New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

Back to Article

Rent Abatement for Natural Disasters: One Size Does Not Fit All

Warren A. Estis and Michael E. Feinstein

New York Law Journal

04-03-2013

It has been reported that a spate of litigation has been filed by residential tenants seeking rent abatements from their landlords, on various grounds, as a result of Hurricane Sandy, the unprecedented storm that hit New York City on Oct. 29-30, 2012, leaving hundreds of thousands without electricity, elevator service, heat and/or hot water for several days and longer. Among the most ambitious lawsuits is a proposed class action lawsuit filed by three tenants who are seeking bilateral class status, attempting to add potentially hundreds of thousands of tenants and landlords in the state of New York to the action.[1] These actions have opened unchartered legal territory.

Issues raised in these cases include to what extent should residential tenants who lost services due to a natural disaster be entitled to a rent abatement? Also, should all tenants be entitled to a rent reduction for a deprivation of essential services, regardless of the disparate impact of the disaster upon various tenants and without consideration of the landlords' response?

Assume the following scenario: After the superstorm hit, all utility service was lost resulting in a concomitant loss of heat, running water and elevator service in two similar apartment buildings. Incurring great cost, the owner of the first building bought a generator such that common areas had light, provided meals and bottled water for the tenants, set up a charging station in the lobby so that tenants could recharge their cell phones, and handed out flashlights to tenants. In contrast, the owner of the other building did not lift a finger to help his tenants in their time of need. Under New York law, have both owners breached the warranty of habitability such that the tenants are automatically entitled to a rent abatement for failing to provide essential services regardless of the efforts the owner made in mitigation?

The Legal Background

The starting point of the analysis is Section 235-b of the New York Real Property Law (RPL), which implies a warranty of habitability into every residential lease in New York that the premises are fit for human habitation, that the condition of the premises is in accord with the uses reasonably intended by the parties, and that the occupants will not be subjected to any conditions dangerous, hazardous or detrimental to their life, health or safety.

Over 30 years ago, in *Park West Mgmt. v. Mitchell*, tenants in an apartment complex saw their trash pile up and were denied routine maintenance services over the course of a 17-day labor strike. Affirming a 10 percent reduction of one month's rent, the New York Court of Appeals stated that conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disasters are all within the scope of the warranty. Despite this holding, the court further stated that:

the warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability. Rather [the statute] was designed to give rise to an implied promise [by] the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term.[2]

Significantly, the court observed that it is impossible to attempt to document every instance in which the warranty of habitability could be breached, and that each case must turn on its own peculiar facts.

To provide some guidance, the *Park West* court commented that a finding that the premises are in violation of applicable housing codes does not necessarily constitute a breach of the warranty. Instead, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the

code violation, the manner in which it impacted the health, safety and welfare of the tenants, and the measures taken by the landlord to alleviate the violation. Accordingly, a court should consider efforts by a landlord to mitigate problems that it did not cause in determining whether a breach has occurred.

After *Park West*, RPL §235-b was amended in 1983 to add protection for landlords in cases of strikes or labor disputes that they did not cause, if they made, where practicable, a good faith attempt to cure the breach. This constitutes legislative recognition that it would be inequitable to impose strict liability upon landlords for violations that arguably establish a breach under the language of the statutory warranty of habitability.

Another appellate court has held that, even though tenant health and safety are adversely affected by an insufficiency of heat, not every such deprivation will constitute a breach of the warranty.[3] The Appellate Term reiterated that a decision as to a breach of the warranty will turn on the extensiveness of the breach of the applicable housing codes, the manner in which it affected the health of the tenant, and the measures taken by the landlord to alleviate the violation. It observed that the ultimate determination of residential tenant rate abatement claims is rarely capable of resolution by papers alone.

