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***Sharp v. Norwood*: New York Offers Little Guidance on Whether Chronically Late Rent Payments Constitute a “Nuisance”**

I. Introduction

For numerous years, the Doctrine of Nuisance has been a successful and steadfast shield available to tenants as they skirmish with the mighty sword brandished by landlords seeking to extract rent payments. In *Michman v. Rivera*,¹ for example, the Civil Court of the City of New York, Bronx County, stated that “[i]t shall be a valid defense . . . to show existing violations in the building . . . which are dangerous, hazardous or detrimental to life or health as a basis for nonpayment.”² In *Michman*, the tenants refused to pay their rent because, inter alia, the landlord failed to: (1) fix the broken hall banister and handrail; (2) fix the defective fire escape; (3) provide the dwelling with a resident janitor; and (4) remove rubbish which accumulated in the dumbwaiter shaft.³

In addition to defending against demands to pay rent, tenants have also successfully used the Doctrine of Nuisance to ensure that landlords completely abate nuisances interfering with the tenants’ “use and enjoyment”⁴ of the premises. In *Allison v. Bay Realty Corp.*,⁵ the tenant’s infant was found to have severely elevated levels of lead in his blood.⁶ This finding was reported to the Department of Health’s Lead Prevention Program

1. 39 Misc.2d 347, 240 N.Y.S.2d 859 (N.Y. Civ. Ct. 1963).

2. *Id.* at 349, 240 N.Y.S.2d at 863.

3. *See id.* at 349, 240 N.Y.S.2d at 863.

4. RESTATEMENT (SECOND) OF TORTS § 822 (1977).

5. 172 Misc.2d 480, 660 N.Y.S.2d 338 (N.Y. Sup. Ct. 1997).

6. *See id.* at 481, 660 N.Y.S.2d at 339.

which investigated and found numerous lead paint violations throughout the building.⁷ Shortly thereafter the Department of Health issued an Order to Abate Nuisance⁸ to the landlord and directed the landlord to correct the violations within five days.⁹

Another tenant, facing possible "imminent peril"¹⁰ because her toilet was blocked, successfully forced the landlord to abate the nuisance created by the stoppage.¹¹ In *300 West 154th Street Realty Co. v. Department of Buildings of the City of New York*,¹² the tenant claimed that she repeatedly urged the landlord to fix her toilet.¹³ When the landlord failed to make the necessary repairs, the tenant contacted the City Department of Buildings, which in turn was unsuccessful in its attempt to have the landlord abate the nuisance.¹⁴ Instead, the Department of Buildings made the arrangements for the necessary repair and ultimately billed the landlord for the costs.¹⁵

On the flip side, the Doctrine of Nuisance has been a mighty tool for the landlord as well. In *1021-27 Avenue St. John Housing Development Fund Corp. v. Hernandez*,¹⁶ for example, the landlord commenced a holdover proceeding seeking to evict the tenant on the ground that the latter's drug use and sale on the premises constituted a nuisance.¹⁷ In *Hernandez*, the landlord alleged that the tenant sold and used drugs in the apartment.¹⁸ Moreover, the landlord also claimed that the tenant allowed "undesirables" to use his apartment in order to sell

7. *See id.*

8. *See id.* at 482, 660 N.Y.S.2d at 339. "The order informed [the landlord] that a child with a blood lead level of 20 micrograms per deciliter or higher resided in apartment 3-1." *Id.* "The order stated that an inspection of the apartment revealed levels of lead in violation of New York City Health Code § 173.13(c) and (d) and detailed the areas where the violations occurred." *Allison*, 172 Misc.2d at 482, 660 N.Y.S.2d at 339. "The order directed the [landlord] to correct the lead paint violations within five days." *Id.*

9. *See Allison*, 172 Misc.2d at 481, 660 N.Y.S.2d at 339.

10. *300 West 154th Street Realty Co. v. Department of Buildings of the City of New York*, 26 N.Y.2d 538, 543, 260 N.E.2d 534, 536, 311 N.Y.S.2d 899, 902 (1970).

11. *See id.* at 543, 260 N.E.2d at 536, 311 N.Y.S.2d at 902.

12. 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S. 2d 899 (1970).

13. *See id.* at 541, 260 N.E.2d at 535, 311 N.Y.S.2d at 901.

14. *See id.* at 541-42, 260 N.E.2d at 535, 311 N.Y.S.2d at 901.

15. *See 300 West 154th Street Realty Co. v. Department of Buildings of the City of New York*, 26 N.Y.2d at 542, 260 N.E.2d at 535, 311 N.Y.S.2d at 901.

16. 154 Misc.2d 141, 584 N.Y.S.2d 990 (N.Y. Civ. Ct. 1992).

17. *See id.* at 142, 584 N.Y.S.2d at 990.

18. *See id.*

and use drugs.¹⁹ As a result of the tenant's conduct, the other tenants in the building were denied their right to peaceful and quiet enjoyment.²⁰ The court stayed final eviction pending psychiatric treatment aimed at curbing the tenant from performing and condoning such conduct solely because the tenant suffered from severe emotional and mental deterioration.²¹

Landlords have also successfully used the Doctrine of Nuisance to evict tenants who could not or refused to control the behavior of others.²² Nonetheless, whether used by the landlord or by the tenant, the Doctrine of Nuisance is primarily concerned with protecting the right to use and enjoy property.²³ To ensure its fairness, "nuisance law requires a court to engage in a balancing test and to weigh the particular facts in each case."²⁴ This case by case analysis has yielded inconsistent results.²⁵

The court has left open the issue of whether chronically late rent payments by the tenant constitute a "nuisance." On May 8, 1997, the Court of Appeals of New York refused to evict the tenant in *Sharp v. Norwood*²⁶ because the landlord failed to offer any evidence demonstrating that the nuisance of chronically late rent payments "interfere[d] with the use or enjoyment of [its] property."²⁷ However, the Court of Appeals specifically left undecided the issue of whether an eviction proceeding grounded in nuisance would prevail where chronically late rent payments are accompanied by aggravating circumstances.²⁸

Part II of this Note introduces the laws of landlord, tenant and nuisance. This part delves into New York's treatment of both when and under what circumstances a theory based in nuisance may be used in the landlord and tenant arena. Part II of this Note sets forth the facts and the numerous decisions of the

19. *See id.*

20. *See id.* at 142, 584 N.Y.S.2d at 990-91.

21. *See Hernandez*, 154 Misc.2d at 143, 148, 584 N.Y.S.2d at 994.

22. *See infra* Part II.D.

23. *See* Frona M. Powell, *Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases*, 21 REAL EST. L. J. 182, 188 (Fall 1992).

24. *Id.* at 189 (citations omitted).

25. *See id.*

26. 89 N.Y.2d 1068, 681 N.E.2d 1280, 659 N.Y.S.2d 834 (1997).

27. *Id.* at 1069, 681 N.E.2d at 1281, 659 N.Y.S.2d at 835.

28. *See id.*

Sharp case before it reached the New York Court of Appeals. Part III summarizes the treatment given to the lead case by New York's highest court. Part IV analyzes the New York Court of Appeal's curt decision in *Sharp* in light of the current unworkable standard. Part V concludes that the New York Court of Appeals erred in summarily disposing of *Sharp* without setting forth a workable standard which would yield consistent results.

II. Background

A. *The Law of Landlord and Tenant Generally*

A landlord is "[t]he owner of an estate in land, or a rental property, who has leased it to another person, called the 'tenant.'"²⁹ A tenant is defined as "one who holds a possessory estate in land for a determinate period or at will by permission of . . . the landlord . . ."³⁰ Together, the landlord and tenant contract for the use and possession of a house or land for a fixed term, at a stipulated rent and subject to additional conditions or obligations which may be mutually agreed upon.³¹ A lease is the contract between the landlord and tenant which generally sets forth, inter alia, an agreed upon rent,³² the duration of the leasehold, the identity of the parties and a description of the premises.³³

As was briefly alluded to in the preceding paragraph, a landlord ("lessor") is entitled to insert a covenant³⁴ into the lease that states a specified amount which is to be paid by the tenant ("lessee") to the landlord as rent.³⁵ A tenant, on the

29. BLACK'S LAW DICTIONARY 607 (6th ed. 1991).

30. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 249 (2d ed. 1993).

31. See W. A. HOLDSWORTH, THE LAW OF LANDLORD AND TENANT 6 (49th ed. 1934).

32. "Leases, particularly written ones, customarily contain a number of contractual covenants, virtually always including a tenant's covenant to pay rent. None of these covenants are necessary to the existence of the leasehold . . . However, because landlords generally expect rent, it is likely that a court would find an implied promise for rent unless the parties had overcome the implication." CUNNINGHAM, *supra* note 30, at 250.

33. See HOLDSWORTH, *supra* note 31, at 6. See also CUNNINGHAM, *supra* note 30, at 262.

34. "A 'covenant' is simply a promise or agreement . . ." HOLDSWORTH, *supra* note 31, at 10.

35. See *supra* notes 30-32 and accompanying text.

other hand, has the right to possession³⁶ for the period of time generally specified in the lease.³⁷ Coupled with the tenant's right to possession, "[t]he principal covenant on the part of the landlord, is the covenant for . . . quiet enjoyment."³⁸ Other covenants which may be inserted in the lease on the part of the lessor include a covenant that the landlord will repair the premises, and a covenant that the landlord will renew the lease to the lessee upon its expiration.³⁹

Likewise, covenants on the part of the lessee can be inserted into the lease.⁴⁰ One typical covenant which binds the lessee is a covenant that the lessee will use the premises for a specific and agreed upon purpose (e.g., use of premises limited to the operation of a delicatessen).⁴¹ Because "[t]he payment of rent is not essential to the existence of a leasehold,"⁴² a covenant to pay rent is frequently inserted in a lease.⁴³ Nonetheless, "the payment of rent is obligatory upon the lessee, so long as he continues to hold the premises without obstruction on the part of the lessor"⁴⁴

Covenants, of course, can be breached.⁴⁵ For example, "[i]n an actual eviction the landlord physically forces the tenant off the premises or enters and wrongfully excludes the tenant."⁴⁶ In this situation, if it is decided that the landlord's acts are wrong, the covenant of quiet enjoyment is breached and the tenant may sue the landlord for re-possession and for damages where appropriate. Further, the tenant may sue to possibly ter-

36. The tenant must enter upon the premises for the right to possess to be complete. See *HOLDSWORTH*, *supra* note 31, at 6.

