

# The Landlords' Quandary Upon Tenants' Failures To Renew Leases

## COUNSELS' CORNER:

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**WHITE PLAINS** - Several years ago we suggested that a change in the Emergency Tenant Protection Regulations in 2001 would clarify the confusion surrounding a Landlord's options, and requirements, upon a Tenant failing to renew a lease when offered such a renewal pursuant to the regulations.

The following regulations were adopted: Section 2503.5(b)(2) and (3) which state that:

"(2) Where the tenant fails to timely renew an expiring lease or rental agreement offered pursuant to this section, and remains in occupancy after the expiration of such lease or rental agreement, such lease or rental agreement may be deemed renewed upon the same terms and conditions, at the legal regulated rent, together with such guideline adjustments as would have been applicable had the offer of a renewal lease been timely accepted. The effective date of the rent adjustment under the deemed renewal lease shall commence on the first rent payment date occurring no less than 90 days after such offer is made by the owner. (3) Notwithstanding the provisions of paragraph (2) of this subsection, an owner may elect to commence an action or proceeding to recover possession of a housing accommodation in a court of competent jurisdiction... where the tenant, upon the expiration of the existing lease or rental agreement, fails to timely renew such lease in the manner prescribed by this section."

Prior to the adoption of the regulations, there was disparity among the cases interpreting the regulations as to whether a Landlord was required to offer the Tenant an opportunity to cure the failure to renew the lease or whether no such opportunity to cure was required. The regulations seemed to clarify the Landlord's option to either accept the Tenant's lease as renewed or to commence a holdover proceeding to evict the tenant.

### The Issues

By implication, it would seem, the Landlord would not be required to offer the tenant an opportunity to cure the failure to renew the lease.

The issues relevant to the Tenant's failure to renew are as follows:

1. Is the failure to renew the lease curable under any circumstance?
2. Is the Landlord required to provide the Tenant with an opportunity to cure the failure to renew the lease?
3. Do Courts have the authority to permit the Tenant to cure after the inception of an eviction proceeding?
4. If the Court has such authority, can the failure to renew the lease be excused or otherwise amenable to a belated cure?

Surprisingly, or perhaps not so surprisingly, the regulation has done little to clarify the murky waters surrounding these issues.

The Division of Housing and Community Renewal (DHCR) has issued an opinion letter stating that no notice to cure is required. Generally, an agency's interpretation of its own regulation is given deference by Courts when deciding

an issue relative to that interpretation. DHCR specifically stated that "the applicable regulations do not require a notice to cure prior to termination of a tenancy for failure to timely accept and return a lease renewal offer."

### Recent Examples

Nonetheless, a series of recent cases have demonstrated that great confusion still surrounds the meaning, and perhaps intention of the regulations.

A number of courts have held that the failure to renew the lease is "excusable" by the Court in its discretion. This finding was specifically upheld in

However, recent cases, albeit not appellate cases, further eroded the Landlord's right to bring a holdover proceeding without a notice to cure. The White Plains City Court has found, in a variety of cases, that not only may the failure to return the lease renewal in a timely fashion be excused, but that it may be cured by the Tenant without the Court's exercising any discretion.

In the case of 16 Apartment Associates, J.V. v. Lewis, the Court held that the failure to renew the lease was a curable violation. It found that the cure by the tenant by returning the lease after the eviction proceeding was started was sufficient to excuse the failure to timely return and renew the lease.

Further, in Chestnut Hill Apartments, LLC v. Mitchell, the court dismissed the Petition finding that "a tenant's failure to sign a renewal lease is curable," inherently, indicating that the belated tender of the renewal lease by the tenant cured the failure to timely renew the lease and precluded the bringing of the holdover proceeding.

We submit that the Court, in White Plains, has interwoven the issue of whether the tenant can cure (without justification) with whether the tenant had to show that the Court had to exercise its "equity" jurisdiction to excuse the failure to timely renew. The difference is apparent — for the court to exercise its equity jurisdiction there has to be a hearing where the Court has to determine that the Tenant is entitled to renew through some circumstance, such as failing to renew because of sickness, inadvertence or the like.

To require a Notice to Cure would give the Tenant an automatic right to renew, even later than the required 60 days, when the failure to renew was for any reason or no reason.

### Opportunities

Finally, in Martine Associates LLC v. Donahoe, the Court dismissed a case holding that "the landlord was required to provide the written notice to cure." Therefore, the current state of the law, at least in one city, is that the Landlord must provide a notice to cure after the tenant fails to renew the lease, that the tenant may cure (whether such a notice is given or not), and that even if the tenant does not cure at that time the Court may excuse the failure to renew the lease if the tenant cures after the inception of the proceeding, or presumably may excuse same and permit the tenant an opportunity to cure.

Thus, the tenant would seem to have not one, not two, but three bites at the apple in White Plains.

In direct contrast, the Mount Vernon City Court in Cottage Realty Associates v. Bryant, held, quoting Carriage House Realty Co. v. Conlon, 128 Misc2d 143, that "none of these regulations require that a notice to cure must be served prior to the commencement of a summary proceeding."

Thus the Mount Vernon City Court has held that there is no requirement for a notice to cure, and thus presumably no right to cure may be found in the applicable law or regulations. The clear conflict among the various Courts and DHCR creates uncertainty for the Landlord. The best that can be said to date is that a higher court will have to be called upon to resolve the disparate decisions.

Clearly, detailed discussion with landlord-tenant counsel is necessary whenever a decision must be made as to how to proceed with a tenant who has failed to renew a lease in a timely fashion.

**Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J. Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).**

Membership Meeting of the BRI. The conference will feature Judith Calogero, commissioner of the Division of Housing and Community Renewal (DHCR). The meeting will focus on topics of interest to the BRI's realty sector, including issues affecting the Apartment Owners Advisory Council (AOAC).

\*Tuesday, April 19, 6:30 p.m., The Crowne Plaza Hotel, White Plains — The General Membership Meeting of the Cooperative and Condominium Advisory Council (CCAC) of the BRI. The conference will examine two topics: 1) Security — What Buildings and Complexes Should Know; and 2) The Routine Administrative Fees of Your Co-op and Condo — Are

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## IMPACT BUILDING & REALTY NEWS

Publisher: ALBERT ANNUNZIATA  
Executive Editor: JEFFREY R. HANLEY  
Editorial Assistants: NATANNYA TONGE,  
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ELAINE NUGENT, HERB ROSE, GENE TULLIO  
Production: MEADOW ART & DESIGN, FAIR LAWN, N.J.

Published by the Builders Institute  
Subscription \$20 per year, included in membership dues.  
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Entered as periodical matter at  
Post Office, White Plains, NY 10610  
USPS 259-900

IMPACT (USPS 259-900) is published monthly for \$20 per year by the Builders Institute, 80 Business Park Drive, Suite 309, Armonk, N.Y. 10504. Periodicals postage pending at Armonk, N.Y. POSTMASTER: Send address changes to IMPACT, 80 Business Park Drive, Suite 309, Armonk, N.Y. 10504.

## Reviewing Another Busy Spring for Industry Members

### THE HANLEY REPORT

By Jeff Hanley  
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ARMONK — Spring and a busy schedule of events affecting the local building and realty industry always seem to go together. This year is no exception.

The Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI), the local leader of the building and realty industry, has announced a series of meetings and conferences that will help to fill the

calendars of industry members. From topics affecting the building and construction sector, to the realty and property management area, the events touch on important issues affecting those involved in the respective industries. Here's a review of what's ahead:

\*Thursday, April 14, 6:30 p.m., The Crowne Plaza Hotel, White Plains — The General