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# RETALIATORY EVICTION PROTECTION IN NEW YORK— UNRAVELING SECTION 223-b

## INTRODUCTION

An inherent conflict exists within the typical landlord-tenant relationship. The landlord views renting as a business; the tenant regards the premises as his home. These divergent interests become apparent when the landlord decides that he no longer wishes to rent to the tenant. This private conflict becomes a public concern when the landlord uses his power of eviction to retaliate against tenants who have been active in improving their housing conditions. Retaliatory eviction, a practice which "might have been called anything; 'vengeful eviction' or, simply, 'getting even,'"<sup>1</sup> has caused great concern among tenants in recent years.<sup>2</sup> The New York legislature responded by enacting section 223-b of the Real Property Law,<sup>3</sup> a statute designed to prevent retaliatory eviction.<sup>4</sup>

This Note examines the protections section 223-b gives tenants and addresses the problems which courts may face in applying the statute. Particular attention will be given to the issues of establishing retaliatory motive and the relief available once retaliatory eviction has been proven.

## I. AN OVERVIEW OF THE RETALIATORY EVICTION PROHIBITION

### A. *The Development of Retaliatory Controls*

Traditionally, tenants have had little recourse against the capricious behavior of their landlords. A New York landlord could evict, for any reason, a tenant who remained on the premises after the expiration of the lease or the landlord's termination of a periodic tenancy<sup>5</sup> by means of an action in

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1. *Markese v. Cooper*, 70 Misc. 2d 478, 479, 333 N.Y.S.2d 63, 66 (Monroe County Ct. 1972). Because this type of eviction usually occurs at the end of a rental term or period, it has been referred to as retaliatory termination. Levy, *Adjusting the Economic Relationship of Landlord and Tenant—Rent Alteration Remedies*, 11 Urb. L. Ann., 155, 182 (1976).

2. E.g., Letter from Thatcher Homes Tenant Association to Gov. Hugh Carey (July 11, 1979) (on file with the *Fordham Law Review*); Letter from Corn Hill People, United, Inc. to Gov. Hugh Carey (July 9, 1979) (on file with the *Fordham Law Review*); Letter from New York State Rural Housing Coalition to New York State Legislature (May 14, 1979) (on file with the *Fordham Law Review*).

3. N.Y. Real Prop. Law § 223-b (McKinney Supp. 1979).

4. The new law is one of many enacted within the past few years designed to give tenants greater rights. E.g., N.Y. Gen. Bus. Law § 352-eee (McKinney Supp. 1979) (eviction protection for tenants when premises are being converted to cooperatives or condominiums); N.Y. Real Prop. Law § 226-b (McKinney Supp. 1979) (right to sublease or assign); N.Y. Real Prop. Law § 230 (McKinney Supp. 1979) (protection for membership in a tenants' association); N.Y. Real Prop. Law § 235-b (McKinney Supp. 1979) (warranty of habitability); N.Y. Real Prop. Law § 235-c (McKinney Supp. 1979) (protection for unconscionable lease or clause).

5. A tenant in possession without the permission of the landlord was considered a trespasser at common law, *Stern v. Equitable Trust Co.*, 238 N.Y. 267, 269, 144 N.E. 578, 578 (1924), and is regarded as a holdover under present New York statutory law. N.Y. Real Prop. Law § 232-c (McKinney 1968). The landlord can either decide to make a new agreement with this tenant or to evict. *Id.* Where there are provisions in a lease giving the tenant the right to a renewal of the tenancy, however, the landlord cannot evict at the end of the rental term, *Kuppers v. Tortora*

ejectment<sup>6</sup> or a summary proceeding.<sup>7</sup> Tenants risked eviction for engaging in activities that ran counter to the landlord's wishes, even if those activities were lawful. More recently, however, several courts have restricted the right of landlords to use eviction as a means of retaliation against their tenants.

The prohibition of retaliatory eviction derived from various policy and constitutional grounds. For example, the landlord is not "free to evict in retaliation for his tenant's report of housing code violations to the authorities."<sup>8</sup> To do otherwise "would clearly frustrate the effectiveness [of housing

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Agency, Inc., 63 Misc. 656, 659, 313 N.Y.S.2d 225, 227 (Civ. Ct. N.Y. 1970), and therefore the retaliatory eviction issue would not arise.

6. *Smith v. Littlefield*, 51 N.Y. 539, 541 (1873).

7. The procedure through which a landlord can remove a tenant in summary form is contained in New York's Real Property Actions and Proceedings Law, N.Y. Real Prop. Acts. Law §§ 701-782 (McKinney 1979), and Real Property Law, N.Y. Real Prop. Law §§ 228, 232-a, 232-b, 232-c, (McKinney 1968). Section 711 of the Real Property Actions and Proceedings Law sets forth the grounds for removal of a tenant by a special proceeding. One basis of removal is a tenant remaining in possession after expiration of the term without permission of the landlord. N.Y. Real Prop. Acts. Law § 711(1) (McKinney 1979). In the case of a tenancy for a definite term, there is no statutory notice of termination requirement. N.Y. Real Prop. Law § 232-b (McKinney 1968).

Proper notice is the sole requirement of termination in the case of periodic tenancies. *See, e.g.*, N.Y. Real Prop. Law §§ 232-a, 232-b (McKinney 1968). Once it has been given and the tenant holds over, the landlord can evict through a holdover summary proceeding. N.Y. Real Prop. Law § 232-c (McKinney 1968). The mechanics of termination of a month-to-month periodic tenancy are set forth by statute. N.Y. Real Prop. Law §§ 232-a, 232-b (McKinney 1968). In New York City, a landlord must give a tenant written notice of at least 30 days; outside New York City, at least one month's notice is required. *Id.* The length of notice of termination of other types of periodic tenancies continue to be governed by common law. *See* 28 Mott St. Co. v. Summit Import Corp., 64 Misc. 2d 860, 863, 316 N.Y.S.2d 259, 263 (Civ. Ct. N.Y. 1970). In a year-to-year tenancy, for example, a landlord must give at least six months notice of termination. *Pugsley v. Aikin*, 11 N.Y. 494, 497 (1854). Tenancies at will require written notice of not less than 30 days. N.Y. Real Prop. Law § 228 (McKinney 1968).

