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NOTES AND COMMENTS

THE NEW YORK CITY CIVIL HOUSING COURT: CONSOLIDATION OF OLD AND NEW REMEDIES

In his 1972 message to the state legislature, the governor of New York called for a method of resolving New York City housing violation claims expeditiously while assuring “. . . a fair and judicious forum for resolving owner-tenant disputes.”¹ Recognizing that severe problems of congestion and limited facilities burden the criminal courts,² the governor suggested removing housing cases from those courts in the same manner that traffic violations were transferred to a tribunal within the State Department of Motor Vehicles.³

The legislature responded by approving the 1972 Housing Court Law⁴ which sets forth legislative findings concerning the ineffectiveness of criminal sanctions against owners as a means of securing building code compliance.⁵ Specifically, the use of criminal fines to induce such compliance was emphatically rejected because past reliance on the fines has

. . . provided an opportunity for some building owners to resist the proper enforcement of housing standards by abuse of procedural

¹ Annual Message, Jan. 18, 1972, N.Y. Laws 195th Reg. Sess. 3361, 3378 (McKinney 1972).

² *Id.* at 3372.

³ *Id.*

⁴ Ch. 982, [1972] N.Y. Laws 195th Reg. Sess. 3099 (McKinney 1972) [hereinafter Housing Court Law]. The bill was originally introduced in both houses as S. 9745 & A. 11590. In 1965, a study group had recommended that such a court be established and be devoted entirely to housing problems. See LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, LEGAL REMEDIES IN HOUSING CODE ENFORCEMENT IN NEW YORK CITY 230-57 (1965) [hereinafter LEGAL REMEDIES]. The present bill was drafted, in large part, by Dr. Lorraine D. Miller, member of the housing court advisory council, and Assemblywoman Rosemary R. Gunning. Other sponsors were Assemblyman Seymour Posner and Senators Roy Goodman and Thomas Laverne.

A housing court with both equity and criminal adjudication powers was established by the Massachusetts legislature in 1971. Mass. Gen. Laws ch. 185A sets forth the jurisdiction and powers of the housing court for the city of Boston. Only one judge presides but he may appoint a number of “housing specialists” with one of them designated “chief housing specialist.” Qualifications of these specialists are analogous to those of the New York City Housing Court hearing officers yet they serve only in an advisory capacity to the presiding judge. All costs of the Boston housing court are expressly required to be paid by the city and all sums received by the court are deposited in the city treasury.

The drafters of the New York City Housing Court bill could not allow criminal cases to be heard without effecting an amendment to the state constitution since the new court is to be part of the New York City Civil Court.

⁵ § 1(a) Housing Court Law.

devices for dilatory purposes, evasion of service of process, failure to heed orders to remove violations, [and by] treating the payment of small criminal fines as a lesser cost of repair and removal of violations.⁶

The legislature decided to add to the New York City Civil Court a Housing Part capable of (1) hearing all actions related to building problems, including actions to recover the new civil penalty, (2) recommending or employing any available remedy regardless of the relief originally sought, and (3) retaining jurisdiction over the subject matter until a satisfactory result is attained.⁷ Finally, the legislature called for hearing officers whose backgrounds will reflect intimate knowledge of current housing problems and remedial programs.⁸ In addition to applying their special expertise to housing remedies, these hearing officers will ease the workloads of both criminal and civil court judges. The Housing Court Act was not passed without controversy and it is interesting to note that a recent New York City Bar Committee report on the Act has made the rather astonishing recommendation that the provision for hearing officers be eliminated.⁹ The impetus for this suggestion was the fact that the officers, being given broad powers comparable to those of civil court judges, will be involved in the entire range of traditional landlord-tenant disputes in addition to the newly created civil penalty actions. The report declared, "It is neither wise nor necessary that the parties to such actions shall be denied the privilege of having their rights determined by duly elected and experienced judges."¹⁰

⁶ *Id.* See note 36 *infra*. For a thorough discussion of the inadequacy of the criminal sanction, see LEGAL REMEDIES at 44-49; Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, at 1275-81 (1966) [hereinafter Grad]; Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, at 820-24 (1965) [hereinafter *Housing Codes*.]

⁷ § 1(b) Housing Court Law. See Grad 1282-83. Examples of continuing jurisdiction, after adjudication, may also be found in provisions of the Domestic Relations Law:

Once a court has obtained jurisdiction of a party through a matrimonial action, the jurisdiction continues even after the final decree is entered, and provisions affecting the support of the wife or children may be annulled, varied or modified after a divorce is granted . . . It is as though the judgment in each case had an express reservation that it might thereafter be annulled, varied or modified as justice requires.

E. CANUDO, MARRIAGE, DIVORCE & ADOPTION LAWS OF NEW YORK 66 (1971). The federal Bankruptcy Act similarly grants district courts broad supervisory powers over debtors and their business operations. See 11 U.S.C. §§ 11 & 66 (1970).

⁸ § 1(c) Housing Court Law.

⁹ COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENTS TO "HOUSING COURT ACT" (Dec. 6, 1972) at 2. [hereinafter CITY BAR REPORT].

¹⁰ *Id.*

Despite the opposition to hearing officers expressed by the City Bar Association, it appears that the legislature intends to retain them in the manner presently prescribed by the Housing Court Law.¹¹ Contrary to the City Bar's opinion, the promoters of the bill feel that conflicts between owners and tenants will best be resolved by specialists in the housing field.¹²

The multi-sponsored Housing Court bill was signed into law by Governor Rockefeller on June 8, 1972. In his memorandum of approval, the governor echoed the legislature's findings by stating that

[u]nder the present antiquated system, the criminal courts have become burdened with an inappropriate jurisdiction, and corrective action is hindered by the brief involvement of the courts with problem buildings and the unfortunate tendency of a minority of irresponsible owners to treat fines as a cost of doing business.¹³

He also noted that the bill was responsive to his earlier requests for a "judicially-supervised" forum, thereby indicating his disfavor of the type of legislation the city had originally sought, i.e., a city administrative tribunal.¹⁴

The remainder of this Note will discuss the details of the legislation as enacted, its interaction with existing legislation and case law and the funding problem facing the new court.

THE FUNDING FIASCO

Having demonstrated the failings of present methods of housing code enforcement in New York City and having convinced the state legislature and governor of the urgency of the need for effective enforcement, one would suppose that housing reformers could rest secure

¹¹ Interview with Dr. Lorraine D. Miller, advisory council member, Feb. 2, 1973.

¹² *Id.*

¹³ Memorandum of Approval, June 8, 1972, N.Y. Laws 195th Reg. Sess. 3410 (McKinney 1972).

¹⁴ See Annual Message, Jan. 18, 1972, N.Y. Laws 195th Reg. Sess. 3361, 3378 (McKinney 1972). Addressing himself to measures to speed the administration of justice, the Governor asked the legislature to

[provide] a method for judicially supervised determination of housing violations which would free New York City judges and courts from much of the burden of thousands of housing violation cases, and still insure a fair and judicious forum for resolving owner-tenant disputes.

Id.

In 1971, the City of New York attempted to secure legislative approval of a plan to establish an administrative tribunal within its Housing and Development Administration rather than to seek a specialized part within the civil court system. A bill introduced in the State Senate provided for appointment of hearing officers by the administrator. S. 5716, 194th Reg. Sess. (1971). Only code violation cases were to be heard and new rules were to be promulgated regarding petition, summons, and answer. The bill was relegated to the rules committee and did not survive the 1971 session.

in their victory once the Housing Court Law was passed. To the contrary, perhaps the largest battle remains, for, despite the imminency of the scheduled April 1, 1973, opening date, a source of funding for the new court has yet to be found.

