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# TENANT REMEDIES FOR A DENIAL OF ESSENTIAL SERVICES AND FOR HARASSMENT -THE NEW YORK APPROACH

# TENANT REMEDIES FOR A DENIAL OF ESSENTIAL SERVICES AND FOR HARASSMENT —THE NEW YORK APPROACH

## I. Introduction

Much has been said and written about the inequities of the landlord-tenant system, especially as it affects the ghetto and lower-income tenant.[1] A significant portion of legal comment has reviewed the historical development of the common law and has analyzed the resulting imbalance between landlord and tenant. The conclusion of much review and analysis is that, because of the problems inherent in the common law remedies, development in the law is needed to limit the landlord's ability to take financial advantage of impoverished tenants.[2]

In response to this sort of criticism, the New York Legislature has enacted a series of statutory remedies intended to afford the tenant protection when the landlord fails to provide adequate services. The Legislature has been faced, however, with the problem of finding a proper balance between the property rights of the landlord and the human rights of the tenant. As a result, each of these remedies has severe shortcomings which render its operation difficult and at times virtually impossible.[3]

## II. Stay of Proceedings Under Real Property Actions and Proceedings Law Section 755

Section 755, New York's rent withholding provision, provides for a stay of proceedings for eviction on non-payment of rent, or for any action for rent or rental value, when such proceedings are instituted by the landlord.[4] The statute, as amended, makes the remedy available throughout the state.[5] There are two alternative sections, 1(a) and 1(b), under which the tenant may move for a stay.

Section 1(a) has two requirements. First, the tenant must prove that a notice or order to remove a nuisance or violation, or to make necessary and proper repairs, has been issued by the municipal department charged

1. See generally Quinn & Phillips, The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future, 38 Fordham L. Rev. 225 (1969) [hereinafter cited as Quinn & Phillips]; Schoshinski, Remedies of the Indigent Tenant: Proposal for Change, 54 Geo. L.J. 519 (1966).

2. Quinn & Phillips 250.

3. For a procedural review, see N. LeBlanc, A Handbook of Landlord-Tenant Procedures and Law, with Forms (2d ed. 1969).

4. N.Y. Real Prop. Actions Law § 755(1)(a) (McKinney Supp. 1971).

5. Id. § 755.

with the responsibility of enforcing the multiple dwelling law or applicable housing code. Secondly, the court must find that the condition against which the order is directed is equivalent to a constructive eviction of the tenant from a portion of the premises, or that the condition is, or is likely to become, dangerous to life, health or safety. If these requirements are met, a stay will be granted. Under this section, with the violation or violations being of record, the burden falls upon the landlord to prove that the condition does not endanger life, health or safety, or that it has been repaired or removed.[6]

Under Section 1(b), which does not require violations of record, the court may still grant the stay if, in its opinion, proper proof is made that a condition exists such as to constructively evict the tenant from a portion of the occupied premises, or if the premises are, or are likely to become, dangerous to life, health or safety. Although the section does not expressly so indicate, a fair reading indicates that the burden of proof is on the tenant to prove the hazardous condition.[7]

Section 1(c) states an important exception, in that the court may not grant a stay where it appears that the condition was caused either by the wilful or negligent act of the tenant or his agent.[8]

Prior to the 1969 amendments to section 755, the requisite condition was limited to one constituting constructive eviction. In this regard, court standards varied widely as to what conditions were sufficient for a stay under section 755. One commentator stated:

> The violations of record must be sufficiently dangerous to be tantamount to a constructive eviction. Generally, that means that there are violations which are serious in nature and constitute a danger to the tenant's health and safety. In actual fact, it varies considerably from judge to judge as to what constitutes a sufficient number of violations or a sufficiently serious violation. For some judges, any violation is sufficient to obtain a 755 Order. With other judges, the building must be nearly falling down before they will grant the tenant a 755 Order. Certain types of violations are more meaningful to the court than others. Such violations include no heat, rat infestation, no water, no hot water, or fire department violations. Violations regarding failure to repair usually must be quite numerous before they constitute a good basis for a 755 Order.[9]