There were a few instances in which a landlord's right of eviction was limited even prior to this retaliatory eviction prohibition. Three of these were noted by the court in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). They concern: (1) where the landlord is a governmental body, it cannot deprive tenants of due process; (2) where emergency rent control legislation is in effect, landlord rights are restricted; (3) a landlord may not oust a tenant in response to the tenant's exercise of voting rights. *Id.* at 689 n.5. Another exception in New York involves legislation which prohibits eviction of a tenant for non-payment of rent if housing code violations are present. N.Y. Mult. Resid. Law § 305-a (McKinney Supp. 1979); N.Y. Real Prop. Acts. Law § 755 (McKinney 1979); N.Y. Soc. Serv. Law § 143-b (McKinney 1976); *see* *Portnoy v. Hill*, 57 Misc. 2d 1097, 1100, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968). Nevertheless, a landlord can evict by waiving non-payment and then bringing a holdover summary proceeding. This gap in the law was alluded to by the court in *Markese v. Cooper*, 70 Misc. 2d 478, 481, 333 N.Y.S.2d 63, 67 (Monroe County Ct. 1972). In addition, in New York publicly assisted housing accommodations, the landlord may not discriminate against tenants because of race or religion. N.Y. Civ. Rights Law § 18-c (McKinney 1976).

8. *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 1016 (1969); *accord*, *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 862-63 (D.C. Cir. 1972); *Schweiger v. Superior Court*, 3 Cal. 3d, 507, 513-17, 476 P.2d 97, 100-03, 90 Cal. Rptr. 729, 732-35 (1970) (en banc); *Clore v. Fredman*, 59 Ill. 2d 20, 27, 319 N.E.2d 18, 22 (1974); *Markese v. Cooper*, 70

codes] as a means of upgrading the quality of housing."<sup>9</sup> If a tenant knows that a landlord could terminate his tenancy in response to the report of a violation, he might hesitate and perhaps refrain from notifying authorities. In addition, other tenants would be discouraged from taking similar action.<sup>10</sup> Because housing code violations might thereby go unreported, the remedial purpose of housing codes would be undermined.<sup>11</sup>

Courts have also recognized that the first amendment secures a tenant's rights to form a tenants' association, to discuss housing conditions with other tenants, and to make complaints to public authorities.<sup>12</sup> This right cannot be impaired by a court sanction of eviction.<sup>13</sup> Accordingly, if a landlord institutes eviction procedures because of the tenant's participation in a tenants' association or complaint, the eviction would be an unlawful infringement of a tenant's exercise of his constitutional rights to hold meetings and report violations.<sup>14</sup>

Misc. 2d 478, 484, 333 N.Y.S.2d 63, 70 (Monroe County Ct. 1972); *Dickhut v. Norton*, 45 Wis. 2d 389, 395-99, 173 N.W.2d 297, 301-02 (1970).

9. *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969)

10. *Id.*

11. *Id.* at 700-01. In *Markese v. Cooper*, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972), the court noted the generally prevalent shortage of building inspectors, which enhances the need for tenants to notify governmental authorities of housing code violations. *Id.* at 483, 333 N.Y.S.2d at 69-70. In New York City, for example, housing inspectors declined in number from 700 in 1972 to 465 as of the end of 1979. Goodwin, *Violations Rise in New Pattern Apartments*, N.Y. Times, Dec. 12, 1979, § B, at 1, col. 1, § B, at 7, col. 7.

12. See, e.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 462-63 (2d Cir. 1978), *Edwards v. Habib*, 397 F.2d 687, 694-96 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 505-06 (S.D.N.Y. 1969); *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 225, 281 A.2d 544, 546 (Super. Ct. App. Div. 1971), *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 632, 339 N.Y.S.2d 281, 286 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973); *Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 255, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972).

13. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 694 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 507 (S.D.N.Y. 1969); *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 225, 281 A.2d 544, 546 (Super. Ct. App. Div. 1971); *Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 255, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972). The reasoning is that "judicial action in private disputes is a form of state action" which requires application of fourteenth amendment due process and equal protection requirements. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 505 (S.D.N.Y. 1969). Therefore, "[a] retaliatory eviction would be judicial enforcement of private discrimination; it would require the application of a rule of law that would penalize a person for the exercise of his constitutional rights." *Id.* at 506. Although all courts which banned retaliatory evictions on constitutional grounds implicitly accepted this argument, at least one declared that judicial resolution of a retaliatory eviction dispute is not a form of state action requiring the application of the fourteenth amendment, *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1226 (S.D.N.Y. 1970), and another held that a claim of retaliation based on constitutional grounds cannot be raised in a summary proceeding. *Lincoln Square Apts., Inc. v. Davis*, 58 Misc. 2d 292, 294, 295 N.Y.S.2d 358, 361 (Civ. Ct. N.Y. 1968), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 130 (App. Term 1st Dep't 1969).

14. See *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969). The court explained that "[t]here would be no point in a tenant trying to improve conditions in a building that he would not be allowed to continue to live in. Permitting retaliatory evictions would thus inhibit him in the exercise of his constitutional rights [and thereby] have a chilling effect." *Id.* at

The prohibition against retaliatory eviction, however, was not uniformly accepted by New York courts. Some lower courts accepted the retaliatory eviction defense when landlords commenced summary proceedings to evict holdover tenants,<sup>15</sup> and some localities adopted local ordinances against the practice.<sup>16</sup> In many areas of New York State, however, tenants were without any protection from retaliation.<sup>17</sup> Moreover, even where the retaliatory eviction doctrine was applied, there was confusion and dispute with regard to the existence of defenses to retaliation,<sup>18</sup> and the availability of a damage cause of action<sup>19</sup> and injunctive relief.<sup>20</sup> Hence, a more comprehensive approach

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506 (footnotes omitted). See also *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 339 N.Y.S.2d 281 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973). The court stated that these first amendment rights "would for all practical purposes be meaningless if the threat of eviction would coerce the most justifiable complaints into a submissive silence." *Id.* at 632, 339 N.Y.S.2d at 286.