Although the Housing Court bill lacked an appropriation provision, April 1 was originally selected by the drafters because it coincided with the anticipated takeover of all court costs by the state. A bill that would have amended the state's Judiciary Law, shifting the entire financial burden of the New York City Civil Court system from the city to the state,¹⁵ was introduced in both houses of the 1972 legislature. Unfortunately, this bill died in the rules committee. As a result, although the Housing Court was sired by the state legislature, the city faces financial responsibility for its birth. The governor has since refused to allocate state contingency funds to help the court open on time¹⁶ despite his previously expressed favorable attitude toward state funding of court costs.¹⁷ The mayor regards the state as financially responsible for the Housing Court and, seeking a postponement of the scheduled opening date, has asked the governor for adequate funds.¹⁸

With no solution to the monetary crisis yet found, a public hearing was held on October 4, 1972, to hear criticisms of the new bill and to consider the funding problem. Judge Edward Thompson, the Administrative Judge of the Civil Court, being responsible for opening the new court on April 1, remarked:

At this juncture I have nary a paper clip, I have not 10 cents of money with which to hire people, provide the machinery, afford the room or train in a sensible management fashion the help I must have.¹⁹

The judge stated that at least \$750,000 would be required annually.²⁰ The mayor had previously incorporated this dollar estimate in his appeal to the governor.²¹ The frustration of the parties involved in establishing the new court was well expressed by the chairman of the Housing Court's advisory council:

¹⁵ S. 10467 & A. 12213, 195th Reg. Sess. (1972).

¹⁶ N.Y. Times, Nov. 12, 1972, at 30, col. 1.

¹⁷ Annual Message, Jan. 18, 1972, N.Y. Laws 195th Reg. Sess. 3361, 3372 (McKinney 1972).

The cost of operating the courts is now borne jointly by the State and local governments. But here again, State and local governments do not have adequate resources to finance their costs. Ultimately, as part of a general restructuring, the financing of the net costs of all major courts should be assumed by the state.

Id.

¹⁸ 168 N.Y.L.J. 104, Dec. 1, 1972, at 1, col. 5.

¹⁹ N.Y. Times, Dec. 5, 1972, at 51, col. 5.

²⁰ *Id.*

²¹ 168 N.Y.L.J. 104, Dec. 1, 1972, at 3, col. 6.

Not only the Legislature but the city administration and the Governor's office strongly supported removal of housing offenses from the Criminal Court. Now, the Governor and the Mayor each tells us that this child, having been sired, should be deposited on the other's doorstep.²²

If the legislature fails to appropriate funds to enable the Housing Court to commence operations on its opening date, it is clear that the city must bear the added cost burden. Section 104 of the New York City Civil Court Act specifically provides that: "salaries of both judicial and nonjudicial personnel of the court and all other expenses of the court whatsoever shall be a charge upon the city of New York." The only relief currently tendered by the state for the civil court is a \$10,750 annual stipend for each judge, as provided by section 34 of the Judiciary Law. Should no funds be forthcoming from any source by April 1, 1973, it is inconceivable that all landlord-tenant and related actions would cease. Most likely, the landlord-tenant part of the civil court would continue to function and housing proceedings in the criminal and supreme courts would remain therein. No provisions in the Housing Court Law could reasonably be interpreted to cause cessation of all the actions and proceedings it encompasses should the Housing Part be unable to open its doors on time. The landlord-tenant part was not expressly abolished as of April 1, 1973, nor was the criminal court divested of jurisdiction over willful or reckless code violators. The Supreme Court's jurisdiction over housing matters traditionally heard therein will remain concurrent with that of the Housing Part. Hence, it is doubtful whether a crisis situation will actually be triggered if the new court remains inoperative upon its legislated opening date.

More difficult to answer is the question whether the landlord-tenant part could assume the *new* functions the Housing Court Law assigns to the civil court via the Civil Court Act (CCA) as of April 1, 1973. As a matter of legislative intent, the question is probably to be answered in the negative since the many changes in the CCA, Multiple Dwelling Law and Administrative Code that accompanied the passage of the Housing Court Law were passed as a unit that clearly had as its nucleus the establishment of the new court.

CONSTITUTIONAL IMPLEMENTATION

Article VI of the New York State Constitution²³ calls for the legislature to establish a civil court for New York City, having lawful jurisdiction over certain actions for relief not exceeding \$10,000. The court

²² N.Y. Times, Dec. 5, 1972, at 51, col. 5.

²³ Adopted Nov. 7, 1961.

is authorized to handle summary proceedings for removal of tenants and recovery of possession of real property.²⁴ In addition, the constitution states that the court has such equitable jurisdiction as may be provided by law.²⁵ Since the civil court has no general equitable jurisdiction,²⁶ specific statutory enactments are required for the adjudication of actions other than those enumerated in Article VI.²⁷

In compliance with the constitutional mandate, the New York City Civil Court Act (CCA) was passed in 1962.²⁸ The CCA codified the jurisdictional provisions of article VI²⁹ and set forth various administrative rules. Costs of the court are charged to the city.³⁰

Since the legislature has, by virtue of the Housing Court Law, chosen to use the civil court as a forum for all housing cases, appropriate amendments have been made to the CCA³¹ and to other laws which confer jurisdiction on the court.³² These amendments will be discussed in the next three sections of this Note.

AMENDING THE CIVIL COURT ACT

To effectuate its goals, the Housing Court Law adds a new section entitled "Housing Part" to the Civil Court Act (CCA).³³ This section embodies the organization of the special part and the many proceedings which it will entertain. Several actions already heard by the civil court in the landlord-tenant part are included.³⁴

In addition, the court will exercise jurisdiction over the new civil penalty action.³⁵ These civil penalties, fixed by the building authorities at mandatory rates and imposed for violations of state and city building laws, had been suggested by a number of authorities as representing a far more reasonable approach than criminal prosecution.³⁶

²⁴ N.Y. CONST. art. VI, § 15(b).

²⁵ *Id.*

²⁶ *See, e.g.,* *Circulation Associates, Inc. v. Mother's Manual, Inc.*, 53 Misc. 2d 225, 278 N.Y.S.2d 137 (Civ. Ct., New York County 1967).

²⁷ N.Y. CONST. art. VI, § 15(b).

²⁸ Ch. 693, [1962] N.Y. Laws 185th Reg. Sess.

²⁹ *See* N.Y. CITY CIVIL COURT ACT §§ 202-04 (McKinney 1963).

³⁰ *Id.* § 104.

³¹ §§ 2-4 Housing Court Law.

³² § 5 *id.*, amending N.Y. MULT. DWEL. LAW § 306(2); §§ 6-9 *id.*, amending N.Y. MULT. DWEL. LAW § 309; §§ 10 & 11 *id.*, amending ch. 26, title D, N.Y. CITY AD. CODE.

³³ § 2 *id.*, adding N.Y. CITY CIVIL COURT ACT § 110 (McKinney Supp. 1972).

³⁴ N.Y. CITY CIVIL COURT ACT § 110(a)(5) (McKinney Supp. 1972) designates actions based on article 7-A of the N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL §§ 769-82 (McKinney Supp. 1972)) and summary proceedings to recover possession of residential premises, including instances where the tenant asserts a lawful defense based on either RPAPL § 755 or N.Y. MULT. DWEL. LAW § 302-a (McKinney Supp. 1972).

³⁵ N.Y. CITY CIVIL COURT ACT § 110(a)(1) (McKinney Supp. 1972).

³⁶ Criminal trial judges, accustomed to hearing more serious offenses involving spe-

If unpaid, these penalties will become a lien upon the building and its collectable rents.³⁷

Other new provisions in this section allow the Housing Part to consolidate all pending actions against any one building³⁸ and to

. . . recommend or employ *any remedy, program, procedure or sanction* authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest . . .³⁹

However, this broad grant of remedial authority is limited in cases where the court elects to call for administration or an expenditure by a city agency. In such cases, the court must inform the city's code enforcement department of the contemplated order and the department will have at least 15 days to comment on the appropriateness of the order.⁴⁰

cific intent, may be reluctant to impose the stigma of a criminal conviction on a building owner because of minimal violations. Hence, only nominal fines usually issue on conviction. A 1965 study found that fines averaged \$5.68 in 1940, rose to an average of \$18.54 by 1955 and "have generally been in the neighborhood of \$22.00 ever since." LEGAL REMEDIES at 40. In a recent interview, a Department of Rent and Housing Maintenance attorney maintained that the actual average fine has been even lower, placing it at three dollars per violation and noting that the average case involves four violations, for a total of twelve dollars.