6. Id. § 755(1)(a).
7. Id. § 755(1)(b).
8. Id. § 755(1)(c).
9. N. LeBlanc, supra note 3, at 13.

There has been, additionally, some question as to the requirements for finding a constructive eviction under the statute. At common law, constructive eviction requires abandonment of the premises.[10] However, the legislative intent of section 755 seems clear from the text. The requirement of abandonment would make little sense in a statute which is designed as a defense to an action for eviction. Thus, most courts have rightly held that there is no such requirement,[11] although one recent case has inexplicably found difficulty in reconciling the concept of a constructive eviction without an abandonment.[12]

The problem is obviated, however, by the additional language in the amended statute: "is, or is likely to become, dangerous to life, health, or safety," which gives the courts adequate leeway in evaluating the seriousness of the condition. This language is open to interpretation, however, and, like the prior constructive eviction standard, will require a substantial hazard to obtain a section 755 stay.[13] There is, therefore, some uncertainty as to what qualifies for a stay of proceedings. One may conclude that the many smaller, harassing annoyances will not suffice to justify granting a stay. Since the statute is defensive only, it provides no affirmative method for correcting hazards other than withholding rent and waiting for the landlord's action to dispossess.[14]

Even more importantly, rentals must be deposited with the court in lieu of payment to the landlord.[15] When the condition is rectified, *the landlord receives all the rentals due.* Alternatively, the court has the right to disburse deposited funds to contractors for the effectuation of repairs or the payment of outstanding debts to suppliers of essential

10. Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).

11. Malek v. Perdina, 58 Misc. 2d 960, 297 N.Y.S.2d 14 (Civ. Ct. 1969). For a case decided under the prior law (Civ. Prac. Act § 1446-a), see Emray Realty Corp. v. DeStefano, 5 Misc. 2d 352, 160 N.Y.S.2d 433 (Sup. Ct. 1957).

12. Buddwest & Saxony Properties, Inc. v. Layton, 62 Misc. 2d 171, 308 N.Y.S.2d 208 (Yonkers City Ct. 1970).

13. For a pre-amendment finding, see De Koven v. 780 West End Realty Co., 48 Misc. 2d 951, 266 N.Y.S.2d 463 (Civ. Ct. 1965). For a finding as to conditions dangerous to life, health or safety, under Article 7-A, N.Y. Real Prop. Actions Law §§ 769-782 (McKinney Supp. 1971), see Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (Civ. Ct. 1965). See also Buddwest & Saxony Properties, Inc. v. Layton, 62 Misc. 2d 171, 308 N.Y.S.2d 208 (Yonkers City Ct. 1970).

14. After loss of a § 755 defense, an eviction warrant may still be stayed. N.Y. Real Prop. Actions Law § 751 (McKinney 1963).

15. Id. § 755(2).

services.[16] In either case, the landlord risks only a delay in obtaining rent monies by failing to repair and waiting for a court decree. If such a decree is forthcoming, the landlord pays only what he would have had to pay in any case; the balance of funds are returned to him. If the court finds the condition not to be dangerous to life, health or safety, or not to be the equivalent of a constructive eviction, the decree will never eventuate.

These weaknesses combine to render the section 755 remedy a somewhat ineffective solution to tenant problems. Some of these weaknesses were considered in the enactment of Article 7-A of the Real Property Actions and Proceedings Law.

### III. "Rent Strikes" by Tenant Groups Under Real Property Actions and Proceedings Law Article 7-A

The Article 7-A proceeding is an affirmative proceeding, instituted by service of petition issued by the court. It requires one-third of all tenants in a multiple dwelling[17] in the City of New York to act in concert. The requisite grounds for such action are as follows:

> [T]here exists in such multiple dwellings or in any part thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or *any other condition dangerous to life, health or safety*, which has existed for five days, or an infestation by rodents, or any combination of such conditions.[18]

It is notable that Article 7-A does not refer to conditions *likely to become* dangerous to life, health or safety as does section 755. This distinction, coupled with the five-day existence clause, makes this proceeding more of an emergency provision.[19] However, it appears that such

16. Id. § 755(3), as amended (McKinney Supp. 1971).

17. In Article 7-A a multiple dwelling is defined as "any dwelling which constitutes a multiple dwelling as defined in the multiple dwelling law, of six or more apartments." N.Y. Real Prop. Actions Law § 782 (McKinney Supp. 1971). This differs from the normal definition of multiple dwelling. See N.Y. Mult. Dwell. Law § 4(7) (McKinney Supp. 1971) (residence of three or more families living independently).

