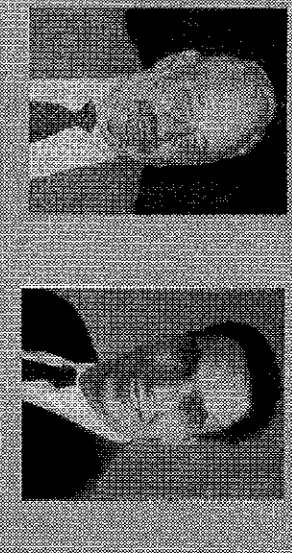


A Landlord's Answer to Repeated Non-Payments by a Tenant

COUNSELS' CORNER:

By Kenneth J. Finger
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WHITE PLAINS - Many a landlord has been frustrated by the recalcitrant tenant that fails to pay rent in a timely fashion.

The landlord is required to wait for the payment of rent until well after the date upon which the rent is required to be paid. In fact, certain tenants all but require the landlord to commence a summary proceeding for the non-payment of rent.

In such circumstances the landlord is required to expend sums of money for the preparation of a three-day demand for the payment of rent, the process server fees, the preparation of a notice of petition and petition, appearance in Court by attorney, and possibly other legal fees and Marshal fees.

If the landlord is fortunate he may recover some of the expenses, but the likelihood is that even with an award of fees by the Court, the landlord will not recover all of the expenses. Moreover, the landlord never recovers the lost income or compensation for the unavailability of the rental funds from the time the rent is due until the time monies are collected.

Options

As many will attest, tenants may come to know the system and realize that failure to promptly pay may not result in prompt eviction and that they can pay at the last minute to avoid an eviction. Unfortu-

nately, when the Emergency Tenant Protection Act (ETPA) applies, the landlord must offer to renew the lease of the tenant each year and the recalcitrant tenant will no doubt renew, adding insult to injury and the pattern will then be repeated for another year or two. What is a landlord to do when faced with such an untenable situation?

The landlord may commence an action based on the chronic failure to pay rent in a timely fashion. Historically, the landlord could commence a "chronic late payment of rent" case on the basis of either a "nuisance" or a violation of a "substantial leasehold obligation."

The case of Herald Towers LLC v. Perry, 1/16/2002, NYLJ 19, col. 1 provides a thorough overview of the previous distinctions between the two types of actions. The Court asserted that: "To establish that chronic non-payment of rent constitutes a nuisance, the petitioner 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' (25th Realty Associates v. Griggs, 150 AD2d 155)(emphasis supplied). If the landlord succeeds in

meeting this significant burden of proof, upon entry of judgment, respondent is not entitled to any opportunity to cure (Sharp v. Norwood, 223 AD2d 6, 11 [1st Dept.], lv. granted, 231 AD2d 974 [1st Dept. 1996], aff'd 89 NY2d 1068 [1997]) (holding that "a nuisance found to be caused by chronic late payment of rent cannot be cured").

A Contrast

By contrast, a landlord seeking to establish that a tenant's chronic non-payment of rent constitutes a violation of a substantial obligation of tenancy faces a different and less stringent burden of proof. A landlord may demonstrate this by showing that it has been repeatedly forced to institute non-payment proceedings and to serve rent demands on respondent to collect chronically late rental payments. "Courts have recognized that landlords may commence a holdover proceeding based on either nuisance or breach of a substantial obligation of tenancy due to chronic non-payment of rent, that the burden of proof is greater when the claim is one of nuisance, and that, when a petitioner claims a breach of a substantial obligation, a respondent has the right to effect a cure."

What all of this means to the landlord is that when contemplating an action based on chronic non-payment of rent

the landlord was required to make a choice.

One option was the more difficult case to prove, nuisance. However, the benefit accorded the landlord who prevailed on a nuisance claim was the ability to commence the action and evict the tenant without providing any opportunity to cure. The alternative was an action based on the breach of a substantial obligation of the tenancy.

While such a case would be easier to prove, it would also require that the tenant be provided an opportunity to cure prior, and in New York City would warrant an opportunity to cure after a judgment against the tenant as well. Thus the landlord was forced to engage in a cost-benefit or risk reward analysis before embarking on a chronic late payment of rent case.

However, in the case of 326-330 East 36th Street Assoc., 191 Misc.2d 329, 331, 74-1 NYS2d 380, the Appellate Term found that "Strict adherence to the literal terms of the Code notice requirement is unwarranted in a chronic late payment holdover proceeding, however, since the past, persistent rent defaults which form the basis of the landlord's claim cannot be remedied by a tenant's furnishing of assurances of future performance...to insist upon the service of a formal notice to cure in such circumstances is to compel the performance of a useless and futile act."

