Summary Reversal

Tenant Restored to Possession by Appellate Term

A JUDGMENT of possession and issuance of a warrant to remove a respondent from possession is the most basic element of relief sought in a summary proceeding. In a recent decision by the Appellate Term, Second Department, Second and Eleventh Judicial Districts, in *Hegeman Asset LLC v. Smith*,[1] the appellate court ordered a tenant to be restored to possession post-eviction. Such relief in and of itself would not be remarkable.[2] What makes the decision of note is the procedural posture and manner that such relief was granted. There was summary reversal of the order of the Civil Court, Kings County, upon motion by the tenant-appellant and after the appellate court had sua sponte ordered and held an evidentiary hearing. This article discusses the facts of the case and the reasoning of, and legal authority relied upon by, the appellate court. (The Appellate Term panel was Justices Michael L. Pesce, Joseph G. Golia, and Jaime A. Rios.)

In *Hegeman*, the petitioner commenced a non-payment summary proceeding by a petition seeking a monthly rent of $490 for the months of January 2002 through August 2003, plus $100 legal fees, for a total of $9,900. The tenant answered, asserting that she had paid her rent to her landlord as directed by him, that petitioner was not her landlord and that she was not "informed" of petitioner. Initially, the case was dismissed when, on an adjourned return date, the petitioner failed to appear.

LANDLORD-TENANT

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After the case had been restored upon petitioner's motion, a so-ordered stipulation was entered into on Oct. 22, 2003, with the tenant appearing pro se. The stipulation provided that the petitioner, as landlord, would have a final judgment in the sum of $1,540, consisting of rent of $490 for August, September and October 2003 and $10 per month for January through July 2003. Execution of the warrant was stayed until December 21, 2003 for full payment. By that date, the tenant also was to pay or prove payment of July 2003 rent. The landlord was to inspect and repair mold and other conditions.

Eviction and Challenge

The landlord asserted it never received payment of the agreed upon sum and on Jan. 20, 2004, 30 days after the stipulated payment deadline, the tenant was evicted. On that day, the tenant moved in Civil Court by order to show cause to be restored to possession. The order to show cause stayed reletting and removal of the tenant's possessions. In her supporting affidavit, the tenant claimed that she had mailed her rent to landlord as directed and that she had mailed all the payments due through Jan. 31, 2004. The landlord did not submit written opposition.

By order dated Jan. 22, 2004, the Civil Court denied the tenant's motion. The Appellate Term decision summarized the Civil Court order as follows:

> The court's order recites that landlord stated that he never received tenant's checks; that tenant had had the funds in her checking account for 30 days until she was evicted and had never returned to court; and that there was no legal basis to restore tenant to possession.[3]

The Appellate Term decision noted that the Civil Court had issued that order "without having heard any sworn testimony."

On Jan. 23, 2004, the Appellate Term signed an order to show cause by the tenant seeking a "stay." It stayed all proceedings, including the reletting of the premises, pending determination of the motion. In support of the order to show cause, the tenant pro se stated that the landlord had deliberately created the situation by suing her for monies that were never owed and then refusing to cash her checks for the rent. She claimed that (i) she was never served with a marshal's notice; (ii) she had mailed her checks to the landlord on Dec. 19, 2003, they were never returned and the money was still in the bank; (iii) her daughter had no place to stay upon getting out of school; and (iv) she had lived in the apartment for 16 years and always paid her rent promptly.

The tenant also submitted an affidavit from her former landlord attesting to the fact that, as of the date of the building's sale in April 2003, her rent payments were up to date and had always been timely. Her motion papers additionally included a notarized statement from several other tenants in the building stating that, since the current landlord had bought the building, he had repeatedly refused to accept their monthly rent payments and brought all of them to court for non-payment.

In opposition, the landlord's managing agent stated that a new tenant had signed a lease for the premises on Jan. 20 (the day of the eviction), prior to service of the Civil Court's order to show cause on landlord on Jan. 21. further contended that all of the tenant's belongings had been removed prior to the stay and that the new tenant was in possession. He stated that he had not received any money from the tenant by mail or otherwise and that the eviction did not take place until 30 days after payment was to have been made pursuant to the so-ordered stipulation.

By order dated Feb. 25, the Appellate Term sua sponte amended the Jan. 23 order to show cause to provide that the landlord, its attorney and the alleged new tenant in possession show cause at a hearing "why an order should not be made restoring tenant-appellant to possession pending appeal and/or summarily reversing the January 22, 2004 order of the Civil Court." The Appellate Term decision explained the purpose of the hearing as follows:

> The hearing was directed in order to test the bona fides of landlord's claim to this court, disputed by tenant, that there was a new tenant in possession and, if there was such a new tenant, to allow this court to determine if restitution should be made.[4]

A decision notable because of the procedural posture and manner by which an evicted tenant was ordered restored to possession.

A hearing and oral argument were held before the Appellate Term on March 10. The alleged new tenant testified that she was shown the apartment on Jan. 20, the day of the tenant-appellant's eviction; that she had paid the landlord one month's rent and security deposit; that she had moved in the next day and remained in occupancy for two weeks but then moved out to allow landlord to do renovations. She further testified that she had moved back into the apartment the day before the hearing. The Appellate Term decision noted that the new tenant "was unable to document that any utility services were being supplied in her name."