18. N.Y. Real Prop. Actions Law § 770 (McKinney Supp. 1971) (emphasis added).

19. Kahn v. Riverside Syndicate, Inc., 34 App. Div. 2d 515, 308 N.Y.S.2d 65 (1st Dept.), motion for leave to appeal denied, 27 N.Y.2d 724, 262 N.E.2d 672, 314 N.Y.S.2d 531 (1970), noting emergency situation required.

action is applicable even in a situation short of an emergency, but where services essential to life, health or safety have been denied.[20] The term "life, health or safety," however, is still subject to the same problem of interpretation as under section 755.

Article 7-A also requires withheld rents to be deposited with the court, but in the implementation of a judgment rendered in an Article 7-A proceeding, the court may appoint an administrator (an attorney, certified public accountant or licensed real estate broker) to take over the operation of the multiple dwelling, using the deposited rent funds for operating capital.[21] This remedy has also been used in a case where fire damage had rendered part of a dwelling uninhabitable, and the landlord, seemingly, was no longer operating the building. The administrator is given the power not only to repair the building, but also to rent restored apartments and to re-rent as apartments become available.[22]

In addition to the problems discussed above, there is a further difficulty, not limited to Article 7-A and section 755, but applicable to any actions against the landlord by the tenant. A periodic tenant, a tenant at sufferance and a tenant on lease risk eviction, either on thirty days notice, or at the expiration of the lease, by either defending or instituting procedures to correct housing violations.[23] This so-called retaliatory eviction has been the subject of much legal comment, and some court recognition, but still remains a great deterrent to the tenant's availing himself of his legal rights.[24] For the tenant at sufferance, and for the lessee as the expiration of the lease approaches, the fear of retaliation is a real concern, and unless the tenant is prepared to find new accommodations, the usefulness

20. Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (Civ. Ct. 1965).

21. N.Y. Real Prop. Actions Law § 778 (McKinney Supp. 1971).

22. Oyola v. Combo Creditors, Inc., 64 Misc. 2d 727, 315 N.Y.S.2d 666 (Civ. Ct. 1970).

23. N.Y. Real Prop. Law § 228 (30 days for tenant at will or by sufferance); § 232(a) (30 days for monthly tenancy within city of New York); § 232(b) (one month notice to terminate monthly tenancy or month-to-month tenancy outside the city of New York) (McKinney 1968).

24. The leading case in the area of retaliatory evictions is Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). See also Thorpe v. Housing Authority, 393 U.S. 268 (1969); Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. 1962); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968).

A few states have passed anti-retaliatory eviction statutes, See, e.g., Ill. Rev. Stat., ch. 80, § 71 (Smith-Hurd 1965); Mich. Comp. Laws § 600.5646(4) (Supp. 1972).

of such remedies as section 755 and Article 7-A diminishes markedly. Relocation is rarely the practical option of the urban ghetto tenant. Article 7-A provides some strength in numbers, under the presumption that the landlord will not evict a substantial number of tenants. However, the Article 7-A proceeding requires organization, and the organizer may be subject to an even greater risk of retaliation.[25]

The Article 7-A proceeding gives considerably more power to the tenant than does section 755. However, organization is difficult; tenants are frequently unwilling to "stick their necks out," and the facts must "sustain the existence of the emergency situation which the Legislature envisaged when Article 7-A was enacted in 1965."[26] Of course, the landlord retains the defense that the condition was caused by the fault of the petitioners.[27] In addition, the remedy of rent withholding exposes the landlord to no greater risk or expenditure, as the withheld monies are used only to make the necessary repairs and the balance is returned to the landlord. Also, even under Article 7-A, the landlord can show his willingness to make repairs, give the court assurances as to time, and retain management of his estate.[28]

## IV. Rent Abatement Under Multiple Dwelling Law Section 302(a)

The legislature, realizing the inherent weakness in rent withholding, has also specified circumstances under which rent may be abated. Section 302(a) applies to cities with populations of 400,000 and over.[29] It covers conditions which constitute, or which will constitute if not promptly corrected, a fire hazard or a serious threat to the life, health or safety of the occupants. However, this statute encourages the landlord to delay, since the right to abate is subject to three qualifications: (1) notice of violation must be on file in the municipal department records; (2) notice must have been given to the last registered owner; and (3) such violation must exist for *six months* from time of notice.[30]

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25. For the unfortunate result of an attempt at such organization, see Lincoln Sq. Apts. v. Davis, 58 Misc. 2d 292, 295 N.Y.S.2d 358 (Civ. Ct. 1968) aff'd per curiam, 64 Misc. 2d 859, 316 N.Y.S.2d 130 (Sup. Ct. 1969).

