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LANDLORD-TENANT

Landlord's Rent Demands Ruled 'Deceptive' Under GBL 349


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New York General Business Law Section 349 (GBL 349), titled "Deceptive Acts and Practices Unlawful," provides in subsection (a) that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." In addition to giving the New York State attorney general the ability to enforce the statute by obtaining injunctive relief and restitution, GBL 349, subsection (h) provides a private right of action, stating that:

> [i]n addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorneys' fees to a prevailing plaintiff.

In an unusual application of GBL 349 in the landlord-tenant context, a recent decision issued by the Supreme Court, Westchester County in *Bryant v. Casco Bay Realty*[1] held that the landlord's three-day rent demands served on Section 8 residential tenants, as predicates to prior summary nonpayment proceedings that the landlord had commenced, were "deceptive" within the meaning of GBL 349. Assuming this decision stands, landlords need to be aware that residential tenants have another tool in their disposal to resist a landlord's attempts to enforce the tenant's lease obligations.

'Casco Bay'

The facts as recited by the court in *Casco Bay* are as follows. The defendant Casco Bay Realty was the owner and landlord of 220-250 Yonkers Avenue in Yonkers, New York, known as the "Parkledge Apartments." Defendant at all relevant times received federal financial assistance to operate the building. Plaintiffs Melvella Bryant and Stephanie Gaines resided in separate apartments the Parkledge Apartments as participants in the federal "tenant-based" assistance program under Section 8 of the Housing Act of 1937.[2] Both plaintiffs' leases were U.S. Department of Housing and Urban Development (HUD) model leases within the meaning of HUD Handbook 4530.3.

> Landlords need to take care that rent demands are sufficiently specific and demand only such amounts that are due as "rent" under the parties' lease.

Beginning in late 2011, the plaintiff Melvella Bryant had repeatedly either failed to pay, or tendered portions of her rent late, after Westchester County Department of Social Services discontinued her shelter allowance of $295 per month. This continued for months. During this time, the landlord served multiple three-day rent demands. Each rent demand, however, failed to specify the months for which the landlord demanded payment of the rent, and also included what the court referred to as "non-rent charges such as unspecified late fees, legal fees, or other fees in the lump sum demanded."

In April 2012, the landlord then sent letters to all tenants informing them of a new policy that the landlord would no longer accept partial rent payments. In June 2012, the landlord refused Bryant's tender of partial rent and, that same month, served a notice of termination. The landlord then commenced a summary non-payment proceeding in Yonkers City Court based on the notice of termination.

After trial, the court held that the landlord had failed to establish that Bryant's non-payment was "willful, unjustified, without explanation, or accompanied by an intent to harass the landlord," and therefore ruled that the landlord could not evict Bryant. The court set the matter for an additional court date solely to address the outstanding arrears and marked the matter off the calendar without prejudice as to the landlord's claim for late fees.

As to plaintiff Stephanie Gaines, she fell into arrears, and the landlord served eight three-day rent demands during the period March 2011 through June 2013. According to the court in *Casco Bay*, "six of the eight three-day demands directed Gaines to pay a lump sum that included non-rent charges such as late fees or other fees." In each month that was the subject of a rent demand, Gaines had tendered her Section 8 family share rent payment late. During this time, Gaines also made only partial payment of what "she thought was the actual rent due," which the landlord rejected as partial payment. In June 2012, the landlord commenced a summary non-payment eviction proceeding against Gaines based on a

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three-day rent demand seeking $464.50.

Multiple additional three-day rent demands followed, all of which included rent and a "late fee." According to the court, Gaines had fallen into arrears due to her husband's mismanagement of the household unemployment insurance benefits and Gaines was working with Westchester County Department of Social Services (DSS) and other organizations to resolve the matter. The landlord then commenced another summary non-payment proceeding in February 2013 against Gaines seeking a "lump sum of $2,471 as rent." The court in *Casco Bay* does not explain how either of the two summary proceedings against Gaines were disposed of.

While Gaines was waiting for assistance from DSS, she received a notice from the landlord, dated Aug. 14, 2013, addressed to all tenants, stating, among other things, that "[a]ll past due rent, late fees, parking fees, and air conditioning fees must be paid in full" and that if payment is not made, "[t]he next course of action will be to file for an eviction."

