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Maintenance and Repairs of Cooperative Apartments: Rights and Remedies of Tenant-Shareholders

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MAINTENANCE AND REPAIRS OF COOPERATIVE APARTMENTS: RIGHTS AND REMEDIES OF TENANT-SHAREHOLDERS

I. Introduction

Imagine you have recently made a substantial cash down payment on a $175,000 two-bedroom cooperative apartment on the top floor of an attractive building in Manhattan.[1] Building security seems to be adequate, your quarters are spacious, and your neighbors appear to be respectable and reasonable. A few months later, however, your delight with your new home is somewhat diminished when you discover a small crack in the ceiling that leaks when it rains. You put in a request to an officer of the building cooperative corporation for rectification of the problem. No one repairs your leak and the condition worsens. You and cooperative officials bicker over how extensive a repair job is necessary and what the cost would be. Only those on your floor seem to care at all about the problem because only they are immediately affected by the leaky roof. The other people in the building look unfavorably on a major repair that would raise their maintenance charges. Meanwhile, your interior walls and personal property are increasingly subject to damage during further rainstorms. You call the local housing agency whose inspectors note numerous violations relating to inadequate refuse disposal, fire hazards and the lack of proper lighting in the hallways, as well as the leak in your apartment. No action having been taken on your requested repairs, you stop making your monthly payments to the cooperative corporation. The corporation has now brought a summary proceeding in housing court to evict you and obtain payments due. What is your best defense against the corporation?

Generally, today's apartment dweller has greater power than ever before to compel his landlord to provide adequate maintenance and repair services. A tenant may be entitled to withhold all or part of his rental payments if his requests for these reasonably expected services are not heeded. Additionally, he may be able to raise the

1. Recent listings show moderate-sized apartments of this description have this approximate asking price. *See, e.g.*, N.Y. Times, Oct. 21, 1979, § 8, at 26-29. Real estate industry spokesmen estimate the per room price in Manhattan's luxury buildings at $34,000. N.Y. Times, Sept. 23, 1979, § 8, at 1, col. 4.

landlord's nonperformance as a defense to any resultant eviction proceeding.[2] Underlying the tenant's recently improved position is a progression of common law landlord-tenant principles and the enactment of new statutory rights and remedies within the last decade.[3] The furthest progression has been embodied in the common law principle of implied warranty of habitability of the leased premises, which has been generally liberalized and codified in New York in section 235-b of the Real Property Law.[4]

It is unclear whether these developing concepts provide protection to a cooperator.[5] A cooperator holds stock in the cooperative corporation which owns the building and leases his apartment in the building from the corporation. The layman ordinarily speaks of "buying" and "owning" a "co-op," but actually no fee interest is ever conveyed to any individual inhabitant.[6] Yet despite the leasehold nature of the interest, if the cooperator's apartment at some point requires extensive repairs, or if there has merely been a stoppage of normal maintenance service in the building, he may find himself as alone in his responsibility to keep his dwelling livable as is any fee owner of a home. The civil court, which has original jurisdiction over all housing matters in New York City,[7] has recently been divided on the issue of whether to impose upon the cooperative corporation the duty to maintain the premises in habitable condition. Two decisions arising from fact patterns substantially similar to the hypothetical offered above have reached conflicting results, one decision denying a cooperator a defense under the warranty and upholding the corporation's right to a summary proceeding; the other upholding a cooperator's claim under the warranty.[8] No appellate court has yet reviewed this issue.

2. *See* notes 65-88 *infra* and accompanying text.

3. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

4. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1979).

5. The terms "cooperator" and "tenant-shareholder" will be used interchangeably to describe a cooperative apartment dweller.

6. N.Y. Times, March 4, 1979, § 8, at 1, col. 3.

7. N.Y. CITY CIV. CT. ACT § 110 (McKinney Supp. 1979). *See generally* Note, *The New York City Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHN'S L. REV. 483 (1973), for a description of this court's purview.

8. *Compare* 320-E. 57th Corp. v. DeLulio, No. 59269/78 (N.Y.C. Civ. Ct., Jan. 10, 1979) *with* Hauptman v. 222 E. 80th St. Corp., 418 N.Y.S.2d 728 (N.Y.C. Civ. Ct. 1979). For a discussion of the cases, *see* notes 130-33 *infra* and accompanying text.

This Note will first outline a tenant's remedies where the landlord has failed to keep the premises, common areas or both in adequate condition.[9] Second, to aid in determining whether a cooperator ought to have tenants' remedies available, this Note will examine the legal relationship between a cooperative corporation and its individual cooperators.[10] Because these advantageous remedies are often unavailable to cooperative apartment dwellers, this Note will explore other existing courses of action open to the disgruntled cooperator.[11]

II. Modern Residential Tenants' Remedies

A. Development of the Common Law

Traditionally, a lease was deemed merely a conveyance of an interest in land.[12] Until recently, the common law recognized no duty in the landlord, absent an express promise in the lease to the contrary, to provide for the maintenance of dwelling space.[13] The rule of *caveat emptor* was strictly applied. The landlord was deemed to have made no warranty that the demised property was fit for any particular purpose or, if it were a dwelling, that it was a habitable space.[14] Furthermore, payment of rent was in no way contingent upon the landlord's continued maintenance of the building. Notwithstanding the breach of a covenant in the lease, the tenant could not withhold payment. Rather, the tenant was forced to bring a separate action to enforce the promise.[15] Simply stated, the tenant paid for the right of possession of the premises.

This common law rule was an outgrowth of the typical leasehold arrangement, the agricultural land lease, and, as such, made emi-

9. *See* pt. II *infra.*

10. *See* pt. III *infra.*

11. *See* pt. IV *infra.*

12. Originally, conveyance of a leasehold estate merely gave the tenant the right to claim possession (Gorcher v. Keteltas, 3 Hill 330 (N.Y. Sup. Ct. 1842)), but now statute requires that the landlord actually deliver possession to the tenant. N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

13. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD-TENANT § 5.1, Comment b (1973).

14. But note, the common law recognized an exception to this rule in the case of a short-term lease of furnished premises for immediate occupancy. *See, e.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51 (1892); Pines v. Perssion, 14 Wis. 2d 490, 111 N.W.2d 409 (1961).

15. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70 (1962).

nent sense. Agrarian tenants merely wanted exclusive possession of a piece of land for a period of years with no landlord interference; such tenants had the skill and desire to effect the repair of any defect left by the landlord on the land.[16] When applied to city apartments, however, the separation of rental payments on the one hand, and the condition of the premises on the other, was a grotesque departure from logic. Apartment dwellers in major urban centers did not think of themselves as paying merely for the cubicles of air space they leased. Rather, urban tenants view a leasehold as offering space and an identifiable package of services.[17] The courts have recently begun to acknowledge this reality. In the late nineteen-sixties and early nineteen-seventies, a surging flood of tenants' rights cases washed over the banks of the old common law of real property, leaving a rich silt in which a growing garden of tenants' rights and remedies is cultivated today.[18]

The first direct assault on the traditional landlord-tenant principles was *Javins v. First National Realty Corp.*[19] in the District of Columbia. The landlord sought possession of the leased premises on the grounds that the appellants (tenants) had failed to pay rent. The tenants alleged approximately 1,500 violations of the Housing Regulations of the District of Columbia as an equitable defense or a set-off against the claim for rent.[20] The court of appeals reviewed the traditional approach to landlord-tenant law which, the court indicated, ignored the logical distinction between agrarian uses and modern urban uses.[21] The court recognized that a city dweller seeks "a well known package of goods and services—a package which includes not merely walls and a ceiling, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[22] Approving the

16. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD-TENANT § 5.1, Comment b (1973).

17. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

18. The hardships that were visited upon tenants under the obsolescent rules of old landlord/tenant law have been fully described. *See, e.g.*, Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

19. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

20. *Id.* at 1073.

21. *Id.* at 1074. *See* note 16 *supra* and accompanying text.