26. Kahn v. Riverside Syndicate, Inc., 34 App. Div. 2d 515, 516, 308 N.Y.S.2d 65, 66 (1st Dep't), motion for leave to appeal denied, 27 N.Y.2d 724, 262 N.E.2d 672, 314 N.Y.S.2d 531 (1970).

27. N.Y. Real Prop. Actions Law § 775 (McKinney Supp. 1971).

28. Id. § 777.

29. The Multiple Dwelling Law itself applies to cities with a population of 500,000 or over. N.Y. Mult. Dwell. Law § 3(1) (McKinney Supp. 1971).

30. Id. § 302(a)(3)(a).

The statute does not allow the tenant to recover rents voluntarily paid during the six-month period. The tenant often does not know if the violation has been recorded, and notice may be difficult to achieve and prove. It is the six-month delay provision itself, however, that is especially questionable when one recalls that the situation to be remedied is a fire hazard or a serious danger to life or health. If the purpose of the statute is to coerce the landlord to repair or rectify the condition, it seems slight coercion indeed. On the other hand, if its purpose is to remedy a dangerous condition, or to recompense the tenant for his time without service, then there should not be a six month delay.[31]

## V. The Remedy for Welfare Recipients Under Social Services Law Section 143(b)

Section 143(b),[32] known as the Spiegel Law, is perhaps New York's most theoretically effective piece of remedial legislation, although the statute benefits only welfare recipients. As the Department of Welfare is allowed to pay rent directly to the landlord, and can withhold payment where it has knowledge of any violation of law which is dangerous, hazardous, or detrimental to life or health, the power to control the landlord's actions is apparently greater in this statute than in any other. It is notable, however, that only the Welfare Department and not the individual tenant can invoke the section 143(b) remedy.

A further remedy available under section 143(b) is the ability to initiate a proceeding before the appropriate housing rent commission to lower the maximum rent allowable for lack of essential services to which the tenant is entitled. The legislative intent of the provision is clear:

> The legislature hereby finds and declares that certain evils and abuses exist which have caused many tenants, who are welfare recipients, to suffer untold hardships, deprivation of services and deterioration of housing facilities because certain landlords have been exploiting such tenants by failing to make necessary repairs and by neglecting to afford necessary services in violation of the laws of the state. Consequently, in the public interest, the necessity for the enactment of the provisions of this act is hereby declared as a matter of legislative determination.[33]

31. For a discussion of the statute, see Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971).

32. N.Y. Soc. Services Law § 143(b) (McKinney 1966). See also N. LeBlanc, supra note 3, at 11-12.

33. Ch. 997, § 1, [1962] McKinney Sess. Laws of N.Y. 3207.

It is significant that serious slum conditions exist in areas where the proportion of welfare recipients is high. Presumably, due to such factors as departmental overwork, limited numbers of staff lawyers and a fear of discouraging landlords from accepting welfare tenants, the remedy is not invoked more frequently and more effectively.

### VI. Rent Control Protections and the New Rent Control Statute

Rent control in New York was an emergency measure caused by the critical post-war housing shortage.[34] The shortage still exists, although *adequate* housing may be a better description of the missing quantity. In recognition of the existence of this condition, the New York Legislature, effective June 30, 1971, extended the Emergency Rent Control Law for an additional two years.[35] This same act, however decontrols apartments presently under control as they become vacant. The purposes of the statute, as stated by Governor Rockefeller of New York, are: (1) to attack the ills caused by rent control; (2) to restore reasonable market incentives for the maintenance and upgrading of housing; (3) to discourage the appalling abandonment of housing; and (4) to establish an atmosphere conducive to massive construction of new housing by the private sector.[36]

The controlled tenant has in the past been subject to minor harassment because the landlord was entitled to a small statutory increase in maximum rent allowable if a vacancy occurred.[37] Under the new law, the landlord has greater incentive to cause vacancies, as decontrol provides the landlord with the right to determine the rental amount.[38] The legislature, realizing the temptation it was providing for landlords, included a strict set of provisions against tenant harassment:

34. In 1942, the United States government instituted the first emergency rent controls under the Emergency Price Control Act of 1942, ch. 26 § 2, 56 Stat. 24, repealed, Act of Sept. 6, 1966, Pub. L. No. 89-554 § 8(a), 80 Stat. 651. In New York, commercial rent control was enacted in 1945, N.Y. Unconsol. Law §§ 8521-8538 (McKinney 1961), business rent control, also in 1945, N.Y. Unconsol. Law §§ 8551-8567 (McKinney 1961), and residential control in 1946, N.Y. Unconsol. Law §§ 8581-8597 (McKinney 1961).

