

(Cite as: 159 Misc.2d 542, 605 N.Y.S.2d 814)



Leonard, Respondents.

Sept. 15, 1993.

Civil Court, City of New York,
New York County, Housing Part 18.
LONDON TERRACE GARDENS, a Partnership,
Petitioner,

v.

Charles H. STEVENS, Susan Heller & Ross
Wisdom, Guillemro Metz, Conrad
Cummings, Judy Richeimer, George Goldsborough
& Will Jobse, Edward Ulrich,
Sarah Heflin, Matthew Carlson & Heather Carlson,
Margot Gerson, Regina
McCarthy, Lester Polakou & Mary Polakou,
Graciela Vidal, Ronald Cole & Edrie
Cole, Harold G. Joen, Paul Williams, Paul Maloney
IV & Teresa Maloney, Michael
Ansingh & Tamara Wip, Pamela Coneh & Ann
Epstein, Dana Wolf, Jeffrey
Rothstein & Melissa Dattilio, Zillah Lawrence,
Mary Harper, Michelle Spinner,
Eve Sorel, Beatrice Domencio, Jillion Lieder,
Leslie Greaves, Thomas McNamara,
Judith Aligen, Julie Leonard, Eileen Moss, Robert
Rossi & Mary Mize-Rossi, Dean
Smith & Jill Smith, Miriam Fischer, Steven Stark &
Annie Copeland, Stephen
Canfield & Phillippee Stessel, Brian Millsap &
Mario Egozi, Gary
Gordon, Jack Srofsky, James Moorehead Jr. &
Adrienne Stein, Linda O'Keefe,
Michael Gasster & Ying Li Gasster, James Chmiel
& Pamela Chmiel, Anne
McKenzie & Malcolm Mellon, Natalie Casden,
Anne Ahern, Milan Stitt, Jose
Hernandez & Garey B. Gentry, Alan Weaver,
Wayne Cohen & Susan Cohen, Elizabeth
Murray, Andrew Humm, Milton Hoffman,
Frederick Hecker-Oho, Marren Dugdall &
Richard Murphy, Florence Sutta, Miriam Winter,
Thomas Williams, Frances
Gluckman, Nancy Fields, Neil Leonard & Harriet

Landlord brought summary proceedings for nonpayment of rent against tenants of rent controlled and rent stabilized apartments. The Civil Court, City of New York, New York County, Gans, J., held that demand for payment of charges other than legal regulated rent in written three day notice involving rent stabilized or rent controlled premises was prohibited and required dismissal of nonpayment petition.

Petitions dismissed.

West Headnotes

[1] Administrative Law and Procedure ⚡423.1
15Ak423.1 Most Cited Cases

[1] Statutes ⚡190

361k190 Most Cited Cases

Where wording of statute or regulation is expressed in clear and unambiguous terms, it is duty of courts to enforce law as written.

[2] Landlord and Tenant ⚡297(.5)

233k297(.5) Most Cited Cases

Demand for payment of charges other than legal regulated rent in written three-day notice involving rent stabilized or rent controlled premises is prohibited, and requires dismissal of nonpayment petition; such conclusion enforces mandate of rent stabilization and rent control laws that only legal regulated rent may be demanded or received, and principle that only demand for legal regulated rent may support possessory judgment. Rent Stabilization Code, § 2525.1, McK.Unconsol.Laws; Rent and Eviction Regulations, § 2205.1(a), McK.Unconsol.Laws; McKinney's RPAPL § 711, subd. 2; McKinney's Real Property Law § 234;

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McKinney's N.Y.City Civ.Ct.Act § 1906-a.

[3] Landlord and Tenant ↪297(.5)

233k297(.5) Most Cited Cases

Purpose of requiring landlord to demand rent of tenant prior to initiating summary nonpayment proceeding in civil court is not only to inform tenant that in absence of payment of demanded amount or surrender of premises, legal proceedings will be instituted, but also to allow tenant to remedy any default in payment, thus avoiding litigation and possible eviction. McKinney's RPAPL § 711, subd. 2.