22. 428 F.2d at 1074 (footnote omitted).

recent trend toward applying the principles of contract law to leases,[23] the court found it imperative to impose on the leasing of apartments a kind of implied warranty of fitness similar to that which sales of goods are subject, in order to make the law consistent.[24] The tenant was reasonable in expecting that the apartment be fit for habitation throughout the specified term of the lease, or, as in the sales analogue, "fit for the ordinary purposes"[25] for which it was used. The court held that the local housing code determined the components of "fitness," or habitability.[26] Thus, the minimum basic entitlements of tenants were fairly well defined.

The proper remedy to be applied is less easily described. The *Javins* court's reliance on contract theory[27] suggests the use of contract-type remedies for a breach of the warranty of habitability. Such remedies include specific performance, rescission and restitution, and money damages.[28] Damages could consist of (1) the amount of diminution of market or use value to the tenant of the premises during the term[29] or (2) the amount the tenant himself spends to restore the premises to a habitable state[30] (the so-called "repair and deduct" principle) or both.

In *Marini v. Ireland*[31] the New Jersey Supreme Court addressed the issue of the "repair and deduct" remedy.[32] The court held that the tenant's expenditure on repairs the landlord failed to make constituted a good defense in a dispossess action[33] and that the "repair and deduct" method was an appropriate remedy in set-off.[34]

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23. *Id.* at 1075.
24. *See* N.Y. U.C.C. § 2-314(1) (McKinney 1964).
25. N.Y. U.C.C. § 2-314(2)(c) (McKinney 1964).
26. 428 F.2d at 1081.
27. *Id.* at 1080.
28. RESTATEMENT OF CONTRACTS § 326 (1932).
29. *Id.* § 329, Comment b.
30. *Id.* § 347.
31. 56 N.J. 130, 265 A.2d 526 (1970). This case was a dispossess proceeding in which the tenant had deducted from a monthly rental payment the amount she spent to repair a cracked toilet. She had had this work done after having made numerous attempts to have the landlord see to the problem. *Id.* at 134-35, 265 A.2d at 528. The court emphasized that the landlord, as well as delivering possession of a habitable space, will have an affirmative duty to keep the premises in fit condition: "It is a mere matter of semantics whether we designate this covenant one 'to repair' or 'of habitability and livability fitness.' " *Id.* at 144, 265 A.2d at 534.
32. *Id.* at 135, 265 A.2d at 528.
33. *Id.* at 140, 265 A.2d at 531.
34. *Id.* at 146, 265 A.2d at 535.

Soon thereafter, lower New York courts followed the reasoning of *Javins* and *Marini* where landlords failed to correct flagrant violations of New York's Multiple Dwelling Law[35] and the New York City housing code.[36] *Amanuensis, Ltd. v. Brown*[37] was the first case in which the implied warranty doctrine was accepted in the civil court, New York County. The court exercised caution in invoking the new doctrine by explaining that building security was so inadequate that it was clear the landlord had a "design . . . to force the tenants to leave by permitting the violations to continue and the living conditions to become increasingly onerous."[38] Subsequent cases in New York adopted the *Javins* position that the existing local housing code would provide the standard for habitability in all residential leases.[39] *Amanuensis* is instructive on the issue of the appropriate remedies. Specific performance, which presumably would have meant an order to install more secure doors and windows, was not decreed, probably because of the court's traditional wariness of promulgating an affirmative order which would require judicial supervision.[40] A rescission remedy, in the sense of the lease terminating and the tenant vacating, was not to the tenant's advantage because of the tight urban housing market.[41] Instead, damages were awarded to the tenant to be set off from rent payable in proportion to the

35. N.Y. MULT. DWELL. LAW §§ 1-366 (McKinney 1974 & Supp. 1978).

36. NEW YORK, N.Y. ADMIN. CODE ch. 26, tit. D (1977 & Supp. 1978).

37. 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971).

38. *Id.* at 16-17, 318 N.Y.S.2d at 14. The front door to the building had been broken for several months. Drug addicts took advantage of the open, unguarded entrance and began to use the building as a gathering place, a "shooting gallery." *Id.* at 17, 318 N.Y.S.2d at 14-15.

39. Mannie Joseph, Inc. v. Stewart, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (Civ. Ct. 1972); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971). In the wake of these early cases, tenants' advocates encouraged tenants to act boldly in demanding landlord performance of maintenance and repairs. *See generally* J. STRIKER & A. SHAPIRO, SUPER TENANT (1st ed. 1973). But a commentator affiliated with MFY Legal Services, a pioneer group on this frontier of the law, cautioned against a tenant's unilateral withholding of rent in response to a perceived breach of duty by the landlord. At that stage of the law's development a tenant might have been quickly evicted. LeBlanc, Book Review, 2 FORDHAM URB. L.J. 173 (1973).

40. 11 S. WILLISTON, CONTRACTS § 1422A, at 760-62 (3d ed. 1968); RESTATEMENT OF CONTRACTS § 371 (1932). An old New York case holds precisely that equity will not enforce specific performance of an express covenant by a landlord to repair. Beck v. Allison, 56 N.Y. 366 (1874).

41. 65 Misc. 2d at 19-20, 318 N.Y.S.2d at 17. A rescission order would have actually aided the landlord's design, thereby providing the tenant a right without an effective remedy.

seriousness of the violations.[42]

The appellate division of the New York Supreme Court put its imprimatur on the implied warranty of habitability in May, 1975 in *Tonetti v. Penati.*[43] The court found that the presence of rats and an unbearable, ineradicable dog odor in the leased apartment to be a breach of the landlord's warranty of habitability which justified rescission and a refund of the tenant's security deposit, just as advance payments for future services would be recoverable from one who breached a contract.[44] The court stated a logical truism which was only beginning to apply as a legal doctrine: "The main concern of today's tenant is that he acquire premises which he can enjoy for living purposes; he is more mobile and generally less skilled at maintenance than the agrarian tenant; repairs are most costly and dwellings, with modern plumbing and electrical facilities, are more complex."[45]

B. New York's Statutory Remedies

In addition to the development of common law principles in the courts, tenants have had available a variety of remedial paths in administrative regulations and statutory enactments. The housing code[46] has served well as a tool for measuring defects and the overall quality of conditions for the purposes of evidence and the computation of appropriate damages.[47] However, the original sole reliance on administrative proceedings and civil and criminal fines and penalties has been a well-documented failure.[48]

Second, under section 302-a of the Multiple Dwelling Law, governing "rent-impairing violations," a tenant need not pay any rent if the landlord has been on formal notice of a serious violation of the

42. *Id.* at 22, 318 N.Y.S.2d at 19. *Accord,* Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971)(where violations included rat holes and broken toilets).

43. 48 A.D.2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975).

44. *Id.* at 30, 367 N.Y.S.2d at 808.

45. *Id.* at 29, 367 N.Y.S.2d at 807.

46. NEW YORK, N.Y. ADMIN. CODE ch. 26, tit. D (1977 & Supp. 1978).

47. *See, e.g.,* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. 1973); Mannie Joseph, Inc. v. Stewart, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (Civ. Ct. 1972); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971); Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971).

48. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254 (1966).

housing code for longer than six months.[49] The Division of Code Enforcement is charged with promulgating a list of "rent-impairing" violations by means of a complex procedure prescribed by the legislature.[50] The availability of this remedy ought to give the landlord the impetus to correct serious problems. However, the six-month waiting period necessarily obstructs quick remedies to situations which frequently require immediate attention. Furthermore, two procedural aspects are disadvantageous to the tenant. First, the tenant must affirmatively plead and prove the facts that trigger the statute; second, he must deposit rent claimed by the landlord with the clerk of the court.[51] The party proving his allegations of fact recovers the entire amount so deposited.[52] The tenant cannot reclaim any amount he may have paid before invoking the section.[53]

Section 755 of the Real Property Actions and Proceedings Law provides a two-part defense for tenants against a landlord's action where the Division of Code Enforcement or another administrative agency has issued an order to correct a code violation.[54] Under these circumstances, the tenant may obtain a stay of proceedings to dispossess. Under this section, there is no need for the Division of Code Enforcement to make a formal finding of a "rent-impairing" violation, but the court must deem the condition to be a constructive

49. N.Y. MULT. DWELL. LAW § 302-a(3)(a) (McKinney 1974). The section applies in cities with populations of 400,000 or more. *Id.* § 302-a(1). A nearly identical provision applies for smaller cities and towns and villages. N.Y. MULT. RES. LAW § 305-a (McKinney Supp. 1979).

