WHY LANDLORDS LOSE IN HOUSING COURT

Four-Month Study of Housing Court Decisions

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A Presentation Prepared for LandlordsNY

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I. INTRODUCTION

As with every article I have ever written, this piece is as useful for tenants and their lawyers as it is for landlords and their lawyers.

I conducted a study of all the published New York City Housing Court decisions I could find between January 1, 2017 and April 30, 2017 ("the Study"). I present my findings and draw conclusions therefrom. The results are not pretty for landlords. I make suggestions for how landlords can conduct themselves in better ways. Again, I believe that tenants and their lawyers will also find this piece of some interest.

II. MICHELLE'S FOUR-MONTH STUDY OF HOUSING COURT CASES IN NEW YORK CITY

A. Study Assumptions

I read every case that was reported between January 1, 2017 and April 30, 2017 in the following three (3) sources ("the Sources"), which were:

1. Westlaw – in both the "Cases" database and the "Trial Court Orders" database;
2. Vendrome's "Landlord v. Tenant" Resource; and
3. The New York Law Journal.

I created an Excel spreadsheet ("the Chart"). On the Chart, I noted the following for each case I included in the Study:

1. Date of the case or the report on the case
2. The source of my information
3. Case name and legal citation (where available)
4. The county
5. Whether the case was "won" in Housing Court by:
   - Landlord
   - Tenant
   - Neither; in which case I indicated it was a "draw"
6. Whether I was surprised by the result

I only considered Housing Court cases (residential cases, not commercial); not Supreme Court cases, DHCR cases, Loft Board cases, or cases from any other forum. I only considered residential cases. I only considered cases in the five counties of New York City. There was not one case in any source regarding Richmond County. I considered SRO cases and co-op cases in Housing Court.

I excluded consideration of Housing Authority cases. I excluded consideration of cases where tenants were suing sub-tenants.

I only considered matters with final dispositions in Housing Court. If a motion for summary judgment was denied or if discovery was granted for either side, I did not consider the cases.

I considered both holdovers and nonpayments.

The cases I considered "draws", i.e. neither landlord not tenant won, were cases where the tenant won on a technicality and the court concluded its decision with a strong suggestion to the landlord on how to re-file the case properly. There were only two such cases.

B. Primary Source Material

I have created one large pdf with copies of all the cases and/or case synopsis I considered. I do not believe that I am allowed to re-publish material from any of these Sources, because it is not my intellectual property. I will, however, email the pdf of the data to anyone who asks for it.

C. Study Results

The chart is available on the last four pages of this booklet. The results surprised me.

- The Chart includes 71 cases.
- Tenant won 63 of the 71 cases (**89% of the time**).
- Landlord won 6 of the 71 cases (**6% of the time**).
- There were 2 "draws" (3%).

The boroughs broke down as follows:

- Bronx - 26
- Kings – 23
- Queens – 15
- New York - 15

D. Study Flaws

I do not know how the Sources compile cases. The results of the Study so strongly favor tenants that I have to wonder if there is some reason that tenant victories are more widely reported than landlord victories.

In discussing this project with colleagues, someone suggested that "winning" landlord cases settle more. I am unsure why this would be true. I welcome hearing other people's theories.

Moreover, if a reader has a decision from this time period that was not reported in the Sources used and would like to contribute it to the Study, I would be glad to include it.

There is an average of 258,540 new landlord and tenant cases filed in the New York City Civil Court every year. [1] I looked at a four-month period, one-third of a year. If these 71 cases are all the written decisions in that period, that means that only .082% of all cases result in written decisions. If you sit in a Housing Part on any given morning and observe how many cases are

[1] http://www.courts.state.ny.us/COURTS/nyc/civil/statistics.shtml

quickly settled, perhaps that figure is not incorrect. But as of this writing, I have no way to know. It seems low to me.

III. WHY DO LANDLORDS LOSE SO FREQUENTLY IN HOUSING COURT?

This section is purely the author's opinion. There is nothing scientific in this section. If you do not care to hear my opinion, then just skip to the next section.

Over twenty years ago, when I started in this profession, I had a boss who used to bring in Housing Court cases to his small Court Street law firm. He would tell every landlord-client what a great case they had, that the case was a "slam dunk", that he would kick the tenant's butt. Then I would be assigned the actual work. I would invariably find that the case was not a "slam dunk"[2] and I would often soon discover that the case was a loser. I asked my boss, *"Why do you tell landlords that their case has a higher chance of winning than it obviously does?"* This was his answer, *"If you do not tell these landlords what they want to hear, then there are 100 other guys on this very block who will and they will get the work, not us."* Right up through today, I have heard associates of landlord-oriented law firms with this same complaint.

I decided that when I created my own law firm[3] that I would do nothing short of tell prospective-landlord-clients the truth. I have done exactly that. It has not been easy. For one thing, I am a woman in a male-dominated field. When I started giving landlords bad news about the likelihood of Housing Court litigation achieving their goals, certain people openly questioned whether I was "aggressive" enough because of my gender.

But I kept telling the truth. And it seems to have paid off.

I don't lose a lot. Why? I get asked a lot – what is my secret sauce for great results in Housing Court? Am I smarter than other lawyers? NOPE. Do I have a larger team? NOPE. Did I go to an Ivy League School and receive honors? NOPE and NOPE. Do I work harder than other people? (Probably!) But NOPE. Do I have some insider influence? G-d forbid NOPE! There is NOTHING special about me. So, wait for it…

[2] There is no such thing.