37. See *CUNNINGHAM*, *supra* note 30, at 260.

38. ROBERT BUCKLEY COMYN, *A TREATISE OF THE LAW OF LANDLORD AND TENANT* 158 (1821). The covenant of quiet enjoyment provides a warranty from the landlord to the tenant that the latter will not be disturbed in possession by any other individual claiming possession via a paramount right. See *CUNNINGHAM*, *supra* note 30, at 283.

39. See *COMYN*, *supra* note 38, at 169-70.

40. See *id.* at 171.

41. See *CUNNINGHAM*, *supra* note 30, at 277.

42. *Id.* at 365.

43. See *COMYN*, *supra* note 38, at 192.

44. *Id.*

45. See *id.* at 475.

46. *CUNNINGHAM*, *supra* note 30, at 284 (citing *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970); *Olin v. Goehler*, 39 Wash. App. 688, 694 P.2d 1129 (1985)).

minate the leasehold or to suspend rent payment.⁴⁷ In short, a breach of the covenant of quiet enjoyment by actual eviction may result in complete excuse of the tenant's performance under the lease.⁴⁸

A constructive eviction, by comparison, results when "some wrongful act or omission by the landlord [results in] the premises becom[ing] uninhabitable ('untenantable') for the intended purpose."⁴⁹ *Phyfe v. Dale*⁵⁰ is illustrative. In *Phyfe*, due to lewd conversations and loud arguments occurring in nearby apartments, the tenant and his family were kept awake until all hours of the night.⁵¹ Additionally, acts of prostitution occurring in those neighboring apartments could be seen by the tenant and his family from their apartment.⁵² On one occasion, the tenant's wife was accosted and insulted by intoxicated men while she was in one of the elevators.⁵³ During the trial it was shown that the landlord knew of this objectionable conduct, but took no action to remedy matters.⁵⁴ As a result, the tenant removed himself and his family from the premises.⁵⁵ When the landlord sued the tenant for rent, the tenant counter-claimed that he and his family were constructively evicted.⁵⁶ The Appellate Term of the New York Supreme Court held that "[t]he actions which the landlord permitted to take place in the elevators and halls constituted a common nuisance, which the landlord had the complete power to abate. His failure to do so justified the [tenant] in vacating the premises."⁵⁷

As *Phyfe* illustrated, courts may hold landlords accountable where a nuisance was created by the landlord's other tenants.⁵⁸

47. See CUNNINGHAM, *supra* note 30, at 284. Where the landlord only partially evicts the tenant from a portion of the demised premises, the tenant may withhold the entire amount of the rent due. See *id.* at 286.

48. See *id.* at 284-85.

49. *Id.* at 286.

50. 72 Misc. 383, 130 N.Y.S. 231 (N.Y. App. Term. 1911).

51. See *id.* at 384, 130 N.Y.S. at 232.

52. See *id.*

53. See *id.*

54. See *id.*

55. See *Phyfe*, 72 Misc. at 384, 130 N.Y.S. at 232.

56. See *id.* at 233.

57. *Id.* at 232.

58. See *id.* (citing *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376 (1909) (brothel); *Barton v. Mitchell Co.*, 507 So. 2d 148 (Fla. App. 1987) (adjacent tenant, exercise studio); *Bocchini v. Gorn Management Co.*, 69 Md. App. 1, 515 A.2d 1179 (1986)

Landlords may also be held accountable for “failure to provide promised utilities, such as heat.”⁵⁹ In addition to the situation where the landlord permitted a nuisance inside the leased premises, a constructive eviction can also result where the landlord’s wrongful act or failure to act occurs outside of the leased premises.⁶⁰ Recently however, New York courts have drawn the line and limited a landlord’s liability for nuisances created by other tenants.⁶¹ In any event, where constructive eviction results because the landlord breaches the covenant of quiet enjoyment, the tenant must vacate the premises within a reasonable time in order to assert a claim for damages or to use it as a defense for failing to pay rent.⁶²

“The relation of landlord and tenant may be determined by the death of the tenant for life or *cestui que vie*; by the happening of the event upon which the lease is limited; by effluxion of time; by notice to quit; by forfeiture; by merger; or by surrender.”⁶³ Both the fixed-term tenancy and the tenancy for years, for example, terminate automatically at the previously agreed upon end of the term.⁶⁴ In this situation, neither the landlord nor the tenant need give notice for the tenancy to end.⁶⁵ In the event that the tenancy is for some specified period, such as a month, the tenancy terminates on the last day of that month.⁶⁶ A tenant who does not quit the leased premises at the end of the

(noisy tenants in apartment above); *Q C Corp. v. Maryland Port Administration*, 68 Md. App. 181, 510 A.2d 1101 (1986) (adjacent tenant had chrome waste landfill)).

59. CUNNINGHAM, *supra* note 30, at 286-87 (citing *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930) (heat; dictum); *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959) (electricity, heat, elevator); *Shindler v. Grove Hall Kosher Delicatessen & Lunch, Inc.*, 282 Mass. 32, 184 N.E. 673 (1933) (heating system); *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970) (air conditioning; dictum)).

60. *See* CUNNINGHAM, *supra* note 30, at 286.

61. *See* *Palais Partners v. Vollenweider*, 173 Misc.2d 8, 660 N.Y.S.2d 272 (N.Y. Civ. Ct. 1997) (landlord not responsible for tenant’s nudity and sexual acts).

62. *See* CUNNINGHAM, *supra* note 30, at 288.

63. COMYN, *supra* note 38, at 255 (emphasis in original).

64. *See* CUNNINGHAM, *supra* note 30, at 394.

65. *See id.* at 394-95.

66. *See id.* at 395.

term becomes a tenant at sufferance and may be forced to accept a new lease term.⁶⁷

B. *The Law of Nuisance Generally*

A nuisance is defined as "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damages."⁶⁸ The most common form of nuisance is that which deals with a condition maintained by a defendant on the defendant's land which produces any annoyance that interferes with a plaintiff's right to the use and enjoyment of the land possessed by that plaintiff.⁶⁹

Typically, a nuisance can be classified as public or private or both.⁷⁰ "A public nuisance is one which affects an indefinite number of persons, or all the residents of a particular locality, or all people coming within the extent of its range or operation, although the extent of the annoyance or damage inflicted upon individuals may be unequal."⁷¹ A private nuisance, on the other hand,

"includes any wrongful act which destroys or deteriorates the property of an individual or of a few persons or interferes with their lawful use or enjoyment thereof, or any act which unlawfully hinders them in the enjoyment of a common or public right and causes them a special injury different from that sustained by the general public."⁷²

The basic distinction is that a public nuisance affects the public at large, whereas a private nuisance affects only a limited number or just one person.⁷³ Regardless of how it is classified, a nuisance must produce discomfort, inconvenience or annoyance.⁷⁴ A nuisance claim rooted on mere speculation or overly-

67. *See id.* at 271-72, 395.

68. BLACK'S LAW DICTIONARY 736 (6th ed. 1991).

69. *See* CUNNINGHAM, *supra* note 30, at 417.

70. *See* BLACK'S LAW DICTIONARY, *supra* note 68, at 736.

71. *Id.*

72. *Id.*

73. *See* CUNNINGHAM, *supra* note 30, at 420.

74. *See* JOSEPH A. JOYCE and HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES 32 (1906).

nervous sensitivities is likely to fail.⁷⁵ In short, a nuisance must “substantially interfere[] with the ordinary comfort of human existence.”⁷⁶

Although monetary damages may be sought, most plaintiffs seek to enjoin the defendant from perpetuating the harmful nuisance.⁷⁷ It is quite possible, however, that a court will deny an injunction because “it would do more harm than good.”⁷⁸ For example, where an injunction would result in unemployment or other disadvantages to the surrounding community, a court may refuse to enjoin the nuisance created by a commercial enterprise.⁷⁹ In order to reach this determination, a court will normally balance the effect on the plaintiff if an injunction is not granted versus the effect on the defendant if an injunction is granted.⁸⁰ When performing this balancing, a court will consider social and economic factors.⁸¹

When dealing with the law of landlord and tenant, a claim based on nuisance, where appropriate, may lie with either the landlord or tenant as against the other.⁸² For example, “[a]n action or suit may be brought by a landowner, though he is not such owner at the time of the erection of the nuisance.”⁸³ Thus, where the tenant’s wrongful conduct affects the landlord’s interest in the property, the landlord is clearly within his or her legal right to sue the tenant for the resulting damage.⁸⁴ Likewise, “tenants in possession may maintain an action or suit for injury sustained during the tenancy.”⁸⁵ Where a nuisance affects the tenant’s comfort or health, the fact that the tenant occupies, but

75. *See id.*

76. *Id.* at 32-33. (citations omitted).

77. *See* CUNNINGHAM, *supra* note 30, at 421(citations omitted).

78. *Id.* Of course, a court may also choose to issue a partial injunction rather than a total prohibition. *See id.* at 421-22.

79. *See id.* at 421 (citing *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), on remand 72 Misc. 2d 834, 340 N.Y.S.2d 97 (1972), *aff'd*, 42 A.D.2d 496, 349 N.Y.S.2d 199 (1973).

80. *See* CUNNINGHAM, *supra* note 30, at 421.

81. *See id.*

82. *See* JOYCE, *supra* note 74, at 636-40.

83. *Id.* at 636.

84. *See id.*

85. *Id.* at 638 (citations omitted).

does not own the premises, does not prohibit the tenant from seeking to remedy, abate or recover from the nuisance.⁸⁶

C. *Rent Control Goals and Rent and Eviction Regulations in New York City Generally*

In an attempt to protect against unconscionable rent increases and to rectify a severe housing shortage, New York State decided that it would no longer allow landlords and tenants to deal without state monitoring.⁸⁷ On January 15, 1951, the Temporary State Housing Rent Commission ("the Commission") submitted its Rent Control Plan ("the Plan") to the Legislature of the State of New York.⁸⁸ To aid in drafting the Plan, the Commission conducted a Survey of Rents and Rental Conditions ("Survey").⁸⁹ From its Survey, the Committee reached, *inter alia*, the following conclusions:

(1) The shortage of housing accommodations is still acute in all of the areas of the State [of New York] now subject to rent control.

* * *

(3) The Commission's Survey clearly reveals that we have not recovered from the impact of World War II

(4) Forces are in the making which will make it virtually impossible to foresee the day when the supply of housing will sufficiently approximate the demand to permit rent control to give way to the normal bargaining relations between landlord and tenant.