A third rationale, discussed in dicta, concerns the citizen's right to inform his government of a violation of law. "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *Edwards v. Habib*, 397 F.2d 687, 697 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), (quoting *In re Quarles & Butler*, 158 U.S. 532, 536 (1895)).

The growth of the retaliatory eviction prohibition primarily involved residential rental housing. It has not gained a comparable degree of acceptance by courts or legislatures in the commercial rental context. This is due to the lack of significant public policy, i.e., improving housing, *see Mobil Oil Corp. v. Rubinfeld*, 48 A.D.2d 428, 432-33, 370 N.Y.S.2d 943, 948-49 (2d Dep't 1975), *aff'd*, 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976), and the availability of other remedies. See *William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 755-56, 556 P.2d 666, 670-71 (1976) (en banc). In a recent Hawaii case, however, a commercial tenant was permitted to use a retaliatory eviction defense. *Windward Partners v. Delos Santos*, 59 Hawaii 104, 117, 577 P.2d 326, 334 (1978).

15. *E.g.*, *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 632, 339 N.Y.S.2d 281, 286 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term. 2d Dep't 1973); *Markese v. Cooper*, 70 Misc. 2d 478, 486-87, 333 N.Y.S.2d 63, 72-73 (Monroe County Ct. 1972); 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 86-87, 368 N.Y.S.2d 122, 125-26 (Long Beach City Ct. 1975); *Portnoy v. Hill*, 57 Misc. 2d 1097, 1100, 294 N.Y.S.2d 278, 279-81 (Binghamton City Ct. 1968). But see *Lincoln Square Apts., Inc. v. Davis*, 58 Misc. 2d 292, 294, 295 N.Y.S.2d 358, 361 (Civ. Ct. N.Y. 1968), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 130 (App. Term. 1st Dep't 1969) (the court rejected a defense of retaliation in summary proceedings).

16. In 1972, Syracuse and Binghamton passed local laws prohibiting retaliatory eviction of tenants. N.Y. State Senator Pisani, *Questions & Answers About the Anti-Retaliation Housing Bill* at 2 (undated) (on file with the *Fordham Law Review*) [hereinafter cited as *Questions & Answers*]; see *Cornell v. Dimmick*, 73 Misc. 2d 384, 387-88, 342 N.Y.S.2d 275, 279 (Binghamton City Ct. 1973) (court applied the Binghamton ordinance).

17. *Questions & Answers*, *supra* note 16, at 1.

18. See *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 507 (S.D.N.Y. 1969); *Lincoln Square Apts., Inc. v. Davis*, 58 Misc. 2d 292, 294, 295 N.Y.S.2d 358, 361 (Civ. Ct. N.Y. 1968), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 130 (App. Term 1st Dep't 1969); *Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 255-56, 329 N.Y.S.2d 148, 150 (Sup. Ct. 1972).

19. Compare *Markese v. Cooper*, 70 Misc. 2d 478, 489, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972) (damages recoverable) with 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 87, 368 N.Y.S.2d 122, 125 (Long Beach City Ct. 1975) (rejecting a damage cause of action).

20. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969). The court held that

was needed to solve effectively the problem of retaliatory eviction on a statewide basis. As one court lamented, "unless the Legislature acts, these admittedly incomplete standards will have to suffice until the slow hand of experience shapes new and better ones."<sup>21</sup>

### B. The Basic Elements of Section 223-b

Against this background, New York joined the growing number of jurisdictions that have enacted legislation against retaliatory eviction.<sup>22</sup> Section 223-b is intended to become "a key ingredient which has been missing" in New York's housing program.<sup>23</sup> The statute makes available to tenants an

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injunctive relief was not available to prevent an eviction because the availability of a retaliatory eviction defense in New York courts would be sufficient protection. *Id.* at 507; *see Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 255, 329 N.Y.S.2d 148, 150 (Sup. Ct. 1972).

21. *Markese v. Cooper*, 70 Misc. 2d 478, 490, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972). *See also* 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 87, 368 N.Y.S.2d 122, 125-26 (Long Beach City Ct. 1975).

22. *E.g.*, Alaska Stat. § 34.03.310 (Cum. Supp. 1975); Ariz. Rev. Stat. Ann. § 33-1491 (West Supp. 1979); Cal. Civ. Code § 1942.5 (West Supp. 1980); Conn. Gen. Stat. Ann. § 47a-20 (West Supp. 1980); Del. Code Ann. tit. 25, § 5516 (1975); D.C. Code Encycl. § 45-1654 (West 1978); Hawaii Rev. Stat. § 521-74 (1976); Ill. Ann. Stat. ch. 80, § 71 (Smith-Hurd 1966); Ky. Rev. Stat. § 383.705 (Supp. 1978); Me. Rev. Stat. Ann. tit. 14, § 6001 (1980); Md. Real Prop. Code Ann. § 8-208.1 (Supp. 1979); Mass. Ann. Laws ch. 186, § 18 (Michie/Law. Co-op Supp. 1980); Mich. Comp. Laws Ann. § 600.5720 (West Supp. 1979); Minn. Stat. Ann. § 566.03 (West Supp. 1979); Neb. Rev. Stat. § 76-1439 (Cum. Supp. 1976); N.H. Rev. Stat. Ann. § 540:13-a, -b (Supp. 1979); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1979); Ohio Rev. Code Ann. § 5321.02 (Anderson Supp. 1979); Or. Rev. Stat. § 91.865 (1977); Pa. Stat. Ann. tit. 35, § 1700-1 (Purdon 1977); R.I. Gen. Laws § 34-20-10 (1970); Va. Code § 55-248.39 (Supp. 1979); Wash. Rev. Code Ann. §§ 59.18.240, 59.18.250 (Supp. 1978).