Proposals for pre-set monetary penalties, the magnitude of which would reflect the true seriousness of the violations involved and which would be administered in a civil court environment, appear in Grad at 1282-87. Advantages of the civil fine would include a non-jury trial, no criminal record for an owner who complies in good faith, and the possible establishment of a revolving fund from which collected penalties could be used to finance other future repairs by the city. *Id.* at 1284-86.

³⁷ N.Y. CITY CIVIL COURT ACT § 110(a)(3) (McKinney Supp. 1972).

³⁸ *Id.* § 110(b).

³⁹ *Id.* § 110(c) (emphasis added).

⁴⁰ *Id.* City housing codes are enforced by a group within the Department of Rent and Housing Maintenance. The department is one of four within the city's Housing and Development Administration. The other three include the Department of Development (urban renewal, rehabilitation, etc.), Department of Relocation & Management Services (social services, emergency housing, etc.), and the Department of Buildings (regulation and inspection of new and altered buildings, licensing of craftsmen, etc.).

Section 110(c) prevents the housing part from entirely pre-empting the functions of the code enforcement department. Before enactment of the Housing Court legislation, the city appeared to favor the creation of an administrative tribunal within the city's Housing and Development Administration. See note 14 *supra*. Section 110 recognizes that concern over pre-emption may exist and ensures that special expertise within the city's housing department will not be disregarded by the housing part in reaching a determination regarding a problem building. Interview with Attorney, Dep't of Rent and Housing Maintenance, Nov. 28, 1972. See N.Y. Times, Aug. 25, 1972, at 13, col. 2.

The New York City Bar Committee Report stated that the broad power given the Housing Court to "recommend or employ any remedy, program, procedure or sanction authorized by law" was intended to be subject to a definite veto power on the part of the city when the proposed remedy calls for an expenditure of city funds. Although the applicable provision in the legislation indicates a 15-day period within which the city may object to a court ordered expenditure, the committee concluded that the wording in that provision should "make the veto power clear and uncontestable." CITY BAR REPORT at 4.

The housing part is permitted to handle receivership proceedings, heretofore brought before the New York Supreme Court.⁴¹ These proceedings permit the city itself to institute repairs on premises having violations which are deemed dangerous to the life or health of tenants while collecting rents and profits from the building to cover costs.⁴² All other enforcement remedies, formerly commenced in the supreme court, are to be consolidated within the jurisdiction of the Housing Part.⁴³

The new Housing Part section of the CCA also describes the composition of an advisory council for the court. The real estate industry, tenants, civic groups and the bar will each have two representatives on the council.⁴⁴ The remainder of the 14-member group will consist of a city representative appointed by the mayor, the State Housing Commissioner, and four members of the public at large.⁴⁵ Serving without compensation, the council must meet at least four times a year and submit annual reports on the work of the Housing Part to the administrative judge of the civil court, the judicial conference, the legislature, governor and mayor.⁴⁶ An important function of the advisory council is the annual preparation of a list from which hearing officers are to be appointed by the administrative judge.⁴⁷ Minimal requirements for these officers include two years of active practice with at least five years membership in the state bar. They will each serve three year renewable terms, subject to review by the administrative judge.⁴⁸

Finally, the new Housing Part section provides for maintenance of a record of proceedings indexed by building address,⁴⁹ mechanical

⁴¹ N.Y. CITY CIVIL COURT ACT § 110(a)(6) (McKinney Supp. 1972).

⁴² N.Y. MULT. DWEL. LAW § 309 (McKinney 1946) is the statutory basis for the receivership action. For an interesting discussion of these proceedings, including their constitutionality, see *Housing Codes* 828-30. See also Note, *Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253, 257 (1966).

⁴³ N.Y. CITY CIVIL COURT ACT § 110(a)(2) (McKinney Supp. 1972) (collection from owner of city's costs in repairing or demolishing a dwelling); *id.* § 110(a)(3) (placement of liens on building and its rents for costs incurred by the city in repair or demolition); *id.* § 110(a)(4) (injunctions and restraining orders to enforce housing standards); *id.* § 110(a)(7) (imposition of violations and actions for their removal).

⁴⁴ *Id.* § 110(g). Current members of the court's advisory council include Judge Bernard Botein, chairman, Dr. Lorraine D. Miller, co-author of the housing court bill, Leon Silverman, president of the Legal Aid Society, and Maximino Gonzalez, consultant to the Mayor on Neighborhood Conservation Program on Relocation.

⁴⁵ *Id.* The city is represented by Anthony Gliedman, counsel to the Department of Rent and Housing Maintenance.

⁴⁶ *Id.* § 110(h).

⁴⁷ *Id.* § 110(f).

⁴⁸ *Id.* § 110(i).

⁴⁹ *Id.* § 110(j).

recording of hearings,⁵⁰ and representation of the city's code enforcement department by its own department counsel.⁵¹

The jurisdictional backbone of the Civil Court Act, Article Two, has also undergone significant change. Section 203 of the CCA which enumerates the real property actions within civil court jurisdiction,⁵² is extended to encompass those actions which the housing part will hear.⁵³ The new civil penalty action has necessitated the following four additions to civil court jurisdiction:

- (1) Imposition of code violations and orders for their removal;⁵⁴
- (2) Imposition and collection of civil penalties for such violations;⁵⁵
- (3) Collection of costs expended by the City of New York to correct any such violations;⁵⁶
- (4) Imposition or foreclosure of liens upon real property and rents by the City of New York for payment of civil penalties or costs expended for corrective action taken by the city.⁵⁷

As the Practice Commentary to the amended section 203 indicates, placement of these new provisions in that section may be inappropriate. The new civil court jurisdiction could have been outlined under a new CCA section. With the exception of item (4) above, these provisions do not relate directly to real property as do the actions already listed in section 203.⁵⁸

The last jurisdictional change implemented in the CCA adds to the provisional remedies the civil court may order.⁵⁹ Injunctions are permitted to issue pursuant to code enforcement provisions of the state and local laws⁶⁰ and receivers may be appointed in furtherance of these laws.⁶¹ The Housing Part will utilize these remedies as a consequence of its own broad jurisdiction.⁶²

⁵⁰ *Id.* § 110(k).

⁵¹ *Id.* § 110(l).

⁵² *E.g., id.* § 203(a) (partition); *id.* § 203(d) (specific performance); *id.* § 203(f) (reformation or rescission of deed).

⁵³ § 3 Housing Court Law.

⁵⁴ N.Y. CITY CIVIL COURT ACT § 203(n) (McKinney Supp. 1972).

⁵⁵ *Id.* § 203(k).

⁵⁶ *Id.* § 203(l).

⁵⁷ *Id.* § 203(m).

⁵⁸ N.Y. CITY CIVIL COURT ACT § 203, Practice Commentary at 18 (McKinney Supp. 1972).

⁵⁹ § 4 Housing Court Law.

⁶⁰ N.Y. CITY CIVIL COURT ACT § 209(b)(4) (McKinney Supp. 1972).

⁶¹ *Id.* § 209(c).

⁶² *See* N.Y. CITY CIVIL COURT ACT §§ 203(k)-(n) (McKinney Supp. 1972).

CHANGES IN THE MULTIPLE DWELLING LAW

The Multiple Dwelling Law (MDL), enacted in 1929,⁶³ incorporates standards of building construction and maintenance that the legislature deems to be reasonably related to public health or safety.⁶⁴ If violations remain uncorrected after proper notice to the owner, authorities can effect repairs and charge the owner directly or through receivership action. As previously noted, the new housing part of the civil court will have authority to entertain such proceedings. Hence, provisions in the MDL that formerly allow local building authorities to bring an action in the supreme court have been modified to include the housing part of the civil court when the premises involved are within New York City.⁶⁵ The MDL also now recognizes either the city or a tenant as a proper party to compel code compliance by a building owner if a department order goes unheeded.⁶⁶ The pertinent section has been corrected to bring these proceedings within the housing part.⁶⁷

The MDL provides that a dwelling which is untenanted for more than 60 days, is left unguarded, and remains in an unsafe condition may be certified as an "untenanted hazard" and ordered demolished after due notice to the owner and mortgagees.⁶⁸ Should demolition not be commenced within 21 days after such notice, a hearing may be held in the supreme court and an order for demolition by the city may issue.⁶⁹ In the future, the new housing part will conduct these hearings when the premises are within New York City.⁷⁰

THE NEW YORK CITY ADMINISTRATIVE CODE

The last body of law which is affected by the Housing Court legislation is Chapter 26, Title D, of the Administrative Code of the City of New York.⁷¹ Known as the Housing Maintenance Code, Title D supplements the Multiple Dwelling Law in designating building violations

⁶³ Ch. 713, [1929] N.Y. Laws 152d Reg. Sess.

