# HOUSING COURT COMMITTEE NEWS

By Newsletter Subcommittee September/October 2015 Edition

## Decisions of Note

The Newsletter Subcommittee is excited to reveal a new regular feature of the Newsletter: *Decisions of Note by Hon. Jaya K. Madhavan, Supervising Judge, Bronx Housing Court.* In each edition, Judge Madhavan will highlight a few recent appellate decisions which may be useful to landlord–tenant attorneys. This month, Judge Madhavan focuses on the effect of tax returns on primary residence claims as well as the age old question of when does a summary proceeding begin.

## Spring Creek Towers Rejecting LINC Vouchers?

A new lawsuit alleges that Spring Creek Towers—a subsidized housing complex in East New York—is rejecting potential tenants using Living in Communities Rental Assistance (LINC) vouchers. The Fair Housing Justice Center has joined the plaintiffs as a third plaintiff.

The LINC program grants rent subsidies to homeless shelter occupants to enable them to move into apartments.

## Stronger Law Against Tenant Harassment

*New York Daily News* reports that Mayor de Blasio signed into law a number of bills prohibiting heavy-handed tactics used by some landlords to pressure tenants to move out.

The new laws make it illegal for a landlord to make another buyout offer before 180 days pass after the initial offer. Landlords are also forbidden to mislead or threaten tenants, or call them at unconventional hours. The bills also require the landlord to inform the tenant of the option of staying in the apartment.

The law aims to prevent further erosion of the stock of rent regulated apartments. According to Mayor de Blasio, buyout offers rarely “work out in the tenants favor. They always work out in the landlords favor,” adding, “it looks like short term gain, but you know what? You wake up in a year and you don’t have affordable housing anymore.”

Please send your comments or suggestions for a newsletter item to housingcourtnews@gmail.com

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## Caught on Tape: Landlord Harassment

A NYT article reports that tenants in an East Village apartment building have made use of audio and video recording devices, ostensibly to capture evidence of landlord harassment. The tenants allege that they were pressured by the landlord's attorney to enter into a buyout agreement of their rent-stabilized apartments, misled by false information (such as a claim that the building would soon be deregulated), and faced naked threats of impending construction in their building and the inconvenience and vermin said construction would release. The Tenant Protection Unit of the NYS Attorney General's Office is investigating the harassment complaints. Meanwhile, Stephanie Rudolph of the Urban Justice Center is handling the tenants' harassment action against the landlord.

## HUD Charges NYC High-Rise with FHA Violation

According to RealEstateRama, a government and public real estate blog, the US Department of Housing and Urban Development (HUD) announced that it is charging the owners of a NYC high-rise with violating the Fair Housing Act by refusing to allow a disabled resident to keep an emotional support animal. The HUD's charge can be read here.

HUD states that The Dorothy Ross Friedman Residence, a supportive housing residence for senior citizens, working professionals, and persons with HIV/AIDS, brought a holdover proceeding against a disabled man for violating the pet-clause of his lease even though the tenant had provided documents from his doctor and the National Service Animal Registry showing that the dog was an emotional support animal. The holdover case has been stayed while the HUD charge is being investigated.

## Talking to New Yorkers about the Housing Courts

The latest voice in the Right to Counsel debate is a NYT op-ed co-written by Mark D. Levine, a City Council member from the Seventh District, and Mary Brosnahan, president of the Coalition for the Homeless. In it, the authors remark on resource concerns and a heavy caseload that burdens operations in New York City housing courts, and allege a gross imbalance of bargaining power between landlords with counsel and tenants, who are overwhelmingly unrepresented. The authors then posit that expanded legal services aid--framed as the 'right to counsel'--would drastically reduce unnecessary evictions and result in an overall cost-reduction for the City.

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## Mayor's Townhall Meeting Becomes a Housing Meeting

A recent San Francisco Gate article characterizes Mayor de Blasio's first full-fledged town hall meeting as a forum for him to flesh out his affordable housing plan. At the event, held at a Washington Heights high school, Mayor de Blasio defended his plan as the best course of action to assist low-income New Yorkers, while fielding concerns from many citizens and over 20 civic groups. Mayor de Blasio has made affordable housing the centerpiece of his administrative agenda. His plan would create or preserve 200,000 units of affordable housing over the next decade.

## Sleeping Over in Jersey City

According to the New York Times, even as New York takes a strong stance against Airbnb and similar services, our neighbors in Jersey City are considering legitimizing what the NYT calls "short-term sleepover web services." Based on the terms of the proposed legislation, Jersey City would reap the same 6 per cent hospitality tax it charges hotel guests in the city.