The GBL 349 Action

Bryant and Gaines thereafter commenced *Casco Bay* in Supreme Court, Westchester County. Plaintiffs sought a declaratory judgment that the landlord's three-day rent demands contravened GBL 349, and "declaring void any attorneys' fees, court costs, or late fees currently assessed against them based on three-day demands… and enjoining defendant from serving three-day demands that similarly contravene that provision." In support of the their claims, plaintiffs maintained that they were only required to pay as "rent" the Section 8-approved share of the rent pursuant to federal law, and that other charges such as "late fees cannot properly be characterized as rent charges, and that a possessory judgment cannot include non-rent charges." Plaintiffs further maintained that a rent demand must indicate the periods for rent allegedly due and the amount for each period, and must also differentiate between rent and non-rent charges. Plaintiffs asserted that a landlord engages in "a deceptive act or practice" under GBL 349 when it "demands a lump sum as rent without putting the tenant on notice that the sum includes non-rent charges."

After a trial on stipulated facts, the court in *Casco Bay* issued its decision and order on April 9, 2015. Among other things, the court agreed with the plaintiffs that the three-day rent demands that the landlord had delivered "were deceptive within the meaning of" GBL 349.

The court initially observed that a summary non-payment proceeding under RPAPL 711(2) may only be maintained to collect unpaid rent and that in the HUD addendum to the lease for Section 8 tenants, "late fees, attorneys' fees, and court costs" are not listed among the charges that comprise "rent to owner."[3] In addition, the court noted that the Appellate Term had expressly held in *Fairview Hous., LLC v. Wilson*[4] that attorney fees may not be recovered against a Section 8 tenant in a summary proceeding.

The plaintiffs in 'Casco Bay' asserted that a landlord engages in "a deceptive act or practice" under GBL 349 when it "demands a lump sum as rent without putting the tenant on notice that the sum includes non-rent charges."

The court found that the three-day rent demands that the landlord had issued were "improper" and "deceptive" under GBL 349 in that they:

> merely listed lump sums, characterized as 'rent,' without indicating that the amount allegedly due included ancillary charges such as late fees. However, the only amount that needed to be paid to prevent a non-payment proceeding was the overdue rent, and the ancillary charges at issue here are not a component of rent arrears in a summary proceeding against a Section 8 tenant. Compounding the problem, the three-day demands failed to list the time frames during which the rent delinquencies allegedly arose. As a result, under controlling case law, plaintiffs did not have 'actual notice of the alleged amount due and of the period for which such claim is made.[5]

The court concluded that the lump sums listed in the three-day demands "were misleading" under GBL 349 because "they created the impression that plaintiffs were required to pay more than what was actually owed as rent in order to avoid eviction."[6]

In ruling in favor of plaintiffs on their GBL 349 claim with respect to the rent demands, the court relied on *Meyerson v. Prime Realty*[7] and *Lozano v. Grunberg*.[8] Notably, however, neither of those cases involved a GBL 349 claim with respect to a rent demand. In *Myerson*, the court ruled that the plaintiff stated a cause of action under GBL 349 against her landlord, based on the landlord having "falsely" stated in lease renewal forms for the plaintiff's rent-regulated apartment that the failure to provide tenant's social security number would result in non-renewal and eviction.

In *Lozano*, the plaintiff alleged that the landlord had sent a notice to tenant stating "dispossess warning" and that if rent was not paid within the "next few days," the landlord would have the marshal remove tenant's furniture to a warehouse. At the time the notice was sent, however, no eviction proceeding had been commenced. As such, the Appellate Division sustained the tenant's claim that the landlord's notice violated GBL 349.

As to damages, the court observed that GBL 349 entitles the plaintiff to injunctive relief to enjoin the unlawful act or practice, and "actual damages or fifty dollars, whichever is greater…."[9] As such, the court awarded plaintiffs the minimum damages award of $50. Because the plaintiffs had failed to provide proof of attorney fees or court costs, they were not entitled to recover same.

Conclusion

Based on the decision in *Casco Bay*, residential landlords need to be aware that tenants may attempt to bring claims under GBL 349 to the extent the landlord seeks to recover amounts in a rent demand that the landlord is not entitled to. Prudent landlords of course need to take care that rent demands, which are predicate to a summary nonpayment proceeding, are sufficiently specific and demand only such amounts that are due as "rent" under the parties' lease. It remains to be seen whether other courts will follow *Casco Bay* in applying GBL 349 in this context.

1. NYLJ, 1202726157374 (Sup. Ct. West. Co. April 9, 2015).
2. 42 USC 1434f[o].
3. NYLJ, 1202726157374 at *7.
4. 38 Misc.3d 128[A] (App. Term 2d Dept. 2012).
5. NYLJ, 1202726157374 at *7 (internal citations omitted).
6. Id. at *8.
7. 7 Misc.3d 911 (Sup. Ct. N.Y. Co. 2005).
8. 195 A.D.2d 308 (1st Dept. 1993).
9. NYLJ, 1202726157374 at *10-11.