* * *

(6) While a return to normal relations between landlord and tenant still remains the policy of the State [of New York] and of this Commission, the Commission cannot recommend any measure of decontrol [as of January 15, 1951].⁹⁰

As a result, the Commission addressed the two broad objectives mandated by the Legislature in 1946 when it enacted the Rent Control Law: "(1) the continuation of [rent] controls [only] so long as required and (2) their gradual elimination as soon as an easing of the housing situation would permit."⁹¹ In short,

86. *See id.* at 639.

87. *See* JOSEPH D. MCGOLDRICK, RENT CONTROL PLAN AND PROPOSED RENT AND EVICTION REGULATIONS 17 (1951).

88. *See id.*

89. *See id.*

90. *Id.* at 17-18.

91. *Id.* at 20.

rent control in the state of New York was created as a protective device.⁹² The goal was to protect “the public from inflation and tenants from gouging that would inevitably result from the acute housing shortage that ha[d] existed in the urban areas of [the United States] and [of New York State] since 1942.”⁹³

To further protect against “speculative, unwarranted and abnormal increases in rents,”⁹⁴ the Legislature of the State of New York also regulates and controls evictions.⁹⁵ The legislature separated the grounds for eviction into two distinct categories.⁹⁶ The first category exists where “the landlord claims that the conduct of the tenant is such as to deprive [the landlord] of the protection of the regulations or where the occupancy of the tenant is illegal because of the requirements of local or state law.”⁹⁷ In this first category, the landlord must serve written notice on both the tenant and the “district rent office.”⁹⁸ For notice to be valid, it is imperative that the landlord state the following: (1) the ground upon which it relies for the tenant’s removal or eviction; (2) the material facts supporting the existence of this reliance; and (3) the date when the landlord requires the tenant to surrender possession.⁹⁹ After service, the landlord may bring an action or proceeding to recover possession against the tenant in the local court.¹⁰⁰ In this first category, the landlord need not secure a certificate from the Administrator before serving the tenant.¹⁰¹

The second category, on the other hand, bars the landlord from evicting the tenant unless the landlord first secures a certificate from the Administrator.¹⁰² Issuance of the certificate permits the landlord to pursue its action or proceeding to recover possession when the applicable waiting period has ex-

92. See MCGOLDRICK, *supra* note 87, at 18.

93. *Id.* at 18.

94. N.Y. STATE RENT CONTROL § 8581(1) (McKinney 1987).

95. *See id.*

96. *See* MCGOLDRICK, *supra* note 87, at 29.

97. *Id.*

98. N.Y. RENT & EVICTION REGULATIONS § 2204.3(a) (McKinney 1987).

99. *See id.* § 2204.3(b).

100. *See* MCGOLDRICK, *supra* note 87, at 29.

101. *See id.*

102. *See id.*

pired.¹⁰³ "A certificate, [for example], shall be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family. . . ."¹⁰⁴ Or, the Administrator shall issue a certificate when the landlord seeks possession of the premises for the purpose of remodeling or substantially altering it.¹⁰⁵ In short, the landlord must demonstrate an immediate and compelling necessity before an Administrator will issue a certificate.¹⁰⁶ However, regardless of whether the reason is for personal gain or for remodeling purposes, the Administrator must carefully scrutinize both the landlord's motives and the Rent and Eviction Regulations before making a determination to evict the tenant.¹⁰⁷

D. *Selected New York Cases Which Demonstrate a Tenant's Eviction Where "the Tenant Committ[ed] or Permitt[ed] a Nuisance"*¹⁰⁸

In 1991, the Court of Appeals affirmed the New York Supreme Court, Appellate Division, First Department's judgment evicting an 80-year-old tenant from an apartment on the 17th floor of a building bordering Manhattan's Central Park West.¹⁰⁹ The tenant in *Frank v. Park Summit Realty Corp.*¹¹⁰ periodically allowed his 37-year-old nephew to reside with him.¹¹¹ The nephew, who suffered from chronic schizophrenia, would often engage in bizarre and disturbing behavior while residing in the tenant's apartment.¹¹² For example, the nephew would appear in the nude in the building's public places, would

103. *See id.* Where the tenant is required to relocate, the applicable waiting period is four months. Conversely, where the tenant need not relocate, the applicable waiting period is three months. *See* N.Y. RENT & EVICTION REGULATIONS §§ 2204.4(a)-(b)(1) (McKinney 1987).

104. *Id.* § 2204.5(a).

105. *See id.* § 2204.7(a).

106. *See* MCGOLDRICK, *supra* note 87, at 29.

107. *See id.*

108. N.Y. RENT & EVICTION REGULATIONS § 2204.2(a)(2) (McKinney 1987).

109. *See Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991).

110. 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991).

111. *See id.*

112. *See id.*

verbally abuse the other residents including threats of physical and sexual assault, and caused a health and safety hazard to the other residents because of his inattention to personal hygiene and unsanitary manners.¹¹³ On one occasion, the nephew even punched his uncle, the tenant, in the face.¹¹⁴ While it is true that the nephew could control this conduct by taking prescribed medication, he often failed to do so.¹¹⁵ As a result, the police had to be summoned on numerous occasions to usher the nephew to a nearby hospital for induced administration of the prescribed medicine.¹¹⁶ Shortly thereafter, the nephew underwent voluntary treatment on an outpatient basis to regain his normal behavior.¹¹⁷

In 1989, the landlord counterclaimed in the tenant's suit seeking an abatement¹¹⁸ in his rent arguing for the tenant's eviction on the theory that the latter condoned a nuisance created by the tenant's schizophrenic nephew.¹¹⁹ The New York Supreme Court concluded that "[the landlord] had 'not yet proven a nuisance' sufficient to justify [the tenant's] eviction."¹²⁰ Nonetheless, at the conclusion of the trial, the New York Supreme Court "issued a stern warning to [the tenant] that henceforth he would be held responsible for his nephew's publicly antisocial behavior and creation of unsanitary conditions, and [the tenant] would also be responsible for monitoring the nephew's medication schedule and attendance at the clinic for medical treatment."¹²¹ Additionally, the New York Supreme Court additionally warned the tenant that if he failed to curb his nephew from further incidents, a renewal of the eviction proceeding would be immediately entertained.¹²²

113. *See id.* at 33, 573 N.Y.S.2d at 655-56.

114. *See id.* at 35, 573 N.Y.S.2d at 656.

115. *See Frank*, 175 A.D.2d at 33, 573 N.Y.S.2d at 656.

116. *See id.* at 34, 573 N.Y.S.2d at 656.

117. *See id.*

118. *See id.* at 33, 573 N.Y.S.2d at 655. The tenant had a history of withholding the rent in his attempt to have the landlord provide services which included repairs. *See id.* at 37, 573 N.Y.S.2d at 657 (Milonas, J., dissenting). The New York Supreme Court, however, denied the tenant's claim for rent abatement. *See Frank*, 175 A.D.2d at 33, 34, 573 N.Y.S.2d at 655, 656.

119. *See id.* at 33, 573 N.Y.S.2d at 655.

120. *Id.* at 33, 34, 573 N.Y.S.2d at 656.

121. *Id.* at 34, 573 N.Y.S.2d at 656.

122. *See id.*

Four months later, however, the tenant's nephew reverted back to his antisocial behavior which was proscribed by the Supreme Court.¹²³ Once again, the nephew was shouting obscenities in public places within the building.¹²⁴ Moreover, the nephew was now physically molesting both the females employed to work in the building as well as the female residents.¹²⁵ As a result, the landlord took up the Supreme Court's invitation and renewed its eviction proceeding.¹²⁶ The tenant involuntarily committed his nephew and promised that the nephew would not be permitted to return to his residence.¹²⁷ Because the nephew's commitment was only temporary, the Supreme Court disposed of this proceeding a second time by enjoining the tenant from "directly or indirectly allowing [the nephew] to return to residence" at the tenant's apartment.¹²⁸ The Supreme Court did not, however, enjoin the nephew from visiting either the building or the tenant's apartment.¹²⁹ Thus, the landlord appealed this decision to the Supreme Court, Appellate Division, First Department.¹³⁰

The Appellate Division stated that "[a] nuisance is a condition that threatens the comfort and safety of others in the building. If the key to the definition is a pattern of continuity or recurrence of objectionable conduct, [the landlord] has long satisfied this test."¹³¹ By allowing his nephew to reside in his apartment, the tenant "permitt[ed] a nuisance"¹³² and thereby usurped "[t]he safety and domestic tranquillity of [both] other tenants in the building" and those individuals employed to work in the building.¹³³ As a result, the Appellate Division concluded that the tenant's eviction was warranted.¹³⁴ This conclusion was affirmed five months later by the Court of Appeals of New

123. *See id.* at 35, 573 N.Y.S.2d at 656.

124. *See Frank*, 175 A.D.2d at 35, 573 N.Y.S.2d at 656.

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.* at 35, 573 N.Y.S.2d at 657.

129. *See Frank*, 175 A.D.2d at 35, 573 N.Y.S.2d at 657.

130. *See id.* at 33, 573 N.Y.S.2d at 655.

131. *Id.* at 35-36, 573 N.Y.S.2d at 657 (citations omitted).

132. N.Y. RENT & EVICTION REGULATIONS § 2204.2(a)(2) (McKinney 1987).

133. *Frank*, 175 A.D.2d at 36, 573 N.Y.S.2d at 657.

134. *See id.*

York.¹³⁵ Although the Court of Appeals modified *Frank* on a different ground, it affirmed the Appellate Division's holding that the tenant's conduct constituted a nuisance and thereby warranted the tenant's eviction.¹³⁶

Following the Court of Appeals decision in *Frank*, the Supreme Court, Appellate Term, First Department evicted a tenant who suffered from schizophrenia despite the tenant's argument that her conduct did not constitute a nuisance because it was precipitated by her mental illness and was thus unintentional.¹³⁷ In *Eskin*, five neighbors testified that the tenant's abusive and antisocial behavior substantially interfered with their comfort and safety.¹³⁸ Specifically, those who testified stated that they were threatened by the tenant and that they often witnessed the tenant cause disturbances in the building's public areas.¹³⁹ Although the tenant did not testify, her psychiatrist stated that in his opinion, the tenant was not violent.¹⁴⁰ The psychiatrist also testified, however, that he expected the tenant's past outbursts to repeat themselves at some future point.¹⁴¹ As a result, the Appellate Term concluded that the tenant's state of mind is not at issue where the holdover proceeding is grounded in nuisance, but rather the effect that the tenant's conduct has upon the building staff and the building's other tenants is dispositive.¹⁴²

In a more recent case, the Supreme Court, Appellate Term, First Department, citing *Frank*, affirmed the eviction of a tenant for her failure to stop her unemancipated teenage children from, inter alia, urinating in public hallways.¹⁴³ The *Torres*

135. See *Frank v. Park Summit Realty Corp.*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991).

136. See *id.* The Court of Appeals reinstated a portion of the Supreme Court's order which awarded the tenant a partial rent abatement. The Appellate Division erred when it awarded the landlord all rent arrears. See *id.* at 792, 587 N.E.2d at 287-88, 579 N.Y.S.2d at 649-50.