The Inquiry Is Fact-Intensive

It is easy to jump to the conclusion that a residential tenant is entitled to a rent abatement based on a breach of the warranty of habitability, simply because of an interruption of service of electricity, elevator service and/or heat for several days. But the careful inquiry required of courts in each case may lead to a different conclusion. It is evident that not all natural disasters or service disruptions affect all tenants equally. The loss of elevator service in a four-story building may be much less significant than the loss of such service in a 34-story building, and tenants in the latter on lower floors are generally much less affected by such loss than tenants on higher floors. Similarly, those living on high floors are less likely to be adversely affected by flooding than tenants in basement or ground floor apartments. The loss of electricity is likely less significant to tenants who have gas heat and/or gas ovens. The tenant mix across buildings also varies and should also be taken into account. The loss of heat and hot water could have a more dramatic impact upon a building occupied by the elderly and families with small children as opposed to a building whose tenants are mostly college students and young professionals.

As the response of the landlord is also relevant to rent abatement claim litigation, the fact-finder should review what actions a landlord took or did not take to ameliorate the detrimental impact of the disruption of service, and whether such action was taken as promptly as possible. Such considerations should be analyzed with respect to each individual claim for rent abatement. It is thus difficult to rationalize affording class action treatment to rent abatement litigation involving all residential tenants in New York State or New York City who were without electricity, heat and/or hot water for a period of time due to the storm and through no fault of the landlord.

RPL §235-b

Tenant advocates will hasten to argue that the plain language of RPL §235-b imposes liability without regard to whether the landlord is at fault. We submit that it would not be sensible or just to interpret the statute in such a manner.

In approving RPL §235-b, Governor Hugh Carey noted that the section was intended to remedy tenant inequities "founded upon legal principles that evolved during the middle ages." He stated: "By one large step this bill moves the law of landlord and tenant into the twentieth century."[4]

Nearly 40 years have passed since the adoption of this statute, and many of the inequities noted by Carey at the time RPL 235-b was enacted have been alleviated. Four decades ago, landlords were generally understood to hold much greater power over their residential tenants than they do today. Since the enactment of the statute, an extensive body of law protecting tenants' rights has developed. Regulations protecting residential tenants have been promulgated in various municipalities, especially New York City. Additionally, advances in technology, including cellphones with cameras and video recorders, have made it much easier for tenants to organize, communicate amongst themselves, and to subject the conduct of their landlords to public scrutiny.

In considering rent abatement claims based upon facts and circumstances completely beyond the landlords' control, it is important for the courts of today to consider the impact their rulings are likely to have. It is desirable to encourage landlords to take steps to mitigate harm caused by a power outage that a landlord had no role in causing and could not prevent. For example, the law should encourage landlords to provide bottled water to tenants without running water, and flashlights to those without electricity. In rent abatement litigation where the warranty of habitability has been breached for reasons totally outside the landlord's control, and the landlord has promptly taken all of the actions one would expect a reasonably prudent landlord to take under the circumstances, it is not sensible to punish the landlord. Rather, in such circumstances, the courts should consider no abatement or, at most, only a nominal reduction.

Conclusion

The 1975 enactment of §235-b was designed to update landlord tenant law from the middle ages to the 20th century. In the wake of Hurricane Sandy, the New York legislature may choose to amend the statute to provide expressly that there is no automatic entitlement to a rent abatement in the case of a natural disaster, similar to the 1983 amendment addressing strikes and labor disputes that are also beyond a landlord's control. But even absent such an amendment, as shown above, existing precedent warrants consideration of not only the tenant's loss of services, but also whether the landlord responded responsibly, effectively, and in a timely manner. When residential tenants are deprived, through no fault of their landlords, of services that tenants are expected to receive, courts are already required to balance the rights of tenants and landlords alike. Courts

should review the landlord's reaction to the situation, including whether the landlord responded responsibly and expeditiously, in good faith, and whether it actually alleviated the tenant's problems. Only after taking these factors into account can a court reach a fair and just determination, and ensure equitable application of this law in the 21st century.

Warren A. Estis *is a founding partner at Rosenberg & Estis.* ***Michael E. Feinstein*** *is a partner at the firm.*

Endnotes:

1. " Residential Tenants Explore Rent Abatements," *New York Law Journal*, Feb. 25, 2013, p.1.

2. 47 N.Y.2d 316, 327, 418 N.Y.S.2d 310 (1979).

3. *Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 139-40, 438 N.Y.S.2d 164 (Sup. Ct. App. Term, 1st Dept. 1981).

4. 9 NY Legis Ann, 1975, p.438) (quoted in *Suarez*, 107 Misc. 2d at 138-39).