⁶⁴ For a history of the development of the Multiple Dwelling Law see Note, *Rent Strike Legislation — New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253, 256-57 (1966). See also Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60, 62 (1968).

⁶⁵ § 5 Housing Court Law, amending N.Y. MULT. DWEL. LAW (MDL) § 306(2); § 8 *id.*, amending MDL § 309(5)(a); § 9 *id.*, amending MDL §§ (5)(c)(1), (3). See MDL Supp. (McKinney 1972).

⁶⁶ N.Y. MULT. DWEL. LAW § 309(f) (McKinney Supp. 1972).

⁶⁷ *Id.*

⁶⁸ N.Y. MULT. DWEL. LAW §§ 309(2)(a)-(c) (McKinney 1946).

⁶⁹ *Id.* §§ 302(2)(d)-(e).

⁷⁰ N.Y. MULT. DWEL. LAW § 309(2)(d) (McKinney Supp. 1972).

⁷¹ Added by Local Law No. 56, July 14, 1967.

within New York City.⁷² Two interrelated innovations in housing code enforcement are made possible by the new provisions in the Housing Maintenance Code: first, a new civil penalty replaces the ineffective criminal fine system and, second, expeditious methods of obtaining jurisdiction over a violator or problem building are now available because of the civil nature of the action.

Experience had demonstrated the ineffectiveness of the criminal penalty to compel code compliance under ordinary circumstances. Statistical information revealed that the cost of repairs to a building owner greatly exceeded the minimal fine he could expect to receive for a particular violation.⁷³ Wide disparities were shown to exist in the sentencing practices of various criminal court judges, reflecting uncertainty as to whether or not the usual code violator should be regarded as a true criminal.⁷⁴ Long delays in trial also served to defeat the goal of prompt code compliance by the defendant.⁷⁵ Since both personal service and an appearance were mandatory in the criminal proceeding, evasion of service of process was a common delaying tactic employed by building owners. Even when the defendant appeared and entered a guilty plea, adjournments were commonly granted to allow the city to reinspect the premises and note any remedial work begun by the owner.⁷⁶ The end result of all these flaws in the criminal procedure was to focus the court's attention on divergent issues, while the victims of code violators continued to suffer.

The new law corrects some of these weaknesses through its provi-

⁷² See Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60, 62 (1968).

⁷³ See note 36 *supra*.

⁷⁴ LEGAL REMEDIES at 37-38.

Judges differ, too, in the weight they give to evidence of correction of the violation; some will pay little heed to evidence of repair, varying the fine largely with the seriousness of the violations, while others will treat more leniently a defendant who corrects the violation prior to court-ordered reinspection.

Id. at 37.

⁷⁵ *Id.* at 40-42.

In one "typical" court day, the gap between charge date and the first return date ranged from 43 days to more than 5 months. From first return date to date of disposition the time gap ranged from 1½ months to 10 months. In the last-mentioned case, in which more than a year had elapsed between the original charge date and the date of disposition, 3 of the violations involved in the disposition had been recorded as much as 3½ years prior to ultimate disposition. Two of these were of a kind classified as hazardous. . . . Thus, criminal prosecution in housing court can hardly be considered a "summary" remedy!

Id. at 41-42.

⁷⁶ *Id.* at 29. As much as three weeks time could be set by the court for reinspection of the premises. If no reinspection report was then available, a further adjournment could be called. *Id.*

sions relating to civil service of process.⁷⁷ In rem jurisdiction over a building and lot can now be effected by posting a summons, in a conspicuous place, on the building charged with housing violations. The last registered owner or managing agent must receive a copy of the summons by certified mail.⁷⁸ The new civil penalties imposed for code violations can then be enforced directly against the owner or by liens against his building. Service is complete upon filing of the summons and affidavit of service with the clerk of the Housing Part.⁷⁹ This type of service will eliminate the shortcomings of the personal service required for criminal prosecution of code violators. In a criminal action, the defendant must also appear in person before his trial can proceed. A civil action requires only that the defendant have the constitutionally requisite contacts with the jurisdiction and that he be given fair notice and an opportunity to defend before his case may be disposed of. With regard to multiple dwellings, owners are required to register their addresses with the city. Therefore, a civil penalty proceeding will focus on the subject building and will not be curtailed because of an elusive owner.⁸⁰

The second innovation is implemented by means of a new article added to the Housing Maintenance Code and entitled "Article 51—Civil Penalty."⁸¹ The three sections included in the new article elaborate upon the imposition⁸² and enforcement⁸³ of the civil penalty and provide for a stay of cumulative fines during the pendency of the action.⁸⁴ With regard to imposition, violations of the MDL and Housing Maintenance Code will be categorized as either (1) non-hazardous, (2) hazardous, or (3) immediately hazardous for purposes of determining

⁷⁷ § 10 Housing Court Law, *amending* N.Y.C. AD. CODE § D26-50.09. See CPLR 302(a)4 and CPLR 313 which obviate the need for personal service within the state to obtain personal jurisdiction over an absentee landlord.

⁷⁸ § 10 Housing Court Law, *amending* N.Y.C. AD. CODE § D26-50.09.

⁷⁹ *Id.*

⁸⁰ LEGAL REMEDIES at 219-29.

In order for a civil court to exercise its powers over a person or thing two elements are necessary. First, the state must have certain minimal contacts with that person or thing (*i.e.*, residence, physical location, place where the transaction, contract or injury occurred), and second, a reasonable method must be devised by law, and must be followed, in order to notify the defendant of the pending proceeding and to give him an opportunity to be heard. In the field of housing enforcement, the physical location of the multiple dwelling within the geographic area of the court's jurisdiction is in itself sufficient to provide an adequate basis of jurisdiction, whether the owner lives in New York, in Alaska, or in a foreign country.

Id. at 223. See Grad, *Code Enforcement* 1285-86.

⁸¹ § 11 Housing Court Law.

⁸² N.Y. CITY AD. CODE § D26-51.01.

⁸³ *Id.* § D26-51.03.

⁸⁴ *Id.* § D26-51.05.

the applicable fine.⁸⁵ The city's Department of Rent and Housing Maintenance has made these classifications and submitted them to the housing part's advisory council for approval.⁸⁶ When a violation is discovered by the department, the owner or his agent will be notified and a time period within which he is to submit a certificate of compliance will be specified.⁸⁷ The notice will also state the date by which each violation must be corrected, such date being a function of the degree of hazard involved.⁸⁸

Of great importance to tenant groups is the provision for an

⁸⁵ *Id.* § D26-51.01(d). See note 86 *infra*. § D26-51.01(a) gives the following schedule per violation:

VIOLATION	CIVIL PENALTY
Non-hazardous	\$10 to \$50
Hazardous	\$25 to \$100, plus up to \$10 per day
Immediately hazardous	\$25 per day

⁸⁶ N.Y. CITY AD. CODE § D26-51.01(d) authorizes the department to undertake this task and, after receiving the advisory council's approval, to publish the list in the New York City Record. See The City Record, Sept. 1, 1972, at 3334-38. Pursuant to this directive, the department held a public hearing at City Hall, Oct. 13, 1972, on the proposed classifications. As a result, several changes were made, and the modified listing was later published. See The City Record, Nov. 15, 1972, at 4395-98.