23. N.Y. State Senator Pisani Press Release at 1 (May 8, 1979) (on file with the *Fordham Law Review*). The law is intended to " 'preserve and upgrade the quality of [New York's] existing housing.' " *Id.* Senator Pisani also stated that tenants' housing rights " 'are useless unless tenants may responsibly exercise them without fear. [Section 223-b] will enable them to do so.' " *News From Senator Joseph R. Pisani* (June 15, 1979) (on file with the *Fordham Law Review*). There had been unsuccessful attempts to enact such legislation in every year since 1972. Section 223-b represents the culmination of these efforts. *Questions & Answers, supra* note 16, at 3. Municipalities could not effectively deal with the problem of retaliatory eviction, because the state government has exclusive jurisdiction concerning major changes in landlord-tenant law. *Id.* There was near-unanimous approval of the bill in the New York Senate, with only one Senator publicly opposed. *Id.*

The law is applicable to "all rental residential premises except owned-occupied dwellings with less than four units." N.Y. Real Prop. Law § 223-b(6) (McKinney 1979). The law is primarily intended to govern premises not subject to rent regulation because these already have eviction controls more restrictive than those of § 223-b. *Questions & Answers, supra* note 16, at 2. *See also* Mullarkey v. Borglum, 323 F. Supp. 1218, 1229 (S.D.N.Y. 1970) (the court observed that "evictions from rent-controlled premises in New York City are well nigh impossible because they are strictly limited and may be obtained only upon the landlord's proving one of the grounds enumerated in the applicable law."). Therefore, § 223-b will have its major impact in upstate areas of New York and suburban low-income rental housing. Within New York City, § 223-b will principally affect rental housing not governed by rent regulation, including converted lofts in Manhattan and converted one, two, and three family homes in other boroughs of the city, which were previously owner-occupied. *Questions & Answers, supra* note 16, at 2. The provisions of the

affirmative defense of retaliation,<sup>24</sup> sets forth a procedure for courts to follow in determining the existence of landlord retaliation,<sup>25</sup> provides for injunctive relief,<sup>26</sup> and establishes a damage cause of action.<sup>27</sup>

Prior to the enactment of section 223-b, some New York courts accepted an equitable defense of retaliatory eviction.<sup>28</sup> In this respect, the statute codifies this prior law. Thus, when a landlord brings a summary proceeding for possession, a tenant may plead the defense.<sup>29</sup> Section 223-b, however, goes beyond the common law and affirmatively gives tenants a cause of action for damages<sup>30</sup> and allows them to sue for injunctive relief.<sup>31</sup>

law are not applicable "in any case in which it is established that the condition from which the complaint or action arose was caused by the tenant, a member of the tenant's household, or a guest of the tenant" or "where a tenancy was terminated pursuant to the terms of a lease as a result of a bona fide transfer of ownership." N.Y. Real Prop. Law § 223-b(6) (McKinney Supp. 1979).

24. N.Y. Real Prop. Law § 223-b(4) (McKinney Supp. 1979).

25. *Id.* § 223-b(4)(5).

26. *Id.* § 223-b(3).

27. *Id.*

28. *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 632, 339 N.Y.S.2d 281, 286 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973); *Markese v. Cooper*, 70 Misc. 2d 478, 487, 333 N.Y.S.2d 63, 73 (Monroe County Ct. 1972); 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 85, 368 N.Y.S.2d 122, 124 (Long Beach City Ct. 1975); *Portnoy v. Hill*, 57 Misc. 2d 1097, 1100, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968). This equitable defense of retaliatory eviction, fashioned by courts, rested on § 743 of the Real Property Actions and Proceedings Law, which states that "any legal or equitable defense" may be asserted by a tenant in an eviction proceeding. N.Y. Real Prop. Acts. Law § 743 (McKinney 1979). Accordingly, courts concluded that they had the inherent power "to accommodate any equitable defense, including retaliatory eviction." *Markese v. Cooper*, 70 Misc. 2d 478, 487, 333 N.Y.S.2d 63, 73 (Monroe County Ct. 1972).

29. N.Y. Real Prop. Law § 223-b(4) (McKinney Supp. 1979).

30. *Id.* § 223-b(3); see pt. III *infra*.

31. N.Y. Real Prop. Law § 223-b(3) (McKinney Supp. 1979). The change in New York law with respect to injunctive relief is illustrated by the following case. In *Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Sup. Ct. 1972), a pre-§ 223-b case, tenants received a notice to quit which they believed to have been served in retaliation. They petitioned the court for an injunction prohibiting the landlord from acting on the notice before he commenced a summary proceeding for possession. *Id.* at 255, 329 N.Y.S.2d at 149. Although the court was convinced that the landlord had acted in retaliation for the tenants' participation in a tenants' organization, *id.*, it refused to grant injunctive relief, reasoning that the availability of an equitable defense in an eventual proceeding was sufficient retaliatory protection. *Id.* at 255-56, 329 N.Y.S.2d at 150. Under § 223-b, however, a tenant who receives a notice to quit can now request a court to issue an injunction similar to that sought in *Church*. N.Y. Real Prop. Law § 223-b(3) (McKinney Supp. 1979). For a preliminary injunction to issue in New York, a strong showing must be made by the tenant that there is a probability of success on the merits, irreparable harm if the relief is not granted, and that a balancing of equities is in his favor. *Gambar Enterprises, Inc. v. Kelly Servs.*, 69 A.D.2d 297, 306, 418 N.Y.S.2d 818, 824 (4th Dep't 1979). For the Second Circuit standard, see *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 747, 250 (2d Cir. 1973) (the issuance of a preliminary injunction requires likelihood of success on merits and possible irreparable harm or serious questions on the merits which make them a proper basis for litigation and a balance of hardships clearly on the side of the party requesting the relief). *Accord*, *Selchow*

Under section 223-b a tenant is specifically protected against retaliatory eviction if he files good faith complaints with governmental authorities,<sup>32</sup> exercises his rights under the rental agreement or any housing law,<sup>33</sup> or & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 866 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

A tenant can also seek injunctive relief to prevent other forms of retaliation, such as when he receives a demand for a disproportionate rent increase after he has engaged in protected activities. If the court decides that injunctive relief should not be granted or the tenant does not seek an injunction, the rent increase will take effect. If the tenant pays only the agreed-upon rent, the landlord may not bring a summary proceeding based on nonpayment of the new rent. Rather, the landlord must bring holdover summary proceedings if he desires the tenant's removal. *See* note 45 *infra*. At this point, the tenant can assert the defense of retaliation, and the resolution of the issue will determine whether the additional rent is to be paid. Section 223-b appears to require that the tenant pay the original rent, that is, the "rent for which he is otherwise liable," but not the additional portion demanded in order to avail himself of the retaliatory defense. N.Y. Real Prop. Law § 223-b(4) (McKinney Supp. 1979).