[3] Itkowitz PLLC is MY law firm, I am the 95% owner.

I win more because I refuse to file losing cases, which means I don't actually file many cases. There it is, now you know.

I am a small firm and I am my own boss, so I simply refuse to file a case if I don't feel more than 75% sure that I can win. I will not file a case I think is a loser. NO matter who the client or prospective client is, no matter how much of a legal fee I am passing up.

A fellow landlord-and-tenant attorney (not part of my firm) asked me to take a look at a case for him recently. He asked me, *"How can I win this, Michelle?"* I replied, *"You can't. It's a loser."* He asked me, *"Well how would you win it?"* And I said, *"I wouldn't win it, which is why I wouldn't file it."* And he literally said this to me, *"What kind of lawyer are you? GOOD lawyering is about fighting losing battles."* No…it isn't. Good lawyering, in this author's humble opinion, is largely about good ANALYSIS. Why would anyone ever willingly choose to spend money on legal fees and time and energy on a litigation to lose?

You can't make this stuff up. Last week I had a settlement – a good settlement – on a case where Legal Aid represented a tenant association[4]. My client had worked hard on the settlement, as did Legal Aid. We had consensus and were ready to sign and begin a new chapter in the building's history. On the eve of settlement, I got an email from a previously-silent partner in Tennessee, that said the following:

> This settlement agreement is ridiculous. You are giving away the store. I am a lawyer, barred in Tennessee. You need to explain to me why we should enter into this terrible stipulation. If you cannot adequately explain this, I want you to immediately begin a nonpayment case against every tenant in the building. I demand an explanation as to why you think we should waive all this rent.

Yawn. If I had a dime for every email I received like that, then I'd be a rich woman. But I digress… There was a time in my career when I would have felt defensive upon receiving such a missive. Those days, fortunately, are behind me. Instead, this is how I answered:

Here is your explanation. This isn't Tennessee…It's *Brooklyn*.

[4] Irrelevant details changed to protect the innocent!

> I have adequately and repeatedly explained my reasoning for strongly recommending this settlement in the series of Legal Project Management letters that have formed the Project Charter for this matter. I attach them hereto and refer you to them.
>
> If, after reviewing that material, you, as a lawyer and a business person, feel that my representation is inadequate – that I am too weak, not clever enough, that there is more to the story – then I urge you to shop around and seek other counsel. This is a critical juncture in this matter. If you really want to go to war with this building, then you need to do so with a lawyer that you trust. That does not seem to be me.
>
> In any event, I am not willing to initiate these eight cases on your behalf. Those eight cases will be what I call, and I chose my words carefully, "bullshit losing cases". I do not file bullshit losing cases. There are ethical reasons for me refusing to file bullshit losing cases. There are branding reasons for me refusing to do so. When judges, adversaries, and clients see me coming, I want them to think of me as the woman who wins. There are economic reasons for my aversion to the bullshit losing cases, as well. Clients who are gung-ho in the beginning about bullshit losing cases, tire of paying legal fees as the months turn into years and results are not achieved. Let some other lawyer lose these cases for you. I prefer to exit on an up-note!
>
> Let me know what you want to do. But if you are moving into a litigation posture on this matter, I can travel no farther with you on this journey.

You may recall above that I included a column in the study that I call, "Surprise?" I noted how often a case's outcome surprised me. Case outcomes on in this study surprised me 7% of the time. In other words, I like to think that, given the fact patterns set forth in the 63 losers, that I would not have filed more than 4 or 5 of them, had they come across my desk. But, alas, hindsight is always twenty-twenty.

When you are always in an inferior position, when you spend all day losing, you end up beaten and beleaguered. That goes for landlords and their attorneys. When you stop picking fights you can't win, you create the space in your business life to arrive at whatever clever, out-of-the-box, and/or mutually beneficial solutions might actually exist. Ryan Holiday, in his book, The Obstacle is the Way, says that *"Being trapped is just a position, not a fate. You get out of it by*

addressing and eliminating each part of that position through small, deliberate actions – not by trying (and failing) to push it away with super human strength."

The balance of this booklet is filled with the small and deliberate actions, that if taken before initiating a landlord and tenant case, could have either alerted the landlords in the 63 losing cases to the weaknesses of their positions, causing them to stand down, and/or could have helped them to ameliorate those problems before going to court with a losing case. In short, Landlords need to educate themselves and be far more discerning and proactive in the Housing Court space.

The following is culled from the continuing legal education materials that I create to teach other lawyers about landlord and tenant law.

IV. VITAL PRELIMINARY CONSIDERATIONS

Landlord and tenant cases are often won (or lost) before the case is even filed. A myriad of factual issues need to be examined, understood legally, and dealt with in order to bring a winnable case on behalf of a landlord. This is so because these cases all depend on the service of a proper predicate notice, which is not amendable.[5] Therefore, mistakes made at the predicate notice stage, even before a pleading is drafted, can destroy a landlord and tenant case. If you do not discover that you made such a mistake until trial, it can be devastatingly wasteful of time and money.

A. Petitioner's Interest

At trial, the petitioner (i.e., landlord) must prove its interest in the premises.[6]

Therefore, a few days before trial is the wrong time for a landlord's attorney to discover things such as the following. The landlord, owner of a six family building, technically has the deed to the house "in his mother's name", and as a result, landlord's attorney named the wrong petitioner in the petition—case dismissed.

[5] *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980).