35. N.Y. Unconsol. Law §§ 8581-82 (McKinney Supp. 1971). Under this act, § 8582(2)(i) specifically decontrols apartments as they become vacant.

36. Governor's Memoranda [1971] McKinney Sess. Laws of N.Y. 2608-09.

37. N.Y. Unconsol. Law §§ 8582, 8584 (McKinney Supp. 1970), as amended, N.Y. Unconsol. Law §§ 8582, 8584 (McKinney Supp. 1971).

38. For status of rent upon vacation of rent-controlled premises, see N.Y. Unconsol. Law § 8582(i),(*l*) (McKinney Supp. 1971). Note: if decontrol is either by commission determination or by municipal decision, see N.Y. Unconsol.

It shall be unlawful for any landlord or any person acting on his behalf, with intent to cause the tenant to vacate, to engage in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations.[39]

The Rent Control Commission has the power of enforcement under this section. The commission may in its discretion apply to the supreme court for an injunction enforcing compliance with the provision,[40] or may certify the facts to the district attorney of any county having jurisdiction, with the applicable sanctions being a fine of not more than $5,000 or imprisonment for not more than one year, or both.[41] Although the injunctive remedy and the deterrent effect of criminal sanctions may work to the advantage of the tenant, he may not bring the action himself, and is dependent upon the commission. However, the legislature has seen fit to provide the tenant with a separate remedy for landlord harassment which has caused an abandonment:

Any tenant who has vacated his housing accommodations because the landlord or any person acting in his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations may, within ninety days after vacating, apply to the commission for a determination that the housing accommodations were vacated as a result of such conduct, and may, within one year after such determination, institute a civil action against the landlord by reason of such conduct. In such action the landlord shall be liable to the tenant for three times the damages sustained on account of such conduct plus reasonable attorney's fees and costs as determined by the court. In addition to any other damages the cost of removal of property shall be a lawful measure of damages.[42]

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Law § 8592(2-a) (McKinney Supp. 1971). Note also local rent stabilization statutes that may affect landlord's freedom to increase rent beyond a certain limit.

39. N.Y. Unconsol. Law § 8590(5) (McKinney Supp. 1971).
40. Id. § 8591(1) (McKinney 1961).
41. Id. § 8591(2).
42. Id. § 8591(7) (McKinney Supp. 1971).

With respect to this last provision, Governor Rockefeller noted that "this measure recognizes the fears of tenants and enacts strong deterrents —including provisions for the award of attorney's fees to insure that even the poorest person will have access to his legal rights."[43]

Unfortunately, this purpose may not in fact be effected by the statute. Under this section, the tenant must *vacate his premises* before he has a cause of action. It bears the same disadvantage as the common law constructive eviction, where abandonment is required for relief from rent.[44] The purpose of statutory remedies for a denial of essential services is to circumvent the requirement of abandonment. Otherwise, the common law remedy of constructive eviction would be adequate protection against denial of essential services. Now the legislature has reverted to an old standard: first you leave, and then you determine your rights.

Although the new provision suggests a successful deterrent against landlord harassment of tenants, there are several additional factors that should be considered. First, similar to housing codes, the enforcement of the criminal sanctions under the statute may be far less effective than would be supposed from the text.[45] Secondly, there is complete dependence on the discretion of the Rent Commission to bring an action while the tenant is in possession, and to render a finding of harassment if the tenant vacates. Thirdly, the abandonment requirement limits the tenant's personal remedy, as he must choose between vacating or foregoing his cause of action.[46] Fourthly, the decontrol provisions of the new law encourage the landlord to maintain run-down conditions, for it should be noted that disrepair and dissatisfaction help cause the *voluntary* vacating of controlled and decontrolled units.

These failings may well render the new provision relatively ineffective in preventing or remedying harassment.

## VII. New Common Law Remedies

An examination of the foregoing statutes shows that the legislature is either unwilling, or unable, to overcome the bias inherent in the land-

43. Governor's Memoranda [1971] McKinney Sess. Laws of N.Y. 2609.

44. Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).