Examples of the revised classifications are given below:

CLASSIFICATION	DESCRIPTION	STATUTE
A (Non-hazardous)	Requires paving of cellar floors where dampness occurs	MDL § 78
B (Hazardous)	Requires discontinuance of use of the gas-fired refrigerator	AD. CODE § D26-18.03
C (Immediately Hazardous)	Requires abatement of nuisance consisting of rodents	AD. CODE § D26-13.03

Some violations fall into either two or all three classifications, "depending upon the severity of the condition." The City Record, Nov. 15, 1972, at 4395, col. 1.

⁸⁷ N.Y.C. AD. CODE § D26-51.01(b). The owner will be given 14 days, from date of correction, to certify compliance to the code enforcement department. *Id.* § D26-51.01(g).

⁸⁸ *Id.* § D26-51.01(c) sets out the following time periods:

VIOLATION	CORRECTION TIME
Non-hazardous	* At least three months from date of mailing of notice
Hazardous	* One month from date of mailing of notice
Immediately Hazardous	Forthwith upon personal service on the actual or last registered responsible individual,
	or
	Within five days from date of certified mailing to such individual, if personal service cannot be accomplished.

* These time limits can be postponed if prompt action is taken, and the responsible party has a substantial legitimate reason for being unable to complete repairs on time. *Id.*

owner's certificate of compliance, the veracity of which is presumed as provided in the present Housing Court legislation.⁸⁹ While such a certificate may be used advantageously as a means of rapidly clearing title to property upon which violations have been recorded,⁹⁰ the strong possibility of false certification clearly exists. It has been suggested that

The Department should have a right (in addition to prosecuting for perjury and filing a new notice of the continuing violation) to prove a certification false. By the same token and for the protection of future owners, the Department must, in such case, be compelled to act promptly.⁹¹

The New York City Bar Association has proposed that the department be allowed, within 30 days after owner certification, to reinspect the premises and recover twice the penalty should the certification prove false.⁹²

As a result of this criticism, the owner certification provisions may be redrafted so as to include a reinspection by the city 28 days after the owner certifies, *under oath*,⁹³ that he has corrected any violations. The tenant may be allowed to initiate the reinspection and proven false certifications will result in additional penalties being charged against the responsible party.⁹⁴

Civil penalties will run from the date stipulated by the Department of Rent and Housing Maintenance for completion of corrective measures to the date of actual cure of the violations.⁹⁵ By providing that

⁸⁹ The notice of violation shall direct that when one or more of the violations specified therein has been corrected the owner shall within fourteen days after such correction certify to the department, in writing, by certified or registered mail, such correction including the date when each violation was corrected, and a copy of such certification shall then be promptly mailed to any complainant by the department. Such violation shall be *deemed corrected on the date so indicated, and the department may not bring an action thereon.*

N.Y. CITY AD. CODE § D26-51.01(g) (emphasis added).

⁹⁰ CITY BAR REPORT at 4.

⁹¹ *Id.*

⁹² *Id.*

⁹³ The present legislation prescribes only that the owner mail a letter stating that repairs have been completed. See note 89 *supra*.

⁹⁴ Interview with Dr. Lorraine D. Miller, Feb. 2, 1973.

⁹⁵ N.Y. CITY AD. CODE § D26-51.01(a). The recipient of a non-hazardous or hazardous violation notice may obtain a postponement of the stated correction date if he is financially or technically unable to comply by such date.

N.Y. CITY AD. CODE § D26-51.01(f) provides:

In cases of non-hazardous and hazardous violations, the notice of violation shall advise that within fourteen days of the receipt thereof, the recipient of the notice shall be entitled to discuss the violation with the department as to the nature and extent of the repair or correction to be made and methods of financing such repair or correction.

In addition, N.Y. CITY AD. CODE § D26-51.01(c)(3) states:

The department shall postpone the date by which a violation shall be corrected upon a showing that prompt action to correct the violation has been taken but

the fine be cumulated on a per diem basis, any improper delays caused by the responsible party are made to work to his disadvantage. Unfortunately, the mandatory cumulative penalty provided for an immediately hazardous violation is in sharp contrast to a possible flat monetary fine which may be imposed for a hazardous violation, regardless of its duration. A major loophole presently exists as a result of this discrepancy. The object of a civil penalty should be to make housing code violation economically unfeasible for the building owner and to acknowledge that he is committing a continuous offense against the occupants. Prior civil penalty provisions were inflexible because they were not commensurate with the duration of the alleged violations.⁹⁶ In short,

the remedy ought to take the gambler's odds out of housing penalties, the penalty ought to be calculable in advance, rather than giving the recalcitrant owner a sporting chance to beat the system with a relatively small fine even in the case of a building with many violations.⁹⁷

One solution would use the classification of violations as either non-hazardous, hazardous or immediately hazardous solely for purposes of setting a pre-penalty time for compliance by the owner. Regardless of the nature of the violation, however, a cumulative per diem charge

that full correction cannot be completed within the time provided because of technical difficulties, inability to obtain necessary materials, funds, or labor, or inability to gain access to the dwelling unit wherein the violation occurs

The City Bar Report called attention to an apparent discrepancy in the above two provisions. The reporting committee felt that denying an "immediately hazardous" violator the right to conferral with the department under § D26-51.01(f) was unduly discriminatory. The very same reasons which justify postponement under § D26-51.01(c)(3) were felt to be just as applicable to the recipient of an "immediately hazardous" violation notice as they are to the other two classes of violators. CITY BAR REPORT at 5.

In addition to the power of postponement, it was recommended that the department be given power to mitigate or abate the resultant civil penalty should it conclude that such action would expedite prompt compliance. CITY BAR REPORT at 5-6. The reporting committee took cognizance that the city could not reasonably be expected to institute civil penalty actions every time an owner fails to comply within a designated period. Hence, it was suggested that both the city and the code violator be given more leeway to effect a compromise and, if the city determines that a penalty action would be improper, such determination should be made public. CITY BAR REPORT at 6.

This last suggestion apparently seeks to preserve the discretionary power of the city's code enforcement agency but it should be recalled that the possibility of escaping a monetary penalty was found to be a factor that greatly influenced non-compliance in the past. The housing part itself has been given discretion to allow certain circumstances to act as a defense or in mitigation of liability. A further grant of discretion to the city might undo the effectiveness of the new legislation.

⁹⁶ Section 304 of the Multiple Dwelling Law and ch. 26, section 634a-8.0 of the New York City Administrative Code each prescribe a \$250 civil penalty for failure to comply with orders directing removal of building violations. These provisions have been used rather infrequently. LEGAL REMEDIES at 59-60.

⁹⁷ *Id.* at 68.

should then be mandatory rather than discretionary as presently provided. The amount of the per diem penalty could vary according to the nature of the violation.

While the Department of Rent and Housing Maintenance bears primary responsibility for enforcing the newly created civil penalty, if, within thirty days, the city takes no action on a complaint from a tenant alleging unsound conditions on his premises, the tenant may be able to summon the owner before the Housing Part.⁹⁸ Should the court determine that a violation does exist, it may order the code enforcement department to issue a notice to the owner.⁹⁹

Certain defenses are permitted the defendant in a civil penalty action.¹⁰⁰ If compliance could not be achieved by the stated date due to difficulties in procurement of necessary materials, funds, or labor¹⁰¹ or if the violation arose from acts of a third party not under the defendant's control,¹⁰² liability may be extinguished or mitigated.¹⁰³ A tenant may be impleaded into a civil penalty action and the owner may demonstrate that proper care of the subject premises was the responsibility of the tenant.¹⁰⁴ Any penalties recovered may, in the discretion of the court, be applied toward repair of the premises.¹⁰⁵ This latter provision was attacked by the New York City Bar Committee Report on the Housing Court. In view of an existing Housing Maintenance Code provision for a separate rehabilitation fund comprised of collected and pooled fines,¹⁰⁶ it was considered inappropriate to delegate any discretion to the court in this regard.¹⁰⁷

One new provision of the Housing Maintenance Code which runs

⁹⁸ N.Y. CITY AD. CODE § D26-51.01(i). Enforcement of a civil penalty is, however, left exclusively to the code enforcement department. N.Y. CITY AD. CODE § D26-51.03(a).

⁹⁹ N.Y.C. AD. CODE § D26-51.01(i).

¹⁰⁰ *Id.* § D26-51.03(b).

