

Landlords – Records for Non-Payment Cases

A “simple” non-payment proceeding can quickly become less ordinary if appropriate records have not been maintained, made available to the attorney for the Landlord, and ultimately entered into evidence at trial. The absence of such records at a non-payment trial, even in the face of the basic proposition that payment is an affirmative defense, that is, must be proven by the tenant, can prove fatal.

Petitioner neglected to introduce any evidence that rent was owed other than the testimony of its President James Nazzaro. Petitioner's testimony alone, without documentation to support it, is hearsay and therefore inadmissible. *See Anzalone v. State farm Mutual Insurance co.*, 92 A.D.2d 238 at 240, 459 N.Y.S.2d 850 at 853 (N.Y.App. Div.2d Dep't 1983).

Island Prof'l Ctr. v. Ansanelli, 20 Misc. 3d 1114(A), 867 N.Y.S.2d 375 (N.Y. Dist. Ct. 2008)

In the Island Prof'l Ctr. v. Ansanelli, id., the Court found that mere testimony was insufficient to establish non-payment of rent. While that case involved a corporation, the decision indicates that documentary evidence may be required to establish the non-payment.

The Court in that case continued it's decision and held that:

Furthermore, copies or computer printouts of the original business records would have been admissible, but still no records were offered... Petitioner's failure to produce his business records “draws an unfavorable inference against Petitioner.” *Amerifirst Mortgage Corp. v. Tracy Green and Aida Claudio*, 7 Misc.3d 1028(A), 801 N.Y.S.2d 229 (2005).

The Court referred to an inference but ultimately dismissed the petition thereby rendering the lack of records determinative.

Many landlords today keep the record of rent charges and payments on any of a variety of computer programs and



systems. Nonetheless, with proper foundational testimony, the printouts generated by these programs, containing the information to prosecute a non-payment case, are admissible. The Civil Procedure Law and Rules, Article 4518, Business Records states that:

Any writing or record...shall be admissible...if...it was made in the regular course of any business and that it was the regular course of such business to make it... An electronic record ... shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record.

Business records are thus admissible whether created by hand or by entry into computer and reproduced as a printout, provided that it was the regular business to make the record and the record was made in the regular course of business. Thus the non-payment case starts long before trial, long before the commencement of the case, and long before the service of any predicate three day demand. A strong non-payment case begins with recording of rent charges and rent payments at the inception of the tenancy and the maintaining of the record of payment and charges in a timely manner throughout the tenancy. Upon production of the record for trial, the attorney for landlord can then establish the appropriate foundation for the admissibility of such records and avoid the fate of the landlord in Island Prof'l Ctr. v. Ansanelli, id., dismissal.

From a practical standpoint a printout or ledger of charges and payments provides an actual hard copy document for the court to rely upon in reaching its decision. Most trials do not result in a decision “on the record” but many conclude evidence with the Court reserving decision. In

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such event the Court will review the file thereafter and the inclusion of a document setting forth the amount owed can be extremely important as there may be no transcript of the proceedings for the Court to reference.

The same foundation is applicable to all of the landlord's records and thus record keeping becomes imperative in many ways. The lease, renewal leases, invoices, and other documents pertaining to the tenancy all may be made and kept in the regular course of business and thus may be admissible in the same way at a trial as needed. Thus the importance of contemporaneous and clear record keeping cannot be understated.

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The law firm of Finger and Finger, A Professional Corporation was founded in 1974 by Kenneth J. Finger. Currently the firm has four principal attorneys: Kenneth J. Finger and Dorothy M. Finger, Carl L. Finger and Daniel S. Finger.

Currently Finger & Finger represents Landlords with free market, Section 8, HUD, ETPA, and other regulated properties throughout Westchester County. The firm processes numerous cases and appears regularly in all of the City Courts and many of the justice courts in Westchester County. The firm drafts notices to cure, notices to terminate, combined notices, three day demands, holdover petitions, non-payment petitions, leases, and other landlord tenant related documents on a consistent basis. Most important to clients is the regular and effective communication system in place at Finger & Finger, which includes not only contact with clients upon a change in status of any case, but a weekly update listing all pending cases and the status of each.

Further, the firm is counsel to the Builder's Institute of Westchester County and its subsidiary, the Apartment Owners Advisory Council. The attorneys work daily on

issues involving all areas of rent regulation and Landlord-Tenant work.

Finger & Finger practices in all aspects of real estate law, including all matters relating to landlord tenant law such as the drafting and negotiation of leases for commercial, retail, office, and residential premises. Additionally, the firm provides services in eviction proceedings and other lease related litigation thus allowing for a particularly relevant perspective to the transactional work regarding leases.

The firm represents clients in considerable litigation in real estate and related areas as well as homeowners' associations, cooperatives, and condominiums. The firm has been successful in matters involving developers, homeowners' associations, individual shareholders, contractors, Sponsors and private water districts. The firm has also represented sponsors of cooperatives, homeowners' associations and condominiums as to offering plans and thus is quite familiar with the legal requirements and also engages in collection matters against delinquent homeowners, unit owners and shareholders involving both city and local court and foreclosure proceedings.

Directly related to Landlord Tenant law, the firm has previously drafted a form "plain language" lease to comply with a change in the law at the time, written articles on Landlord-Tenant law, drafted and litigated commercial lease matters, engaged in the collection of delinquencies and holdover proceedings and other residential and commercial matters. Members of the firm have litigated matters in Federal and State Courts pertaining to housing issues, Section 8, and other HUD and Fair Housing Act related matters. The firm also represents clients in building, housing, and health violations cases, DHCR matters, and discrimination cases.

The principals write articles for legal publications, Impact - the monthly newspaper of the Builders' Institute of Westchester County, Habitat Magazine, and have been retained by other attorneys on landlord-tenant issues in federal court. They also speak at seminars and lectures in Landlord-Tenant, Cooperative, Condominium, and Homeowners' Association matters.

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