45. E.g., Quinn & Phillips 240, n.36 ($50 fine under housing code for violation costing $42,500 to correct). See also Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254 (1966).

46. There is also a possible remedy in asking the rent commission to go to the court and get an order under N.Y. Unconsol. Law § 8591(5) (McKinney Supp. 1971).

lord's basic property right to free alienation of his freehold estate.[47] The imbalance results in tenant problems in two major categories. The first involves conditions where the landlord, for whatever reason, has failed to provide the measure of essential services required for healthful, safe living. The second deals with intentional actions of the landlord, whether to cause a tenant to vacate, to cause him to agree to a rent increase, or simply as retaliation, where such actions do not amount to a denial of essential services.

In both areas, the statutory remedies fail to provide adequate relief. There exist, however, based upon recent case law, effective solutions for each set of problems.

### A. Denial of Essential Services and the Warranty of Habitability

At early common law, the landlord-tenant relationship was considered purely contractual, with the lessee acquiring no rights in the land.[48] As the law developed, however, the leasehold became an estate in land, and the lease itself a conveyance.[49] The landlord's sole responsibilities were to deliver the right to possession, and thereafter not to interfere with that possession.[50] The lease acquired a non-contractual nature, so that covenants between landlord and tenant were construed independently.[51] Therefore, the tenant's duty to pay rent was independent of the landlord's promise to repair, or to provide services. As a result, if the tenant had an action for damages for breach of covenant, he was still liable for the rent.

Recently, however, several important appellate court decisions in other jurisdictions have returned to a more contractual approach to the lease, and have found both an implied warranty of habitability, and a mutuality of covenants, making the payment of rent and the providing of essential services mutually dependent.

In *Lemle v. Breeden*,[52] the tenant brought an action for damages resulting from rat infestation of a furnished dwelling. The Supreme Court of Hawaii found an implied warranty of habitability. Through comparisons with the warranty of merchantability from sales law,[53] and with applications of this concept to the sale of new homes,[54] the court de-

47. Quinn & Phillips 249-251.
48. 2 R. Powell, The Law of Real Property § 221(1), at 177 (1967).
49. Id. at 178
50. Quinn & Phillips, 235 n.18.
51. J. Calamari & J. Perillo, The Law of Contracts, § 162, at 257-259 (1970).
52. 51 Hawaii 426, 462 P.2d 470 (1969).
53. Id. at 432, 462 P.2d at 473.
54. See Schipper v. Levitt & Sons Inc., 44 N.J. 70, 207 A.2d 314 (1965).

termined that as a matter of public policy a warranty of habitability should be implied in leasing agreements. The court in *Lemle* construed the lease to be primarily a contractual relationship, with mutuality of covenants, providing the lessee with the full range of contract remedies.[55] Although *Lemle* involved a furnished dwelling, the decision was not limited to furnished premises, and the court reaffirmed its holding as to unfurnished dwellings shortly thereafter.[56]

In *Marini v. Ireland*,[57] the tenant had repaired a cracked and leaky toilet, and deducted the amount from her rent. The landlord brought an action to evict for non-payment of rent. The Supreme Court of New Jersey utilized a contract theory to find an implied warranty of habitability. The court found that, since the lease restricted the use of the property to "dwelling," this implied that the object of the agreement was suitable living quarters. Further, the court found that the implied warranty and the covenant to pay rent were mutually dependent.[58] In so finding, the court upheld the tenant's right to correct essential service deficiencies, and to deduct the cost from the rent.

In the leading case of *Javins v. First Nat'l Realty Corp.*,[59] the U.S. Court of Appeals for the District of Columbia found an implied warranty of habitability based on the housing regulations of the District of Columbia. In *Javins*, the three appellants, defending an action to evict for failure to pay rent, offered to prove about 1,500 violations of the District of Columbia Housing Regulations within the premises. The court stated:

> [W]e . . . hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.[60]

In effect, the court in *Javins* found an implied warranty of compliance with housing regulations, and just such a statute was added to the District of Columbia Housing Regulations.[61]

55. 51 Hawaii 426, 432-33, 462 P.2d 470, 474 (1969).
56. Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969).
57. 56 N.J. 130, 265 A.2d 526 (1970).
58. Id. at 145-46, 265 A.2d at 534-35. On constructive conditions, see J. Calamari and J. Perillo, The Law of Contracts, §§ 141-49, at 229-36 (1970).
59. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).
60. Id. at 1072-73.
61. D.C. Housing Regs. § 2902.2 (1971).