¹⁰¹ *Id.* § D26-51.03(b)(5). See note 88 supra.

¹⁰² N.Y.C. AD. CODE § D26-51.03(b)(4).

¹⁰³ It has been suggested that the new housing law should clearly distinguish those defenses that may extinguish liability from those that may only be considered in mitigation of damages. CITY BAR REPORT at 7. Under this proposal, inability to obtain the funds needed to correct a violation or a showing that the violation was caused by a person not under the owner's control could only be used in mitigation of damages. *Id.* at 17.

¹⁰⁴ N.Y.C. AD. CODE § D26-51.03(c).

¹⁰⁵ *Id.* § D26-51.03(b).

¹⁰⁶ *Id.* § D26-50.03.

¹⁰⁷ CITY BAR REPORT at 8.

In any case it would seem improper that the court have the power to direct that certain penalties be used to correct violations in certain buildings, when the city administration having jurisdiction over all multiple dwellings may, having knowledge of the facts which no court could possibly be aware of, determine that such funds could be used more beneficially to the city as a whole in some other way and some other building.

counter to the continuing offense treatment embodied in the civil penalty is nevertheless necessitated by due process requirements. A defendant, seeking review of an adverse judgment, will be entitled to a stay of any per diem penalties that might be running against him.¹⁰⁸ This stay is also applicable to certain actions taken by the defendant before proceedings in the Housing Part commence.¹⁰⁹ The constitutional validity of cumulative penalties hinges upon the availability of such a stay to an appellant.¹¹⁰ Without this safeguard, few defendants would risk an appeal since the cost of an unfavorable appellate decision would be a fine that had continued to run until the date of the decision.

The final changes in the Housing Maintenance Code appear in the section dealing with criminal sanctions.¹¹¹ A defendant who willfully or recklessly violates provisions of the Code may be guilty of a misdemeanor.¹¹² Evidence of prior service or actions in the housing part for civil penalties will be admissible in the criminal court.¹¹³

THE EMERGING ROLES OF THE CITY AND TENANT IN EFFECTING HABITABLE CONDITIONS

As a result of the Housing Court legislation, collection of a civil penalty will be a new remedy available to the city. Extensive procedural changes relating to service of process and consolidation of actions should help to expedite corrective action in cases of housing violations. The tenant is given an opportunity to seek owner compliance and, as before, may assert lawful defenses for nonpayment of rent in an action brought by the owner. Additionally, both the city and tenant will have representation on the advisory council of the housing part.

The City's Authority

A municipality has an inherent right to abate unsound building conditions that constitute a public nuisance.¹¹⁴ Beginning with the Tenement Housing Act in 1867,¹¹⁵ and drawing today from both the Multiple Dwelling Law and Housing Maintenance Code, New York

¹⁰⁸ N.Y.C. AD. CODE § D26-51.05(a). See note 85 *supra*.

¹⁰⁹ N.Y.C. AD. CODE § D26-51.05(b).

¹¹⁰ LEGAL REMEDIES at 79-82. Section 7805 of the New York Civil Practice Laws and Rules (CPLR) provides for a judicial stay of the consequences of an administrative order pending appeal by the defendant. *Id.* at 82.

¹¹¹ § 12 Housing Court Law, amending N.Y. CITY AD. CODE § D26-52.01.

¹¹² N.Y. CITY AD. CODE § D26-52.01(a).

¹¹³ *Id.* § D26-52.01(c).

¹¹⁴ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Housing Codes, supra* note 6, at 832; Comment, *Nonprofitability as a Defense for Noncompliance With Minimum Housing Codes*, 1972 WASH. U.L.Q. 374, 376.

¹¹⁵ Ch. 908, [1867] N.Y. Laws 90th Reg. Sess.

City has sought to ensure minimal housing standards for the benefit of its inhabitants.¹¹⁶ These standards must be related to public health and welfare and should not require an unreasonable expenditure by the owner, considering the object to be attained.¹¹⁷ While unsafe buildings may be ordered vacated and demolished, it is certainly more advantageous to the tenants for repairs to be instituted if at all possible. Armed with the powers of injunction, receivership and civil penalties, the city now has an impressive list of remedies to induce remedial action.

Tenant Rights

At common law, the tenant's duty to pay rent was considered an independent covenant, the sanctity of which was penetrable only in rare instances.¹¹⁸ The rule of caveat emptor may have been appropriate when the lessee desired to use land for farming and was given ample opportunity to inspect and decide if the land suited his needs. Such an anachronistic, non-contractual doctrine is, however, unsuitable for modern leases where the lessee is not, in *fact*, securing an estate in land, has little knowledge of building construction, and is unable to competently repair or maintain the premises himself. Housing codes reflect a legislative determination that the owner of a multiple dwelling

¹¹⁶ See Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60 (1968); Comment, *Housing Codes and the Prevention of Urban Blight—Administrative and Enforcement Problems and Proposals*, 17 VILL. L. REV. 490 (1972).

¹¹⁷ *Adamec v. Post*, 273 N.Y. 250, 7 N.E.2d 121 (1937). Non-profitability, per se, is not a defense for an owner who claims that the cost of the required repairs would not be recoverable from rents or increased value of the property. *Id.* at 258-60, 7 N.E.2d at 123-24. Both questions of profitability and reasonable relation to health are presently before the Missouri Supreme Court. See *City of St. Louis v. Brune*, 466 S.W.2d 677 (Mo. 1971) (ordinance requiring installation of shower baths with hot and cold water); Comment, *Nonprofitability as a Defense for Noncompliance With Minimum Housing Codes*, 1972 WASH. U.L.Q. 374.

For cases dealing with the power of the state to require changes in existing buildings in accordance with new building codes, see Annot., 109 A.L.R. 1117 (1937).

¹¹⁸ See POWELL ON REAL PROPERTY, ¶¶ 225 & 230 (abr. ed. 1968); LEGAL REMEDIES at 128-30. Constructive eviction, while it may terminate the leasehold, requires the tenant to remove himself from the premises so as to affirmatively demonstrate its uninhabitability caused by the landlord's acts of neglect. If, in the court's determination, the conditions alleged were not grounds for a constructive eviction, the tenant is liable on the lease despite his removal. Partial eviction allows the tenant to remain on the premises with a complete rent abatement. This occurs only if the landlord physically restrains the tenant from entering upon a part of the premises. See *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707 (1970).

Until recently, courts have not allowed a rent abatement or setoff when a tenant remained after circumstances amounting to a constructive eviction had materialized. See *Gombo v. Martise*, 44 Misc. 2d 239, 253 N.Y.S.2d 459, *rev'g* 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct., Kings County 1964). *But see* note 139 and accompanying text *infra*.

should bear responsibility for providing a safe living environment.¹¹⁹

The New York City tenant has available several statutes that authorize rent withholding under certain circumstances.¹²⁰ The first of these statutes to be passed is presently section 755 of the Real Property Actions and Proceedings Law (RPAPL). Enacted one year after the passage of the Multiple Dwelling Law,¹²¹ section 755 provides a defense for a tenant in a landlord's action for rent. If there exist outstanding violation notices, orders to remove nuisances or to make repairs, and the condition is

. . . in the opinion of the court, such as to constructively evict the tenant . . . or is, or is likely to become, dangerous to life, health, or safety, the court before which the case is pending may stay proceedings to dispossess the tenant for non-payment of rent . . .¹²²

Even if there are no outstanding charges regarding the maintenance of the building, the tenant may prove the existence of conditions commensurate with constructive eviction and have the landlord's summary dispossession proceeding stayed.¹²³ However, rent abatement is not permitted. The stay lasts as long as the tenant deposits the rent due with the court¹²⁴ and terminates upon proof of corrective action by the landlord.¹²⁵ Money so held by the court may be applied toward repair of the premises and the remainder is paid to the landlord when the stay is vacated.¹²⁶

Since 1965, New York City tenants may affirmatively seek to have their rent monies applied toward rehabilitation by way of the so-called

¹¹⁹ See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). *Javins* implied a warranty of habitability in the leases of tenants who refused to pay rent because of some 1500 building violations. The case was remanded with instructions that the trial court might either give full judgment for rent due to the landlord or allow a complete rent abatement or a setoff, depending on the severity of the alleged violations. *Id.* at 1082-83.