The tenant-appellant reiterated the facts that had been stated in her affidavit and introduced proof that her July 2003 money order had been cashed. She also testified that the apartment had remained vacant since the eviction and, if the new tenant had moved in, had done so only on the morning of the hearing. She introduced into evidence photographs taken of the premises showing that it was being renovated and was not occupied. In an affidavit of service, the tenant's sister stated that she had gone to the apartment on March 1, and was invited in by workmen. The condition of the apartment, according to that affidavit of service, was entirely vacant and under repair, with no furniture or sink, the stove unconnected and the flooring dug up.

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At the hearing and oral argument before the Appellate Term, the landlord's attorney argued that the appellate court should not disturb the Civil Court's determination as to credibility. He claimed that the tenant had refused to pay the arrears until the landlord made the repairs. He conceded, however, that, as summarized in the Appellate Term decision, "the facts did not support the allegation in the petition as to the amount of rent sought." The landlord's managing agent testified that he was under the impression, when the building was bought, that the tenant owed $10,000, and had settled for a lower amount because the tenant came in with all the receipts.

'Clear Error'

In its decision, the Appellate Term held that "the appellate remedy of summary reversal ... is appropriate here because of the existence of clear error and exigent circumstances." The error to which the appellate court pointed was that the Civil Court gave weight to the landlord's managing agent's unsworn claim, at oral argument, that he had not received the tenant's checks, even though the Civil Court had before it a sworn affidavit by the tenant asserting that she had complied with the terms of the so-ordered stipulation, including tendering rent checks. The Appellate Term concluded that "[i]n the absence of a hearing, the [lower] court had, contrary to landlord's claim, no proper basis upon which to form a determination of credibility." The Appellate Term viewed this error as "especially harmful" because "the Civil Court record demonstrates that landlord's agent was particularly lacking in credibility." The Appellate Term stated in its decision that "[i]n and of itself, this error requires reversal of the Civil Court order."

The Appellate Term also emphasized "the magnitude of the discrepancy between the amount sought in the petition and the amount, if any, actually owed at the commencement of the proceeding." The proceeding sought $9,800 in alleged arrears and, in moving to restore after the landlord's default, the managing agent had sworn that the tenant owed $10,780 through October 2003. Yet, the Appellate Term noted, "as is evident from the terms of the stipulation and from the subsequent proceedings, tenant owed virtually no arrears prior to the commencement of this proceeding."

Given the magnitude of the discrepancy, the Appellate Term concluded that "it was an abuse of discretion for the Housing Court to so-order the stipulation awarding judgment to landlord," and the appellate court vacated the stipulation and final judgment and dismissed the petition. In support of that disposition, the Appellate Term cited the case of *Hughes v. Lenox Hill Hospital*,[5] which it characterized as standing for the proposition that "a petition containing material misstatements should be dismissed as a matter of equity." It also cited *Schwartz v. Weiss-Newell*,[6] described as holding that a proper rent demand must be in the approximate good faith sum of rent allegedly due.

The Appellate Term also ordered that the tenant-appellant be "restored to possession forthwith." In doing so, the appellate court invoked the power of the Civil Court to award restitution pursuant to CPLR 5015(d) and §212 of the Civil Court Act. Further, CPLR 5523 provides that "[a] court reversing or modifying a final judgment or order ... may order restitution of property or rights lost by the judgment or order. ..." Since the Appellate Term had vacated the final judgment pursuant to which possession of the property had been transferred, it also relied upon its "own original power" to order restitution pursuant to CPLR 5523.

In support of awarding the remedy of summary reversal, the Appellate Term in *Hegeman* cited *People v. Allen*,[7] a criminal case in which the Appellate Division, Second Department, had granted a defendant's motion for summary reversal of a judgment convicting him of robbery, assault and criminal possession of a weapon. The court also cited its own prior decision in *34 Crescent Street Associates, LLC v. U.S. Fish Depot Corp.*[8]

In *34 Crescent Street*, the tenants were evicted from their fish store pursuant to a warrant issued in a commercial non-payment proceeding. The tenants moved to be restored to possession, asserting that they had not received the marshal's notice. It was established that the notice and all the other pleadings and papers in the proceeding had a defective address for the subject premises. In response to the motion, the landlord consented to discontinue the proceeding based on the address defect. The court directed the landlord to restore the tenants to possession.

Thereafter, the tenants moved to be restored to "full possession," including access to the premises through the rear yard for deliveries and for overnight parking of their truck. They asserted that such access was vital to the operation of their business, which included a wholesale operation in the rear and a restaurant in the front, and that they were entitled to such access pursuant to an understanding with the prior owner. The Civil Court denied the tenants' motion because their lease did not mention any right to access through the rear yard. The tenants appealed and moved for summary reversal.