The Court actually addressed the provision in the lease which seemed also to require an opportunity to cure stating "the fact that the lease

provides time for cure 'does not necessarily imply that a means or a method to cure must exist in every case.'"

The holding of the Court in 326-330 East 36th Street Assoc., removes the drawback associated with the chronic non-payment of rent based on the breach of a substantial obligation of the tenancy, i.e. the requirement that the tenant be provided with an opportunity to cure the default.

Thus, based on this case the landlord can have the best of both worlds, the easier burden of proof and the ability to commence the action without providing an opportunity to cure.

An Important Point

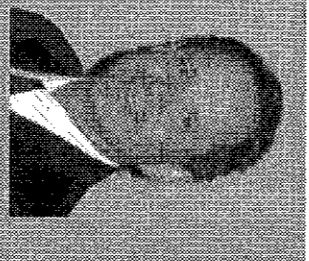
It should be noted that 326-330 East 36th Street Assoc., supra, was decided relative to New York City where tenants may be granted a post judgment stay, which the Court held applicable in cases such as holdover proceedings based on chronic late payment of rent as a breach of substantial obligation of the tenancy. However, the logic would seem consistent and landlords have cause for optimism that the same rationale will apply in Westchester, where there is no such post judgment stay provision of law available to the tenants.

Editor's Note: Kenneth J. Finger, Esq. is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI). He is also a principal of Finger and Finger, A Professional Corporation, of White Plains. Carl L. Finger, Esq., is also with Finger and Finger.

Examining Diverse and Unusual Projects in the Region

THE HANLEY REPORT

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ARMONK - Varied and unique. The words are definitely appropriate when describing some interesting projects this fall in the local building, realty and construction industry. A combination of procedures has produced diverse and attention-grabbing results at specific sites in the Westchester and Mid-Hudson Region.

A new - and unusual - rental housing project in New Paltz (Ulster County) was recently unveiled by the Community Preservation Corporation (CPC). State, federal and local officials gathered on Oct. 23 for a groundbreaking ceremony that marked the beginning of the renovation of a 60-year old apple cooler into 32 units of rental housing.

The project, called the Bella Terra Apartments, is on Apple Hill Farm, an active apple orchard on Route 32 South. The facility will be based in three buildings. It will also feature two courtyards. The development will be composed of 24 apartments with two bedrooms, as well as eight three-bedroom units. Monthly rents will range from approximately \$1,000 to \$1,200, spokesmen said.

The 26,000-square-foot building, known as the Morfello Apple Cooler, is named after a family that has owned Apple Hill Farm since the 1930's. The renovation process, spokesmen said, began when local developer Alan Goodman - who owns and manages apartment buildings in the New Paltz

area - discovered the apple cooler while driving around the area.

Project spokesmen said that Goodman saw the conversion of the building into a residential facility as a strong way of pro-

"CPC is delighted to be financing this important adaptive reuse project."

—Sadie McKeown,

viding housing to the area. CPC is providing construction and permanent financing for the \$2.5 million project, company officials said.

"CPC is delighted to be financing this important adaptive reuse project," said Sadie McKeown, CPC's Hudson Valley regional director. "By reclaiming a vacant warehouse building for residential use, this project will create rental housing, generate local construction jobs and revitalize the tax base. We commend Alan Goodman for his vision and creativity in developing this truly unique project."

A Mount Kisco Development

Another noteworthy and uncommon project is happening in Mount Kisco, where Wilder Balter Partners of Elmsford

broke ground on Nov. 6 for Woodcrest Village Condominiums.

The privately funded project, company officials said, will include 66 units of affordable senior housing for residents of the Village of Mount Kisco, as well as the Town of Bedford.

The project marks the latest in a series of affordable developments for Wilder Balter Partners. The company, officials stress, has specialized in developing affordable homes throughout the east coast. The firm features a partnership that combines the talents of industry veterans Robert H. Wilder

Jr. and William G. Balter. The duo has worked together for more than 10 years.

A Change

The trend of attention-grabbing events continued with a transaction in Purchase.

Austin Corporate Properties of Rye Brook recently reported that Hitachi Metals America has sold its 58-acre corporate campus in Purchase to Purchase Properties Inc.

The property, in an interesting process, has been rezoned from office to residential use. The plan, Austin Corporate Properties said, allows for 17 luxury homes. The site had been the headquarters for Hitachi since 1984. Hitachi relocated to The Center at Purchase late last year.

Austin Corporate Properties conducted the sale. The firm represented both the buyer and seller in the transaction, company officials said.

The trends offer proof of what industry members continually stress about the region's market - that anything can, and sometimes will, happen.