50. *Id.* § 302-a(2). The Department of Housing Preservation and Development, at the time of promulgation of lists of violations of the housing code (*see* note 46 *supra* and accompanying text), indicates which of those violations it proposes to call "rent-impairing" for purposes of section 302-a. Within thirty days the department must hold a public hearing on the propriety of the designation of the particular violations as "rent-impairing." There are provisions for publication of the resulting list of rent-impairing violations. Up to four months after the hearing any interested party may seek review by the state supreme court of any classification of a code violation as "rent-impairing." *Id.* § 302-a(2)(c). The sweep of section 302-a was held to be a constitutional exercise of the state's police power. Ten W. 28th St. Realty Corp. v. Moerdler, 52 Misc. 2d 109, 275 N.Y.S.2d 144 (Sup. Ct. 1966). Examples of rent-impairing violations are: insufficient water supply (NEW YORK, N.Y. ADMIN. CODE § D26-15.01 (1978)), defective fire egress (*Id.* § D26-10.01, 10.05), rodents (*Id.* § D26-13.03), inadequate hot water (*Id.* § D26-17.07), inadequate heating (*Id.* § D26-17.03), and poor lighting for halls and stairways (*Id.* § D26-19.03).

51. N.Y. MULT. DWELL. LAW § 302-a(3)(c) (McKinney 1974).

52. *Id.*

53. *Id.* § 302-a(3)(d).

54. N.Y. REAL PROP. ACTS. LAW § 755 (McKinney 1979).

eviction or to be dangerous to life, health or safety.[55] Even given the foregoing facts, the tenant must pay the rent, as it comes due, into court.[56] The statute provides that the court (or agency) disburse portions of the escrowed money for repairs.[57] If the landlord complies with the order to correct the violations the stay is vacated and that amount not used for repairs is paid to the landlord.[58]

This remedy is not fully satisfactory to the tenant because he ultimately pays the full rent provided for in the lease. Usually there is no abatement based on cut-off of services and the consequent decline in the value of what he has contracted for in the lease.[59] Even if the tenant attains his most important immediate goal, the repair of dangerous or otherwise annoying conditions, he is not fully compensated when he receives nothing in exchange for the diminution in value of his leasehold during the period before judicial intervention. Only in the most extraordinary circumstances will a tenant recover any money. For example, in *Ellabee Realty Corp. v. Beach*,[60] where the landlord instituted nonpayment summary proceedings, the tenant interposed as an affirmative defense allegations of numerous housing code violations, including lack of heat and hot water, broken windows, leaks in the walls, defective light fixtures, and a broken mail box.[61] Pursuant to section 755, all rent due had been ordered to be paid into court and released to the landlord upon his restoration of suitable living conditions in the building; but the court here held that since the landlord failed to perform within two years after the first deposit into court, the tenant was entitled to a full return of the sum of the deposits made into court.[62]

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55. *Id.* § 755(1)(a).

56. *Id.* § 755(2).

57. *Id.* § 755(3).

58. *Id.*

59. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 242-49 (1969), for criticism of section 755.

60. 72 Misc. 2d 658, 340 N.Y.S.2d 8 (Civ. Ct. 1972).

61. *Id.* at 659, 340 N.Y.S.2d at 8-9.

62. *Id.* at 660, 340 N.Y.S.2d at 10. Similarly, in B.L.H. Realty Corp. v. Cruz, 87 Misc. 2d 258, 383 N.Y.S.2d 781 (App. Term, 1st Dep't 1975), the tenant in a nonpayment summary proceeding obtained a section 755 stay of proceedings, citing violations in the building where he lived, and duly deposited his monthly rent into court. When the landlord failed to take any action on needed repairs for three years after the issuance of the stay, the court allowed the tenant to recoup one-half of the deposits as a set-off, reflecting damages for the breach of the warranty of habitability. *Id.*

In like manner, the rules applying to rent-controlled and rent-stabilized apartments set up clear standards for weighing the seriousness of tenants' complaints.[63] Although rent control and rent stabilization rules obviously do not apply to cooperators, the requirements under these systems that apartment dwellers receive certain minimum services and that they not be given less service than they originally bargained for can validly be analogized to the condition of cooperators.

Both sections 302-a and 755 should be workable for the cooperator who is persistent in getting the proper administrative inspections and is willing to suffer the sections' built-in delays. Yet, neither statute can be considered a completely satisfactory means of obtaining recompense for loss of bargained-for services.[64]

C. The Implied Warranty of Habitability

The broadest remedies applied in New York come under the aegis of the statutory warranty of habitability.[65] The language of the stat-

63. Rent control and rent stabilization are two related systems of controlling tenants' housing costs in the tight New York City market. Tenants who come under rent control laws are entitled to certain "essential services," which usually include all those services present at the "freeze" date of the law, April 20, 1962. Landlords are entitled to moderate periodic increases in rent formulated by the Office of Rent Control, a government agency. N.Y. UNCONSOL. LAWS §§ 8601-8617 (McKinney 1974); 1962 N.Y.C. Local Laws No. 20; NEW YORK, N.Y. ADMIN. CODE §§ Y51-1.0 to Y51-18.0 (1975). Rent-stabilized tenants are entitled to periodic lease renewals at rent increases established by the Rent Stabilization Association, a self-regulatory landlord body, and the continuation of designated "required services" agreed upon by the Association. 1969 N.Y.C. Local Laws No. 16; NEW YORK, N.Y. ADMIN. CODE §§ YY51-1.0 to YY51-7.0 (1975). *See generally* Comment, *Emergency Tenant Protection in New York: Ten Years of Rent Stabilization*, 7 FORDHAM URB. L.J. 305 (1979).

64. *See* notes 51-53, 59 *supra* and accompanying text.

65. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1978):

> 1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to convenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.
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> 2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.
>
> 3. In determining the amount of damages sustained by a tenant as a result of a

ute makes no reference to what remedies are available to a tenant in the event of the landlord's breach of this convenant. The courts have acted on the theory that after the legislature creates or endorses a substantive right without specific remedial provisions in the statute, it is the judiciary which must devise the corresponding procedures and remedies.[66] Specifically, the housing part of New York City's Civil Court, established by the Housing Court Law of 1972,[67] is empowered to take and employ any available legal or equitable remedies.[68] Senator Barclay, the sponsor of the warranty of habitability law in the New York Legislature, asserted that the statutory enactment would "confirm the direction that the courts have been taking toward dealing with the question on the basis of contract law."[69] Therefore, the statute has been recognized as a

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breach of the warranty set forth in this section, the court need not require any expert testimony.

The proposed UNIFORM RESIDENTIAL LANDLORD & TENANT ACT (1972 version) [hereinafter cited as URLTA] appears to include an unstated warranty of habitability. Article 2 of the URLTA puts the burden of apartment maintenance on the landlord. URLTA § 2.104. Upon landlord's failure to perform, a tenant could avail himself of all contract-type strategies, including "repair and deduct," claim for damages for diminution in value, and the defense of landlord's breach in actions for rent or possession. *Id.* §§ 4.101-4.105. The URLTA has been substantially adopted as law in 13 states. *See* 7A U.L.A. 17 (West Supp. 1979).

66. Houston Realty Corp. v. Castro, 94 Misc. 2d 115, 116-18, 404 N.Y.S.2d 796, 797-98 (Civ. Ct. 1978) (citing Shaw, *New Law of Implied Warranty of Habitability*, N.Y.L.J., Sept. 2, 1975, at 1, col. 2).

67. 1972 N.Y. Laws ch. 982 (codified in N.Y. CITY CIV. CT. ACT §§ 101-2300 (McKinney 1963 & Supp. 1979)).