[6] RPAPL § 741 (1).

Your lawyer must get his hands on and carefully examine the documents that prove landlord's interest in the premises before drafting any documents for the lawsuit. Here is a chart demonstrating what you need:

PETITIONER'S INTEREST IN PREMISES	**DOCUMENT YOU NEED TO PROVE IT**
Petitioner owns building.	Deed
Petitioner is a tenant who sublet to a subtenant and now wants to evict the subtenant.	Lease
Petitioner is the net-lessee of the building (a lease in which the lessee pays rent plus property expenses, such as taxes and insurance).	Net Lease
Petitioner is the owner of a coop apartment and sublet the apartment and now wants to evict the sub-tenant.	Proprietary Lease

You will need a certified copy of a deed for trial. An original deed is admissible, but often the original deed is unavailable.

It should be noted, however, that there are consistent holdings that "proof of ownership" is *not* a prerequisite to maintaining a proceeding pursuant to RPAPL § 721 which authorizes summary proceedings by "Landlord or lessor…", and that introduction of the lease agreement is sufficient proof of petitioner's right to maintain a summary proceeding.[7] Although it is probably less trouble to bring proof of ownership to trial, if for some reason such proof is not available *and* petitioner is the lessor named in the lease, this is an important line of cases to keep in mind.

Sometimes the landlord will be a Limited Liability Company, but the deed will be in the name of a previous partnership. Not to worry, this is one of the few situations where it is not

[7] *Fifth Ave & 60th St. Corp. v. Kinney E. 60th St. Parking Corp.*, NYLJ, July 28, 1994 (App. Tm. 1st Dept.), citing *K.R.F. Management Co. v. Bartle*, NYLJ, October 19, 1987, p. 9, c. 2 (App. Tm. 1st Dept.) (and cases cited). Introduction of the lease agreement, like here, is sufficient proof of a petitioner's right to maintain a summary proceeding. *Id.*; *see also 201-222 Realty LLC v. Headley*, 2003 WL 21355416 (App. Tm. 2nd and 11th Dept.) ("[L]andlord was not required to establish proof of ownership, only that it was tenants' lessor (RPAPL 721), and this was adequately proven by the introduction of the lease").

hazardous to your *prima facie* case for the deed to be in a different name than the petitioner. Limited Liability Company Law § 1007 (Effect of conversion) states:

> (a) A partnership or limited partnership that has been converted pursuant to this chapter is for all purposes the same entity that existed before the conversion.
> (b) When a conversion takes effect:
> (i) all property, real and personal, tangible and intangible, of the converting partnership or limited partnership remains vested in the converted limited liability company;
> (ii) all debts, obligations, liabilities and penalties of the converting partnership or limited partnership continue as debts, obligations, liabilities and penalties of the converted limited liability company;
> (iii) any action, suit or proceeding, civil or criminal, then pending by or against the converting partnership or limited partnership may be continued as if the conversion had not occurred; and
> (iv) to the extent provided in the agreement of conversion and in this chapter, the partners of a partnership or the general partners and limited partners of a limited partnership shall continue as members in the converted limited liability company.

B. Read the Whole Lease

A landlord's lawyer needs the WHOLE lease, all of it, when preparing a proceeding. A landlord's lawyer should not let his client get away with sending her only the cover page, the default paragraph, and the signature page, no matter how long the full document is. This means you need to compile and your lawyer needs to examine the whole original lease, all its riders, and every single renewal form and the riders thereto. Do NOT tell your lawyer that all of your leases are the same. You never know what is really in there until you look. The lease is the contract between landlord and tenant and, as such, governs the relationship. To start a landlord and tenant case without reading the complete lease is ridiculous. A fair share of those 63 lost cases were lost because no one bothered to read the lease.

C. Make Sure the Building is Being Occupied in Accordance with the Certificate of Occupancy

All too common in New York City is the phenomena of "the illegal three family house." In other words, the certificate of occupancy says the house is a two family, but the owner or previous owner created an extra apartment in either the basement (or anywhere within the building) and someone is living in the illegal apartment. Under this circumstance, none of the tenants in the building have to pay rent, and a summary proceeding may not be maintained against the occupants.[8]

Multiple Dwelling Law § 302(b) states:

> 1. a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one [Certificate of Occupancy], during such unlawful occupation any bond or note secured by a mortgage upon said dwelling or structure, or the lot upon which it stands, may be declared due at the option of the mortgagee.
> b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.

If the illegal unit pushes the number of units to six, the building will be deemed to be Rent Stabilized.[9]

For purposes of these materials, know that an illegally occupied building is a big, huge problem, and it needs to be dealt with.

[8] It is well settled that a landlord may not remove a tenant on the ground of illegal occupancy where: (1) the landlord created the illegality (*see 816 Fifth Ave., Inc. v Purdy*, 127 N.Y.S.2d 695 [First Dept 1951]), or (2) where the landlord took title with notice of an illegality created by a predecessor in title (*see In the Matter of K&G Co. v Reyes,* 52 Misc 2d 606 [N.Y. Civ. Ct. 1966]), and (3) the illegality is susceptible of cure without undue expense or difficulty (*Id.*).

[9] Robrish v. Watson, 48 Misc. 3d 143(A) (App. Term 2nd 2015)

D. Multiple Dwelling Registration

Multiple Dwelling Law § 325 states that no rent shall be recovered by the owner of a multiple dwelling who is not properly registered, until the owner complies with the requirements. A certified multiple dwelling registration ("MDR") is required for trial.