The implied warranty doctrine has now been successfully applied in a number of New York City civil court cases. See notes 139-145 and accompanying text *infra*.

¹²⁰ See MOBILIZATION FOR YOUTH, HANDBOOK OF LANDLORD-TENANT PROCEDURES AND LAW (2d ed. 1969); LEGAL REMEDIES at 154-81; Note, *Rent Strike Legislation — New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253 (1966).

¹²¹ Ch. 871, [1930] Laws of N.Y. 153d Reg. Sess.

¹²² N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755(1)(a) (McKinney Supp. 1972).

¹²³ *Id.* § 755(1)(b).

¹²⁴ *Id.* § 755(2) (McKinney 1963).

¹²⁵ *Id.* § 755(1)(c) (McKinney Supp. 1972). When the Appellate Term reversed the trial court's decision in *Gombo v. Martise*, 44 Misc. 2d 239, 253 N.Y.S.2d 459, *rev'g* 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct., Kings County 1964), it suggested that tenants might still try to invoke the provisions of RPAPL § 755 although a rent abatement would not be permitted absent actual removal of the tenants from the premises. 44 Misc. 2d 239, 253 N.Y.S.2d 459.

¹²⁶ N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755(3) (McKinney Supp. 1972).

"article 7-A" proceeding.¹²⁷ At least one-third of the tenants in a multiple dwelling are required to initiate the proceeding.¹²⁸ Specific items such as lack of heat, water, light, electricity, or proper sewage disposal facilities are made grounds for such an action. In addition,

. . . any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination . . .

of these conditions will support a petition for a hearing by the court.¹²⁹ If the petitioning tenants receive judgment, all tenants occupying the dwelling are directed to pay rent to the clerk of the court as it becomes due.¹³⁰ To assure landlord compliance, an administrator may be appointed to implement the necessary repairs.¹³¹ Upon completion of the work, the landlord receives any surplus from the rent fund and an accounting.¹³²

A New York State tenant, residing in a city with a population of 400,000 or more, may realize a complete rent abatement under the terms of section 302-a of the Multiple Dwelling Law.¹³³ In a summary proceeding for rent, the tenant is permitted to interpose the defense of "rent impairing violations" which have existed on the premises for more than six months. Although this remedy, like RPAPL § 755, is available only as a defense in an action brought by the landlord, there is more certainty for the tenant in its application. Rather than

¹²⁷ *Id.* §§ 769-82.

¹²⁸ *Id.* § 770 (McKinney Supp. 1972).

¹²⁹ *Id.*

¹³⁰ *Id.* § 776.

¹³¹ *Id.* § 778.

¹³² *Id.* § 776. The constitutionality of article 7-A was upheld in *Himmel v. Chase Manhattan Bank*, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (Civ. Ct., New York County 1965). *Himmel* involved a high-class 14-story apartment building, the tenants of which complained of, *inter alia*, faulty central air conditioning, poor plumbing, intermittent elevator service, an infestation of rodents, and poor building security. The landlord argued that the legislature could not delegate authority to the courts to determine whether or not alleged conditions are, in fact, dangerous to life, health or safety. This premise was rejected:

Fact-finding has traditionally been a function of the courts. Why the court cannot do so in this matter evades this court's reasoning. It may be difficult at times, but it can be done. There may be some question as to the method of appointment of the administrator, his duties and obligations, and supervision, but we have faith that in our judicial system these obstacles will be readily surmounted.

47 Misc. 2d at 98, 262 N.Y.S.2d at 520.

Noting that the building involved was not one which would ordinarily be expected to harbor dangerous living conditions, the court held that

[i]n order to serve the entire public at large, regardless of economic status, creed or color, article 7-A was enacted to equalize the standards within the proper echelons of economic status to reasonably provide for the pursuit of a better living under conditions not dangerous to life, health or safety.

Id.

¹³³ N.Y. MULT. DWEL. LAW § 302-a(1) (McKinney Supp. 1972).

hope the court agrees with him that certain violations or conditions amount to a constructive eviction, the tenant has available a list promulgated by the city's code enforcement department, and can readily ascertain those violations which the city designates as "rent impairing."¹³⁴ The six month period runs from the date of notice of such violations to the owner. If they remain uncorrected, the tenant is relieved from paying rent thereafter.¹³⁵ Inimical conditions in areas commonly used by all the tenants (e.g., hallways and stairwells) are ". . . deemed to exist in the respective premises of each resident of the multiple dwelling" so as to provide each resident a defense.¹³⁶ If the tenant himself caused the violation or if he raises the section 302-a defense in bad faith, he may suffer a penalty of up to \$100.¹³⁷

The above three tenant remedies have been expressly named in the new "Housing Part" section of the CCA¹³⁸ and will undoubtedly comprise a major portion of proceedings before the new Housing Part. The legislative intent behind these statutory remedies is to spur compliance with the local building codes in a most effective manner. Owners are believed to be less apt to treat the payment of fines as a cost of doing business if they know their incomes may also be diminished unless they comply.

However, the statutory tenant remedies still adhere to old concepts regarding the duty to pay rent regardless of unlivable conditions on the premises. Section 302-a of the Multiple Dwelling Law is the only provision that actually allows a rent abatement and that only after six months of non-compliance by the landlord. It is also the only section that may be beneficially invoked by a tenant with any certainty of its being heeded by a court in a summary dispossession proceeding. The "rent-impairing" violations are a matter of record while the success of an RPAPL § 755 defense hinges on whether or not the court finds the alleged conditions have amounted to a constructive eviction. Similarly, a successful petition by tenants under RPAPL article 7-A is not tied to a concrete list of building code violations but is left to the court's discretion. Section 302-a of the MDL permits the legislature to determine those violations which should be grounds for rent withholding or abatement and puts the owner on notice that his income may temporarily be lost once certain violations are registered against his building.

¹³⁴ *Id.* § 302-a(2)(c).

¹³⁵ *Id.* § 302-a(3)(a).

¹³⁶ *Id.*

¹³⁷ *Id.* § 302-a(3)(e).

¹³⁸ N.Y. CITY CIVIL COURT ACT § 110(a)(5) (McKinney Supp. 1972).

Implying a Warranty of Habitability

The most recent development that has withdrawn the lease agreement from its ancient framework and subjects it to modern contract law is the implied warranty of habitability. The concept of reading the local building codes into the lease and making the owner's compliance an implied consideration for rent paid was already employed in MDL § 302-a. While that section permits a complete rent abatement only after six months of non-compliance, recent New York decisions have allowed a tenant to offset his own cost of repair against the rent due.¹³⁹ In the first of these decisions, *Jackson v. Rivera*,¹⁴⁰ the court noted the inadequacy of the constructive eviction doctrine and stated:

[U]niform and increasingly outspoken criticism by scholars condemns the outdated and anachronistic concept that separates the landlord's right to receive rent from his duty to maintain his building in accordance with the law.¹⁴¹

To guide a tenant's determination as to whether a condition on his premises would warrant selfhelp and permit a rent setoff, the court listed three criteria:

- (1) the condition in question creates an emergency seriously affecting the habitability of the home,
- (2) the landlord has refused to make the repairs, and
- (3) the condition cannot reasonably be permitted to continue until code enforcement proceedings have run their course.¹⁴²

¹³⁹ *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct., New York County 1971); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct., New York County 1971).

The implied warranty concept, adopted in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), first appeared in 1961 in *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W. 2d 409. *Pines* was cited in *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), wherein a New Jersey tenant had to pay a plumber \$85.72 for repairs which the landlord refused to implement after repeated notice. Allowing the tenant to set off this amount from rent due, the court stated that the landlord is in a better position to know of latent defects in the vital building services and that the landlord impliedly covenants that these services are in proper order both at the beginning of the lease term and throughout its duration.

[I]t is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

265 A.2d at 534. See note 142 *infra*.

For a compilation of cases allowing a setoff by the tenant as a defense in an action for rent by the landlord, see *Annots.*, 40 A.L.R.3d 646 & 1369 (1971).