32. N.Y. Real Prop. Law § 223-b(1)(a) (McKinney Supp. 1979). Many cases have involved tenants who, in attempting to secure housing rights, made complaints to authorities and shortly thereafter were the object of landlord retaliation. *E.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

To avail himself of the benefits of § 223-b, a tenant who reports violations to housing authorities must show that he acted in good faith. N.Y. Real Prop. Law § 223-b(1)(a) (McKinney Supp. 1979). Thus, he should be required to demonstrate that he dealt fairly with the landlord. He should submit evidence that the condition complained of existed and was serious in nature, and that the complaint was reasonable. *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 632-33, 339 N.Y.S.2d 281, 286 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973). In addition, the tenant must present proof that he did not cause the condition. *See* N.Y. Real Prop. Law § 223-b(6) (McKinney Supp. 1979). The statute, however, does not mandate that the condition be present at the time of the litigation. Such a requirement had been established by the trial court in *Toms Point*. 72 Misc. 2d at 633, 339 N.Y.S.2d at 286. In affirming the holding of the trial court, the Supreme Court, Appellate Term, disagreed on this point. 79 Misc. 2d at 206, 360 N.Y.S.2d at 367. The New York legislature wisely rejected this requirement. Under such a test, a landlord could evade the retaliatory eviction prohibition quite easily, by simply repairing the condition which prompted the complaint and then initiating the proceeding for possession. Thus, although the condition complained of is remedied, the tenant will not be in possession to benefit therefrom. A consideration of these factors will act as a safeguard against unfounded complaints by tenants who are merely trying to abuse § 223-b.

The New York City Housing Authority opposed the passage of § 223-b because it believed that tenants would subvert the purpose of the law by making "baseless complaint[s]" in order to take advantage of the law's protections. The Authority feared that tenants would thereby employ retaliatory eviction "as a standard defense in all summary proceedings." Letter from New York City Housing Authority to Richard A. Brown, Counsel to Gov. Carey (July 12, 1979) (on file with the *Fordham Law Review*).

33. N.Y. Real Prop. Law § 223-b(1)(b) (McKinney Supp. 1979). Retaliatory eviction often occurs after a tenant asserts that the premises are uninhabitable as a defense to an action for nonpayment of rent, *see, e.g.*, Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972), or after the tenant complains to the landlord about conditions in need of repair, *see, e.g.*, Schweiger v. Superior Court, 3 Cal. 3d 507, 510, 476 P.2d 97, 98, 90 Cal. Rptr. 729, 730 (1970); Aweeka v. Bonds, 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650, 651-52 (1971). Landlords have also retaliated against tenants who have sought to secure or prevent zoning changes. *See, e.g.*,



participates in a tenants' organization.<sup>34</sup> The statute specifically prohibits a landlord from either serving a notice to quit<sup>35</sup> or commencing a summary proceeding to recover possession<sup>36</sup> in retaliation to protected tenant activities. In addition, a landlord may not substantially alter the terms of a tenancy in retaliation.<sup>37</sup>

The law states that "[s]ubstantial alteration shall include, but is not limited to" refusing to continue a tenancy, offer a new lease, or renew the lease.<sup>38</sup> The flexibility of this provision will be extremely valuable to courts in deciding whether a landlord's conduct was in fact retaliatory. Disproportionate rent increases, for example, have been expressly decreed by some legislatures to be retaliatory.<sup>39</sup> It might be argued, therefore, that because the New

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Windward Partners v. Delos Santos, 59 Hawaii 104, 105-07, 577 P.2d 326, 328 (1978); Pohlman v. Metropolitan Trailer Park, Inc., 126 N.J. Super. 114, 117, 312 A.2d 888, 889 (Super. Ct. Ch. Div. 1973).

Under § 223-b, a complaint made by a tenant to the landlord in reference to a housing code violation or a breach of the Warranty of Habitability Statute, N.Y. Real Prop. Law § 235-b (McKinney Supp. 1979), for example, would be considered a protected act. This result is desirable because the successful operation of important housing legislation would be impaired if tenant notification of a landlord were denied retaliatory protection.

The legislative history indicates that one of the primary purposes behind the enactment of § 223-b was to aid the operation of the Warranty of Habitability Statute. See N.Y. State Senator Pisani, *Memorandum in Support of S. 4138-A* [§ 223-b] (undated) (on file with the *Fordham Law Review*) [hereinafter cited as *Memorandum in Support*]; *Questions & Answers*, *supra* note 16, at 1. See also Governor Hugh Carey, *Memorandum in Approval of the Retaliatory Eviction Law*, reprinted in McKinney's Session Law News (Aug. 1979) at A-438 (July 13, 1979). Governor Carey stated: "[t]his legislation is intended to prevent landlords from threatening tenants with eviction for complaining of violations thereby remaining immune from compliance with housing codes and the New York State Warranty of Habitability Statute enacted in 1975." *Id.* The use of the warranty is a protected act when the tenant makes a habitability complaint and also when the tenant has used it in a court action. In many New York cases, for example, tenants have withheld rental payments and have successfully asserted breach of the Warranty of Habitability in a non-payment proceeding brought by the landlord. See, e.g., *Ocean Rock Assocs. v. Cruz*, 66 A.D.2d 878, 878, 411 N.Y.S.2d 663, 664 (2d Dep't 1978); *Goldner v. Doknovitch*, 88 Misc. 2d 88, 89-90, 388 N.Y.S.2d 504, 505-06 (App. Term. 1st Dep't 1976); *Kipsborough Realty Corp. v. Goldbetter*, 81 Misc. 2d 1054, 1057, 367 N.Y.S.2d 916, 920 (Civ. Ct. N.Y. 1975) (applying an implied warranty of habitability prior to the enactment of RPL § 235-b). These habitability protections would be meaningless, however, if the landlord could retaliate shortly thereafter by terminating the tenancy at the end of the rental period.

