

Landlords -- Beware of Laches

In the last several years Courts have demonstrated a willingness to consider the defense of laches (stale rent due to delays in taking legal action) raised by tenants in non-payment cases. The defense of laches is an “equitable” defense and depends on the facts of each case. However, based on customary record keeping by landlords, the defense is likely to continue to be asserted by tenants. Moreover, the soft rental market has caused many landlords to be sensitive to tenant issues pertaining to rent payments and to delay the commencement of legal action. Nothing is more frustrating for a landlord than demonstrating sensitivity to a tenant’s condition, or keeping good records, and then being penalized for either or both. Yet the defense of laches can do exactly that.

To establish the affirmative defense of laches, a respondent (tenant) must prove (1) the petitioner’s (landlord’s) conduct for which a respondent seeks a remedy; (2) that the petitioner delayed in asserting its rights; (3) lack of knowledge or notice on the respondent’s part that the petitioner would assert its rights; and (4) injury or prejudice to the respondent if the relief is afforded to the petitioner. (Dwyer v. Mazzola, 171 A.D.2d 726, 727 [2d Dept 1991].) Once the respondent meets this burden, the petitioner, to prevail, must show a reasonable excuse for the delay.

Bldg. Management Co. Inc. v. Bonifacio, 25 Misc.3d 1233(A), 2009 WL 4168360 (N.Y.City Civ.Ct.), 2009 N.Y. Slip Op. 52398(U)

This problem is particularly profound where the Landlord credits the payments, as it would generally be entitled to do, to the oldest arrears. In the case of *A & E Tiebout Realty, LLC v. Johnson*, 23 Misc.3d 1112(A) (2009) the tenant did not pay rent for four months. Thereafter the Tenant commenced paying rent and the Landlord credited same to the oldest sums due and owing, as it would normally be entitled to do. The Landlord eventually commenced a summary proceeding to collect the then most recent rents due and owing. The Court held that the because the tenant paid the monthly amount each month after the four months remained unpaid, even though apparently undesignated, the Landlord could not credit the amount back to the oldest arrears. Therefore, the Court



concluded, the amount sought was not the recent rents, but the rents due under the original four months for which tenant did not pay. The Court held, the net result was that the Landlord effectively delayed commencing action to collect the sums due for a period of approximately 23 months. Based on this interpretation of the facts the Court determined that the Tenant had successfully asserted a defense of laches and therefore the Landlord could not obtain a possessory judgment for those amounts. Since those amounts provided the basis for the amount sought, the Court, in substance, dismissed the landlord’s petition and left the landlord solely with the option of pursuing a separate action outside of landlord-tenant court for a money judgment only, at greater delay and expense.

The most disconcerting aspect of the decision in *A & E Tiebout Realty, LLC v. Johnson*, *id.* is not so much that it accepted the laches argument but that it held that “petitioner would still not have an absolute right to direct application of those payments. The right of a creditor to apply payments is subject to the general limitation that the application must be equitable and not work an injustice to the debtor. (Belden v. State, 103 N.Y. 1, 9 [1886]; 82 NYJur2d Payment and Tender § 61 [2009]. See also Carson v. Federal Reserve Bank of New York, 254 N.Y. 218, 232 [1930, Cardozo, C.J.], holding that “an application [of payments], usually appropriate, may be varied by the court when variance is necessary to promote the ends of justice.”)” Thus, even the application of payments to the oldest arrears, usually considered to be of benefit to the Landlord and Tenant, was found to support a defense of laches. No justice for the landlord in this situation.

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The only solution for Landlords is to be diligent in their collection efforts and in an instance where the landlord would like to permit the tenant to carry a balance, to be certain to reduce the agreement to writing, including the manner of crediting of payments and, if possible, a waiver of any defense of laches. While nothing is ironclad in housing court, at least a written agreement will provide some evidence of the parties' intentions. The best protection is not to delay the commencement of legal action, but in the absence of prompt action a written agreement would certainly help and, if a tenant is unwilling to sign such an agreement, then the Landlord will know where it sounds.

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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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