[4] Landlord and Tenant ↪297(2)

233k297(2) Most Cited Cases

To achieve purposes of three-day notice required before initiation of summary nonpayment proceeding in civil court, three-day notice must inform tenant of approximate good faith amount of rent claimed. McKinney's RPAPL § 711, subd. 2.

[5] Landlord and Tenant ↪310(1)

233k310(1) Most Cited Cases

Petitioner may include claim for award of attorney's fees and claim for costs in body of nonpayment petition involving rent stabilized or rent controlled premises, to be determined at conclusion of proceeding. McKinney's Real Property Law § 234; McKinney's N.Y.City Civ.Ct.Act § 1906-a.

*542 **815 Finkelstein, Borah, Schwartz, Altschuler & Goldstein by Lawrence S. Borah, New York City, for petitioner.

Himmelstein, McConnell & Gribben by William J. Gribben, New York City, for respondents.

*543 LOUISE GRUNER GANS, Judge.

Although thousands of summary non-payment proceedings involving rent stabilized or rent controlled premises are initiated in the Civil Court, the question whether a written three day notice under RPAPL 711(2) involving **816 such premises may include a demand for payment of legal fees, collection costs and late charges, in addition to rent, has never been squarely addressed. This court holds that a demand for payment of

charges other than the legal regulated rent in a written three day notice involving rent stabilized or rent controlled premises is prohibited and requires dismissal of the non-payment petition.

These summary proceedings for the non-payment of rent were initiated by petitioner against nine rent controlled and fifty three rent stabilized tenants of London Terrace Apartments. [FN1] All respondents have moved to dismiss based on the invalidity of the written three day notices served on them pursuant to RPAPL 711(2). The motions, which have been consolidated for purposes of disposition, are granted.

FN1. The names of all the respondents and the index numbers of all the cases are listed in the original decision.

Written three day notices or rent demands in all cases involving rent stabilized tenants were served in March, 1993. Service of the notices was followed by service of Notices of Petition and Petitions. Aside from demanding payment of rent due for February, 1993, each three day notice demanded payment of amounts for collection costs, legal fees and late charges. These items were demanded pursuant to lease provisions which defined "collection costs and legal fees" and "late charges" as items of additional rent. Every one of the three day notices in these cases demanded payment of \$375 for collection costs, legal fees of either \$36.75 or \$39.75, and late charge of \$15, [FN2] in addition to the disputed monthly rent amount.

FN2. The amounts demanded do not in every case correspond to the actual lease provision.

In April 1993, petitioner served written three day notices on nine rent controlled tenants. Service of Notices of Petition and Petition followed. These three day notices demanded payment of rent for the months of February, March and April 1993, and amounts of either \$15 or \$45 designated either as "legal fees" or "late charges."

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***544** Petitioner has not represented to the court that the items claimed for collection costs, legal fees or late charges in any of the petitions have been approved by DHCR as part of the legal regulated rent for any of the premises in question.

On their motions to dismiss, respondents contend that the three day notices are invalid because they demand payments in excess of the legal regulated rent, demand payments in excess of agreed lease amounts, and do not ever use the word "rent."

Section 2525.1 of the Rent Stabilization Code (NYCRR) and Section 2205.1(a) of the New York City Rent and Eviction Regulations (NYCRR) read as follows:

2521.1 It shall be unlawful, regardless of any contract, lease or other obligation heretofore or hereafter entered into, for any person to demand or receive, any rent for any housing accommodation in excess of the legal regulated rent, or otherwise to do or omit to do any act, in violation of any regulation, order or requirement under the RSL or this Code, or to offer, solicit, attempt or agree to do any of the foregoing.

2205.1(a) It shall be unlawful, regardless of any contract, lease or other obligation heretofore entered into, for any person to demand or receive any rent for any housing accommodations in excess of the applicable maximum rent established therefor by the State Rent Commission or the Division of Housing and Community Renewal, or otherwise to do or omit to do any act, in violation of any regulation, order or requirement of such administration under the State Enabling Act or under the Rent Law, or to offer, solicit, attempt or agree to do any of the foregoing.