34. N.Y. Real Prop. Law § 223-b(1)(c) (McKinney Supp. 1979). A large number of retaliation cases have involved tenants who were members of tenants' associations. E.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978); *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 281 A.2d 544 (Super. Ct. App. Div. 1971); *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 339 N.Y.S.2d 281 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973). "A tenant's constitutional rights to petition government for redress of grievances and to freedom of association [will] receive practical protection" under § 223-b. *Memorandum in Support*, *supra* note 33, at 1.

35. N.Y. Real Prop. Law § 223-b(1) (McKinney Supp. 1979).

36. *Id.*

37. *Id.* § 223-b(2).

38. *Id.*

39. See, e.g., Del. Code Ann. tit. 25, § 5516 (a)(2) (1975); Ky. Rev. Stat. § 383.705(1) (Supp. 1978); Va. Code § 55-248.39(a) (Supp. 1979); Wash. Rev. Code Ann. § 59.18.240 (2) (Supp. 1978).

York legislature did not specifically mention them in section 223-b, it did not intend to prohibit retaliatory rent increases. Legislation with language similar to that of section 223-b, however, has been interpreted as including such conduct in its prohibition. The New Jersey statute,<sup>40</sup> for example, specifically makes unlawful a substantial alteration of the terms of a tenancy in retaliation.<sup>41</sup> The New Jersey Superior Court,<sup>42</sup> interpreting this law, held that a rent increase from \$70 to \$200 was a prohibited act within the meaning of the statute.<sup>43</sup>

An unreasonable increase in rent can have the same effect as an actual eviction proceeding by forcing a tenant to vacate the premises.<sup>44</sup> Such an increase punishes tenants for engaging in protected activities and thus deters these activities. Accordingly, New York courts should regard retaliatory rent increases as prohibited landlord conduct within section 223-b.<sup>45</sup>

Landlords might also retaliate by reducing services. This practice also penalizes and deters tenants and therefore should be considered prohibited landlord conduct under section 223-b. Other states have legislated against it.<sup>46</sup> In New York, however, the need for protection in this context is less urgent because any reduction in services serious enough to be regarded as a substantial alteration of the terms of a tenancy is probably a breach of the Warranty of Habitability Statute,<sup>47</sup> which will adequately protect the tenant

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40. N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1979).

41. *Id.* § 2A:42-10.10.

42. *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 281 A.2d 544 (Super. Ct. App. Div. 1971).

43. *Id.* at 222-23, 281 A.2d at 546.

44. The tenant's removal from the premises following a retaliatory rent increase is usually the result of a court order obtained on a theory of nonpayment. *See Aweeka v. Bonds*, 20 Cal. App 3d 278, 97 Cal. Rptr. 650 (Ct. App. 1971); *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super 220, 281 A.2d 544 (Super. Ct. App. Div. 1971).

45. A strict interpretation of § 223-b would not, however, leave tenants defenseless to retaliatory rent increases. Although a tenant who decides to pay the increase as demanded will not be able to assert a claim of retaliation, one who merely continues tendering the original rental charge will have statutory protection. It has been held that a landlord may not bring a nonpayment proceeding based on a tenant's refusal to pay a rent increase. *E.g.*, *Palagonia v. Pappas*, 79 Misc. 2d 830, 831, 361 N.Y.S.2d 236, 237 (Suffolk County Ct. 1974) (rent increase following expiration of a tenancy for a definite term); *Industrial Funding Corp. v. Megna*, 87 Misc. 2d 443, 449, 384 N.Y.S.2d 955, 960 (Buffalo City Ct. 1976) (rent increase following termination of a periodic tenancy). Rather, a landlord must evict the tenant through a normal holdover summary proceeding to recover possession. *E.g.*, *Palagonia v. Pappas*, 79 Misc. 2d at 831, 361 N.Y.S.2d at 237; *Industrial Funding Corp. v. Megna*, 87 Misc. 2d at 449, 384 N.Y.S.2d at 960. Because such a holdover proceeding for possession falls specifically within § 223-b's proscription, N.Y. Real Prop. Law § 223-b(1) (McKinney Supp. 1979), a tenant can then assert the defense of retaliation. *Id.* § 223-b(4).

46. *See, e.g.*, Conn. Gen. Stat. Ann. § 47a-20 (West Supp. 1980); Md. Real Prop. Code Ann. § 8-208.1(2) (Supp. 1979); Ohio Rev. Code Ann. § 5321.02 (Anderson Supp. 1979); Wash. Rev. Code Ann. § 59.18.240(3) (Supp. 1978).

47. N.Y. Real Prop. Law § 235-b (McKinney Supp. 1979). The pertinent part of the statute reads: "In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented . . . are fit for human habitation and for the uses reasonably intended by the parties and that the occupants

whether or not this conduct is made unlawful under section 223-b.<sup>48</sup>

## II. PROOF

The nature of the proof required to show retaliation under section 223-b is yet to be determined. Although the statute sets forth a clear procedure for the resolution of the issue when the landlord sues,<sup>49</sup> it is less clear on the standard applicable when the tenant uses retaliatory eviction as a basis for his own action. It is contended that the standard to be used should be the same in both situations.

Section 223-b provides that, in an action by the landlord to recover possession, the tenant will prevail if the court finds, first, that the landlord retaliated for a protected tenant act and, second, that he "would not otherwise have" commenced the action.<sup>50</sup> The tenant will bear the burden of proof on both these issues.<sup>51</sup> It will be relatively easy for him to meet the first proof requirement. The tenant need only show that he engaged in protected acts and that the landlord subsequently brought the action.<sup>52</sup>

Retaliatory motive, the second evidentiary element, will be the crucial and problematic issue in cases arising under section 223-b. The tenant must show that, but for his protected activities, the landlord would not have instituted the possessory proceeding.<sup>53</sup> New York courts, prior to the enactment of section 223-b, had addressed the problem of proving retaliatory motive. One court<sup>54</sup> established a multi-step approach which mandated, *inter alia*, that the "overriding reason" behind the landlord's conduct be retaliation for the tenant's exercise of constitutional rights.<sup>55</sup> Another<sup>56</sup> declared that a tenant must prove "by clear and convincing evidence" the presence of a retaliatory motive.<sup>57</sup> These approaches are conclusory, however, in that they do not provide meaningful guidelines which other courts can apply in determining a landlord's motive; specific criteria are needed.

of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." *Id.* § 235-b(1).