68. Housing Court Law § 1(b) (codified in N.Y. CITY CIV. CT. ACT § 110 (McKinney Supp. 1979)). The court also may impose civil fines for violations. *See generally* Note, *The New York City Civil Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHN'S L. REV. 483 (1973). Furthermore, it is clear that lower-level housing courts statewide will hear and decide all issues and legal theories in a summary proceeding hearing: "Piecemeal determination of issues [is] wholly repugnant to the law. . . . All aspects of the Summary Proceeding should be litigated at one time." Bianchi v. Ficoratto, 83 Misc. 2d 996, 998, 373 N.Y.S.2d 946, 948 (City Ct. White Plains 1975). Alternatively, it is suggested that a tenant may bring his complaint to the small claims part of the civil court to recover his costs of making repairs, or presumably even the diminution in value of the apartment, up to the small claims limit of $1,000. J. STRIKER & A. SHAPIRO, SUPER TENANT 228-32 (2d ed. 1978); Driscoll, *De Minimis Curat Lex—Small Claims Court*, 2 FORDHAM URB. L.J. 479, 486 (1974).

69. 1975 N.Y. SEN. J. 7766-76. A logical extrapolation of the meaning of the statute states: "[leases] call for mutual obligations; they differ little, if at all, from other agreements." Posner & Gallet, *Mitigation of Damages in Residential-Lease Breaches*, N.Y.L.J., Apr. 5, 1978, at 1, col. 2 (citing 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. Term, 1st Dep't 1972)).

codification[70] of the *Amanuensis*[71] and *Tonetti*[72] principles. Accordingly, the lower state courts have manifested the belief that they have been given a mandate to apply an appropriate assortment of contract law principles to section 235-b situations.[73]

Subsequent to the enactment of the statute the cases have often turned on contract principles. In *Kekllas v. Saddy*,[74] the landlord began a nonpayment summary proceeding to recover possession of a leased one-family residence and to force the tenants to pay back rent for two months. The tenant, alleging that the persistent odor of cat urine permeated the house to the extent that his wife felt compelled to abandon the premises after two days,[75] raised the landlord's breach of the implied warranty as a set-off or counterclaim. The court stated that, hypothetically, the tenant could claim: (1) an amount equal to the cost of undertaking repairs himself; (2) an amount representing the difference between the agreed rental price and actual value of the premises in disrepair; or (3) the sum of these two amounts.[76] In *Pantalis v. Archer*,[77] for example, the tenant re-

70. Covington v. McKeiver, 88 Misc. 2d 1000, 390 N.Y.S.2d 502 (App. Term, 2d Dep't 1976); Kekllas v. Saddy, 389 N.Y.S.2d 756 (Dist. Ct. Nassau County 1976).

71. *See* note 37 *supra* and accompanying text.

72. *See* note 43 *supra* and accompanying text. One commentator, after reviewing the old conveyance concept of residential leasing, posited that contractual remedies, including abatement of rent, were implicitly approved by the passage of the statute; the author reasoned that section 235-b was a codification of *Tonetti* except that the statute offers more tenant protection in that it prohibits express waiver of the warranty in the lease. Shaw, *New Law of Implied Warranty of Habitability*, N.Y.L.J., Sept. 2, 1976, at 1, col. 2.

73. *See, e.g.*, Maryanov v. Peters, 409 N.Y.S.2d 691 (Civ. Ct. 1978) (citing Governor's Message of Approval, 1975 N.Y. Laws ch. 597, *reprinted in* [1975] N.Y. LEGIS. ANN. 437); Leris Realty Corp. v. Robbins, 95 Misc. 2d 712, 408 N.Y.S.2d 166 (Civ. Ct. 1978); Whitehouse Estates, Inc. v. Thomson, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (Civ. Ct. 1976). The New York Court of Appeals has recognized a lease as a contract for the purposes of the statute of frauds. That is, the landlord's signature alone on a lease is not sufficient to satisfy the statute in an action against the tenant, but rather the lease must be signed by the party against whom it is to be enforced. Geraci v. Jenrette, 41 N.Y.2d 660, 363 N.E.2d 559, 394 N.Y.S.2d 853 (1977).

74. 389 N.Y.S.2d 756 (Dist. Ct. Nassau County 1976).

75. The tenant also complained of a hot water tank leak and a gas leak in the house. *Id.*

76. *Id.* at 759. In this case, however, the tenant failed to call witnesses to testify on the issue of decreased value, or any other element of damages, and was awarded on his counterclaim only nominal damages of six cents. *Id.* at 760. During the first year of the statutory warranty of habitability landlords urged the courts to require tenants to bring in *expert* testimony to prove the fact and amount of diminution in market value of a residential leasehold. The Legislature, soon recognizing the unrealistic logistical and financial burden such a requirement would place on the typical tenant in an ordinary housing court action, amended the statute to rule out the necessity of an expert witness for evidence on damages.

covered fifty dollars in rent abatement representing a reduction in the apartment's value because of repeated interruptions of the tenant's hot water supply.[78]

The most expansive approach to the warranty of habitability has been taken in *Park West Management Corp. v. Mitchell.*[79] In May, 1976 there was a city-wide, seventeen-day strike of apartment building workers. Approximately 400 tenants in the 2,500-unit Park West Village apartment development withheld their rent for the month of June. The landlord instituted summary proceedings and the tenants, citing a cut-off of normal building services, responded by raising the landlord's breach of the warranty of habitability.[80] The parties stipulated to the fact of extensive disruption of garbage removal and janitorial services.[81] Using a formula based on rent control regulations, a housing court judge determined that the loss of rental value due to the interruption of services entitled the tenants to a ten percent set-off with respect to their June rent.[82] The appellate term, the appellate division of the supreme court and the court of appeals upheld the housing court on both the law and the

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1976 N.Y. Laws ch. 837, § 1 (codified at N.Y. REAL PROP. LAW § 235-b(3) (McKinney Supp. 1978)).

77. 87 Misc. 2d 205, 384 N.Y.S.2d 678 (Dist. Ct. Suffolk County 1976).

78. *Accord,* Covington v. McKeiver, 88 Misc. 2d 1000, 390 N.Y.S.2d 502 (App. Term, 2d Dep't 1976) (tenant was afforded rent abatement where the living conditions were "appalling;" but he was dispossessed of the premises in favor of the landlord); Whitehouse Estates, Inc. v. Thomson, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (Civ. Ct. 1976) (tenant was permitted by the court to deduct $100 per month for a broken air conditioner for two summer months and $10 per month for a defective stove).

79. 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979). Note that the extent of the concept of "habitability" varies among the states. *See* Clarke, *Washington's Implied Warranty of Habitability: Reform or Illusion?,* 14 GONZ. L. REV. 1, 12-22 (1978). *See also* Fusco, Collins & Birnbaum, *Damages for Breach of Implied Warranty of Habitability in Illinois—A Realistic Approach,* 55 CHI.-KENT L. REV. 337, 338 (1979); Note, *Landlord's Liability for Consequential Damages under an Implied Warranty of Habitability,* 44 MO. L. REV. 340, 342-44 (1979); Note, *The Implied Warranty of Habitability in Texas: A Development Long Overdue in Texas Landlord-Tenant Law,* 16 HOUS. L. REV. 225 (1978).

80. 47 N.Y.2d at 326, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315.

81. *Id.* Among the strikers were maintenance workers, doormen, and elevator operators. Tenants in some buildings took turns themselves at these posts to assure that such positions were filled around the clock. The situation was exacerbated by the refusal of municipal sanitation workers to cross the building workers' picket lines to pick up the garbage. N.Y. Times, May 10, 1976, at 55, col. 6; *id.,* May 7, 1976, at A1, col. 6; *id.,* May 6, 1976, at 1, col. 5; *id.,* May 5, 1976, at 33, col. 5.

82. 47 N.Y.2d at 327, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315.

findings of fact.[83]

Park West is significant in terms of defining habitability and outlining the scope of tenants' remedies. The lower appellate court acknowledged that the doctrine of warranty of habitability evolved in response to instances of wilful landlord nonfeasance,[84] but stated that a seventeen-day deprivation of all normal refuse removal and janitorial services could create conditions sufficiently detrimental to trigger the statute.[85] Although the reason for the interruption was beyond the landlord's control, the landlord should not necessarily be allowed to recover the full rent. As the court indicated, contract law excuses the performance of services by a party (here the landlord) prevented from acting by forces beyond his control, but he may not receive compensation for those services he was unable to perform.[86] In holding for the tenants, the court of appeals implicitly adopted this position.