Although the appellate courts of New York have not as yet ruled with respect to an implied warranty of habitability, trends indicate that such an implied warranty may be established.

In *Garcia v. Freeland Realty, Inc.*,[62] the Civil Court of the City of New York, New York County, failed to find such an implied warranty, but held that the landlord had a duty to maintain the premises in a habitable condition because of the requirements of the Multiple Dwelling Law.[63] The same court, however, in *Amanuensis, Ltd. v. Brown*,[64] did find an implied warranty as a defense to the landlord's action for rent. The court held that violations of the Housing Code and the Multiple Dwelling Law would permit a defense in eviction proceedings for nonpayment of rent where (1) the landlord has acted in bad faith, and serious violations impairing habitability exist, or (2) where the violations are substantial and code enforcement has been ineffective, or (3) where violations are substantial, and their continuance is part of a purposeful effort to force tenants to leave their apartments.[65] In reaching its decision, the court distinguished two appellate division cases[66] on the grounds that in those cases (1) that landlord had acted in good faith; (2) the violation did not significantly impair habitability; and (3) routine housing code enforcement was expected to be effective.[67]

Should the higher courts in New York follow the *Amanuensis* decision, and extend the concepts therein to a general warranty of habitability, the remedies of the tenant in cases of denial of essential services will be greatly expanded.

### B. Harassment without Denial of Essential Services

Where there is no denial of essential services, clearly the foregoing statutes, as well as an implied warranty of habitability, will not provide adequate relief. However, there may be an effective remedy under the implied warranty of quiet enjoyment.

This warranty has been long implied in the leasehold relationship. It

62. 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970).

63. N.Y. Mult. Dwell. Law §§ 78, 80 (McKinney 1961).

64. 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971).

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

66. Davar Holdings, Inc. v. Cohen, 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), aff'd mem., 280 N.Y. 828, 21 N.E.2d 882 (1939); Emigrant Indus. Sav. Bank v. One Hundred Eight W. Forty Ninth St. Corp., 225 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep't 1938), aff'd mem., 280 N.Y. 791, 21 N.E.2d 620 (1939).

67. 65 Misc. 2d at 19, 318 N.Y.S.2d at 16.

"affords protection to a lessee in his enjoyment of the leased land as against wrongful acts of the lessor or by one who has a title paramount."[68] The breach of this covenant may justify equitable relief by way of an injunction.[69] If the tenant gives up his possession it may result in a constructive eviction, freeing the tenant from liability for rent.[70] However, the law has been established that:

> The wrongful conduct of a lessor that merely results in an interference with the enjoyment of leased land does not relieve the lessee from his obligation to pay rent. If this results in a breach of the lessor's covenant for quiet enjoyment the lessee may be entitled to damages but in the absence of a provision to the contrary the covenants in a lease are independent.[71]

This limitation, however, may be changed under the theory evolved in warranty of habitability cases. The courts should apply the mutuality of covenants rationale to the warranty of quiet enjoyment. If the rent covenant were conditioned upon the covenant of quiet enjoyment, the tenant could deduct his damages from his rental payments.[72]

An additional remedy for harassment without denial of essential services may be found in the application of tort theory to the landlord-tenant relationship. The New York Supreme Court has already done this in *Scheman v. Schlein.*[73]

In this case, plaintiff-landlord filed suit for libel. Defendant-tenants counterclaimed, seeking damages for the landlord's harassment on the grounds of prima facie tort. The landlord moved to dismiss the counterclaims for failing to state a cause of action. The tenants claimed that the landlord had committed wilful and deliberate acts of misconduct in order to cause the tenants either to consent to a rent increase or to move from their dwellings, rent-controlled apartments in New York City. Tenants alleged that the landlord made telephone calls at extremely late hours and threatened to bring unfounded litigation.

