

### LANDLORD-TENANT LAW

# Due Process Requirements Regarding Section 8 Tenants



By  
**Warren A.  
Estis**



And  
**Michael E.  
Feinstein**

There are numerous residential buildings in New York City which participate in the Section 8 program of the U.S. Department of Housing and Urban Development (HUD). The Section 8 program provides assistance to eligible low and moderate income families to rent housing in the private market. Eligibility for this program is based on a family's gross annual income and family size.

There are numerous private landlords in New York City and elsewhere which participate in the Section 8 program. However, when a private owner participates in this program, it must be aware that the courts have imposed certain expanded due process requirements, as reflected in the procedures set forth in the HUD handbook, on such an owner before it can terminate the lease of a Section 8 tenant. These issues were recently explored by Bronx Civil Court Judge Timmie Erin Elsner in her decision

in *West Farms Estates Co. v. Aquino*,<sup>1</sup> which presented a careful analysis of the law in this area and offered a clear lesson for owners of this type of housing.

### 'West Farms'

In *West Farms*, the tenants of record lived with their son, Danny (collectively, respondents), in an apartment in the building located at 1029 Freeman Street in the Bronx. In July 2013, the son was arrested for statutory rape of a young woman in an apartment located in the same project, for which he later pled guilty. After the son's arrest, his father, one of the tenants of record, passed away. Following sentencing, the son was the subject of deportation proceedings due to his immigration status and was later ordered deported. Thus, the sole remaining occupant of the premises was Danny's mother, who was a senior citizen suffering from numerous medical conditions.

In January 2014, the owner of the building served respondents with a "Combined Ten (10) Day Notice of "Landlord's Intention to Terminate

Tenant's Assistance Payment and Thirty (30) Day Notice of Termination" based on the criminal activity of the son. The notice advised that the owner intended to "terminate your rent assistance payment" and that the owner "elect[ed] to terminate [the] tenancy based upon...material non-compliance with the terms of the lease."

After the expiration of the notice, the owner commenced a summary holdover proceeding. The respondents appeared by counsel, and the matter was tried over the course of several days. After trial, Elsner dismissed the proceeding, finding that the owner's termination process "deprived respondents of their constitutional rights as defined by HUD."

### Due Process

In her decision dismissing the proceeding, the court at the outset observed that despite the owner being a private entity, owner, "by its participation in the HUD program, becomes a government actor for purposes of the due process clauses of the Fifth and Fourteenth Amendments." As such,

WARREN A. ESTIS is a founding member at Rosenberg & Estis. MICHAEL E. FEINSTEIN is a member at the firm.

Section 8 tenants “are protected by the United States Constitution from being deprived of those entitlements without an opportunity to be heard prior to termination of such benefits.”

The court went on to observe that although private landlords of Section 8 housing have enormous discretion to terminate a Section 8 tenant for criminal activity, the landlord must “provide minimal due process to tenants when promulgating such decisions.” Among other things, it is “mandatory” that owners comply with the pre-termination procedures outlined in “HUD handbook 4530:3: Occupancy Requirements of Subsidized Multifamily Housing Programs” (HUD handbook).

While the HUD handbook provides that an owner “may” terminate a lease agreement for “criminal activity by any tenant, any member of the tenant’s household, a guest, or another person under tenant’s control,” the HUD handbook requires the owner to consider “all of the circumstances relevant to a particular eviction case.” Such factors outlined in the HUD handbook include: the seriousness of the offending action, the effect on the community of terminating the tenancy, the extent of the tenant’s participation in the offending action, the extent to which the tenant has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action, and the effect of the owner’s actions on the integrity of the program.

In addition, as the court observed, under the HUD handbook, “owners are required to memorialize their

decision-making procedures as part of their tenant selection plan and consistently implement them.”

Judge Elsner found that the owner had “failed to establish any procedures which protect respondents’ due process rights as required by law.” Among other things, the court found that prior to the service of the termination notice, the owner “did not conduct a hearing or provide respondents with a written decision which supports its rationale based on facts presented termination of respondents’ tenancy.” In addition, although the notice of termination

---

The ‘West Farms’ court observed that although private landlords of Section 8 housing have enormous discretion to terminate a Section 8 tenant for criminal activity, the landlord must “provide minimal due process to tenants when promulgating such decisions.”

indicated that the respondents could request a “meeting” within 10 days, there is nothing in the [notice] that respondents have a right to challenge petitioner’s decision or outlines the procedure for doing so.”

Further, the notice failed to inform respondents of their right to have a hearing and of their “right to have counsel with them at any hearing to confront their accusers.”

The court also observed that owner may have been able to forego the “grievance proceedings” for the subject criminal activity if the owner had commenced a proceeding “pursuant

to any provision of the RPAPL which affords the court discretion to review the facts which underlie the termination of a tenancy.” The owner, however, did not do so, and therefore the court could “not ensure respondents’ due process rights are protected within the ambit of the proceeding before it.” Thus, based on the court’s finding that the termination process deprived the respondents of their constitutional rights, the proceeding was dismissed.

### Conclusion

The foregoing makes clear that when an owner makes the decision to terminate a Section 8 tenant for criminal activity, it must, among other things, be certain that it has considered the factors outlined in the HUD handbook and to have memorialized its decision-making procedures in writing. In addition, the various procedural safeguards described above must be followed. As observed by the court in *West Farms*, owners participating in the HUD program become “government actors” for purposes of the Fifth and Fourteenth Amendments of the Constitution, and thus their conduct with regard to Section 8 tenants will be scrutinized for compliance with constitutional due process requirements.



1. NYLJ 1202759552429, at \*1 (Civ. Ct. Bx. Co. May 23, 2016).