E. HPD Violations

If you are dealing with a nonpayment proceeding, the tenant may have defenses to paying the rent based on the Warranty of Habitability. Every residential lease implicitly carries with it a "warranty of habitability" as articulated in New York Real Property Law §235-b. The leading case in this area is *Park West Management Corp. v. Mitchell*[10], which explains the evolution of this special right in residential tenancies. We learn the following lessons from *Park West*:

- Landlords have a duty to maintain a premises in a habitable condition.
- The obligation of the tenant to pay rent is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition.
- A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.
- Landlord is not a guarantor of every amenity customarily rendered in the landlord-tenant relationship. The warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability.
- As the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work

[10] 47 N.Y.2d 316 (1979).

stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well.

- The Warranty of Habitability is nondelegable and nonwaivable.

- Violation of a housing, building or sanitation code constitutes *prima facie* evidence that the premises are not in habitable condition, but does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is *de minimis* or has no impact upon habitability. Thus, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation.

- The proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.

- The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition.

Certain HPD violations are classified by the HPD as "rent impairing." If such violations exist against a premises for six months or more, tenants of that premises are not obligated to pay rent.[11] You should check the HPD web site to see what violations exist against your subject building and how long they have been there.

[11] MDL § 302-a.

F. DHCR Documents

Where the premises is Rent Stabilized, a certified copy of the New York State Division of Housing and Community Renewal ("DHCR") printout for the premises is required to show that the building and the current lease are properly registered with DHCR.

Moreover, it is vital that you check the information on the DHCR print out and make sure that it:

- Matches the tenant's lease chain; and
- Matches the Rent Guideline's Board rent increases. If there is a rent overcharge, you want to know about it as soon as possible, and:
  - If there were recent MCI's (Major Capital Improvements) you need the DHCR orders that support them.
  - If there were recent IAI's (Individual Apartment Improvements) you need to support them with: (a) work orders (b) receipts marked paid (c) cancelled checks (d) affidavits from contractors (e) pictures.[12]

[12] http://www.nyshcr.org/Rent/OperationalBulletins/orao20161.pdf

Below is a sample chart, demonstrating how you can check the legality of the rent.

Apt 2A				
source of this information	**date**	**item**	**amount**	**notes**
lease	7/16/2012	I year lease started 11/1/2012 ended 10/31/2013	$ 1,045.21	
Renewal Lease	7/1/2013	2 year lease started 11/1/2013 ended 10/31/2015	$ 1,126.21	
RGB order # 45		2 year lease beginning on 11/1/2013 increase	7.75%	
		Allowable Increase	$ 81.00	
		Legal Rent	**$ 1,126.21**	
		difference between actual rent and legal rent	$ (0.00)	no overcharge
Renewal Lease	6/29/2015	2 year lease started 11/1/2015 ending **10/31/2017**	$ 1,148.73	
RGB order # 47		2 year lease beginning on 11/1/2015 increase	2.00%	
		Allowable Increase	$ 22.52	
		Legal Rent	**$ 1,148.74**	
		difference between actual rent and legal rent	$ (0.01)	no overcharge
		GOLUB PERIOD FOR LEASE RENEWAL = 6/1/2017 - 7/31/2017		

G. Arrears Report

In a nonpayment, a landlord's attorney must be exact about the rent demanded. Therefore, it is important to look at the arrears report that the managing agent will use in court to refresh his or her recollection regarding the arrears were computed. The wrong time to figure out that the landlord's version of what was due does not match the landlord's records is on the eve of trial.

H. Take Note of the Requirements of Benefits Programs

A few cases in the study resulted in dismissals because the landlord did not honor the requirements of benefits programs regarding the tenancies. In *Emeagwali v. Burgos*, Queens County, NYLJ January 11 , 2017, 55544/2016, a landlord sued to recover possession of an apartment from tenants in a summary holdover proceeding alleging the parties' lease expired.

Tenants' moved for dismissal for lack of jurisdiction and failure to state a cause of action. The court noted the parties executed a lease rider providing that its terms of the Living in Communities (LINC) Program superseded any conflicting terms of the lease agreement. Thus, while the lease expired on its own terms, the rider was clear the parties agreed to an automatically, self-executing lease renewal unless there was a lack of program funding along with respondents' ineligibility, or their inability to pay rent for the next year. As landlord did not properly terminate respondents' tenancy before commencing the action, the petition was dismissed.

I. Collateral Estoppel Litigation

This item is especially relevant for Rent Stabilized tenancies. When a tenancy has been a long one, you should always check whether an important issue in your case was already decided by a court or the DHCR. Sometimes landlords either do not remember the details of or they do not understand the impacts of prior litigation on a tenancy. This author has seen situations where either party thought they had to litigate an issue regarding the tenancy, but the issue was already decided by DHCR or a court. An example of such an issue would be whether an apartment is subject to Rent Stabilization or what the legal rent under Rent Stabilization should be. When dealing with a tenancy that is multiple decades old where the landlord and tenant have been engaged in prior disputes, a diligent search should be made of the party's files, the court system, and of DHCR records for any decisions which have a collateral estoppel effect on a current dispute.