The court of appeals, passing favorably on the housing judge's method of formulating the amount of rent set-off,[87] conceded the nature of determining damages here was necessarily imprecise, but reaffirmed the well-settled principle that where damages have been caused by breach of contract, and there is uncertainty concerning amount only, the aggrieved party is entitled to a recovery.[88]

This all-embracing warranty of habitability theory would be ideal for the cooperator disgruntled with faulty repair and poor maintenance service in his building. *Park West* makes it clear that the

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83. *Id.* at 330, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

84. Park West Management v. Mitchell, 62 A.D.2d 291, 295, 404 N.Y.S.2d 115, 118 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979).

85. *Id.* at 295, 404 N.Y.S.2d at 117.

86. *Id.* at 296, 404 N.Y.S.2d at 118.

87. 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

88. *Id.* (citing *In re* Rothko, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977); Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264 (1886)). *See also* 5 A. CORBIN, CONTRACTS § 1020 (1964); RESTATEMENT OF CONTRACTS § 331, Comment b (1932). Critics of liberal application of the implied warranty of habitability believe that it will reduce landlords' incomes, making the undertaking of repairs impossible, encouraging landlord abandonment of buildings, and further discouraging the construction of new housing. Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920, 937 (1968). A thorough research project in southern California, however, determined that use of the warranty is resulting in repairs of property, with little other effect on the housing market. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 49-51 (1978).

warranty does not speak merely to the upkeep of the bare minimum of four walls, heat, and hot and cold running water. Apparently the warranty covers everything the normal apartment dweller would expect he bargained for in signing a lease. Yet, this is the one section touching upon individual rights that has been interpreted in some housing court proceedings as not affording the cooperator a remedy or defense against the landlord cooperative corporation.[89]

III. Cooperative Apartments

A. The Cooperative Form

The cooperative form of home owning was introduced in New York City in the mid-nineteenth century.[90] There was a boom in the New York cooperative market in the prosperous 1920's; a bust following the Great Depression. Real acceptance of cooperatives came only after World War II and the expansion of Federal Housing Administration-insured loans.[91] The cooperative form has grown increasingly popular in New York City in recent years. There are now 30,000 cooperative apartments in 500 buildings in Manhattan.[92] Based on the number of "conversion plans" filed by building owners seeking to sell their buildings one unit at a time to potential tenant-shareholders,[93] it is expected that this number will double by 1982. In a tight housing market, the cost of buying into a cooperative rose precipitously during the mid- and late-nineteen seventies.[94]

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89. *See* notes 130-33 *infra* and accompanying text.

90. Mutual Redevelopment v. Goldart, N.Y.L.J., Aug. 8, 1969, at 10, col. 7 (Civ. Ct.); Miller, *Cooperative Apartments: Real Estate or Securities?*, 45 B.U. L. REV. 465 (1965) [hereinafter cited as Miller].

91. Miller, *supra* note 90, at 465-66.

92. N.Y. Times, Mar. 4, 1979, § 8, at 1, col. 3.

93. A developer wishing to convert a rental building into a cooperative must file a plan with the state department of law. The plan must provide that it is either a "non-eviction plan," in which event existing tenants cannot be evicted merely for refusal to purchase cooperative stock, or an "eviction plan," under which non-purchasing tenants may be evicted. A plan is not deemed effective unless a certain percentage of the existing tenants—15% for a non-eviction plan, 35% for an eviction plan—agree to purchase within 12 months of the filing of the offering statement and prospectus. N.Y. GEN. BUS. LAW §§ 352-e, 352-eee (McKinney 1968 & Supp. 1979). *See also* note 152 *infra*. A new law gives absolute protection from cooperative conversions to qualifying senior citizens who rent and protects all rental tenants from coercive conduct in connection with proposed cooperative conversions. 1979 N.Y. Laws ch. 432, § 2 (effective July 5, 1979) (codified at N.Y. GEN. BUS. LAW § 352-eeee (McKinney Supp. 1979)).

94. N.Y. Times, Mar. 4, 1979, § 8, at 1, col. 3. Evidently, the prices of cooperative

A cooperative apartment is the "child of a marriage of a long-term lease with a stock certificate."[95] In a cooperative arrangement, the entire building is owned in fee by a corporation;[96] residents hold shares in the corporation.[97] The corporate entity leases to the shareholders apartments in the building. Each inhabitant of the building is both a shareholder and a tenant of the corporation under a long-term lease.[98]

The right to a lease for a particular apartment requires the purchase of a designated number of shares. Each apartment requires a different number of shares, which number depends upon the size and location (upper stories are deemed more desirable) of the apartment.[99] In addition to the lump sum the occupant pays to obtain the corporation's stock and the right to move into a particular apartment, under the lease or occupancy agreement he must pay a monthly charge which is commonly called a "maintenance" expense.[100] This amount is fixed every year by the board of directors of the corporation. The amount reflects each tenant-shareholder's pro rata share, based on percentage of stock held, of the corporation's expenditures for maintenance services, mortgage payments and real property tax assessments.[101]

Cooperators benefit by the appreciation in value of the apartment and building without the full burden of actual ownership.[102] The

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apartments in early 1979 were routinely being bid up over asking prices as soon as they were available. In addition to the lagging construction of new residential buildings, another proffered explanation of the sharp price increases is the renewed public confidence in the future of New York City. Hellman, *Buying Real Estate: Safety in Concrete,* NEW YORK, Feb. 28, 1979, at 87-88.

95. Isaacs, *"To Buy or Not to Buy: That is the Question" . . . What is a Cooperative Apartment?,* 13 THE RECORD 203, 208 (1958) (cited in Miller, *supra* note 90, at 474).

96. Carden Hall, Inc. v. George, 56 Misc. 2d 865, 868, 290 N.Y.S.2d 430, 433 (Sup. Ct. 1968); 15A AM. JUR. 2d, *Condominiums & Co-operative Apartments* § 59, at 889 (1976).

97. 15A AM. JUR. 2d, *Condominiums & Co-operative Apartments* § 59, at 889 (1976).

98. 4B R. POWELL, REAL PROPERTY ¶ 633.4, at 781-82 (rev. ed. P. Rohan 1978) [hereinafter cited as R. POWELL]; Anderson, *Cooperative Apartments in Florida: A Legal Analysis,* 12 U. MIAMI L. REV. 13, 40 (1957).

99. *See, e.g.,* C. GOLDSTEIN, L. KASTER & P. ROHAN, COOPERATIVES AND CONDOMINIUMS 466-76 (2d ed. 1970) [hereinafter cited as GOLDSTEIN].

100. 4B R. POWELL, *supra* note 98, ¶ 633.4, at 784; N.Y. Times, Mar. 4, 1979, § 8, at 1, col. 3.

101. 4B R. POWELL, *supra* note 98, ¶ 633.4, at 784; Teitelbaum, *Representing the Purchaser of a Cooperative Apartment,* 45 ILL. B.J. 420, 421-22 (1957).

102. Castle, *Legal Phases of Co-operative Buildings,* 2 So. CAL. L. REV. 1, 2 (1928); Annot., *Co-operative Apartment—Stock Rights,* 99 A.L.R.2d 236, 237 (1965).

mortgage payments for the building and all real property taxes are paid by the corporation. The corporation is responsible for management and therefore the risk of personal liability is reduced for each individual. Individual savings are significantly increased by ratable apportionment of costs.[103] Share transfer restrictions and lease covenants prohibiting assignment and subletting give occupants the ability to select those who may move into the building.[104] Furthermore, stock ownership in the building gives the occupants the opportunity to make and enforce rules applicable throughout the building.[105]

The relationship of the cooperative corporation and the tenant-shareholder is to be determined from reading together the original plan of organization of the cooperative arrangement, the prospectus under which the stock was offered, the stock subscription agreement, the proprietary lease (or "occupancy agreement," if so designated), the certificate of incorporation and by-laws of the corporation, and the "house rules" (provided of course, that none of these provisions are contrary to law).[106] Usually, these legal instruments are deemed to form a single contract between the cooperative corporation and the individual cooperator.[107] The recently acknowledged essence of a modern landlord-tenant relationship, the *quid pro quo* of rental payments in exchange for maintenance of livable housing, might be ignored by a court construing this contract.[108]

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103. 4B R. POWELL, *supra* note 98, ¶ 632, at 767.