48. The statute gives tenants a cause of action for breach of warranty. *Id.* § 235-b(3); *see, e.g.,* Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 330, 418 N.Y.S.2d 310, 317, 391 N.E.2d 1288, 1295 (1979), *cert. denied*, 48 U.S.L.W. 3387 (U.S. Dec. 11, 1979) (No. 79-553); Ocean Rock Assocs. v. Cruz, 66 A.D.2d 878, 879, 411 N.Y.S.2d 663, 664 (2d Dep't 1978); Goodman v. Ramirez, 100 Misc. 2d 881, 887-89, 420 N.Y.S.2d 185, 189-90 (Civ. Ct. N.Y. 1979).

49. N.Y. Real Prop. Law § 223-b(4)(5) (McKinney Supp. 1979).

50. *Id.* § 223-b(4).

51. A party asserting an affirmative defense bears the burden of proving that issue. *Conner v. Keese*, 105 N.Y. 643, 646, 11 N.E. 516, 518 (1887).

52. N.Y. Real Prop. Law § 223-b(4) (McKinney Supp. 1979). The tenant must also show that he acted in good faith. *See* note 28 *supra* and accompanying text.

53. N.Y. Real Prop. Law § 223-b(4) (McKinney Supp. 1979).

54. *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 339 N.Y.S.2d 281 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973).

55. *Id.* at 633, 339 N.Y.S.2d at 286.

56. *401 Boardwalk Corp. v. Gutzwiller*, 82 Misc. 2d 84, 368 N.Y.S.2d 122 (Long Beach City Ct. 1975).

57. *Id.* at 85, 368 N.Y.S.2d at 124; *see* *Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970).

There are basic considerations that can be objectively measured by courts. For instance, strong evidence of retaliatory motive is that the actor had knowledge of something against which he retaliated. Therefore, the tenant should be required to prove that the landlord knew of the protected tenant activity<sup>58</sup> before he acted. Thus, if a landlord served a notice to quit before the tenant made a complaint or engaged in some other protected act, a nonretaliatory motive should be inferred.<sup>59</sup> In addition, a disparity in treatment of tenants can be indicative of unlawful motive. The court should determine whether the landlord treated this tenant in a manner significantly different from others similarly situated. For example, in one case,<sup>60</sup> the tenant made a complaint and subsequently received a large rent increase. The court stated that such an increase, "when viewed in relation to the lack of rent increases among other tenants, is a strong indication" of retaliatory motive.<sup>61</sup> If a landlord claims that he has acted in response to a tenant's alleged misbehavior rather than his protected activities, the court should examine the landlord's response to similar misbehavior of other tenants.

Ultimately, the lawfulness of the landlord's motive will be a difficult question for the trier of fact.<sup>62</sup> It will also pose a heavy burden on the tenant because his landlord will be the "best possible source of information"<sup>63</sup> and the tenant will have difficulties in obtaining evidence indicating unlawful motive. The New York legislature, recognizing this problem,<sup>64</sup> provided tenants with some assistance in proving unlawful motive. Section 223-b establishes that when a landlord brings an action or proceeding for possession, a rebuttable presumption of retaliation will arise if the tenant can show that the landlord commenced the possessory action, served a notice to quit, or

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58. *Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970).

59. See N.Y. Real Prop. Law § 223-b(1) (McKinney Supp. 1979); cf. Conn. Gen. Stat. Ann. § 47a-20(b)(4) (West 1978 & Supp. 1980) (when a landlord serves a notice to quit before the tenant's complaint, his possessory action will succeed).

60. *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 281 A.2d 544 (Super. Ct. App. Div. 1971).

61. *Id.* at 225, 281 A.2d at 546. See also *Schweiger v. Superior Court*, 3 Cal. 3d 507, 510, 476 P.2d 97, 98, 90 Cal. Rptr. 729, 730 (1970) (en banc). Courts have also found this test useful in the context of labor relations. In *Berbiglia, Inc. v. NLRB*, 602 F.2d 839 (8th Cir. 1979), the court was presented with the discharge of two union employees, allegedly because of misconduct. There was evidence that they, along with a non-union employee, had falsified commission reports. While the latter was promoted, the two union employees were dismissed. *Id.* at 842. In concluding that the dismissals were unlawfully motivated, the court stated that the "key factor" was "the entirely different treatment accorded . . . the anti-union sales clerk, as compared to that given [the discharged union members]." *Id.* at 844. In resolving claims of retaliatory eviction, courts have found principles of labor relations to be useful. See, e.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978); *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 864 (D.C. Cir. 1972); *Edwards v. Habib*, 397 F.2d 687, 699 n.38 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); *Markese v. Cooper*, 70 Misc. 2d 478, 488-89, 333 N.Y.S.2d 63, 74 (Monroe County Ct. 1972); *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 530 (Tex. Civ. App. 1978).

62. *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

63. *Memorandum in Support*, *supra* note 33, at 1.

64. *Id.*

attempted to alter substantially the terms of the tenancy within six months of certain specially protected acts.<sup>65</sup>

The importance of the presumption is that it changes the proof procedure. In a typical situation a holdover month-to-month tenant makes a complaint to a housing authority, and within the next six months he receives a notice to quit.<sup>66</sup> If in the resulting summary proceeding the tenant asserts the affirmative defense of retaliatory eviction, the presumption would arise.<sup>67</sup> In order to rebut it, the landlord must "provide a credible explanation of a non-retaliatory motive for his acts."<sup>68</sup> It appears that the explanation requires a showing of no more than "that [the landlord] wants the tenant out for any reason other than to retaliate."<sup>69</sup> More importantly, the landlord need not point to tenant misbehavior or other good cause. Under section 223-b *any* reason other than retaliation will serve to rebut the presumption.<sup>70</sup> If the

