

LANDLORD-TENANT

Chronic Non-Payment Holdover Proceedings



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Two very recent decisions issued by the Civil Court—one in New York County¹ and another in Kings County²—concern the bringing of holdover proceedings based on chronic non-payment of rent. Since we have not written about this topic in over 12 years (since our June 2002 article in this publication), this column will present a brief overview of the caselaw in this area.

Background

Prior to the Court of Appeals' 1997 decision in *Sharp v. Norwood*,³ chronic non-payment situations were addressed based on two approaches. One approach was to bring a holdover proceeding on the ground that the chronic late or non-payment of rent constituted a nuisance warranting eviction. Another approach was to bring a holdover proceeding based on the assertion that the chronic late or non-payment of rent was a breach of a substantial obligation of the tenancy.

After *Norwood*, however—in which the Court of Appeals, in affirming the Appellate Division's dismissal of a nuisance holdover proceeding, set forth a strict standard of proof which must be established for nuisance holdovers based on chronic non-payment—most cases were brought based on chronic non-payment being a violation of a substantial obligation of the tenancy. The Appellate Division in *Norwood* stated as follows with respect to the strict standard required to prove that chronic non-payment constitutes a nuisance:

In order to establish that tenant's untimely rent payments constituted a nuisance, the

landlord must demonstrate that it 'was compelled to bring numerous non-payment proceedings within a relatively short period and that the tenant's non-payment was willful, unjustified, without explanation, or accompanied by an intent to harass the landlord.'⁴

The Court of Appeals in *Norwood* noted the lesser standard of proof required for a chronic non-payment proceeding based on the breach of a substantial obligation of the tenancy:

The specific harm petitioners claimed to have suffered as a result of respondent's conduct was that they were repeatedly forced to institute nonpayment proceedings and to serve rent demands on respondent to collect chronically late rental payments. While these facts might have supported an eviction proceeding on the ground that respondent violated a 'substantial obligation' of her tenancy, petitioners did not assert this ground in their holdover petition. Having opted to pursue their remedy in the context of a nuisance case, petitioners were required to establish that respondent's conduct 'interfered with the use or enjoyment' of their property.⁵

Prior Proceedings

In chronic non-payment proceedings based on non-payment being a breach of a substantial obligation of the tenancy, "there is no 'magic number' of prior proceedings required, as each case is sui generis."⁶ Furthermore, "the number of nonpayment actions commenced is relevant only in the context of the entire circumstances surrounding the alleged withholding of rent."⁷ Courts, however, have found that the commencement of frequent non-payment proceedings in a short amount of time, due to a tenant's "unjustified" failure to pay rent as it became due, sets forth a viable claim for eviction

based on the chronic non-payment of rent. See *Definitions Personal Fitness v. 133 E. 58th St.*⁸ (10 non-payment proceedings in seven years); *Adams Tower v. Richter*⁹ (nine non-payment proceedings in three years); *Pamela Equities v. Coverton*,¹⁰ (seven non-payment proceedings

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in two years); *Chelsea 19 Assoc. v. Minetti*,¹¹ (five non-payment proceedings in two years); *2564 Co. v. D'Addario*¹² (11 non-payment proceedings in one and a half years).

Surrounding Circumstances

In addition to the number of non-payment proceedings commenced in a short amount of time, "[t]he circumstances and reasons for the tenant's rent defaults must be considered in determining whether there is adequate proof to sustain a petition for chronic rent delinquency."¹³ Where the tenant's failure to pay rent in the prior proceedings was without justification or excuse, courts will find in favor of the landlord.

In *Adams Tower*, supra, the landlord commenced a summary holdover proceeding against a rent-stabilized tenant based on the chronic non-payment of rent being a breach of a substantial lease obligation. The evidence established that the landlord was required to commence nine non-payment proceedings during a three-year period, which were all resolved by the tenant agreeing to pay the arrears in full, without any abatement of rent.

In granting the landlord's motion for summary judgment, the Appellate Term stated that "[a] history of repeated nonpayment proceed-

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ings brought to collect chronically late rental payments supports an eviction proceeding on the ground that the tenant has violated a 'substantial obligation' of the tenancy."¹⁴ The court, in ruling in the landlord's favor, noted that the proceeding "was not brought upon the ground of nuisance, which requires a showing of 'aggravating circumstances,' but upon the allegation that tenants' 'long-term, unjustified and persistent failure' to pay rent as it became due breached a material leasehold obligation" which "breach is firmly documented in the record, particularly in the absence of a bona fide habitability claim or dispute as to the amount of rent owed."¹⁵

Importantly, the Appellate Term in *Adams Tower* also affirmed the holding of the Civil Court that "a notice to cure was not required because the cumulative pattern of tenants' course of conduct was incapable of 'cure' within 10 days."¹⁶ The court noted that "[t]he fact that a lease or statute provides time for a cure 'does not necessarily imply that a means of method to cure must exist in every case.'"¹⁷ In addition, and for "parallel reasons," the court "decline[d] to apply the post-judgment cure of RPAPL §753[4] to this type of default."¹⁸

Recently, in *Definitions Personal Fitness*, supra, the Appellate Division, First Department reaffirmed that chronic non-payment is a "type of default" that could not be cured within the cure period in the lease and that a notice of default is not necessary for an action based on chronic non-payment.¹⁹

Two recent decisions issued by the New York City Civil Court, however, demonstrate that chronic non-payment holdover proceedings will not be sustained where there was some justification for the tenant's non-payment of rent in the non-payment proceedings.