104. *Id.* ¶ 633.13, at 822, ¶ 633.14, at 825-26.2. Approval by a cooperative's governing board is required for any sale, and such approval is not given automatically. Recently, for example, former President Richard Nixon either withdrew voluntarily or was denied approval to purchase a cooperative interest in an apartment on Manhattan's Upper East Side after the present residents of the building publicly voiced their unwillingness to accept the security problems, the press and curiosity seekers that would accompany the Nixons' presence there. N.Y. Daily News, Aug. 3, 1979, at 4, col. 4; *id.*, Aug. 1, 1979, at 5, col. 4.

105. 4B R. POWELL, *supra* note 98, ¶ 632, at 767. *See, e.g.*, GOLDSTEIN, *supra* note 99, at 280-84. A condominium arrangement differs from a cooperative in that a condominium occupant purchases his dwelling unit in fee and is therefore individually liable for mortgage and tax payments. 4B R. POWELL, *supra* note 98, ¶ 633.1, at 773-75. The association of owners is responsible only for common areas in the condominium development. *See* White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259, 45 A.L.R.3d 1161 (1971) and cases cited therein.

106. *In re* Miller, 173 Misc. 347, 18 N.Y.S.2d 59 (Sup. Ct. 1940); Tompkins v. Hale, 172 Misc. 1071, 15 N.Y.S.2d 854 (Sup. Ct. 1939).

107. *See, e.g.*, Dunbar Apartments, Inc. v. Nelson, 136 Misc. 561, 241 N.Y.S. 354 (Mun. Ct. 1930).

108. *See* notes 130-33 *infra* and accompanying text.

B. The Legal Interest of a Cooperator

The cooperator's legal interest may be deemed to be one in personal or real property. If it is deemed to be an interest in real property, it may be characterized as a fee or tenancy. Which of these legal interests will be recognized depends upon the purpose of the analysis.

The tax laws treat the cooperator as a homeowner with respect to deductions he may take on his income tax in proportion to his contribution to the cooperative's mortgage interest payments and real property tax assessments.[109] The tax laws in effect ignore the shareholding aspect of the cooperative arrangement and designate the cooperator's interest exclusively a real property interest, an interest equivalent to that of a fee owner.[110]

For purposes of federal securities regulations, the cooperative stock is treated as a real property interest. In *United Housing Foundation, Inc. v. Forman,*[111] the United States Supreme Court held that shares of a housing cooperative were not subject to the Securities Act of 1933[112] or the Securities Exchange Act of 1934.[113] Tenant-shareholders alleged violations of the securities laws in the sale of shares of Co-op City, a publicly financed project which was subject to strict state review at each phase of its development.[114] Within this project the cooperative corporation had the first right to buy back a cooperator's stock at the original purchase price. If the cooperative corporation did not buy back the stock (an unlikely circumstance) the selling price to a third party was expressly limited, so that the price originally paid for the stock was, in effect, a recoverable deposit.[115] The Court ruled against the tenant-shareholders, relying in part on the fact that the stock could not appreciate in value and a shareholder could never realize a profit.[116] This reasoning implied

109. I.R.C. § 216(a); N.Y. TAX LAW § 360(12) (McKinney 1975). Additionally, a sale of cooperative apartment stock is eligible for the rollover of gain upon sale of a principal residence (I.R.C. § 1034(f)), and the one-time exclusion of gain upon the sale of a principal residence by individuals over 55 years of age (I.R.C. § 121(d)(3)).

110. Lacaille v. Feldman, 44 Misc. 2d 370, 386, 253 N.Y.S.2d 937, 955 (Sup. Ct. 1964).

111. 421 U.S. 837 (1975).

112. 15 U.S.C. §§ 77a-77aa (1976).

113. 15 U.S.C. §§ 78a-78jj (1976).

114. 421 U.S. at 841.

115. *Id.* at 842-43.

116. *Id.* at 851.

that a wholly private cooperative market in which people buy and sell, at least in part, for the purpose of actual monetary profit could come within the purview of the securities law.[117] The Second Circuit, however, has now held the public/private distinction immaterial.[118] If the Second Circuit decision is followed, the purchase and sale of any cooperative stock will be deemed a real estate transaction.[119] The overriding rationale is that the cooperator is not making an investment in stock in the traditional sense of buying a share in General Motors. Rather, he is buying himself a place to live. In this sense, federal law considers a cooperative to be real property.

In contrast, state courts have called cooperative shares "personalty" where priorities of lienors, judgment creditors and other creditors were at issue.[120] In one case, in determining damages for breach of contract for sale of shares in a cooperative building, the shares were denominated "goods" covered by Article 2 of the Uniform Commercial Code.[121] Similarly, in federal court, cooperative shares were held to be incorporeal personalty, for the purpose of exempting them from the President's Phase I price controls in 1973.[122] On the other hand, for the purposes of the statute of frauds, the cooperative sale is treated as a real estate transaction.[123]

C. Duty to Maintain and Repair

The cases are less illuminating on the issue of the cooperator's status with regard to the kind of service a tenant wants and expects in his building. As we have seen, the relationship between the corpo-

117. *E.g.*, 1050 Tenants Corp. v. Jakobson, 503 F.2d 1375, 1378 (2d Cir. 1974).

118. Grenader v. Spitz, 537 F.2d 612 (2d Cir.), *cert. denied*, 429 U.S. 1009 (1976).

119. 421 U.S. at 842.

120. State Tax Comm'n v. Shor, 43 N.Y.2d 151, 371 N.E.2d 523, 400 N.Y.S.2d 805 (1977).

121. Silverman v. Alcoa Plaza Assocs., 37 A.D.2d 166, 323 N.Y.S.2d 39 (1st Dep't 1971). The case involved default by the buyer of cooperative shares soon after he had made a down payment pursuant to the contract of sale. The seller subsequently sold the shares to a third party at the original contract price; *i.e.*, the seller suffered no loss of his bargain. The defaulting buyer sought to regain his down payment. A defaulting party has no right to recover a down payment on a real property transaction (Cohen v. Kranz, 12 N.Y.2d 242, 189 N.E.2d 473, 238 N.Y.S.2d 928 (1963)). However, here the court characterized the shares as personalty and the defaulting buyer was allowed to recover. 37 A.D.2d at 172, 323 N.Y.S.2d at 45. The court looked to the intentions of the parties to determine the nature of the contract. *Id.* at 171-72, 323 N.Y.S.2d at 44.

122. Stockton v. Lucas, 482 F.2d 979 (Temp. Emer. Ct. App. 1973) (interpreting Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 201-206, 84 Stat. 796).

123. Frank v. Rubin, 59 Misc. 2d 796, 300 N.Y.S.2d 273 (Sup. Ct. 1969).

ration and cooperator is considered that of landlord-tenant for the purpose of the corporation's bringing an eviction proceeding against the cooperator in housing court.[124]

One housing court case, in dicta, recognized a legal duty in the cooperative corporation in its capacity as landlord to keep all parts of the building in good repair. The repair problem in that case, however, was outside the leased premises.[125]

Neither the language nor the legislative history of section 235-b suggest the exception of cooperative apartments from the scope of the warranty of habitability.[126] A cooperator seeking the protection of the statute ought to be able to rely on the express statement that the statute embraces "every written or oral lease or rental agreement for residential purposes."[127] Cooperators in city apartments are presumably more like other urban apartment dwellers than suburban or rural homeowners in that cooperators expect a certain amount of building maintenance to be done by the corporation. The physical structure of an apartment building makes this expectation reasonable. Few individuals, whether cooperators or renters, would have the expertise or resources to perform work on the normally complex apartment building facilities.[128]

Thus far, however, it appears that the courts perceive cooperators as having the protection of more detailed agreements and greater

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124. 930 Fifth Ave. Corp. v. King, 40 A.D.2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972); Hilltop Village Coop. #4 Inc. v. Goldstein, 43 Misc. 2d 657, 252 N.Y.S.2d 7 (App. Term, 2d Dep't 1964), *aff'd*, 258 N.Y.S.2d 348 (App. Div., 2d Dep't 1965); Chinatown Apartments, Inc. v. Chu Cholam, N.Y.L.J., Mar. 29, 1979, at 7, col. 1 (App. Term, 1st Dep't); 1990 Seventh Ave. Coop. v. Edwards, 133 Misc. 831, 234 N.Y.S. 82 (App. Term, 1st Dep't 1929); Esplanade Gardens, Inc. v. Reed, N.Y.L.J., May 9, 1979, at 13, col. 3 (Civ. Ct.); Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (Civ. Ct. 1964); Brigham Park Coop. Apts., Sec. 4 v. Lieberman, 158 N.Y.S.2d 135 (Mun. Ct. 1956); Dunbar Apartments, Inc. v. Nelson, 136 Misc. 561, 241 N.Y.S. 354 (Mun. Ct. 1930). *Contra*, Earl W. Jimerson Housing Co. v. Butler, 97 Misc. 2d 563, 412 N.Y.S.2d 560 (Civ. Ct. 1979). But the corporation cannot bring a nonpayment summary proceeding for an amount allegedly due that represents a credit applicable to the purchase price of the cooperative stock. Adair v. Tookey, 417 N.Y.S.2d 185 (Civ. Ct. 1979).

125. Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (Civ. Ct. 1964). The reasoning behind the finding of a duty in this case has not been followed by other courts, however.

126. *See* 1975 N.Y. SEN. J. 7766-76; Governor's Message of Approval, 1975 N.Y. Laws ch. 597, *reprinted in* [1975] N.Y. LEGIS. ANN. 437.

127. *See* N.Y. REAL PROP. LAW § 235-b(1) (McKinney Supp. 1979).

128. *See* text accompanying note 45 *supra*.

bargaining power, and therefore require less judicial protection than do the generally less affluent urban tenants who are faced with uniform leases and a tight housing market.[129] In *320-E. 57th Corp. v. DeLulio,*[130] the housing part of the civil court held that the warranty of habitability did not apply to an occupancy agreement for an apartment in a cooperative building. The cooperative corporation in this case brought nonpayment summary proceedings after DeLulio had failed to pay her monthly "maintenance" charges for several months. DeLulio sought to interpose the defense of breach of implied warranty of habitability. She claimed that, despite her numerous requests, the corporation had failed to fix a portion of the roof in need of substantial repair, with the result that her interior walls and her personal property were damaged. DeLulio also presented to the court evidence of other housing code violations found by the Division of Code Enforcement of the New York City Office of Rent and Housing Maintenance. In dismissing DeLulio's defense the court relied on an earlier decision, *158th Street Riverside Drive Co. v. Launay,* which reads, in pertinent part:[131]

> While section 235(b) [*sic*] refers to "every written or oral lease or rental agreement for residential premises" and similarly refers to "landlord or lessor" and "tenants or residents," it is clear that the conventional landlord-tenant relationship is contemplated. . . . Accordingly, this court holds that because a cooperative corporation does not stand in the conventional relationship of landlord to its member tenants, the provisions of section 235(b) of the Real Property Law do not apply to such relationship. Respondent's remedy lies elsewhere.

The factual setting in *Hauptman v. 222 E. 80th St. Corp.*[132] was nearly identical to *DeLulio* except that Hauptman had the needed repairs done at his own expense. But here the housing judge, citing the warranty of habitability, upheld Hauptman's claim against the corporation for the cost of repairs. This decision is in direct conflict with *DeLulio* and *Launay.* Note, though, that *Hauptman* was distinguishable in that the housing judge was presented with strong, clear language from the cooperator's lease concerning the corpora-

129. N.Y. Times, Mar. 14, 1979, at B1, col. 1.

130. No. 59269/78 (N.Y.C. Civ. Ct., Jan. 10, 1979).

131. 158th Street Riverside Drive Co. v. Launay, N.Y.L.J., Apr. 6, 1976, at 9, col. 2 (Civ. Ct.).

132. 418 N.Y.S.2d 728 (N.Y.C. Civ. Ct. 1979).

tion's duty to maintain structural portions of the building. The *Hauptman* court also made a finding of fault in the original construction of the building.[133] Applying the implied warranty only to conventional tenants may not be a valid policy decision on the basis of their perceived higher bargaining power, since the market for cooperatives has also become highly competitive and a prospective cooperator's bargaining position is generally weak.[134]

IV. Proposed Corporate Law Strategies

It is presently unclear whether the cooperator stands in the position of a modern tenant with respect to his status vis-a-vis the cooperative corporation. He may therefore need to rely, if not on explicit provisions of his contract with the corporation, on procedures made available by the fact of a cooperative's corporate form. When confronted with a dissatisfied cooperator the courts sometimes indicate that the cooperator's primary forum is the board meeting and that the cooperator's best tool is his vote in contesting directors' elections.[135] Apparently, the prevailing attitude in such courts is that those in a "cooperative" ought to be true to their name by being cooperative in the sense of heeding each other's individual complaints so that litigation in quest of tenant-type remedies should be unnecessary.[136]

In New York the mechanism of the law of business corporations generally applies to cooperatives.[137] The management of a cooperative corporation is entrusted to its directors and officers.[138] The shareholders' voting procedure is not necessarily the same as in the usual corporation. Each cooperator is allotted one vote, rather than

133. *Id.*

134. N.Y. Times, Mar. 4, 1979, § 8, at 1, col. 3; Hellman, *Buying Real Estate: Safety in Concrete*, NEW YORK, Feb. 28, 1979, at 87-88.

135. Russell v. Third Equity Owners Corp., 67 A.D.2d 869, 870, 413 N.Y.S.2d 392, 393 (1st Dep't 1979); Bourgeois v. Am. Savings Bank, 63 Misc. 2d 468, 469-70, 312 N.Y.S.2d 232, 233-34 (Civ. Ct. 1970).

136. 67 A.D.2d at 870, 413 N.Y.S.2d at 393.

137. Jamil v. Southridge Coop., Sec. 4, Inc., 93 Misc. 2d 383, 385, 402 N.Y.S.2d 292, 293 (Civ. Ct. 1978).

138. The Business Corporation Law applies to all phases of cooperative corporation operation except where expressly stated otherwise. N.Y. COOP. CORP. LAW § 5 (McKinney Supp. 1979). Such application of laws designed for general business use arguably makes an awkward fit. Hennessey, *Cooperative Apartments and Town Houses*, 1956 U. ILL. L.F. 22, 40-41.

a portion based on percentage of total share ownership,[139] unless voting according to proportionate patronage or shares in the cooperative is expressly provided for.[140] The New York Cooperative Corporation Law provides shareholders can remove a director by a vote of three-quarters of those present at a meeting where merely ten percent of those entitled to vote are present.[141] Conceivably, a small group of cooperators united by a common problem, for example, all the people on the leaky top floor, could bring about a change in board membership.

The board of directors has the usual corporate authority but cooperative shareholders are in a better position than shareholders of businesses to determine specific policies in that they actually live with the consequences of board actions and can readily determine the effectiveness of these actions; also, the number of shareholders is usually lower than that of a large corporation, so that as a practical matter it may be easier to hear the suggestions of all shareholders. Cooperators may therefore insist on more frequent shareholder meetings and assert more control over the board than business shareholders do.[142]

Failure to provide adequate maintenance and repair services arguably constitutes the kind of inaction or mismanagement for which corporate directors and officers may be held liable, either as a breach of the duty of care owed to the corporation or as a breach of fiduciary duty. The directors are bound to manage the affairs of the corporation so as to achieve its purposes efficiently *and* to treat individual cooperators fairly and equally.[143] The duty owed by all corporate directors and officers is to exercise "that degree of care which an ordinarily prudent person in a like position would use under similar circumstances."[144] This duty comprises obligations of

139. N.Y. COOP. CORP. LAW § 44 (McKinney 1951 & Supp. 1979).

140. *Id.* §§ 45-46. At least five directors must be chosen, at least one of whom is both a United States citizen and a New York State resident. *Id.* § 11(9).

141. *Id.* § 63.

142. Yourman, *Some Legal Aspects of Cooperative Housing*, 12 L. & CONTEMP. PROB. 126-133 (1947).

143. Vernon Manor Co-op Apartments v. Salatine, 15 Misc. 2d 491, 495, 178 N.Y.S.2d 895, 900-01 (Westchester County Ct. 1958). The court in this case found a board-imposed late charge for nonpayment of a small supplementary charge unreasonable and unenforceable. *Id.* at 496-97, 178 N.Y.S.2d at 902.