The following case is an example of this phenomenon. In *Ordway Holdings, LLC/Pugmire*: DHCR Adm. Rev. Docket Nos. EO410042RO, EO410059RT (1/26/17) LVT Number: #27572, Tenants complained to the DHCR of a rent overcharge in 2012 and claimed that landlord failed to properly register the apartment. They claimed they moved into the apartment in 1992 under a fraudulent lease. They also claimed that landlord failed to properly file an amended initial registration form although directed to do so in a 1996 DHCR decision. Landlord pointed out that, in a 2013 nonpayment proceeding against tenants, the housing court had ruled that even if landlord hadn't served or filed the amended RR-1, this didn't bar landlord from collecting the lawful rent upon lease renewal. The Distract Rent Administrator ("DRA") ruled that the housing court had already resolved the overcharge claim but ordered landlord to amend a renewal lease that commenced on Dec. 1, 2012, but had been offered late on Nov. 15, 2013. The DRA said that the renewal lease should reflect a commencement date of March 1, 2014, and that any rent increase collected before that date should be refunded. Landlord and tenants both appealed. The DHCR found that the DRA had correctly ordered amendment of the

renewal lease. And the housing court had resolved the overcharge claim and its decision was affirmed on appeal.

Furthermore, when a new owner takes over a building (or, preferably, before they close), it absolutely must obtain a DHCR "Cases By Building Report", which will let the owner know about all of the decisions ever made by DHCR with respect to that building.

Finally, the Court of Appeals (NYS's highest court) held that DHCR must consider rent reduction orders entered outside of four-year limitations period in determining amount of overcharge. *Cintron v. Calogero*, 15 N.Y.3d 347 (2010). So if there is a rent reduction order anywhere in the tenancy's history, which has not been overcome with a restoration order, then you are likely looking at a viable overcharge counterclaim in a nonpayment proceeding.

J. Correspondence

Gather and examine all correspondence between landlord and/or managing agent and the tenant.

K. Look for Evidence of Additional Occupants

It is important for a landlord's to figure out who she is dealing with in the space. What you are trying to avoid is a failure to name all the parties to the proceeding. Anyone you have not named will not get evicted on eviction day.

- Does the landlord know who occupies the space?
- Has the lease been assigned?
- Did the landlord give permission to anyone else to be in the space – either written or oral?
- Has the landlord encountered anyone other than the tenant with respect to the premises?
- Have subtenants, authorized or unauthorized, moved into the premises?
- Has the superintendent or the landlord noticed if the tenant is missing in action and unknown people are coming in and out of the premises?
- What are the names on the mailbox?

- Get the last three checks that the rent has been paid with – what is the name on the account?

L. Google the Tenant

You should Google your opponent. What are you looking for here? I don't know exactly, but you would be surprised what you can find and how it can be helpful.

M. Cameras

1. Why cameras?

There are certain cases that I refuse to bring on behalf of a landlord-client if the client has not properly installed cameras outside of the subject apartment. These include:

- non-primary residence cases
- illegal sublet cases
- illegal short-term sublet cases (like Airbnb)
- succession rights cases, and
- many types of nuisance cases.

Such cases are almost un-winnable without a camera.

Let us consider a non-primary residence case, for example. In the Rent Stabilized context, a tenant must reside in his or her apartment as his or her primary residence. Therefore, the first thing that a landlord needs to prove in a non-primary residence case is that the tenant is NOT there. How could a landlord prove that the tenant is not there? The following is a sample colloquy between a lawyer and a landlord-client on this topic.

Landlord: The tenant in B5 no longer lives in the apartment as his primary residence.
Lawyer: How do you know that tenant does not live in the subject apartment anymore?
Landlord: Because he isn't there.
Lawyer: I heard you say that already. But *how* do you know? What is the source of your knowledge?
Landlord: The super.
Lawyer: The super lives on the same floor as the tenant and is home all day long?

Landlord: No the super doesn't live on tenant's floor and he is obviously out and about all day.

Lawyer: The super lives in the building at least?

Landlord: No, the super lives in another building.

Lawyer: OK, so the super attends to only the tenant's building?

Landlord: No, the super cares for ten buildings, tenant's building is one of the ten.

Lawyer: So, if the super works 40 hours per week, and tenant's building is one of ten, at best he or she spends about 4 hours per week in tenant's building?

Landlord: I don't know; maybe more.

Lawyer: So what is the super (who is already a biased witness because he is testifying on behalf of his employer) going to testify to, that in the four hours per week that he is in the building he never sees tenant around?

Landlord: Something like that, I guess.

Lawyer: Then you lose. Because tenant will come in and testify that she lives in the apartment, and you have not done anything significant to discredit her.

Landlord: Well a private investigator got me a printout that shows that someone with the same name as tenant owns a house in the Catskill Mountains.

Lawyer: What name is that?

Landlord: "John Smith".

Lawyer: That is a very common name. Does anything else in the report connect tenant to that address?

Landlord: No.

Lawyer: Even if Tenant John Smith of Apt. B5 does own that house in the Catskill Mountains, what are you going to do when Smith says this is just a summer home he only goes to occasionally and he rents it out to others for investment purposes?

Landlord: Well, I just know tenant doesn't live there. I just know it.

Lawyer: Does the super ever see anyone else coming and going from the subject apartment?

Landlord: No.

Lawyer: Has the tenant had any repairs done in the apartment recently?

Landlord: 18 months ago he complained of a leak and we went in and fixed it.

Lawyer: Well that suggests to me that tenant lives there.

Landlord: I just know tenant doesn't live there. I just know it.

Lawyer: Your psychic knowledge or strong hunch is NOT admissible evidence. You need ADMISSIBLE PROOF in a court.