It was further alleged that the landlord persuaded his daughter and

68. W. Burby, Handbook of the Law of Real Property, § 62, at 147 (3d ed. 1965).
69. Id. § 62 at 148.
70. Id.
71. Id. § 76 at 173.
72. See notes 48-55 supra and accompanying text.
73. 35 Misc. 2d 581, 231 N.Y.S.2d 548 (Sup. Ct. 1962).

son-in-law to take possession of the apartment directly above and to create disturbing noises at late hours. The landlord moved to dismiss the counterclaim on the basis of failure to plead special damages, a requirement of a cause of action in prima facie tort. The court held, however, that the cause of action lay in traditional tort, sounding in intentional infliction of mental distress. Although there was some evidence of physical injury in *Scheman*, the court stated that there was no such prerequisite for recovery, citing *Battalla v. State of New York*.[74]

The court also noted that both injunction and punitive damages were available as remedies, without pleading special damages, as the action sounded in traditional tort.[75] The *Scheman* case has since been favorably cited for the application of *Battalla* to intentional torts.[76] It stands as an available yet little-known approach to the problem of harassment where the landlord has not denied essential services. The greatest advantage of this tort remedy is the fact that it is unrelated to, and therefore unlimited by, the inequality inherent in the landlord-tenant relationship.

## VIII. Conclusion

It may be fairly stated that New York's legislative remedies have failed to solve the basic problem inherent in the landlord-tenant relationship. These failings are manifested by time delays in causes of action, requirements in some cases of abandonment of the premises, provisions for return of withheld monies to the landlord without penalty, and lack of effective coercive sanctions.

While the early common law viewed the landlord-tenant relationship

74. Id. at 583, 231 N.Y.S.2d at 551, citing Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (holding that physical injury is not necessary for a cause of action in negligent infliction of mental distress). See also Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958); Halio v. Lurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961).

75. Scheman v. Schlein, 35 Misc. 2d 581, 584-85, 231 N.Y.S.2d 548, 552-53 (Sup. Ct. 1962).

76. See Kalina v. Gen. Hosp. of City of Syracuse, 18 App. Div. 2d 757, 235 N.Y.S.2d 808, 810 (4th Dep't 1962) (dissenting opinion), aff'd mem., 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963); Ruiz v. Bertolotti, 37 Misc. 2d 1067, 1069, 236 N.Y.S.2d 854, 856 (Sup. Ct. 1962), aff'd mem., 20 App. Div. 2d 628, 245 N.Y.S.2d 1003 (2d Dep't 1963) (deliberate malevolent conduct confined purely to words); Haight v. McEwen, 43 Misc. 2d 582, 583, 251 N.Y.S.2d 839, 841 (Sup. Ct. 1964). See also Kharas & Koretz, Property, 15 Syracuse L. Rev. 295, at 302 (1963); Tymann, Bystander's Recovery for Psychic Injury in New York, 32 Albany L. Rev. 489, at 492 (1968).

as requiring no more of the landlord than a right to possession and non-interference, present requirements of necessity impose responsibilities of upkeep, maintenance and provision of services upon the landlord. Once such duties exist, the very foundation of the law should change. It is tempting, therefore, in view of recent case law developments discussed above, to place the burden of revision of the landlord-tenant relationship on the courts, asking them to mold the common law, as it is developing, to encompass present needs, to achieve a fair balance of power between landlord and tenant. This, however, the courts seem reluctant to undertake.

In a recent New York Supreme Court case,[77] the court noted that it was the role of the legislature to change such ancient foundations of common law, and refused to find a general implied warranty of habitability in a clearly sub-standard dwelling. In *Lindsey v. Normet*, the United States Supreme Court recently stated that:

> Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative and not a judicial function. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.[78]

It seems clear, therefore, that the legislature must act to resolve the plight of the urban tenant. Such remedies as causes of action based on implied warranties of habitability, quiet enjoyment, and freedom from harassment, with stringent sanctions, are necessary. In his dissent in *Lindsey*, Mr. Justice Douglas quoted Judge Wright's description of the fundamental problems attendant with reform in this area:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and door, proper sanitation, and proper maintenance.[79]

77. Golden v. Gray, 327 N.Y.S.2d 458 (Sup. Ct. 1971).

78. Lindsey v. Normet, 92 S. Ct. 862, 874 (1972).

79. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), as quoted in Lindsey v. Normet, 92 S. Ct. at 880 (Douglas, J., dissenting).

Mr. Justice Douglas further stated:

> This vital interest that is at stake may, of course, be tested in so-called summary proceedings. But the requirements of due process apply and due process entails the right "to sue and defend in the Courts," a right we have described as "the alternative to force" in an organized society.[80]

80. 92 S. Ct. 862, 880, citing Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907).