137. See *301 East 69th St. Assoc. v. Eskin*, 156 Misc. 2d 122, 600 N.Y.S.2d 887 (N.Y. App. Term 1993).

138. See *id.* at 123, 600 N.Y.S.2d at 888.

139. See *id.*

140. See *id.*

141. See *id.*

142. See *Eskin*, 156 Misc.2d at 123, 600 N.Y.S.2d at 888.

143. See *Acorn Realty, L.L.C. v. Torres*, 169 Misc. 2d 670, 652 N.Y.S.2d 472 (N.Y. App. Term. 1st Dep't 1996).

court held that the tenant's failure to curtail her children's anti-social behavior constituted a nuisance and warranted her eviction.¹⁴⁴ In addition to urinating in the building's public hallways, the tenant's children repeatedly vandalized both the door to the building's front entrance and its elevator, used marijuana in the building's public hallways, verbally abused other residents, and assaulted the building's staff.¹⁴⁵ Citing *Frank*, the Appellate Term stated that this

pattern of objectionable behavior substantially threatens the comfort and safety of others in the building, and "demand[s] the protection of the law in the form of the eviction of [the tenant], whose conduct permitted and condoned the nuisance and whose tenancy itself, in all likelihood, will encourage the nuisance to continue unabated."¹⁴⁶

E. *New York's Movement Toward Concluding That "the Tenant Is Committing or Permitting a Nuisance"*¹⁴⁷ by *Chronically Tendering the Rent After It Is Due*

In *25th Realty Associates v. Griggs*,¹⁴⁸ the Supreme Court, Appellate Division, First Department, set forth guidelines to determine whether a tenant's untimely rent payments constitute a nuisance.¹⁴⁹ In *Griggs*, the landlord commenced suit in the Supreme Court of New York County to recover possession of the apartment.¹⁵⁰ The landlord sought a declaration proclaiming that the tenant's continued occupancy created a nuisance.¹⁵¹ In response, the tenant defended by stating that he was withholding the rent because the premises were in need of repair, and a bona fide dispute with the landlord existed over whether he was entitled to a rent reduction.¹⁵² The Supreme Court granted the tenant's cross motion for summary judgment, but the Appellate

144. See *id.* at 671, 652 N.Y.S.2d at 473.

145. See *id.*

146. *Id.* (citing *Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 36, 573 N.Y.S.2d 655, 658, *modified on other grounds*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991)).

147. N.Y. RENT & EVICTION REGULATIONS § 2204.2(a)(2) (McKinney 1987).

148. 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dep't 1989).

149. See *id.* at 156, 540 N.Y.S.2d at 435.

150. See *id.* at 155, 540 N.Y.S.2d at 434.

151. See *id.*

152. See *id.* at 156, 540 N.Y.S.2d at 436.

Division reversed and remanded to the trial court because it felt that the tenant's motives for withholding the rent could not be adequately squared from the record alone.¹⁵³

As in *Sharp*, the premises the landlord sought to recover in *Griggs* were occupied for more than thirty years by a rent-controlled tenant.¹⁵⁴ Moreover, the tenant in *Griggs*, like the tenant in *Sharp*, consistently failed to pay his rent on time and, as a result, forced the landlord to bring repeated nonpayment actions against him.¹⁵⁵ Specifically, during a six-year period, the landlord in *Griggs* brought eleven successful nonpayment actions against the tenant.¹⁵⁶ The Appellate Division remanded the case back to the Supreme Court to determine whether the tenant was truly justified in not paying his rent or whether the tenant was merely harassing the landlord.¹⁵⁷ To aid the trial court, the Appellate Division stated that in order "to evict a tenant for chronic late payment of rent, the landlord must show that it was compelled to bring numerous nonpayment proceedings within a relatively short period and that the tenant's nonpayment was willful, unjustified, without explanation, or accompanied by an intent to harass the landlord."¹⁵⁸

Although the Appellate Division stated in *Griggs* that the landlord must offer proof that it brought numerous nonpayment proceedings against the tenant,¹⁵⁹ that court did not, however, specify how many proceedings the landlord was obliged to bring against a tenant to satisfy this requirement. In *Greene v. Stone*,¹⁶⁰ the Appellate Division partially answered this query by stating that "the number of nonpayment actions commenced

153. See *Griggs*, 150 A.D.2d at 156-57, 540 N.Y.S.2d at 435-36.

154. See *id.* at 156, 540 N.Y.S.2d at 435.

155. See *id.*

156. See *id.*

157. See *id.* at 157, 540 N.Y.S.2d at 436. After trial, the Appellate Division modified the Supreme Court's order in that, inter alia, unless the tenant received written authorization from the landlord, the tenant could not resume occupancy or residency whether it be temporary or otherwise. See *25th Realty Associates v. Griggs*, 195 A.D.2d 428, 428-29, 602 N.Y.S.2d 526, 526 (1993). On September 14, 1993, the Court of Appeals of New York denied the tenant's motion for leave to appeal. See *25th Realty Associates v. Griggs*, 82 N.Y.2d 747, 622 N.E.2d 301, 602 N.Y.S.2d 800 (1993).

158. *Griggs*, 150 A.D.2d at 156, 540 N.Y.S.2d at 435 (citations omitted).

159. See *id.*

160. 160 A.D.2d 367, 553 N.Y.S.2d 421 (1st Dep't 1990).

is relevant only in the context of the entire circumstances surrounding the alleged withholding of rent.”¹⁶¹ In short, no “magic number” exists.¹⁶²

In *Greene*, the landlord brought a holdover proceeding against his rent-stabilized tenant because the tenant failed to timely pay his rent on forty-nine separate occasions.¹⁶³ Moreover, the tenant often carried a balance into the following month.¹⁶⁴ On one specific occasion, for example, the rent went unpaid for a period of thirteen consecutive months.¹⁶⁵ In addition, on nine separate occasions the tenant’s rent checks were subsequently returned for insufficient funds.¹⁶⁶ As a result, during this four year period, the landlord was forced to serve the tenant with legal process twenty-one times, three of which were nonpayment proceedings.¹⁶⁷

Despite the fact that the landlord in *Greene* was forced to bring numerous nonpayment actions, the Civil Court of New York County dismissed this summary holdover proceeding because it found insufficient proof to conclude that the tenant substantially violated his lease agreement.¹⁶⁸ The Appellate Term, First Department, affirmed the dismissal.¹⁶⁹ The Appellate Division, First Department, however, reversed and remanded for a determination of whether the tenant was justified in withholding rent.¹⁷⁰ The Appellate Division stated that the tenant’s “possession of the subject premises may constitute a nuisance warranting eviction if not adequately explained by the tenant.”¹⁷¹

In order to find a nuisance in a holdover proceeding, the trial court must find that the landlord was forced to bring repeated nonpayment proceedings against the tenant.¹⁷² The trial court must additionally probe the tenant’s motive for paying the

161. *Id.* at 368, 553 N.Y.S.2d at 422.

162. *Sharp*, 223 A.D.2d 6, 9, 643 N.Y.S.2d 39, 41 (1st Dep’t 1996).

163. *See Greene*, 160 A.D.2d at 368, 553 N.Y.S.2d at 421.

164. *See id.* at 368, 553 N.Y.S.2d at 421-22.

165. *See id.* at 368, 553 N.Y.S.2d at 422.

166. *See id.* at 368, 553 N.Y.S.2d at 421.

167. *See id.* at 368, 553 N.Y.S.2d at 421-22.

168. *See Greene*, 160 A.D.2d at 368, 553 N.Y.S.2d at 422.

169. *See id.* at 367, 553 N.Y.S.2d at 421.

170. *See id.* at 368, 553 N.Y.S.2d at 422.

171. *Id.*

172. *See supra* notes 155-58 and accompanying text.

rent late.¹⁷³ In probing the tenant's motive, the *Greene* court was required to determine whether the tenant purposefully intended to harass the landlord or whether the tenant lacked an explanation to justify withholding the rent payment that was due.¹⁷⁴ In *Ocean Farragut Associates v. Sawyer*,¹⁷⁵ the Civil Court of the City of New York rendered a final judgment of possession in the landlord's favor.¹⁷⁶ In *Sawyer*, the landlord was forced to bring nine proceedings for nonpayment of the rent against the tenant over a period of forty-two months.¹⁷⁷ The tenant never disputed the suits and paid the amount claimed by the landlord plus the landlord's costs.¹⁷⁸ However, during an even shorter period of only twenty-four months, eleven of the tenant's rent checks failed to clear due to insufficient funds.¹⁷⁹ In *Sawyer*, the landlord demonstrated that (1) it was forced to bring numerous nonpayment proceedings against the tenant, (2) the tenant was unjustified in withholding any portion of the rent due, and (3) the tenant's willful payment with "bad" checks was intended to harass the landlord.¹⁸⁰ This combination of factors led the *Sawyer* court to hold that the tenant's eviction for late payment of rent was warranted.

F. *Treatment of the Lead Case, Sharp v. Norwood, Before It Reached the Appellate Division, First Department*

Under New York's Rent and Eviction Regulations, a landlord may maintain an action or a proceeding to recover possession of its leased property without first obtaining a certificate from an Administrator.¹⁸¹ Specifically, a landlord may maintain an action where "[t]he tenant is committing or permitting a nuisance in such housing accommodations."¹⁸² In March 1992, using these regulations as a guideline, Sharp ("landlord") commenced a holdover proceeding against Norwood ("tenant")

173. See *supra* notes 155-58 and accompanying text.

174. See *supra* notes 155-58 and accompanying text.

175. 119 Misc.2d 712, 464 N.Y.S.2d 346 (N.Y. Civ. Ct. 1983).