Our neighbor's experiment will certainly yield some interesting data for New York to analyze, but just how relevant it will be remains to be seen. For one thing, Jersey City is home to merely twelve hotels, while New York City boasts 245 hotels registered with the Hotel Association of New York City.

## Access to Justice Conference "Law a la Carte"

On October 14, 2015, Access to Justice in conjunction with the NYSBA, held a conference entitled "Law a la Carte: Limited Scope Practicing for Low and Moderate Income Clients. " The conference was led by the Hon. Fern Fisher, and among the many panelists were Hon. Dina Fein, Hon. Jean Schneider, Hon. Peter Moulton, Hon. Paul Alpert, and our very own Tracy McNeil.

The discussion was primarily focused on limited scope representation, broadly covering benefits, drawbacks and practical nuances. Judge Fein, together with practitioner Laura Unflat, discussed Limited Assistance Representation as implemented in Massachusetts. The panel then turned its attention toward the possibility of introducing a similar system in New York. Speakers presented programs that already exist in our state, such as the Volunteer Attorney Program, CLARO, the Volunteer Lawyer for the Day, and Uncontested Divorce Clinic.

For more information about LAR go to: http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html

# Decisions of Note
## by Hon. Jaya K. Madhavan
## Supervising Judge, Bronx Housing Court

## Tax Returns and Primary Residence

The IRS will not be the only one auditing tax returns from now on–so will careful landlord–tenant attorneys and the courts. In *Ansonia Associates Ltd. Partnership v. Unwin*, 130 AD3d 453 [1st Dept 2015], the tenant deducted the rent for the apartment under a tax code provision which applied only if the apartment was not used for her personal use. The tenant argued that her tax returns were not dispositive "because the Rent Stabilization Code states that in determining primary residence 'no single factor shall be solely determinative' (9 NYCRR 2520.6 [u])." The Court rejected that claim, finding that "respondent may not claim primary residence because that claim is 'logically incompatible' with the position she asserted on her tax returns *(see Katz Park Ave. Corp. v Jagger, 11 NY3d 314*, 317 [2008])."

Recently, in *Goldman v. Davis*, 2015 NY Slip Op 25310 [Appellate Term, 1st Dept], the Court ruled that it was "constrained" by *Unwin* to hold that a tenant's sworn declarations in his tax returns were dispositive as to his primary residence–and even preponderated over his credible testimonial evidence–contrary to established precedent (*see West 157th St. Assoc. v Sassoonian*, *supra* [declaration of residence at different address on tax returns and deduction of entire rent as business expense not dispositive as a matter of law as to primary residence]; *Glenbriar Co. v Lipsman*, 11 AD3d 352, 353 [2004], *affd on other grounds* 5 NY3d [*3]388 [2005] [listing of out-of-state address as primary residence in tax returns not fatal to claim of primary residence in New York]; *310 E. 23rd LLC v Colvin*, 41 AD3d 149 [2007] [same]; *Village Dev. Assoc., LLC v Walker*, 282 AD2d 369 [2001] [New Jersey address designated on tenant's tax returns "is merely one of many factors to be considered in determining primary residence; it is not a controlling factor . . . [t]he consequences of such filing is a matter for the taxing authorities, not this Court"]; *23 Jones St. Assoc. v Keebler—Beretta*, 284 AD2d 109 [2001] [while documentary evidence "can be significant in determining primary residence, it is not essential, and it does not necessarily preponderate over inconsistent testimonial evidence"]; *300 E. 34th St. Co. v Habeeb*, 248 AD2d 50 [1997] [same]).

These cases may have significant implications for any landlord–tenant matter in which the tenant's primary residence is an issue. April 15 may never be the same.

## When does a Summary Proceeding Begin?

The simple answer to this question is: it depends. In *92 Bergenbrooklyn, LLC v. Cisarano*, 2015 NY Slip Op 25282 [Appellate Term, 2d, 11th & 13th Jud Dists], the Court recently answered the thorny question of when is a summary proceeding "commenced." Ultimately, the Court held that this question "must...be answered differently...depending on the context in which the question

arises."

As framed by the Court, "[t]he question presented is whether the change to the commencement-by-filing system [CCA 400] was meant to alter the preexisting rule regarding acceptance of rent, i.e., does the reference in RPAPL 711 (1) regarding the acceptance of rent after the commencement of the proceeding still relate to when the tenant is served or, by virtue of the amendment of CCA 400, does it now refer to when the petition is filed?"