A picture (or a video) is worth a thousand words, or a thousand guesses and speculations.

Cameras are cheaper than legal fees. If a landlord is not willing to pay for cameras, he is not going to be willing to pay legal fees for a protracted trial that landlord is likely to lose.

2. How to do cameras correctly.

Cameras should be set up by a professional licensed private investigations and/or security firm. The more experience the company has with this type of work, the better.

First, the camera must be set up so that it does NOT look into the tenant's apartment when the door is opened, thus invading tenant's privacy.

The camera must be set up so that it gets a clear view of the subject apartment, but not so that multiple apartments are under surveillance, because then there will be a lot of unnecessary footage to review.

The camera should be motion activated; otherwise, it will be difficult to review all the footage.

I strongly prefer that the same person who installs the camera also maintains it (i.e. changes its batteries). Ideally that will also be the person who retrieves the data card from the camera and then gets the data to where it is going and superintends it. This is important for chain of custody of evidence purposes. Ideally, this will also be the person who reviews the footage and produces a detailed log of what each incident reveals. This person is your witness in court.

Landlord's counsel can see why attending to the details of this type of thing BEFORE a case gets started is vital to bringing a healthy case. Tenant's counsel can also see how useful it is when landlord's counsel leaves this important evidentiary work unattended to until trial.

V. CONCLUSIONS

Landlords need to educate themselves and take proactive steps to both: (a) learn how to file more legally sound cases, which will almost always be steps that also cause you to run a better multi-family asset; and (b) to know when not to file any case at all.

Landlords need to stop expecting the landlord's bar to solve the residential real estate industry's fundamental problems, which are perhaps better addressed by legislators and lobbyists. In other words, I am sorry that you are losing money on a certain apartment or that you strongly dislike a certain tenant. But just because you made a bad deal or have a personality conflict with a tenant, does not mean that there is necessarily a legal solution to your dilemma. *"I really really want an eviction here!"* – is NOT a legal theory that leads to an eviction. Moreover, you probably should not expect your lawyer to push back on you as hard as I do in the above example with my TN client, whose cases I refused to file. Understand that landlords' attorneys make a great deal of money on those 89% losing cases (if each of those 63 losers cost an average of $5k in legal fees, that would be $315k). Therefore, your unrealistic expectations and your lawyer's need to pay the rent can come together to create disastrous results…almost 89% of the time.

DATE	SOURCE	CASE NAME	COUNTY	OUTCOME	T	L	D	TOTAL	SURPRISE?	Sur. Tally
11/14/2016	Vendrome January 2017	1342 Bergen LLC v. Edwards: Index No. 99827/14, NYLJ No. 1202774523342 (Civ. Ct. NY; 11/14/16; Schneider, J)	New York	Tenant	1			1	no	
12/6/2016	Vendrome January 2017	Flushing QF Portfolio II LLC v. Santana: Index No. 66189/16, NYLJ No. 1202775025696 (Civ. Ct. Queens; 12/6/16; Ressos, J)	Queens	Tenant	1			1	no	
12/8/2016	Vendrome January 2017	1215 Realty LLC v. Khan: Index No. 62292/2015, NYLJ No. 1202775507101 (Civ. Ct. Bronx; 12/8/16; Asforis, J)	Bronx	Tenant	1			1	no	
12/14/2016	Vendrome January 2017	167 LLC v. Mendoza: 53 Misc.3d 1219(A), 2016 NY Slip Op 51745(U) (Civ. Ct. Bronx; 12/8/16; Lutwak, J)	Bronx	Tenant	1			1	no	
12/14/2016	Vendrome January 2017	974 Anderson LLC v. Davis: Index No. 10721/2016, NYLJ No. 1202775507043 (Civ. Ct. Bronx; 12/14/16; Lutwak, J)	Bronx	Landlord		1		1	no	
12/22/2016	Vendrome February 2017	Estrada v. Browand: Index No. 811444/16, NYLJ No. 1202777603444 (Civ. Ct. Bronx; 12/22/16; Sanchez, J)	Bronx	Tenant	1			1	no	
12/27/2016	Vendrome January 2017	Gora Realty, LLC v. Croker: 54 Misc.3d 1202(A), 2016 NY Slip Op 51820(U) (Civ. Ct. Bronx; 12/27/16; Lutwak, J)	Bronx	Landlord		1		1	no	
1/4/2017	NYLJ	5510 345 Lefferts Blvd Brooklyn LLC v. Jean-Baptiste	Kings	Tenant	1			1	no	
1/4/2017	NYLJ	Gerard Manor Corp. v. Maria	Bronx	Draw			1	1	no	
1/11/2017	NYLJ	Meadow Manor Holdings LLC v. Christian	Queens	Tenant	1			1	no	
1/11/2017	NYLJ	Kingsland Holding Group LLC v. Lyking-Spragion	Queens	Tenant	1			1	no	
1/11/2017	NYLJ	Carroll Flats LLC v. Simmons	Kings	Tenant	1			1	no	
1/11/2017	NYLJ	Emeagwali v. Burgos	Queens	Tenant	1			1	no	
1/11/2017	NYLJ	S&S Agriculture USA, Inc. v. Maldonado	Bronx	Tenant	1			1	no	
1/18/2017	NYLJ	1970 University LLC v. Akpata	Bronx	Tenant	1			1	no	
1/18/2017	NYLJ	8206 Third Avenue Realty LLC v. Resto	Kings	Tenant	1			1	no	
1/25/2017	NYLJ	149 St LLC. v. Siciliano	Queens	Tenant	1			1	no	
1/25/2017	NYLJ	162-20 LLC v. Reynoso	Queens	Tenant	1			1	no	
1/25/2017	NYLJ & Vendrome February 2017	Kwai & Wong Inc. v. Hodges & Kwai & Wong Inc. v. Hodges: Index No. 69373/16, NYLJ No. 1202777492044 (Civ. Ct. NY; 1/9/17; Saxe, J)	New York	Draw			1	1	no	