176. See *id.* at 716, 464 N.Y.S.2d at 349.

177. See *id.* at 712, 464 N.Y.S.2d at 347.

178. See *id.* at 712-13, 464 N.Y.S.2d at 347.

179. See *id.* at 713, 464 N.Y.S.2d at 347.

180. See *Sawyer*, 119 Misc.2d at 715, 464 N.Y.S.2d at 347-48.

181. See N.Y. RENT & EVICTION REGULATIONS § 2204.2 (McKinney 1987).

182. *Id.* § 2204.2(a)(2).

claiming that Norwood's chronically late rent payments constituted a "nuisance."¹⁸³

On or about November 1, 1961, Norwood and her former husband commenced occupancy of an apartment located in Manhattan.¹⁸⁴ The apartment building was subsequently converted to cooperative ownership but Norwood did not purchase the proprietary shares allocated to her unit.¹⁸⁵ Rather, Norwood retained her tenant status under the written lease agreement; a status which continued to be subject to City Rent Law and the New York City Rent and Eviction Regulations.¹⁸⁶

In 1992, the landlord served Norwood with a "Notice of Termination" claiming, inter alia, that Norwood tendered her rent payments in an untimely fashion.¹⁸⁷ Specifically, during the period of November 1990 through March 1992, the landlord served 11 three-day rent demands on Norwood.¹⁸⁸ Shortly after the landlord served the "Notice of Termination," it commenced this holdover proceeding.¹⁸⁹ Judge Fisher-Brandveen, then sitting on the Civil Court,¹⁹⁰ granted Norwood's motion to dismiss

183. See *Sharp v. Norwood*, 223 A.D.2d 6, 643 N.Y.S.2d 39 (1st Dep't 1996). The Appellate Division, First Department, noted that the landlord in this matter did not predicate its holdover proceeding upon the breach of a leasehold obligation theory. See *id.* In noting this, the Appellate Division, First Department, expressly stated that the landlord may have chosen the nuisance theory in an attempt to avoid the remedial prescription of Real Property Actions and Proceedings Law § 753(4) which grants the tenant a ten-day stay to cure the breach. See *id.* at 11, 643 N.Y.S.2d at 42. Under a nuisance theory, however, the tenant does not have an opportunity to cure where chronically late rent payments are found to constitute a nuisance. See *id.* at 11, 643 N.Y.S.2d at 42 (citing 301 East 22nd Street Co. v. Lampert, NYLJ, July 2, 1984, at 13, col. 5 (App. Term, 1st Dep't)).

184. See *Sharp*, 223 A.D.2d at 7, 643 N.Y.S.2d at 40.

185. See *id.*

186. See *id.* Peter J. Sharp, now deceased, was the holder of the unsold shares allocated to Norwood's cooperative unit. See *id.* Peter Hagner Sharp, Caroline Mary Sharp and Randall Allison Sharp, as executors of the will of Peter J. Sharp, were the successors-in-interest and had taken Peter J. Sharp's place in this proceeding. See *id.* at 6, 643 N.Y.S.2d at 39. Peter J. Sharp, the original petitioner, died during the pendency of the proceeding. See *id.* at 14, 643 N.Y.S.2d at 44 n.1 (Sullivan, J., dissenting).

187. See *Sharp*, 223 A.D.2d at 7, 643 N.Y.S.2d at 40.

188. See *id.* at 14, 643 N.Y.S.2d at 44 (Sullivan, J., dissenting).

189. See *id.* at 7, 643 N.Y.S.2d at 40.

190. Judge Fisher-Brandveen is currently the Chief Administrative Judge of the Civil Court of the City of New York. The New York City Civil Court (NYCCC) is one of the largest courts in the world. As the name implies, this court functions only in New York City. See DAVID D. SIEGEL, *NEW YORK PRACTICE* 20 (2d ed.

this holdover proceeding.¹⁹¹ Judge Fisher-Brandveen's decision rested upon the finding that: (1) during the thirty-three years that Norwood resided in this same apartment, the landlord commenced only two¹⁹² nonpayment proceedings in the prior fifteen years that Norwood had lived in the apartment; and (2) the "Notice of Termination" failed to indicate any arrearages owed by Norwood.¹⁹³ The landlord appealed Judge Fisher-Brandveen's grant of Norwood's dismissal motion to the Appellate Term, First Department.¹⁹⁴

The Appellate Term of the Supreme Court, First Department, held that "[c]hronic late payment and nonpayment of rent may constitute a nuisance warranting eviction if not adequately explained by the tenant" and it unanimously reversed the order and reinstated the landlord's petition.¹⁹⁵ The Appellate Term found that the facts set forth in the petition and in the "Notice of Termination" were sufficient to support the landlord's cause of action for nuisance.¹⁹⁶ Thus, the Appellate Term reversed the dismissal of the complaint and sent it back to the trial court.¹⁹⁷

During the trial, Norwood explained that her difficulty in paying the rent on time stemmed from the late alimony payments she received from her ex-husband.¹⁹⁸ "Clearly, a woman

1991). NYCCC has monetary jurisdiction up to \$25,000. *See id.* In addition, NYCCC only has civil jurisdiction; this includes real property actions. *See id.* In the area of summary proceedings, NYCCC has jurisdiction to render a judgment of dispossession, for rent and of interpleader claims. *See id.* A judgment for rent, however, may be rendered without monetary limitation. *See id.* Litigants urging counterclaims need not be concerned with a monetary limit when dealing with this court because the limit is not applicable to counterclaims. *See* SIEGEL, at 20. NYCCC also has equity jurisdiction, but this jurisdiction is statutorily limited to actions dealing with real property and contract rescission or reform. *See id.* In 1972, an amendment to the New York City Civil Court Act (NYCCCA) expanded equity jurisdiction in housing cases in an attempt to meet problems in residential housing. *See id.*

191. *See Sharp*, 223 A.D.2d at 7, 643 N.Y.S.2d at 40.

192. *See id.* at 10, 11, 643 N.Y.S.2d at 42. The landlord contended that six nonpayment proceedings were commenced against Norwood during the course of a nine-year period. The First Department agreed with Judge Fisher-Brandveen's finding, however, that only two such proceedings were commenced. *See id.*

193. *See id.* at 7, 643 N.Y.S.2d at 40.

194. *See id.*

195. *Sharp*, 223 A.D.2d at 7, 643 N.Y.S.2d at 40.

196. *See id.*

197. *See id.* at 8, 643 N.Y.S.2d at 40.

198. *See id.* Norwood and her husband were divorced in 1970 and for a number of years thereafter, Norwood's ex-husband's attorney paid the landlord di-

who is entitled to moneys from her ex-husband by court order and fails to receive same in a timely fashion cannot be considered to have engaged in willful conduct as to warrant a nuisance when her rent is tendered late."¹⁹⁹ Thus, finding no evidence that Norwood's conduct was willful, harmful or unjustified, or that it rose to the level of a nuisance, Judge Arthur Scott dismissed the proceeding.²⁰⁰

The Appellate Term, in a split decision,²⁰¹ affirmed.²⁰² Like Judge Scott, the majority of the Appellate Term held that Norwood's conduct was not intended to harass the landlord and it did not rise to the level of a nuisance.²⁰³ On a purely procedural basis, the dissent pointed out that "financial inability to pay is not a defense to chronic late payments and, even if it were, such a defense was not proved."²⁰⁴ Thereafter, the landlord's motion to appeal this decision and order to the Appellate Division was granted by the Appellate Term.²⁰⁵

G. *The Supreme Court, Appellate Division, First Department's Decision in Sharp*

To prevail on a nuisance theory, a landlord must satisfy two elements: first, the landlord must show that it was "compelled to bring numerous nonpayment proceedings within a relatively short period and that the tenant's nonpayment was willful, unjustified, without explanation, or accompanied by an intent to harass the landlord;"²⁰⁶ second, the landlord must show that it brought those numerous nonpayment proceedings "in good faith to collect outstanding rent and not as a pretense

rectly. *See Sharp*, 223 A.D.2d at 8, 643 N.Y.S.2d at 40. In 1988, however, the attorney ceased this practice and Norwood began to receive a correspondingly larger alimony check. *See id.* It was from this alimony check that Norwood claimed she paid the rent. *See id.* Moreover, during the trial of this action, Norwood explained that her ex-husband's alimony checks were often not cashable due to insufficient funds. *See id.* at 10, 643 N.Y.S.2d at 42.

199. *Id.* at 8, 643 N.Y.S.2d at 40-41.

200. *See Sharp*, 223 A.D.2d at 8, 643 N.Y.S.2d at 40.

201. Justices Stanley Parness and Edith Miller in the majority and Justice William P. McCooe dissenting.

202. *See id.* at 8, 643 N.Y.S.2d at 41.

203. *See id.*

204. *Id.* at 16, 643 N.Y.S.2d at 46 (Sullivan, J., dissenting).

205. *See id.* at 8, 13, 643 N.Y.S.2d at 41, 44.

206. *Sharp*, 223 A.D.2d at 8, 643 N.Y.S.2d at 41, 44 (citing 25th Realty Associates v. Griggs, 150 A.D.2d 155, 156, 540 N.Y.S.2d 434, 435 (1st Dep't 1989)).

to meet the definition of nuisance for the purposes of bringing a holdover action.²⁰⁷ Compared with an action predicated on a breach of a leasehold obligation, therefore, the landlord in this matter must prove more than a mere pattern of Norwood's late rent payments.²⁰⁸

Here, the landlord brought only two such nonpayment proceedings against Norwood within the prior fifteen years; neither of those actions were ever litigated.²⁰⁹ Holding that the prior nonpayment proceedings were "a woeful [and] transparent effort to bring this action within established case law regarding the number of and immediacy of prior nonpayment proceedings needed for the purpose of bringing a holdover action based on nuisance," the Appellate Division, First Department affirmed the dismissal of this holdover proceeding.²¹⁰ In short, the Appellate Division, First Department, refused to allow the landlord to predicate a nuisance holdover proceeding on two prior nonpayment proceedings.²¹¹

The Appellate Division, First Department, emphatically stated that there is clearly no "magic number" of prior nonpayment proceedings required to prove nuisance as a basis for eviction.²¹² Rather, "the number of nonpayment actions commenced is relevant only in the context of the entire circumstances surrounding the alleged withholding of rent"²¹³ In this matter, the Appellate Division, First Department, pointed out that Nor-

207. *Sharp*, 223 A.D.2d at 8, 643 N.Y.S.2d at 41.

208. *See id.* at 11, 643 N.Y.S.2d at 42-43.

209. *See id.* at 8-9, 643 N.Y.S.2d at 41. The landlord commenced the first nonpayment proceeding action shortly after December 1, 1991, to collect December's rent. *See id.* This action was discontinued, however, because Norwood paid December's rent before she was served with the petition. *See id.* The landlord commenced the second nonpayment proceeding action in February 1992, but because the wrong party was served and because Norwood paid February's rent before she was served with the petition, the action was never litigated. *See Sharp*, 223 A.D.2d at 8-9, 643 N.Y.S.2d at 41.