The Appellate Term in *34 Crescent Street* granted the motion only with respect to access to the premises through the rear yard. The appellate court held that since such access was "necessary to tenants' full enjoyment of the premises," therefore such access was "included in the lease as a matter of right" under the general rule that those rights essential to the use of demised premises pass as appurtenant thereto. The court also noted that to deny access through the back door "may well raise fire safety concerns." It directed the landlord to immediately restore to tenants access to the premises through the rear yard, including for deliveries.

As to the issue of overnight parking, however, the appellate court denied the tenants' request for summary reversal of the Civil Court order on the grounds that the tenants had "not adequately shown either clear legal error or exigency with respect to such parking." The appellate court held that review of the parking issue would await disposition of the appeal itself.

The Appellate Term in *Hegeman* concluded its decision with a paragraph that was highly critical of the conduct of the landlord and its attorneys. The court stated:

> In the absence of a credible explanation, the circumstances presented give rise to a strong inference that the commencement and prosecution of this proceeding involved conduct that was completely without merit in fact.[9]

The court pointed out that the tenant-appellant, "[i]f she be so advised," might move pursuant to 22 NYCRR §130-1.1 to recover costs, attorney's fees and sanctions of up to $10,000 against the landlord and/or its attorneys.

That section authorizes such relief when the court finds there has been frivolous conduct, and defines conduct as being frivolous if, among other things, "it asserts material factual statements that are false." In determining such motion, the court continued, it would consider such questions as "whether there was a building-wide scheme to evict the building's current tenants" and whether the allegation in the petition that $9,800 was owed, and the subsequent averment in an affidavit submitted after the landlord's counsel had conferenced the matter with the tenant that the tenant allegedly owed $10,780, had any basis in fact.

The court also mentioned other statutory remedies that the tenant might pursue if she deemed it appropriate, such as RPAPL 853 and Sections 2525.5 and 2526.2[c][2] of the Rent Stabilization Code.[10] RPAPL 853 authorizes treble damages if a person is ejected "in a forcible manner, or after he has been put out, is held and kept out by force or by putting him in fear of personal violence." The Rent Stabilization Code provisions cited by the court make it unlawful to harass a tenant, including specifically, as to §2526.2[c][2], for purposes of "obtain[ing] a vacancy of a housing accommodation."

In short, the *Hegeman* case well illustrates Yogi Berra's famous dictum that "it ain't over till it's over.' Even if there has been an eviction and even if a new tenant is in possession, there is still the possibility that the old tenant might be restored to possession through legal process. What *Hegeman* further shows is that in a situation where an appellate court believes the lower court is clearly wrong and the error has caused significant hardship, the appellate court can grant summary relief so as to avoid the normal extended time frame characteristic of an appeal. The presumed infrequency of that approach makes it all the more distinctive when it is used.

What makes *Hegeman* even more noteworthy is that the appellate court held an evidentiary hearing and, as a result of that hearing, granted the tenant-appellant summary reversal of the Civil Court order. On first blush, the notion of such a hearing would seem antithetical to an appellate court. However, here, the appellate court was considering a request by the tenant-appellant to resolve the matter not by the normal appellate process but rather on motion for peremptory relief. Therefore, the appurtenances of motion practice logically should be available for the court to use — and those include, even if not often invoked, an evidentiary hearing.

Undoubtedly, it is the rare situation where an appellate court will use the procedures on display in *Hegeman*. It is perhaps only fitting that soon after the Olympics featuring feats of physical uniqueness, we discuss a case where, it might be said the court engaged in a display of appellate uniqueness.

1. NYLJ, July 6, 2004, p. 26, col. 4, 2004 N.Y. Slip Op. 24258, 2004 WL 1620865 (App. T 2nd Dep't)

2. See, e.g., the following recent decisions by the Appellate Term, Second Department, Second and Eleventh judicial districts: (i) *New York City Housing Authority Kingsborough Houses v Sullivan*, NYLJ, July 8, 2004, p. 28, col. 2, and *Amc Realty LLC v. Farfan*, NYLJ, July 8, 2004, p. 27 col. 6, where the court on appeal reversed orders of the Civil Court, Kings County, which had denied tenants' motions to be restored to possession, and (ii) *Western Estates LLC v Roberts*, NYLJ, July 26, 2004, p. 27, col. 5, where the court granted the tenant's motion to be restored to possession pending appeal, on condition that the tenant-appellant pay landlord certain rent arrears.

3. NYLJ, July 6, 2004, p. 28, col. 4, at col. 4.

4. Id., at col. 5.

5. 226 A.D.2d 4, 651 N.Y.S.2d 418 (1st Dep't 1996), leave to appeal denied, 90 N.Y.2d 829, 66(N.Y.S.2d 552 (1997).

6. 87 Misc.2d 558, 386 N.Y.S.2d 191 (Civ. Ct N.Y. Co. 1976).

7. 303 A.D.2d 686, 756 N.Y.S.2d 859 (2nd Dep't 2003).

8. NYLJ, Nov. 21, 2002, 30 HCR 669 (App. T 2nd Dep't).

9. NYLJ, July 6, 2004, p. 28, col. 4, at col. 6.

10. 9 NYCRR §§2525.5 and 2526.2[c][2].