144. N.Y. BUS. CORP. LAW §§ 715 (officers), 717 (directors) (McKinney 1963 & Supp. 1979).

due care and diligence in addition to the obvious constraints against self-dealing.[145] Liability, however, may not be grounded on mere misjudgment.[146] Generally, decisions of policy are left to the directors' sole discretion to the extent these decisions are reached in an honest and good faith manner.[147] An aggrieved cooperator could assert that the primary purpose of the corporation is to preserve or upgrade the physical condition of the building at the lowest possible cost, thereby enhancing the value of the cooperators' investment. Failure to provide adequate maintenance and repair services could be an actionable breach of the directors' duty to protect that value.

The directors stand in the position of fiduciaries to the cooperative corporation. This rule imposes a high standard[148] on their behavior in their interactions with the corporation and with shareholders. An allegation of breach of fiduciary duty could be a proper attack against a board member or an officer who deprives a cooperator or group of cooperators of some service or repair job, so that he himself is better served by the cooperative's resources; for example, if a director's apartment or hallway were to benefit by substantial alterations while other parts of the building deteriorated. A recent case, however, suggests that a cooperator's case based on breach of fiduciary duty requires a factual background more serious than mere inconvenience to the cooperator, or alternatively requires allegations of conspiracy by defendant directors to deprive plaintiff cooperators of their rights.[149]

Removal of directors and officers who ill serve the corporation is a remedy prescribed in the statute. A petition to the court to consider removal of a director or officer requires the participation of only ten percent of the shareholders. In cases of the corporate officials' neglect of legal duties, the attorney general can bring a similar action even without a minimum number of complaining sharehold-

145. Barr v. Wackman, 36 N.Y.2d 371, 329 N.E.2d 180, 368 N.Y.S.2d 497 (1975).

146. Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 825 (1944); Kamin v. Am. Express Co., 86 Misc. 2d 809, 383 N.Y.S.2d 807 (Sup. Ct.), *aff'd*, 54 A.D.2d 654, 387 N.Y.S.2d 993 (1st Dep't 1976).

147. Blaustein v. Pan Am. Petroleum & Transp. Co., 293 N.Y. 281, 56 N.E.2d 705, *motion denied*, 293 N.Y. 763, 57 N.E.2d 841 (1944).

148. *See* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

149. Russell v. Third Equity Owners Corp., 67 A.D.2d 869, 870, 413 N.Y.S.2d 392, 393 (1st Dep't 1979).

ers.[150] As in any corporation, this remedial path would be open to cooperative tenant-shareholders.

Another route may be followed through the office of the attorney general under a section of the state's blue sky law. Unlike the federal securities law in its scope,[151] New York's Martin Act specifically provides for regulation of cooperative housing stock.[152] The prospective buyer is protected by provisions for full disclosure by the cooperative developer and by the required establishment of an escrow account in which his money is held until he takes possession of the apartment.[153] The law can be enforced by the attorney general or by the individual in a civil suit.[154] Unfortunately for the cooperator, there is nothing the attorney general can do to help a cooperator who has settled into an apartment, absent an allegation of fraud or misrepresentation as to matters that must be included in the offering statement.[155]

V. Conclusion

Logically, the cooperator who is subject to summary proceeding and the other mechanisms of landlord-tenant court should have recourse to pro-tenant provisions of the law, including the broad warranty of habitability. He is not yet assured, however, of possessing these protections.[156] Remedies within the corporate framework appear impracticable. There appears to be no principled reason why tenant-shareholders should not have available this full panoply of statutory defenses in the housing court proceedings, in view of the fact that cooperative corporations have full right to assert the same

150. N.Y. BUS. CORP. LAW §§ 706 (directors), 716 (officers) (McKinney 1963 & Supp. 1979).

151. *See* notes 111-19 *supra* and accompanying text.

152. N.Y. GEN. BUS. LAW §§ 352-e(1)(a), 352-ee (McKinney 1968 & Supp. 1979). The cooperative conversion section has been renumbered 352-eee. 1979 N.Y. LAWS ch. 135, § 1 (effective May 24, 1979).

153. N.Y. GEN. BUS. LAW § 352-e(2-b) (McKinney Supp. 1979).

154. Steingart v. 21 Assocs., Inc., 31 Misc. 2d 212, 215, 220 N.Y.S.2d 276, 279 (Sup. Ct. 1961). The attorney general's administrative actions under the statute are subject to judicial review, pursuant to Article 78 of the Civil Practice Law and Rules. 160 W. 87th St. Corp. v. Lefkowitz, 76 Misc. 2d 297, 350 N.Y.S.2d 957 (Sup. Ct. 1973).

155. Examples of items that must be in the prospectus are: essential terms of all mortgages, names and business background of the principals involved, the interests and profits of the promoters, all transfer restrictions, and a description of all major current leases. N.Y. GEN. BUS. LAW § 352-e(1)(b) (McKinney Supp. 1979).

156. *See* notes 130-33 *supra* and accompanying text.

claims available in any other landlord and tenant case. Otherwise, if the tenant-shareholder is not permitted all the contemporary tenant's defenses, the corporation should not be permitted to use the expedited landlords' procedure.[157]

The warranty of habitability would be the most effective lever for an individual cooperator. Certainly, the warranty should apply to him if a literal reading of the statute is given force; it is supposed to attach to "*every* written or oral lease and rental agreement for residential purposes."[158] No legislative pronouncement tends to exclude cooperative leases from the purview of the statute.

Underlying the present construction of the law which may exclude cooperative dwellers from warranty protection may be the idea that the predominantly middle- and upper-income cooperators do not constitute a group that needs the type of protection that the majority of apartment dwellers need. There may be the feeling that cooperative dwellers deal from a better position, and that they have greater bargaining power in their housing market than poor people have in theirs. One may contend that typical cooperative dwellers have the advantages of: (1) greater choice of places to live, (2) lawyers and other knowledgeable advisors, and (3) more complete and precise documentation of their rights. As a practical matter, however, the supply in the prospective cooperator's housing market is very small and he is not in the position to demand more explicit statements of the corporation's responsibilities. In this respect, prospective purchasers need no less protection than do lower-income people who rent.

The problem with an analysis of the cooperator's rights is that "cooperative housing evolved in the twilight of an era when judicial opinions were characterized by 'pigeonholing,' a process of attaching labels to the parties (or operative facts) and then reasoning with the agreed-upon classification serving as a major premise."[159] There is a need for a comprehensive law which deals with every aspect of

157. This appears to be the rationale of a recent decision, Earl W. Jimerson Housing Co. v. Butler, 97 Misc. 2d 563, 412 N.Y.S.2d 560 (Civ. Ct. 1979), which denied the cooperative corporation recourse to summary proceeding in housing court. This decision runs contrary to the authority of the cases cited in note 124 *supra*.

158. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1979) (emphasis added).

159. Rohan, *Cooperative Housing: An Appraisal of Residential Controls and Enforcement Procedures*, 18 STAN. L. REV. 1323, 1337 (1966).

cooperative apartment operation, as the proposed uniform condominium statute covers that kind of home ownership.[160] Among other things, the condominium act provides for: an implied warranty of quality of the housing; a class action remedy for violations of the act and of the condominium association's by-laws; recovery of punitive damages and attorneys' fees in certain cases; and the nonenforceability of unconscionable contract terms.[161]

As the law now stands, counsel for a prospective cooperator ought to ensure that the lease or occupancy agreement defines the corporation's continued delivery of a package of services including, at least, maintenance and repair of the roof, the exterior portion of the building, all structural portions, plumbing, heating and ventilation systems, and all common areas as a condition precedent to continued monthly payments. The cooperator should make an express reservation of self-help remedies and rights of set-off in the event of the corporation's failure to maintain and repair and he should attempt to procure the corporation's waiver of its rights to proceed in summary fashion in housing court.

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160. *See* Thomas, *The New Uniform Condominium Act*, 64 A.B.A.J. 1370 (1978).
161. *Id.* at 1373.