210. *Id.* at 9, 12, 643 N.Y.S.2d at 41, 43.

211. *See id.* at 9, 643 N.Y.S.2d at 41.

212. *Id.* *See 25th Realty Associates v. Griggs*, 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dep't 1989), where, in a six year period, the landlord prevailed in eleven nonpayment proceedings against the tenant. Despite this finding, the First Department remanded for a determination whether the tenant had bona fide reason to withhold the rent due to building code violations and disputes over rent reduction. *See id.*

213. *Sharp*, 223 A.D.2d at 9, 643 N.Y.S.2d at 41 (citing *Greene v. Stone*, 160 A.D.2d 367, 368, 553 N.Y.S.2d 421 at 422 (1st Dep't 1990)).

wood never refused to pay the rent.²¹⁴ Moreover, during the trial Norwood explained that the reason she paid the rent late was because the money came from her alimony payment and her ex-husband's payments were often late.²¹⁵ Lastly, this court pointed out that Norwood never carried a balance into the following month.²¹⁶ Thus, "[i]n viewing the totality of the circumstances presented, [the First Department] conclude[d] that the evidence at trial did not establish that [Norwood's] late payment of rent constituted a nuisance."²¹⁷ In short, the Appellate Division, First Department, stated that Norwood's conduct was neither willful, unjustified or lacking in explanation, nor was it an attempt to harass the landlord.²¹⁸

Turning next to the doctrine of equity,²¹⁹ the Appellate Division, First Department, then discussed numerous cases holding that courts dislike lease forfeiture.²²⁰ This, stated the First Department, was a well-settled equitable principle.²²¹ Recalling that the elderly Norwood had occupied this same apartment for over thirty-three years, the court stated that "it would be inequitable to permit the landlord to forfeit [Norwood's] rent-controlled tenancy and direct [her] eviction."²²² The court added that Norwood's lease forfeiture would be especially inequitable due to the scarcity of affordable housing accommodations in New York City.²²³

214. See *Sharp*, 223 A.D.2d at 9, 643 N.Y.S.2d at 41.

215. See *id.* at 10, 643 N.Y.S.2d at 42.

216. See *id.* at 10, 643 N.Y.S.2d at 42.

217. *Id.*

218. See *id.* (relying on 25th Realty Associates v. Griggs, 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dep't 1989)).

219. "Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation." BLACK'S LAW DICTIONARY 540 (6th ed. 1991).

220. See *Sharp*, 223 A.D.2d at 11, 643 N.Y.S.2d at 43 (citing *Harar Realty Corp. v. Michlin & Hill, Inc.*, 86 A.D.2d 182, 188, 449 N.Y.S.2d 213, 218, *appeal dismissed* 57 N.Y.2d 836, 442 N.E.2d 60, 455 N.Y.S.2d 763; 57 N.Y.2d 607, 442 N.E.2d 69, 455 N.Y.S.2d 1027 (1989); 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (1991); 220 West 42 *Assoc. v. Cohen*, 60 Misc. 2d 983, 302 N.Y.S.2d 494 (1987)).

221. See *Sharp*, 223 A.D.2d at 11, 643 N.Y.S.2d at 43.

222. *Id.*

223. See *id.*

Finally, the First Department focused on the illegal and insufficient documentation supporting the landlord's case.²²⁴ Specifically, the court pointed out that "the landlord placed no evidence before [it] to establish with certainty when [Norwood] paid the rent within any given month."²²⁵ At the trial, Norwood stated that because her ex-husband's alimony checks occasionally bounced due to insufficient funds, she developed the habit of buying a money order upon successful cashing of the alimony check, dating it the first of the month regardless of the actual date, and paying the rent in person at the landlord's management office.²²⁶ All of these activities were completed by Norwood on the same day.²²⁷ Further testimony revealed that the landlord would same-day deposit the funds if Norwood paid early enough; otherwise, he would deposit the funds the next day.²²⁸ Because Norwood had a habit of incorrectly dating the money orders and the landlord never issued receipts for these money orders, the court stated that "no one can say for certain how late the rent was [paid]."²²⁹

H. *The Dissent in the Supreme Court, Appellate Division, First Department*

"The [landlord's] petition to terminate the tenancy should be granted on the ground that [Norwood's] continuous late payment of rent constitutes a nuisance."²³⁰ Presiding Judge Sullivan stated that while it is true that the law disfavors lease forfeiture,²³¹ it similarly does not permit the courts to turn a blind eye on a landlord's legal rights when dealing with a ten-

224. *See id.* at 12, 643 N.Y.S.2d at 43. As a specific example, the court pointed out that the landlord, in violation of Real Property Law § 235-e, admitted that it never issued rent receipts for Norwood's money order rent payments. *See id.* The First Department also stated, however, that the documentation supporting Norwood's defense was likewise poor. *See Sharp*, 223 A.D.2d at 12, 643 N.Y.S.2d at 43.

225. *Id.*

226. *See id.* at 10, 643 N.Y.S.2d at 42.

227. *See id.*

228. *See id.* at 12, 643 N.Y.S.2d at 43.

229. *Sharp*, 223 A.D.2d at 12, 643 N.Y.S.2d at 43.

230. *See id.* at 13, 643 N.Y.S.2d at 44 (Sullivan, J., dissenting).

231. *Id.* (relying on *Tehan v. Thos. C. Peters Printing Co.*, 71 A.D.2d 101, 106, 421 N.Y.S.2d 465, 469 (1968)).

ant who virtually never pays her rent on time.²³² In this matter, the landlord was forced to repeatedly serve monthly rent demands.²³³ Moreover, the landlord repeatedly was forced to commence nonpayment proceedings.²³⁴ In short, Judge Sullivan stated that the law permits the courts to relieve a tenant of her lease obligations when that tenant, month after month, over a period of nine years, repeatedly paid her rent late.²³⁵ Judge Sullivan concluded that clearly such default constituted a nuisance.²³⁶

In a holdover proceeding, as previously stated, a landlord must demonstrate that it was forced to bring repeated nonpayment proceedings to prevail on a nuisance theory.²³⁷ According to Judge Sullivan, the landlord met and surpassed this obligation.²³⁸ Not only did the landlord remind Norwood of her written lease obligations after her succession to her former husband's lease rights,²³⁹ the landlord served voluminous rent demands in his efforts to get Norwood to pay her rent in a timely fashion.²⁴⁰ Judge Sullivan pointed out that, to no avail, Norwood remained indifferent to her obligation under the written lease to pay her rent on time and was on average 16.94 days late with her rent payments.²⁴¹ As a result of numerous at-

232. See *Sharp*, 223 A.D.2d at 13, 643 N.Y.S.2d at 44 (Sullivan, J., dissenting).

233. See *id.*

234. See *id.*

235. See *id.*

236. See *id.*

237. See *supra* notes 155-58 and accompanying text.

238. See *Sharp*, 223 A.D.2d at 14, 643 N.Y.S.2d at 44 (Sullivan, J., dissenting).

239. In November 1990, the landlord's attorney wrote Norwood the following letter to remind her of her obligation to pay her rent on time under the written lease: "In examining your recent rental history, [the landlord] finds that you are consistently paying rent in a manner other than [what] is called for in your lease. It is not acceptable for rent to be paid in the middle of the month or at the end of the month. Rather, rent is to be paid at the beginning of each month." *Id.*

240. The landlord served Norwood eleven three-day rent demands for the seventeen month period from October 1990 to February 1992. Moreover, the landlord served Norwood 44 rent demands for the nine-year period from April 1983 to April 1992. See *id.*

241. For the nine-year period from April 1983 to April 1992, Norwood, on average, was 16.94 days late paying her rent. See *id.* at 14, 643 N.Y.S.2d at 44-45.

tempts to extract the rent from Norwood, the landlord incurred legal expenses.²⁴²

Judge Sullivan's dissenting opinion pointed out numerous areas where, in his opinion, the majority fell short of "viewing the totality of the circumstances presented"²⁴³ to arrive at the conclusion that the landlord failed to establish that Norwood's chronically late rent payments constituted a nuisance.²⁴⁴ For example, pointing to statistics from a computer-generated spreadsheet of Norwood's rent payment history which was in evidence at the trial, Sullivan identified numerous times when Norwood failed to pay her rent for months at a time.²⁴⁵ When the majority stated that Norwood never carried a balance into a future month, it looked only to the period surrounding the landlord's filing of the Notice of Termination.²⁴⁶ Moreover, Judge Sullivan noted that at trial, Norwood did not offer documentary proof to support her claim that only her alimony checks were earmarked solely for the payment of rent.²⁴⁷ In fact, it was shown at trial that Norwood was gainfully employed, but the Civil Court claimed that this evidence was irrelevant and did not permit additional inquiry into Norwood's salary or the nature of her position.²⁴⁸

In addition to the majority's incomplete assessment of the "totality of the circumstances presented,"²⁴⁹ Judge Sullivan's dissenting opinion pointed out wholly inaccurate tests employed by the majority.²⁵⁰ For example, Judge Sullivan stated that the majority's reliance on the fact that Norwood never refused to

242. *See id.* at 15, 643 N.Y.S.2d at 45.

243. *Sharp*, 223 A.D.2d at 10, 643 N.Y.S.2d at 42.

244. *See id.* at 13, 643 N.Y.S.2d at 44.

245. [Norwood] paid the May 1984 rent on July 9, 1984, 69 days late; she paid the June 1984 rent on August 8, 1984, 68 days late; her July 1984 rent on August 22, 1984, 52 days late; her May 1983 rent on June 6, 1983, 36 days late; her June 1985 rent on July 16, 1985, 45 days late; her January and February 1988 rent 31 and 39 days late, respectively; her April 1989 rent on May 1, 1989, 30 days late; her July 1989 rent on August 2, 1989, 32 days late; her April and July 1990 rent 22 days late; her October 1991 rent 20 days late; and her February 1991 rent 18 days late. *See id.* at 15, 643 N.Y.S.2d at 45.

246. *See id.* at 10, 643 N.Y.S.2d at 42.

247. *See id.* at 16, 643 N.Y.S.2d at 45 (Sullivan, J., dissenting).

248. *See Sharp*, 223 A.D.2d at 16, 643 N.Y.S.2d at 45 (Sullivan, J., dissenting).

249. *Id.* at 10, 643 N.Y.S.2d at 42.