In the May 2014 decision of Civil Court Kings County Judge Bruce E. Scheckowitz in *Kerem Realty v. Hussein*,²⁰ the landlord commenced a chronic non-payment holdover proceeding against the rent-stabilized tenant based on having commenced four non-payment proceedings in four years. In the first non-payment proceeding, the matter was settled by stipulation of settlement, in which the landlord discontinued the proceeding and agreed to inspect and repair the oven as required by law on designated access dates.

In the second non-payment proceeding, the tenant established that the landlord failed to make required repairs and, as a result, the tenant filed a DHCR complaint which resulted in a DHCR rent reduction order. With respect to the two additional non-payment proceedings, those resulted in judgments against the tenant. The tenant maintained, however, that those proceedings "were a result of his losing a job and that he did not have an issue paying rent after that."

Tenant moved to dismiss the landlord's chronic non-payment holdover petition on the grounds that the four non-payment proceedings were insufficient to support the holdover proceeding. In ruling in favor of the tenant and dismissing the proceeding, the court found as follows:

In light of respondent's warranty of habitability defenses asserted in the non-payment proceeding listed in this chronic delinquent holdover petition, the issuance of a rent reduction order by the DHCR for violations at the premises, and the lack of frequency of cases in the past four years, the court finds that this proceeding should be dismissed. The four non-payment proceedings upon which this holdover is predicated are not sufficient to sustain a chronic delinquent holdover proceeding, particularly here where only two resulted in judgments against the tenant, warranty of habitability defenses were asserted, and the tenant is a 20-year tenant. Notably, in the two most recent proceedings, the respondent satisfied the petitions in court. The non-payment proceedings upon which this holdover are predicated clearly do not demonstrate that respondent has breached a substantial obligation of his tenancy.²¹

In such holdover proceedings, courts will find that a tenant has breached a substantial obligation of its tenancy, justifying the termination of the lease, where multiple non-payment proceedings have been commenced in a short period of time based on the tenant's failure to pay rent without justification.

In the July 2014 decision of Civil Court, New York County Judge Brenda S. Spears in *Chin Cano Realty v. Roa*,²² the landlord commenced a chronic non-payment holdover proceeding against the tenant based on the commencement of three non-payment proceedings against the tenant in a three-year period. According to the decision, the second non-payment proceeding involved "a legitimate dispute as to the amount owed,"²³ in that it was undisputed that the tenant "filed a rent overcharge complaint with the DHCR, which issued a decision finding that respondent was entitled to a refund of \$8,594.30."²⁴

As to the two other non-payment proceedings upon which the landlord relied, while the tenant had alleged a lack of heat as a breach of the warranty of habitability, the court found that it was "unclear from the papers submitted whether the conditions in the apartment precipitated the withholding of rent."²⁵ The court found, however,

that even if the tenant's failure to pay rent in those proceedings was unjustified, those two proceedings alone were "insufficient to establish a history of repeated nonpayment proceedings"²⁶ in order to show that tenant breached a substantial obligation of the tenancy. Thus, the court granted the tenant's motion for summary judgment dismissing the proceeding.

Conclusion

Landlords faced with having to commence multiple non-payment proceedings against defaulting tenants within a relatively short amount of time have a powerful weapon: the chronic non-payment holdover proceeding. In such proceedings, courts will find that a tenant has breached a substantial obligation of its tenancy, justifying the termination of the lease, where multiple non-payment proceedings have been commenced in a short period of time based on the tenant's failure to pay rent without justification. If, however, the tenant had asserted valid defenses to non-payment in the non-payment proceedings, the court may very well conclude that a substantial obligation of the tenancy has not been breached.

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1. *Chin Cano Realty v. Roa*, NYLJ, Aug. 6, 2014, 1202665682144 (Civ. Ct. N.Y. Co.).
2. *Kerem Realty v. Hussein*, NYLJ, May 21, 2014, 1202655815017 (Civ. Ct. Kings Co.).
3. 89 N.Y.2d 1068 (1997).
4. *Sharp v. Norwood*, 223 A.D.2d 6, 8 (1st Dept. 1996), aff'd 89 N.Y.2d 1068 (1997).
5. 89 N.Y.2d at 1069 (internal citations omitted).
6. *Sharp*, supra, 223 A.D.2d at 9.
7. *Greene v. Stone*, 160 A.D.2d 367, 368 (1st Dept. 1990).
8. 107 A.D.3d 617 (1st Dept. 2013).
9. 186 Misc. 2d 620 (App. Term 1st Dept. 2000).
10. NYLJ, July 18, 1990, p. 18, col. 1 (App. Term 1st Dept.).
11. NYLJ, Oct. 27, 1986, p. 13, col. 6 (App. Term 1st Dept.).
12. 35 Misc. 2d 176 (App. Term 1st Dept. 1961).
13. *East End Residences v. Dolen*, NYLJ, April 14, 1997, p. 27, col. 2 (App. Term 1st Dept.).
14. Id. at 621.
15. Id. at 621-22 (internal citations omitted).
16. Id. at 622.
17. Id.
18. Id.
19. 107 A.D.3d 647-48.
20. NYLJ, May 21, 2014, 1202655815017.
21. Id. at *6 (internal citation omitted).
22. NYLJ, Aug. 6, 2014, 1202665682144 (Civ. Ct. N.Y. Co.).
23. Id. at *3.
24. Id.
25. Id.
26. Id. at *3-4.