[1] The three day notice under RPAPL 711(2) is by its terms a "demand of the rent....requiring, in the alternative, the payment of the rent, or the possession of the premises." There can be no misunderstanding that both Sections 2525.1 and 2205.1 unequivocally forbid "any person to *demand* or ****817** receive" rent in excess of the legal regulated rent or maximum rent (emphasis supplied). Under these provisions it is necessarily

unlawful to demand the payment of legal fees, collections costs, and/or late charges in a written three day notice. Where, as here, the wording of a statute or regulation is expressed in clear and unambiguous terms, it is the duty of the courts to enforce the law as written. McKinney's Cons.Laws of New York, Book 1, Statutes sections 73, 76; *Eaton v. New York City Conciliation & Appeals Board*, 56 N.Y.2d 340, 345, 452 N.Y.S.2d 358, 437 N.E.2d 1115 (1982); ***545** *Bender v. Jamaica Hospital*, 40 N.Y.2d 560, 562, 388 N.Y.S.2d 269, 356 N.E.2d 1228 (1976); *Matter of De Peyster*, 210 N.Y. 216, 225, 104 N.E. 714 (1914); *Triborough Bridge & Tunnel Authority v. Crystal & Son*, 2 A.D.2d 37, 39, 153 N.Y.S.2d 387 (1st Dep't), *aff'd* 2 N.Y.2d 961, 162 N.Y.S.2d 362, 142 N.E.2d 426 (1957).

The Appellate Term, First Department, has recognized that in a non-payment proceeding involving rent stabilized premises, "attorney's fees may not be considered 'rent' or be awarded as 'additional rent' in order to enable a landlord to obtain a possessory judgment, and that a lease clause to that effect is unenforceable." *Silber v. Schwartzman*, 150 Misc.2d 1, 3, 575 N.Y.S.2d 226 (App.T., 1st Dep't 1991); see also *Classic Residences, Inc., v. Adams*, N.Y.L.J., February 2, 1993, p. 21, col. 3 (App.T., 1st Dep't); *Broadway Associates v. Spahn*, N.Y.L.J., April 3, 1990, p. 26, col. 1 (App.T., 1st Dep't). *Tivoli v. Wing*, 122 Misc.2d 901, 471 N.Y.S.2d 1018 (Civ.Ct., Kings Co.1984), had earlier applied the same reasoning to collection expenses and late charges as well as to attorney's fees.

Two intertwined concepts formed the basis for the decision in *Silber v. Schwartzman* and the related cases cited. The first, that only amounts "comprising 'legal regulated rent,' " can be identified as the "gravamen of a summary nonpayment proceeding involving rent-stabilized premises." *Silber v. Schwartzman*, *supra* at 2, 575 N.Y.S.2d 226. The *second*, that in a proceeding involving rent regulated premises, the landlord is able to obtain a possessory judgment only for amounts constituting the legal regulated rent. *Id.* at 3, 575 N.Y.S.2d 226. The first concept, follows

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the mandate of the rent laws to enforce payment only of amounts constituting legal regulated rent. The second concept, central to the nature of the summary non-payment proceeding, is that only obligations legally recognized as rent can support the grant of a possessory judgment through eviction.

[2] The conclusion that a written three-day notice or rent demand under RPAPL 711(2) may not include a demand for payment of charges other than the legal regulated rent is a logical extension of the holding of Appellate Term in *Silber v. Schwartzman*. Id. It enforces the mandate of the rent stabilization and rent control laws that only legal regulated rent may be "demanded or received," and the principle that only a demand for legal regulated rent may support a possessory judgment.