DATE	SOURCE	CASE NAME	COUNTY	OUTCOME	T	L	D	TOTAL	SURPRISE?	Sur. Tally
1/25/2017	NYLJ & Vendrome February 2017	Fernandez v. Cronealdi; Fernandez v. Cronealdi: Index No. L&T 74986/16, NYLJ No. 1202777492102 (Civ. Ct. Kings; 1/4/17; Chinea, J)	Kings	Tenant	1			1	no	
1/26/2017	NYLJ	Ahmed v. Otero	Queens	Tenant	1			1	no	
1/26/2017	NYLJ	Estrada v. Browand	Bronx	Tenant	1			1	no	
2/3/2017	NYLJ	1098 Anderson Realty Inc. v. Torres	Bronx	Tenant	1			1	yes	1
2/3/2017	NYLJ & Vendrome March 2017	Zara Realty Holding Corp. v. Santos & Zara Realty Holding Corp. v. Santos: Index No. 73383/16, NYLJ 1202778231347 (Civ. Ct. Queens; 1/17/17; Ressos, J)	Queens	Tenant	1			1	no	
2/6/2017	westlaw trial court orders	Walton Ave. Realty Associates LLC v. Soriano, 54 Misc.3d 1213(A)	Bronx	Tenant	1			1	no	
2/7/2017	westlaw trial court orders & Vendrome March 2017	76 West 86th Street Corp. v. Junas, 2017 N.Y. Slip Op. 27027 & 76 West 86th St. Corp. v. Junas: 45 NYS3d 921, 2017 NY Slip Op 27027 (Civ. Ct. NY; 2/7/17; Weisberg, J)	New York	Tenant	1			1	no	
2/8/2017	NYLJ	20 MK LLC v. Carchi	Queens	Tenant	1			1	no	
2/8/2017	NYLJ & Vendrome March 2017	Kpanou v. Green & Kpanou v. Green: Index No. 26593/2016, NYLJ No. 1202778475625 (Civ. Ct. Bronx; 12/19/17; Asforis, J)	Bronx	Tenant	1			1	no	
2/8/2017	NYLJ & Vendrome March 2017	Boreland v. Blackwood & Boreland v. Blackwood: Index No. 90899/15, NYLJ 1202778475567 (Civ. Ct. Kings; 1/6/17; Stanley, J)	Kings	Tenant	1			1	no	
2/15/2017	NYLJ	H.W. Hinkley Realty L.L.C. v. Romulus	Kings	Tenant	1			1	no	
2/22/2017	westlaw trial court orders & Vendrome April	Highbridge House Ogden LLC v. Del Valle, 54 Misc.3d 1220(A)	Bronx	Tenant	1			1	no	
2/23/2017	NYLJ & Vendrome March 2017	Walton Avenue Realty Associates LLC v. Soriano & Walton Avenue Realty Assocs. LLC v. Soriano: Index No. 62025/2016, NYLJ No. 1202779528387 (Civ. Ct. Bronx; 2/6/17; Lutwak, J)	Bronx	Tenant	1			1	no	
2/27/2017	westlaw trial court orders	1425 U LLC v. Heyward, 54 Misc.3d 1223(A)	Bronx	Tenant	1			1	no	

DATE	SOURCE	CASE NAME	COUNTY	OUTCOME	T	L	D	TOTAL	SURPRISE?	Sur. Tally
3/1/2017	NYLJ	Hobbs Ciena Assoc., LP v. Jimenez	New York	Tenant	1			1	yes	1
3/1/2017	NYLJ & Venrome April	Henry v. Kingsberry	Kings	Tenant	1			1	no	
3/1/2017	NYLJ & Westlaw cases & Vendrome April	121 Irving MGM LLC v. Perez, 2017 WL 1369865	Kings	Tenant	1			1	no	
3/8/2017	NYLJ & Vendrome April	757 Miller Owners, LLC v. Smith	Kings	Tenant	1			1	yes	1
3/8/2017	NYLJ & Westlaw trial court orders & Vendrome April	Dexter 345, Inc. v. Hanlon, 54 Misc.3d 1222(A)	New York	Tenant	1			1	yes	1
3/8/2017	westlaw trial court orders	1605 Realty Corp. v. Cataquet, 54 Misc.3d 1225(A)	Bronx	Tenant	1			1	no	
3/15/2017	NYLJ	Routolo v. Garzillo	Kings	Tenant	1			1	no	
3/15/2017	NYLJ & Vendrome April	Ocean H LLC v. Roland	Kings	Tenant	1			1	yes	1
3/15/2017	NYLJ & Vendrome April	Brooks Family Holdings LLC v. Morrison	Queens	Landlord		1		1	no	
3/22/2017	NYLJ	1425 U LLC v. Heyward	Bronx	Tenant	1			1	no	
3/22/2017	NYLJ & Vendrome April	7825 Realty Associates, LLC v. Doll	Kings	Landlord		1		1	no	
3/22/2017	NYLJ & Westlaw trial court orders & Vendrome March 2017	2 Perlman Drive, LLC v. Stevens, 54 Misc.3d 1215(A)	Kings	Tenant	1			1	no	
3/27/2017	westlaw trial court orders	St. Ann's 350, LP v. Almedina, 55 Misc.3d 1204(A)	Bronx	Tenant	1			1	no	
3/29/2017	NYLJ	Highbridge House Ogden LLC v. Valle	Bronx	Tenant	1			1	no	
3/29/2017	NYLJ	River Park Residences, L.P. v. Reed	Bronx	Landlord		1		1	no	
3/29/2017	NYLJ & Westlaw trial court orders & Vendrome April	560-568 Audubon Realty Inc. v. Rodriguez, 54 Misc.3d 1226(A)	New York	Tenant	1			1	no	
4/5/2017	NYLJ	EOM 106-15 217th Corp. v. Severine	Queens	Tenant	1			1	no	
4/5/2017	NYLJ	Sedgwick Avenue Realty Assoc. LLC v. Perez	Bronx	Tenant	1			1	no	
4/5/2017	NYLJ	Robo, L.L.C. v. Alford	Bronx	Tenant	1			1	no	
4/5/2017	NYLJ	Ocean Gate LP v. Coleman	Kings	Tenant	1			1	no	
4/5/2017	westlaw cases	S.B.H. Realty Inc. v. Santana, 2017 WL 1426805	Bronx	Tenant	1			1	no	