The relevant portions of these statutes are below:

> RPAPL 711[1] provides, in pertinent part, that, "Acceptance of rent after the commencement of the [holdover] proceeding . . . shall not terminate such proceeding nor effect [sic] any award of possession to the landlord . . .."
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> CCA 400 was amended to provide, in pertinent part:
>
> 1. An action is commenced in this court by filing a summons and complaint. A special proceeding is commenced by filing a notice of petition and petition or order to show cause and petition. For purposes of this section, and for purposes of section two hundred three of the civil practice law and rules, filing shall mean the delivery of the summons and complaint, the notice of petition and petition or order to show cause and petition to the clerk of the court in the county in which the action or special proceeding is brought together with any fee required by section nineteen hundred eleven of this act.

The Court observed that both Professor Siegel and the NYC Civil Court believed that this amendment would "in no way" affect summary proceedings even though "[s]ome courts...[] have applied a contrary rule (see e.g. *ABN Assoc., LLC v Citizens Advice Bur., Inc.,* 27 Misc 3d 143[A], 2010 NY Slip Op 51075[U] [App Term, 1st Dept 2010]; *207-213 W. 144th St. HDFC v Jenkins*, 44 Misc 3d 1224[A], 2014 NY Slip Op 51300[U], *3 [Civ Ct, NY County 2014])." Crucially, RPAPL 731 "formerly provided that a summary proceeding is commenced by "service of" a petition and notice of petition. In 1994, this section was amended to delete the words "service of" (L 1994, c 563 § 10). According to the Office of Court Administration's memorandum, this change was made to clarify that summary proceedings "are within the commencement by filing system" (1994 McKinney's Session Laws of NY at 3306) in courts where that system was then in effect (see *528 E. 11th St. H.D.F.C. v Durieaux*, 164 Misc 2d 595, 596-597 [Civ Ct, NY County 1995])." The Court thus held that "a summary proceeding is commenced by filing in the Civil Court."

The Court noted that the "main reason for converting from a commencement-by-service to a commencement-by-filing system was to raise money for the State coffers" (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 719 [1997]). As this purpose has nothing to do with the factors bearing on the issue of whether an acceptance of rent vitiates a termination notice, it is our view that the question of when a summary proceeding is 'commenced' must now be answered differently, in this context and others, depending on the context in which the question arises."

The Court then gave three examples of where commencement must be defined by service–and

not filing–of the petition and notice of petition.

> **1. Rule:** the respondent must be in possession of the premises at the time the proceeding is commenced in order for the proceeding to lie [citations omitted].
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> **Court:** "Clearly, since this rule involves the acquisition of jurisdiction, "commencement" in this context must continue to be defined by service of the petition and notice of petition, not when they are filed, for jurisdiction is obtained upon service, not upon filing (see e.g. *Siedlicki v Doscher*, 33 Misc 3d 18 [App Term, 2d, 11th & 13th Jud Dists 2011]).
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> **2. Rule:** Respondent's removal after the "commencement" of the proceeding does not divest the court of jurisdiction.
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> **Court:** "[S]ince the issue is one of jurisdiction, "commencement" must continue to be defined in terms of service of the petition and notice of petition, not by reference to a filing date."
>
> **3. Rule:** A surrender by a tenant after the commencement of the proceeding will terminate the tenancy, because the service of a petition gives the tenant "an option to consider the lease cancelled and to vacate the premises" (*Sno-Wite, Inc. v Gerald Operating Corp*., 271 App Div 314, 317 [1946]; see *Cornwell v Sanford*, 222 NY 248 [1918]; *Patchogue Assoc. v Sears, Roebuck & Co.*, 37 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2012]).
>
> **Court:** "Here, too, it would seem that the determinative act of commencement should remain service, not filing, because if the tenant is being given an option to terminate, the tenant must be put on notice of the option (see *Cornwell*, 222 NY at 253 ["the issuance and service of the precept . . . cancels the lease . . . as of the time of the removal; the service of the precept is an election and declaration on the part of the landlord that the tenant should remove"] [emphasis added]).

Applying this analysis to RPAPL 711, the Court held that " 'commencement' in the context of the rule regarding an acceptance of rent, should continue to be defined in terms of service, not filing. The intent of the language in question in RPAPL 711 (1)...was to allow the tenant to pay and the landlord to accept rent after the commencement of the proceeding without prejudicing their respective positions....If this is the purpose of the legislation, it would seem that the legislature contemplated that both the landlord and the tenant must be on notice, when rent is accepted, of the commencement. We therefore conclude that 'commencement' in this context should remain keyed to service, not to filing (contra *ABN Assoc., LLC v Citizens Advice Bur., Inc.,* 27 Misc 3d 143[A], 2010 NY Slip Op 51075[U]; *207-213 W. 144th St. HDFC v Jenkins*, 44 Misc 3d 1224[A], 2014 NY Slip Op 51300[U], *3)."

Regardless of whether the First Department adopts *Cisarano*, the Court's analysis offers much for landlord–tenant attorneys to consider.