall contain a general description of the property, a statement of the particulars with regard to the violative condition(s) existing at the rental dwelling unit property and an order requiring that the abandoned household contents existing on or contiguous with the property, and/or its frontage, be removed. The notice shall specify a time, not less than 48 hours after the service thereof, within which the owner served with such notice shall complete the removal of the abandoned household contents from the property or along the frontage or the contiguous right-of-way as specified in the notice. The notice shall further state that, in the event that the cited condition is not eliminated within the time specified in the notice, the Town shall undertake to enter upon the property, if necessary, to remove the abandoned household contents and assess the cost of such removal against said property.

E. Service of notice. The notice may be served either personally or by certified mail, addressed to the last known address, if any, of the owner as the same may appear on the records of the Receiver of Taxes of the Town; provided, however, that if such service is made by certified mail, a copy thereof shall also be posted on the property where the abandoned household contents are located. Service of the notice by mail and posting shall be deemed completed on the day on which both the mailing and the posting will have been accomplished.

F. Failure to comply. Upon failure of the owner of the rental dwelling unit to comply with the notice within the time provided therein, the Town shall provide such labor and materials as are necessary for removing the abandoned household contents from said property or its frontage or contiguous right-of-way and shall cause such work to be performed as will remove the abandoned household contents from the property.

G. Assessment of costs and expenses. All costs and expenses incurred by the Town in connection with the removal of the abandoned household contents from said property or its frontage or contiguous right-of-way

shall be assessed against the subject land or lot. An itemization of such costs shall be provided to the Town Board by the Code Enforcement Official. The total costs and expenses shall then be determined by the Town Board and shall be reported to the Assessor of the Town as the amount to be liened and assessed against the property, and the expense so assessed shall constitute a lien and charge on the property on which it is levied until paid or otherwise satisfied or discharged and shall be collected in the same manner and at the same time as other Town charges.

§ 263-15. Revocation of permit.

A. The Code Enforcement Official shall revoke a rental occupancy permit where he finds that the permit holder has caused, permitted, suffered or allowed to exist and remain upon the premises for which such permit has been issued for a period of 14 business days or more after written notice has been given to the permit holder or the managing agent of such rental dwelling unit a violation of the Multiple Residence Law, New York State Uniform Fire Prevention and Building Code or a violation of this chapter or other chapter of the Riverhead Town Code. Revocation of a permit under this subsection cannot be done by a devisee or assistant of the Code Enforcement Official.

B. An appeal from such revocation may be taken by the permit holder to the Town Board, by written request, made within 30 days from the date of such revocation. The Town Board shall hold a public hearing on such appeal within 30 days after receipt of written notice of such appeal, and after such hearing shall make written findings, a conclusion and a decision either sustaining such permit revocation or reinstating such permit within 30 days after the close of such public hearing. Unless the Town Board directs otherwise in circumstances constituting serious threats to health and safety, the filing of an appeal shall stay the effectiveness of a permit revocation until the Town Board has considered and ruled upon the issue.

§ 263-16. Confidentiality of rental registration.

Under New York State Public Officers Law § 87, Subdivision 2(b), rental registration forms, and that portion of the rental occupancy permit application required, shall be exempt from disclosure under the Freedom of Information Law on the grounds that such disclosure would constitute an unwarranted invasion of personal privacy. The Code Enforcement Official will institute strict policies to ensure that such information is available only to Town personnel who are engaged in the enforcement of the provisions of this chapter.

§ 263-17. Broker's responsibility prior to listing.

It shall be unlawful and a violation of this chapter for any broker or agent to list, show or otherwise offer for lease, rent or sale on behalf of the owner or

authorized agent any dwelling unit for which a current rental occupancy permit has not been issued by the Code Enforcement Official. It shall be the broker's or agent's duty to verify the existence of a valid rental occupancy permit before acting on behalf of the owner or authorized agent. Notwithstanding the above, first-time rentals shall be granted a fourteen-business-day grace period for submission of the required rental permit application paperwork and tenant registration.

§ 263-18. Presumptive evidence of violations.