¹⁴⁰ 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct., New York County 1971).

¹⁴¹ *Id.* at 470, 318 N.Y.S.2d at 9.

¹⁴² *Id.* at 471, 318 N.Y.S.2d at 10. Several days prior to the *Jackson* decision, the same court found for tenants who refused to pay rent due, and who had asserted a breach of warranty of habitability due to the owner's systematic refusal to comply with code re-

In *Morbeth Realty Corp. v. Rosenshine*,¹⁴³ the court held that compliance with the Housing Maintenance Code was impliedly warranted in the lease¹⁴⁴ and allowed the tenant to set off the cost of his repairs where numerous violations were on record. However, the court offered the following caveat:

If there were only one or two minor violations in these premises, I might judge them to be *de minimis* and not a sufficient justification for a reduction in rent.¹⁴⁵

It is apparent, from the above holdings, that a more definitive standard is needed in order that a tenant may fully utilize the concept of implied warranty. The legislature could use the 302-a "rent impairing" violations for this purpose and provide that any costs expended by a tenant to correct such a violation *before* the six month period runs will be deemed a valid setoff.

quirements. *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. County Civ. Ct. 1971). The holding in *Amanuensis* was based, in large part, on the proven attempts by the owner to force the removal of the tenants under an established plan of non-compliance, and upon his refusal to effect greater building security after each of the tenants was victimized by intruding drug addicts. Three conditions, all found to be satisfied by the facts in the case, were set forth as constituting grounds for non-payment when statutory code provisions have been violated:

First, where the landlord has not made a good faith effort to comply with the law, and there have been substantial violations seriously affecting the habitability of the premises.

Second, where there are substantial violations and code enforcement remedies have been pursued and have been ineffective.

Third, where substantial violations exist and their continuance is part of a purposeful and illegal effort to force tenants to abandon their apartments.

65 Misc. 2d at 21, 318 N.Y.S.2d at 19.

A complete abatement was awarded the tenants because of the deliberate scheme employed by the owner to effect their removal. 65 Misc. 2d at 22, 318 N.Y.S.2d at 19. Finally, the court stated that a breach of warranty of habitability could result in a damage award greater than the rent currently due if the tenants could substantiate their losses. 65 Misc. 2d at 24, 318 N.Y.S.2d at 22.

Thus, under the *Amanuensis* rule, a breach of warranty of habitability, characterized by the third ground for non-payment of rent, would justify a complete rent abatement as well as further relief for the tenants. Cases involving breaches of warranty of habitability under the first and second conditions stated in *Amanuensis* arose in *Jackson* and *Morbeth*.

In *Mannie Joseph, Inc. v. Stewart*, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (N.Y. County Civ. Ct. 1972), the tenant characterized her apartment as a "chamber of horrors." Code violations existing for over a year were proven and the court itself visited the premises. Conditions in the building were aggravated by a fire in the basement which affected the water and heating pipes. Citing *Amanuensis*, the court found the apartment uninhabitable and allowed a complete rent abatement over the full period during which the landlord refused to institute repairs, stating,

Such knowing indifference to the suffering of his tenants over such an extended period can only evidence a determination to force them out.

71 Misc. 2d at 161-62, 335 N.Y.S.2d at 710.

¹⁴³ 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct., New York County 1971).

¹⁴⁴ *Id.* at 327, 323 N.Y.S.2d at 366.

¹⁴⁵ *Id.*

In view of the fact that the New York City Civil Court may exercise only that equitable jurisdiction provided by law,¹⁴⁶ a question may arise concerning the validity of the court's allowing a tenant to utilize a defense of breach of implied warranty of habitability in a summary proceeding against him. However, it has been held that, while the court may grant only specified affirmative equitable relief, it may entertain any equitable defense to the extent of dismissing a plaintiff's claim.¹⁴⁷ A second problem is posed by the availability of the defense, at present a matter of pure chance since only a few civil court judges recognize it and their opinions are not binding on their colleagues. An express recognition by the legislature, of the implied warranty of habitability could easily be incorporated within a simple amendment to the Housing Court Law¹⁴⁸ and would eliminate both these problems. A formal conferral of jurisdiction on the civil court, which would allow the defense in summary proceedings, could be effected by modifying section 204 of the CCA.¹⁴⁹

CONCLUSION

Refraining from criminal treatment of a housing code violator and authorizing the Housing Part to maintain uninterrupted supervision of a problem building should accelerate remedial action and consequent benefits to the occupants. Trying to fine the code violator in criminal court has proven to be ineffective as a method of bringing relief to his tenants who must continue to live under undesirable conditions beyond their control. When the court has at its immediate disposal a full range of remedies available to institute repairs, time need not be wasted in attempting to locate the owner.

A novel feature of the housing part is its advisory council. Sharing a role in the selection of hearing officers, the council members should possess at least the same degree of special knowledge as is required

¹⁴⁶ See note 26 and accompanying text *supra*.

¹⁴⁷ See, e.g., *Murphy v. Serial Fed. Sav. & Loan Ass'n*, 30 Misc. 2d 450, 454-55, 216 N.Y.S.2d 228, 234-35 (N.Y. City Mun. Ct., Manhattan 1961).

¹⁴⁸ The proposed amendment would appear in new section 110(a)(5) of the CCA which already recognizes the three statutory tenant remedies discussed in the text. It might read as follows:

§ 110. Housing part

(a) . . .

(5) . . . and to render judgment for rent due, including those cases in which a tenant alleges a defense under section seven hundred fifty-five of the real property actions and proceedings law, . . . section three hundred two-a of the multiple dwelling law or a setoff based on breach of implied warranty of habitability relating to the abatement or reduction of rent in case of certain violations . . . (proposed new wording in italics).

¹⁴⁹ This section codifies the civil court's jurisdiction over summary proceedings as stipulated in § 15(b), article VI of the New York State Constitution.

of the hearing officers themselves. In this regard, the composition of the council as stated in the legislation could be altered to provide stronger representation by the city, special tenant groups, and the real estate industry. The presence of civic groups and the public at large could accordingly be diminished with no adverse effect on the integrity of the court.

Express recognition of the newly established warranty of habitability could easily be incorporated in amendatory legislation.¹⁵⁰ This would serve to both codify recent decisional law which implies a covenant of code compliance by the landlord and to clarify those violations for which a tenant may exact a lawful rent setoff upon his own repair.

In light of the fact that proceedings formerly brought before three different tribunals are to be funneled into one, the new housing part may be faced with a rather formidable task unless it acquires and maintains adequate resources. The new legislation integrates modern substantive and procedural concepts that approach the housing code enforcement problem in a more realistic manner. Yet, without the personal expertise and material facilities contemplated by the legislation, these concepts may not reach fruition.

Leo Zucker

POSTSCRIPT

After research for this article was completed, the Housing Part's opening date was postponed to July 1, 1973, by virtue of a bill passed in response to pressure from New York City's chief legislative lobbyist. N.Y. Times, March 31, 1973, at 39, col. 2; *id.*, March 30, 1973, at 78, col. 1. The city's efforts to postpone the opening (October 15 was the date actually sought) were prompted by a New York County Supreme Court opinion that ordered the city, as the financially responsible governmental division, to allocate funds for the court. *In re McCoy*, 169 N.Y.L.J. 54, March 20, 1973, at 2, col. 4 See text following note 22, *supra*.

Several amendments to the 1972 Housing Court Law have already been proposed during the current legislative session. A bill introduced in both houses would grant the right to a jury trial at the Housing Part hearings. S. 5679 & A. 6040, 196th Reg. Sess. (1973). Another bill, introduced by Senator Bernstein, would amend new section 110 of the CCA so as to expressly recognize a warranty of habitability. S. 5776, 196th Reg. Sess. (1973). This provision would cause to be implied, in every

¹⁵⁰ See note 148 *supra*.

apartment lease, a covenant that the landlord will promptly comply with those building codes which affect conditions dangerous to life, health and safety, *i.e.*, "hazardous" conditions. Covenant violations would apparently be grounds for rent abatement. *See* notes 85 & 148 and accompanying text *supra*.