250. *See id.* at 16-17, 643 N.Y.S.2d at 46 (Sullivan, J., dissenting).

pay her rent is misplaced.²⁵¹ According to Sullivan, the landlord is only required to demonstrate: (1) that Norwood was chronically late with paying her rent, and as a result, the landlord was forced to bring repeated nonpayment proceedings within a relatively short period of time; and (2) that Norwood was unjustified in paying her rent late.²⁵² Moreover, according to Judge Sullivan, “[t]here is no requirement that the landlord show good faith as part of its prima facie case.”²⁵³

According to Judge Sullivan, the issue on appeal was whether Norwood’s justification for paying her rent late was adequate.²⁵⁴ “[R]ent is due on the first of the month. Rent paid any other time, whether it be in the same month or a subsequent month, is late payment and constitutes a default in the tenant’s obligation under the lease to pay rent by the first of the month.”²⁵⁵ Judge Sullivan did, however, realize that there are periods when a tenant’s temporary financial woes result in late rent payment.²⁵⁶ So long as these periods do not result in long-standing and aggravated patterns, they will not constitute a nuisance unless they are intended to harass the landlord.²⁵⁷ Judge Sullivan stated that in addition to establishing a clear pattern of aggravated and long-standing late payment of her rent, Norwood “presented no proof to justify her chronic late payment of rent.”²⁵⁸ Despite the fact that she was gainfully employed, Norwood testified that she relied on her former husband’s monthly alimony check to pay her rent.²⁵⁹ The Civil Court refused to allow any inquiry into Norwood’s employment or any other source of her income or assets.²⁶⁰ Nonetheless, Judge Sullivan adopted the view of the dissent at the Appellate Term that since Norwood did not lack income from other sources, she could not be permitted to claim that her late rent

251. *See id.* at 16, 643 N.Y.S.2d at 46.

252. *See id.*

253. *Sharp*, 223 A.D.2d at 17, 643 N.Y.S.2d at 46.

254. *See Sharp*, 223 A.D.2d at 17, 643 N.Y.S.2d at 46 (Sullivan, J., dissenting).

255. *Id.*

256. *See id.*

257. *See id.*

258. *Id.* at 18, 643 N.Y.S.2d at 47.

259. *See Sharp*, 223 A.D.2d at 18, 643 N.Y.S.2d at 47 (Sullivan, J., dissenting).

260. *See id.* at 18, 643 N.Y.S.2d at 47 (Sullivan, J., dissenting).

payment was solely due to her former husband's alimony payments being occasionally late.²⁶¹ In short, Judge Sullivan's position is: "[f]inancial inability to pay does not justify the chronic late payment of rent."²⁶²

III. The New York Court of Appeals Decision in the Lead Case: *Sharp v. Norwood*²⁶³

On May 8, 1997, in a brief opinion, the New York Court of Appeals affirmed the majority's opinion and stated that the landlord failed to prove his nuisance claim.²⁶⁴ To prevail on a theory of nuisance, the court wrote, the landlord was "required to establish that [Norwood's] conduct 'interfere[d] with the use or enjoyment' of his property."²⁶⁵ According to the court, the landlord offered no evidence to demonstrate that Norwood's late payment of the rent amounted to such an interference.²⁶⁶ Offering no further rationale for its conclusion, the court held that the landlord's holdover petition was properly dismissed by the Civil Court.²⁶⁷

The court pointed out, based on the current set of facts, that the landlord might have prevailed if he based the underlying holdover proceeding on the theory that "[Norwood] violated a 'substantial obligation' of her tenancy" rather than on a nuisance theory.²⁶⁸ However, the court pointed out that the landlord did not base his holdover proceeding on this alternative ground.²⁶⁹ Thus, when faced solely with a holdover proceeding based on the theory of nuisance, the court declined to accept the fact that the landlord, in its attempt to collect the rent, was repeatedly compelled to bring nonpayment proceedings against

261. *See id.* at 19, 643 N.Y.S.2d at 47.

262. *Id.* at 17, 643 N.Y.S.2d at 46 (citing *Fishel v. Oakley*, NYLJ, May 23 1990, at 25, col 3 [App Term, 2nd and 11th Judicial Districts]).

263. 89 N.Y.2d 1068, 1069, 681 N.E.2d 1280, 1281, 659 N.Y.S.2d 834, 835 (1997).

264. *See id.* at 1069, 681 N.E.2d at 1281, 659 N.Y.S.2d at 835.

265. *Id.* (citing *Copart Indus. Inc., v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 362 N.E.2d 968, 970, 394 N.Y.S.2d 169, 171 (1977)).

266. *See Sharp*, 89 N.Y.2d at 1069, 681 N.E.2d at 1281, 659 N.Y.S.2d at 835.

267. *See id.*

268. *Id.* (citing N.Y. RENT & EVICTION REGULATIONS § 2204(a)(1) (McKinney 1997); *Carol Management Corp., v. Mendoza*, 197 A.D.2d 687, 687, 602 N.Y.S.2d 941, 942 (1993)).

269. *See Sharp*, 89 N.Y.2d at 1069, 681 N.E.2d at 1281, 659 N.Y.S.2d at 835.

Norwood.²⁷⁰ Finally, the court stated that it was not deciding “whether chronic late payment or nonpayment of rent, when combined with aggravating circumstances, could ever support an eviction proceeding for a nuisance.”²⁷¹

IV. Analysis

As is typically the case when dealing with a claim grounded on the theory of nuisance, “the question presented . . . is one which is a fact-laden determination.”²⁷² On the set of facts presented in *Sharp*, the Court of Appeals had the opportunity to set forth a bright line rule. The court ran from its opportunity to formulate an instructive approach to delineate when chronically late rent payments constitute a nuisance warranting the tenant’s eviction, ruling instead that under this set of facts, a nuisance could not be found.²⁷³ *Sharp* leaves landlords guessing. Specifically, *Sharp* leaves lower courts arbitrarily adding obstacles for landlords to overcome.²⁷⁴ In an area so murky, a procedure is needed which would put tenants on notice and which would provide guidance for landlords who contemplate the eviction of tenants who consistently breach their duty to pay rent in a timely fashion. To date, no other jurisdictions have faced the dilemma whether (and when) chronically late rent payments constitute a nuisance. A bright line rule would have offered guidance for both New York state courts and foreign courts which struggle in this tremulous area.

A half century ago, the state of New York adopted legislation aimed at protecting tenants against landlords who, because of the scarcity of housing, had the power to drastically and arbitrarily inflate rents.²⁷⁵ Before adoption of that law, if the tenant could no longer afford the rent demanded by the landlord, the tenant was free to seek alternative housing.²⁷⁶ In the face of a housing shortage, a landlord had no shortage of tenants willing to pay rent. This legislation, in effect, terminated the tradi-

270. *See id.*

271. *Id.*

272. *Sharp*, 223 A.D.2d at 13, 643 N.Y.S.2d at 44 (Mazzarelli, J., concurring).

273. *See Sharp*, 89 N.Y.2d 1068, 681 N.E.2d 1280, 659 N.Y.S.2d 834.

274. *See id.*

275. *See supra* Part II.C.

276. *See supra* Part II.C.

tional landlord and tenant bargaining norms.²⁷⁷ It was at this juncture that the New York Legislature expressly left it to the courts to interpret this legislation.²⁷⁸

In affirming *Sharp*, the court re-announced its half century old duty to ensure that tenants are adequately protected against landlords.²⁷⁹ Even today, the City of New York is plagued by a scarcity of affordable housing accommodations.²⁸⁰ In reaching its determination to prohibit the landlord from evicting Norwood, the court undoubtedly took the City's housing shortage into consideration.²⁸¹ Norwood occupied her rent-controlled apartment for over thirty-three years.²⁸² Nuisance requires a court to weigh and balance the particular facts in each case.²⁸³ Obviously, the court found the scale tipped in favor of the landlord in *Frank* when it affirmed the eviction of an 80-year-old tenant from his Central Park West apartment.²⁸⁴

New York courts have consistently held that in order for a landlord to prevail in a summary holdover proceeding based on a nuisance theory, the landlord must demonstrate that it was compelled to bring numerous nonpayment proceedings against the allegedly breaching tenant in a relatively short period of time.²⁸⁵ This is but one burden the landlord must meet. The landlord must also demonstrate that the "tenant's nonpayment [of the rent] was willful, unjustified, without explanation, or accompanied by an intent to harass the landlord."²⁸⁶ In *Sharp*, however, as Judge Sullivan pointed out in his dissent, the court announced yet another burden for the landlord to overcome.²⁸⁷ This new burden requires the landlord to demonstrate that it brought the requisite number of nonpayment proceedings in a relatively short period of time and that it brought the proceedings "in good faith to collect outstanding rent and not as a pre-

277. See *supra* Parts II.A., II.C.

278. See *supra* Part II.C.

279. See *supra* Part II.C.

280. See *supra* notes 222-23 and accompanying text.

281. See *supra* note 223 and accompanying text.

282. See *supra* note 222 and accompanying text.

283. See *supra* note 24 and accompanying text.

284. See *supra* Part II.D.

285. See *supra* Part II.E.

286. 25th Reality Associates v. Griggs, 150 A.D.2d 155, 156, 540 N.Y.S.2d 434, 435 (1st Dep't 1989); see also *supra* note 153 and accompanying text.

287. See *supra* note 206-07 and accompanying text.

tense to meet the definition of nuisance for the purposes of bringing a holdover action."²⁸⁸

As for the first burden, the record in *Sharp*, according to the court, unquestionably demonstrated that the landlord brought two such nonpayment proceedings against Norwood.²⁸⁹ Since neither of those proceedings made it to trial, the First Department believed that the sole reason the landlord commenced the nuisance eviction proceedings was to squeeze himself within the established guidelines for bringing a holdover proceeding grounded in nuisance.²⁹⁰ As a result, the court held that the landlord failed to meet this first burden.²⁹¹

In *Griggs*, eleven nonpayment proceedings were commenced.²⁹² In *Greene*, three nonpayment proceedings were commenced.²⁹³ In *Sawyer*, nine nonpayment proceedings were commenced.²⁹⁴ The number of nonpayment proceedings commenced in *Griggs*, *Greene* and *Sawyer* was found to be satisfactory.²⁹⁵ For nearly an entire decade, however, Norwood, on average, paid her rent seventeen days after it was due.²⁹⁶ Clearly the landlord had ample opportunity to bring additional nonpayment proceedings.²⁹⁷ However, because no "magic number" of nonpayment proceedings exists,²⁹⁸ this requirement appears to be merely a prerequisite and not an absolute requirement.