DATE	SOURCE	CASE NAME	COUNTY	OUTCOME	T	L	D	TOTAL	SURPRISE?	Sur. Tally
4/7/2017	westlaw trial court orders	Kingston Heights Apartments v. Hurdle, 55 Misc.3d 1211(A)	Kings	Tenant	1			1	no	
4/10/2017	westlaw cases	224-232 Atlantic Ave. Investors, LLC v. Gonzalez, 55 Misc.3d 1211(A)	Kings	Tenant	1			1	no	
4/12/2017	NYLJ	Concourse Estates, LLC v. Carmen Soto	Bronx	Tenant	1			1	no	
4/13/2017	NYLJ	Statospheric Inc. v. Kabir	Queens	Tenant	1			1	no	
4/13/2017	NYLJ	East Farm Holding One LLC v. Smart	Kings	Tenant	1			1	no	
4/13/2017	NYLJ & Vendrome April	Famous Developers LLC v. Daniel	Kings	Tenant	1			1	no	
4/19/2017	NYLJ	River Park Residences, L.P. v. Davis	Bronx	Landlord		1		1	no	
4/19/2017	NYLJ	567 W 184th LLC v. Martinez	New York	Tenant	1			1	no	
4/19/2017	NYLJ	East 93rd Street Associates LP v. Cargill	Kings	Tenant	1			1	no	
4/19/2017	NYLJ	Taylor v. Shelton	Kings	Tenant	1			1	no	
4/19/2017	NYLJ	Lewis v. Jordan	Queens	Tenant	1			1	no	
4/26/2017	NYLJ	Forest & Garden Apartment Co. v. Kab	Queens	Tenant	1			1	no	
4/26/2017	NYLJ	Rosenberg v. Baker	Kings	Tenant	1			1	no	
4/26/2017	NYLJ	Strong LP v. Seabron	Kings	Tenant	1			1	no	
4/26/2017	NYLJ	WPH Apartments, Inc. v. Arculk	Queens	Tenant	1			1	no	
4/26/2017	NYLJ	Opperisano v. Opperisano	Kings	Tenant	1			1	no	
4/27/2017	NYLJ	Tal Property Holdings LLC v. Doe	Bronx	Tenant	1			1	no	
					63	**6**	**2**	**71**		**5**
					89%	**8%**	**3%**	**100%**		**7%**
					T	L	D			M

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner of Itkowitz PLLC. She practices real estate litigation. Michelle has over twenty years of experience, and is best known for her work in the area of commercial and complex-residential landlord and tenant law in the City of New York. Michelle represents BOTH landlords and tenants and her core competencies include: Rent Stabilization and Rent Control, the Loft Law, Short-Term Leasing cases, Yellowstone injunctions, tenant buyouts, clearing buildings so that construction projects can go forward, and Rent Stabilization Due Diligence. She also is very experienced in general commercial litigation. See our Accomplishments section of Itkowitz.com to get an idea of the breadth of Michelle's work.

Michelle publishes and speaks frequently on legal issues in real estate. The groups that Michelle has written for and/or presented to include: Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; Rossdale CLE, The Association of the Bar of the City of New York; The New York State Bar Association, Real Property Section, Commercial Leasing Committee; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; BisNow; and SubletSpy.

Michelle regularly creates and shares original and useful content on real estate and law, including booklets, videos, and articles. She is frequently quoted in the press on a variety of real estate and legal issues. As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle recently developed a seven-part, eight-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 16,000 lawyers have purchased Michelle and Jay Itkowitz's earlier CLE classes from Lawline.com, and the programs have met with the highest reviews. Michelle is currently co-authoring a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is immensely proud that Itkowitz PLLC is a NYS Women Business Enterprise Certification by the Empire State Development Corp.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

There are many ways to keep up with Michelle. When Michelle tweets, which is not an obnoxious amount, she does so in an easy to understand manner about useful stuff regarding real estate, business, the legal industry, and organic herb gardening. Feel free to contact Michelle; she would be happy to speak to you.

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