A. It shall be presumed that a single or one-family dwelling unit is occupied by more than one family if any two or more of the following features are found to exist on the premises by the Code Enforcement Official authorized to enforce or investigate violations of Chapter **263** of the Code of the Town of Riverhead or any laws, codes, rules and regulations of the State of New York:

(1) More than one mailbox, mail slot or post office address;

(2) More than one doorbell or doorway on the same side of the dwelling unit;

(3) More than one gas meter;

(4) More than one electric meter, except as may be permitted by the Building Department Administrator or his designee as set forth in Chapter **217**, Part **1**, § **217-6M(4)**, of the Code of the Town of Riverhead;
[Amended 6-17-2008 by L.L. No. 19-2008]

(5) More than one connecting line for cable television service;

(6) More than one antenna, dish antenna or related receiving equipment;

(7) Separate entrances for segregated parts of the dwelling unit, including but not limited to bedrooms;

(8) Partitions or internal doors with locks which may serve to bar access between segregated portions of the dwelling unit, including but not limited to bedrooms;

(9) Separate written or oral leases or rental arrangements, payments or agreements for portions of the dwelling unit among its owner(s) and occupants;

(10) The inability of any occupant to have lawful access to all parts of the dwelling unit; or

(11) Two or more kitchens, each containing one or more of the following: a range, oven, hotplate, microwave or other similar device customarily used for cooking or the preparation of food, refrigerator and/or a sink.

B. If any two or more of the features set forth in Subsection **A(1)** through **(11)** above are found to exist on the premises by the Code Enforcement

Official, a verified statement will be requested from the owner of the building or dwelling unit by the Code Enforcement Official that the building or dwelling unit is in compliance with all of the provisions of the Code of the Town of Riverhead, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York. If the owner fails to submit such verified statement in writing to the Code Enforcement Official within 10 days of such request, such shall be deemed a violation of this chapter.

C. All of the foregoing may be rebutted by evidence presented to the Code Enforcement Official or any court of competent jurisdiction.

§ 263-19. Presumptive evidence of dwelling unit rental.

A. The presence or existence of any of the following shall create a presumption that a dwelling unit is rented:

(1) The dwelling unit is occupied by someone other than the owner, and the owner of the dwelling unit represents, in writing or otherwise, to any person, establishment, business, institution or government agency that he resides at an address other than the dwelling unit in question.

(2) Persons residing in the dwelling unit represent that they pay rent to the owner of the premises.

(3) Utilities, cable, telephone or other services are in place or are requested to be installed or used at the dwelling unit in the name of someone other than the owner.

(4) Testimony by a witness that it is common knowledge in the community that a person other than the owner resides in the dwelling unit.

B. All of the foregoing may be rebutted by evidence presented to the Code Enforcement Official or any court of competent jurisdiction.

§ 263-20. Presumptive evidence of owner's residence.

A. It shall be presumed that an owner of a dwelling unit does not reside within said dwelling unit if one or more of the following sets forth an address which is different than that of the dwelling unit:

(1) Voter registration;

(2) Motor vehicle registration;

(3) Driver's license; or

(4) Any other document filed with a public agency.

B. All of the foregoing may be rebutted by evidence presented to the Code Enforcement Official or any court of competent jurisdiction.

§ 263-21. Penalties for offenses.

A. Any person, association, firm or corporation which violates any provision of this chapter or assists in the violation of any provision of this chapter shall be guilty of a violation, punishable:

(1) By a fine of not less than $250 and not exceeding $1,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of a first offense.

(2) By a fine of not less than $1,000 nor more than $3,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of the second of two offenses, both of which were committed within a period of five years.

(3) By a fine of not less than $2,000 nor more than $5,000 or by imprisonment for a period not to exceed 15 days, or both, for conviction of the third or subsequent offenses of a series of offenses, all of which were committed within a period of five years.

B. Each week's continued violation shall constitute a separate additional violation.

§ 263-22. Enforcement.

This chapter shall be enforced by the Code Enforcement Official as defined by this chapter.