[3][4] The purpose of requiring a landlord, by the terms of RPAPL 711(2), to demand rent of a tenant prior to initiating a *546 summary non-payment proceeding in the Civil Court is not only to inform the tenant that in the absence of payment of the demanded amount or surrender of the premises, legal proceedings will be instituted, but also to allow the tenant to remedy any default in payment, thus avoiding litigation and possible eviction. *Zenila v. Masterandrea*, 123 Misc.2d 1, 472 N.Y.S.2d 980 (Civ.Ct., N.Y.Co.1984); *Zinsser v. Herrman*, 23 Misc. 645, 52 N.Y.S. 107 (App.Term 1898); *Life Realty Partners, L.P. v. Samuel H. Moss, Inc.*, N.Y.L.J., October 16, 1991, p. 22, col. 4 (Civ.Ct., N.Y.Co.). To achieve these purposes, the three day notice must inform the tenant of the "approximate good faith sum" of rent claimed. *Zenila v. Masterandrea*, supra, 123 Misc.2d at 8, 472 N.Y.S.2d 980; *Schwartz v. Weiss-Newell*, 87 Misc.2d 558, 386 N.Y.S.2d 191 (Civ.Ct., N.Y.Co.1976).

By definition, a three day notice or rent demand which demands payment of charges whose collection is prohibited by rent stabilization **818 or rent control regulations does not state a "good faith sum" of rent claimed. It is deceptive and misleading both as to the amount the tenant must pay to avoid eviction, and as to tenant's obligation

to pay petitioner's attorney's fees and costs prior to the commencement of the legal proceeding, regardless of the judicial determination of the claim.

The cases cited by petitioner, *Charles F. Noyes Co., Inc. v. Standard Industries, Inc.*, 85 Misc.2d 853, 381 N.Y.S.2d 185 (App.T., 1st Dep't 1976); *379 Madison Avenue, Inc. v. Stuyvesant Co.*, 242 A.D. 567, 275 N.Y.S. 953 (1934), aff'd mem 268 N.Y. 576, 198 N.E. 412 (1935); *N.V. Madison Inc. v. Saurwein*, 103 Misc.2d 996, 431 N.Y.S.2d 251 (App.T., 1st Dep't 1980); *Ray v. 169 Spring Owners Corp.*, N.Y.L.J., March 2, 1988, p. 14, col. 3 (Civ.Ct., N.Y.Co.), do not concern rent stabilized or rent controlled premises or predate the rent stabilization code, and are therefore inapposite.

Service of three day notices which demand amounts other than the legal regulated rent is likely to result in the payment and collection of prohibited charges. By the terms of the three day notice, failure to pay the demanded amount or vacate the premises will result in a court proceeding and possibly eviction. It is likely that at least some tenants will pay whatever "additional" amount is demanded without question, in order to avoid the stress and expense of litigation. Thus, the three day notice itself can become a device for the collection of unlawful charges. Moreover, any overcharge regardless of its size frustrates the purposes of the rent stabilization and rent control laws. Here, each rent demand from the rent stabilized tenants includes charges approximately \$430.00 above *547 the legal rent amount. All the rent demands when combined, include a total of over \$23,000.00 in excess of the legal regulated rents.

[5] It should be clear that this decision relates only to three day notices in cases involving rent stabilized or rent controlled premises. Even in these cases, petitioner may include a claim for an award of attorney's fees pursuant to RPL 234, and a claim for costs pursuant to NYCCA Section 1906-a in the body of the non-payment petition, to be determined at the conclusion of the proceeding. Without deciding whether petitioner has a right to collect late charges in these cases, see, *Maplewood*

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Management v. Jackson, 113 Misc.2d 142, 448 N.Y.S.2d 966 (Dist.Ct., Nassau Co.1982); *Spring Valley Gardens Associates v. Earle*, 112 Misc.2d 786, 447 N.Y.S.2d 629 (County Ct., Rockland Co.1982), the court notes that petitioner could likewise include a claim for late charges in the petition, which like the claim for attorney's fees and costs, could support the entry of a money judgment only.

For the foregoing reasons the several petitions herein are dismissed. In all cases where a lease provision provides for an award of attorney's fees, respondents' claims for attorney's fees pursuant to RPL 234 shall be preserved pending the outcome of further litigation between the parties. The court does not address respondents' contentions that the lack of the word "rent" in petitioner's three day notices renders them invalid, or that demands for amounts that do not correspond exactly to those stated in the lease riders are likewise invalid. Further, the court does not determine petitioner's motions to consolidate, amend, strike defenses and counterclaims, and for summary judgment.

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