To overcome the second burden, the landlord is required to demonstrate either that: (1) Norwood willfully paid her rent late; (2) Norwood was unjustified in paying her rent late; (3) Norwood lacked an explanation for paying her rent late; or (4) that Norwood intended to harass the landlord by paying her rent late.²⁹⁹ What result, however, if Norwood willfully refused

288. *Sharp v. Norwood*, 223 A.D.2d 6, 8, 643 N.Y.S.2d 39, 41 (1st Dep't 1996); see also *supra* note 208 and accompanying text.

289. See *supra* note 209 and accompanying text.

290. See *supra* notes 209-10 and accompanying text.

291. See *supra* note 211 and accompanying text.

292. See *supra* note 156 and accompanying text.

293. See *supra* note 167 and accompanying text.

294. See *supra* note 177 and accompanying text.

295. See *supra* Part II.E.

296. See *supra* note 241 and accompanying text.

297. See *supra* note 239-40 and accompanying text.

298. See *supra* notes 159-62 and accompanying text.

299. See *supra* note 158 and accompanying text.

to pay her rent until the landlord abated a nuisance interfering with her use and enjoyment,³⁰⁰ but later learned that the landlord was not obligated and could not abate the nuisance? Will Norwood's willful refusal to pay her rent then be unjustified? For example, suppose that from Norwood's apartment window she witnessed a neighbor in the same building engaging in nudity and sexual acts in his apartment. Nearly one hundred years ago, New York courts held the landlord liable to abate this offensive conduct.³⁰¹ Today, however, New York courts have held the opposite.³⁰² Perhaps Cole Porter had this in mind when he wrote: "In olden days a glimpse of stocking was looked on as something shocking but now God knows, anything goes."³⁰³ Nonetheless, would the landlord prevail where Norwood thought she was justified in withholding the rent but was, in fact, mistaken?

In any event, the *Sharp* court determined that Norwood had a valid explanation for consistently paying her rent late.³⁰⁴ The record stated that despite the fact that she was gainfully employed, Norwood waited until her former husband's alimony checks cleared before she paid the rent.³⁰⁵ As previously mentioned, nuisance law requires courts to weigh and balance the particular facts in each case.³⁰⁶ In attempting to prove that Norwood lacked an explanation for paying her rent late, the landlord was estopped from inquiring whether Norwood depended exclusively on her former husband's alimony payments to pay her rent.³⁰⁷ By refusing to probe into either Norwood's income from her gainful employment or income from other sources, the court failed to properly weigh the facts presented to it.³⁰⁸

As indicated above, the landlord still possessed the chance to prove that Norwood's nonpayment was willful, unjustified, or

300. See *supra* note 23 and accompanying text.

301. See *supra* notes 49-60 and accompanying text.

302. See *Palais Partners v. Vollenweider*, 173 Misc. 2d 8, 660 N.Y.S.2d 272 (Civ. Ct. 1997).

303. COLE PORTER, *ANYTHING GOES* (RCA Victor 1987).

304. See *supra* note 215 and accompanying text.

305. See *supra* Part III.C.

306. See *supra* note 24 and accompanying text.

307. See *supra* Part III.C.

308. See *supra* Part III.C.

accompanied by intent to harass. Although the record is silent, it can probably be assumed that Norwood's toilet was free from blockage,³⁰⁹ the landlord did not permit Norwood's neighbor's children to urinate in the public hallways,³¹⁰ and the landlord did not permit Norwood to be assaulted by drunk men in the building's elevator.³¹¹ Clearly, the landlord did not create or ignore any nuisance which would give Norwood an explanation for refusing to tender her rent in a timely fashion. Thus, it is clear that the court did not balance the landlord's second burden correctly. To the landlord's chagrin, the court concluded that the landlord also failed to carry this burden.³¹²

The essential judicial balance³¹³ in cases rooted in nuisance does not end just yet. *Sharp* added yet another burden that the landlord must overcome when attempting to protect his or her right to use and enjoyment³¹⁴ of his or her property.³¹⁵ In addition to showing that he or she commenced numerous nonpayment proceedings and that the tenant's nonpayment was willful, unjustified, lacking explanation, or harassing in nature, a landlord must now also demonstrate that he or she commenced the nonpayment proceedings against the tenant not as a pretense to meet the definition of nuisance for the purposes of bringing a holdover action, but to collect the outstanding rent in good faith.³¹⁶ The court, unfortunately, neglected to define "good faith."³¹⁷

Out of a possible fifty-three separate occasions, the tenant in *Greene* failed to pay his rent on time on all but four of these occasions.³¹⁸ Moreover, the tenant often failed to pay any rent for months at a time.³¹⁹ One month, in particular, the tenant failed to pay the rent until thirteen months had elapsed.³²⁰ During a four year period, the landlord in *Greene* commenced

309. See *supra* notes 10-15 and accompanying text.

310. See *supra* notes 143-46 and accompanying text.

311. See *supra* notes 53-57 and accompanying text.

312. See *supra* Part III.B.

313. See *supra* note 24 and accompanying text.

314. See *supra* note 23 and accompanying text.

315. See *supra* note 206-07 and accompanying text.

316. See *supra* notes 206-07 and accompanying text.

317. See *supra* Part III.B.

318. See *supra* note 163-67 and accompanying text.

319. See *supra* note 165 and accompanying text.

320. See *supra* note 165 and accompanying text.

three nonpayment proceedings and one holdover proceeding.³²¹ Likewise, the landlord in *Sawyer*, during a period of three and one half years, was compelled to serve the tenant with nine dispossessions for nonpayment of the rent.³²² Each dispossession sought back rent at least two months late.³²³ Also, in *Griggs*, the landlord was forced to bring eleven nonpayment proceedings over the course of six years.³²⁴ The tenants in *Greene*, *Sawyer* and *Griggs* were found to have interfered with the use or enjoyment of the landlord's property.³²⁵ Another common thread is the fact that none of these landlords had to demonstrate that it brought these proceedings in good faith.³²⁶ Similarly, none had to persuade the court that he or she did not commence these actions as a mere pretense to meet the definition of nuisance.³²⁷

In *Sharp*, the record indicated that the landlord commenced two nonpayment proceedings, served eleven three-day rent demands during a period of seventeen months, and served forty-four rent demands on Norwood during a nine-year period.³²⁸ During this nine-year period, Norwood's rent was, on average, 16.94 days late each month.³²⁹ Also during this period, Norwood failed to pay her rent on time on all but three occasions.³³⁰ Moreover, sometimes Norwood failed to pay her rent for months at a time.³³¹ Clearly, the landlord's claim for possession based on a nuisance theory was not based on mere speculation or overly nervous sensitivities.³³² As is illustrated above, there were ample opportunities to bring nonpayment proceedings against Norwood, but the Court refused to consider this fact.

If the court considered the landlord's opportunities to bring more than the two nonpayment proceedings he actually did

321. See *supra* note 167 and accompanying text.

322. See *supra* note 177 and accompanying text.

323. See *supra* notes 179 and accompanying text.

324. See *supra* note 156 and accompanying text.

325. See *supra* Part II.E.

326. See *supra* Part II.E.

327. See *supra* Part II.E.

328. See *supra* notes 240 and accompanying text.

329. See *supra* note 240 and accompanying text.

330. See *supra* note 245 and accompanying text.

331. See *supra* note 245 and accompanying text.

332. See *supra* note 75 and accompanying text.

bring against Norwood, *Sharp* would have been brought in line with *Greene*, *Sawyer* and *Griggs* where the landlords brought more than two nonpayment proceedings and succeeded. But now, because of *Sharp*, we have additional requirements for the landlord to meet and no definition of "good faith." As a result, it is questionable whether the landlords in *Greene*, *Sawyer* and *Griggs* would be successful today.

The dissenters would surely agree that Norwood's conduct of consistently paying her rent late can be likened with allowing a "pig in the parlor instead of the barnyard."³³³ Clearly, the act of chronically paying her rent late cannot be viewed as a "right thing in the wrong place."³³⁴ The record speaks for itself; Norwood's act of consistently paying her rent late constitutes a nuisance to the landlord at all times and in all places. The landlord clearly commenced the nonpayment proceedings against Norwood to collect the overdue rent in good faith. The court disagreed.

In short, the Court of Appeals ran from its chance to announce a test that the lower courts could use as a guideline to determine when a tenant is committing a nuisance by chronically paying the rent late. The court should have: (1) considered prior New York cases on landlord-tenant eviction predicated on nuisance; (2) understood the differences between the cases; (3) set forth a guiding principle for nuisance evictions; and, (4) established a clear test which could be implemented by lower courts. A test is needed which will balance the landlord's legal right to prompt payment of rent against the tenant's reason(s) for tendering the rent in an untimely fashion. In addition, it is imperative that a test take into consideration societal influences such as the existence of a shortage of affordable housing. A test is needed to guide landlords and the trial courts. The Court of Appeals decision in *Sharp* dropped the ball.

The Court should have set forth a bright line test which would provide guidance to trial courts as they grapple with the issue of whether and when chronically late rent payments constitute a nuisance. Such a test might include: first, a landlord must show the existence of a pattern of chronically late rent

333. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

334. *Id.*

payments; second, a landlord must demonstrate that the tenant lacked a valid reason (such as the landlord's failure to abate a nuisance which interfered with the tenant's use and enjoyment of the premises); third, a landlord must introduce, where applicable, instances of bad faith (such as proof that the tenant's rent checks were subsequently returned for insufficient funds or that the tenant owes the landlord for arrearages) on the tenant's part; fourth, a landlord must prove that he or she brought a minimum of one nonpayment proceeding per each year of the tenant's occupancy in an attempt to collect the rent due; and, last, a trial court must, in turn, balance the effect on the landlord if eviction is not granted compared to the effect on the tenant if an eviction is granted.

V. Conclusion

The Court of Appeals decision in *Sharp* allows the lower courts to arbitrarily place hurdles in front of landlords who have a contractual right to collect rent in a timely fashion. Allowing lower courts to create hurdles in an ad hoc manner ensures that it will become increasingly more difficult for a landlord to prevail when it bases its claim to collect late rent on a theory of nuisance. The rent control and eviction laws were designed, in part, to protect the public from greedy landlords who attempt to displace tenants with unconscionable rent increases. The rent control and eviction laws were not designed to make it difficult for a landlord to collect the rent legally due. A landlord is responsible to abate a nuisance interfering with the tenant's peaceful enjoyment of the leased premises. A tenant, too, is responsible to refrain from committing or permitting a nuisance. The unwarranted withholding of rent payments when due clearly constitutes a nuisance.

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