65. N.Y. Real Prop. Law § 223-b(5) (McKinney Supp. 1979). Specially protected tenant activities which trigger the presumption of retaliation include a good faith complaint to a governmental authority, an action in a court or official agency wherein the tenant has attempted to enforce housing rights; a judgment in the tenant's favor in a previous court action between the parties, or an order, an inspection, or some other action taken as a result of a governmental complaint or attempted enforcement of housing rights in a court or administrative body. *Id.* § 223-b(5)(a)(b)(c). The statute provides that, even when the action or proceeding was begun more than six months later, as long as the notice to quit was served within the period, the presumption will be relevant at the time of the litigation. *Id.* § 223-b(5). By the express terms of § 223-b, the presumption is applicable in a proceeding or action for possession brought by a landlord. *Id.* The statute does not, however, indicate whether the presumption can arise in an action brought by the tenant. *Id.*

The presumption does not apply in several instances. The first is where the tenant is in violation of the terms of the rental agreement, which includes "nonpayment of the agreed-upon rent." Second, being a member of a tenants' association, by itself, is not enough to entitle a tenant to the presumption. In addition, the tenant must have made a governmental complaint or taken part in a prior court action, or, the tenants' group must have made a complaint on this tenant's behalf. Third, if the tenant merely informs the landlord of a grievance, the presumption will not arise; rather, the tenant is required to have made a complaint to the government or taken part in a court action involving a dispute with the landlord in order to benefit from the presumption within the next six months. N.Y. Real Prop. Law § 223-b(5) (McKinney Supp. 1979). Thus, while § 223-b evidences a legislative grant of basic retaliatory protection for being a member of a tenants' group and making complaints to a landlord, these are not within the category of specially protected acts benefiting from the statutory presumption.

66. In an analogous situation, a tenant with a one-year lease might establish that he made a governmental complaint and, within the next six months, the landlord notified him that the lease would not be renewed.

67. N.Y. Real Prop. Law § 223-b(5) (McKinney Supp. 1979).

68. *Id.* Rather than shifting the burden of proof, this places on a landlord a "more limited 'burden of going forward' " with an explanation. *Memorandum in Support*, *supra* note 33, at 1.

69. *Memorandum in Support*, *supra* note 33, at 1.

70. If, however, the landlord merely restates the grounds for bringing the proceeding for possession, without further explanation, it may not be enough to rebut the presumption of retaliation. The Committee on Landlord and Tenant of the New York State Bar Association, in opposing the enactment of § 223-b, expressed the fear that such a mere restatement of the grounds for removal would be sufficient rebuttal. The Committee on Landlord and Tenant of the Real Property Law Section of the New York State Bar Association, Legislation Report No. 149 (1979) (attached to Letter from Kent H. Brown, Legislative Counsel, to Richard A. Brown, Counsel to Gov. Carey (June 21, 1979)) (on file with the *Fordham Law Review*).

landlord meets this burden, the tenant must then bear the burden of disproving the explanation "by a preponderance of the evidence."<sup>71</sup>

This procedure is an equitable one. If a more restrictive procedure were used to discourage retaliatory conduct by landlords, it would be extremely difficult for them to evict tenants at the end of a rental period once the issue of retaliation had been raised.<sup>72</sup> Such a result would closely resemble the eviction controls commonly found in rent control statutes, which protect the tenant by severely limiting the amount of control that a landlord may exercise over his property.<sup>73</sup> The result would be a significant alteration of the purpose of the retaliatory eviction prohibition.<sup>74</sup> Section 223-b was intended to discourage landlord retaliation,<sup>75</sup> not to be the foundation for widespread judi-

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71. N.Y. Real Prop. Law § 223-b(5) (McKinney Supp. 1979)

72. Under the present law of Minnesota, Minn. Stat. Ann. § 566 03 (West Supp. 1979), for example, in most cases the landlord must establish that he was not motivated "in whole or in part" by a desire to retaliate. *Id.* In *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976), this statutory requirement was interpreted to mean that the landlord must prove a nonretaliatory reason, which is "a reason wholly unrelated to and unmotivated by" protected tenant activities. *Id.* at 430, 240 N.W.2d at 832. This was held to be "nonpayment of rent, other material breach of covenant, continuing damage to premises by tenants, or removal of [the] housing unit from [the] market for a sound business reason." *Id.* at 430, 240 N.W.2d at 832-33. The court then observed that "[s]uch a standard will give full protection to tenants." *Id.* at 430-31, 240 N.W.2d at 833. Full protection from eviction, however, is not the purpose of the retaliatory eviction prohibition. Rather, the prohibition is designed to prevent eviction in those specific cases in which the landlord has retaliated. This should not require a landlord to prove good cause, such as tenant misconduct, or the desire to remove the unit from the market. In New Jersey, the statutory presumption, N.J. Stat. Ann. § 2A: 42-10.12 (West Supp. 1979), has been held to mean that when a landlord, in arriving at a decision to evict, takes into account a protected tenant act "the notice to quit is a 'reprisal' . . . although other factors may also be present or even dominant." *Silberg v. Lipscomb*, 117 N.J. Super. 491, 496, 285 A.2d 86, 88 (Union County Ct. 1971) (emphasis added).

73. Under the New York State Rent Control law, for example, if the tenant is not in violation of an obligation of the tenancy, is not committing a nuisance, damaging the premises, using the premises for an illegal purpose, or has not unreasonably denied the landlord access to the premises, he cannot be removed unless the landlord obtains a certificate of eviction from the housing commission. N.Y. State Rent Control, Unconsol. Laws § 8585(1)-(2) (McKinney 1974). A certificate of eviction will only be issued if the landlord establishes good cause: that he needs the premises for personal or immediate family use, or intends to remodel or demolish them. *Id.* Thus, whether or not the tenant has a lease, he is assured considerable housing security. This security is predicated on the legislative finding that "a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York." *Id.* § 8581(1). In other words, areas of the state that have rent and eviction controls have been granted special treatment. The areas of the state in which § 223-b is to have its primary effect, however, have not been designated by the legislature as areas that deserve such stringent eviction controls. Therefore, § 223-b should not be interpreted to deny indirectly to landlords control over their premises which the legislature did not see fit to do.

An argument might be made that all tenancies in New York State should be granted substantial eviction controls. Tenants would certainly support such a measure. This issue may be faced by the legislature in coming years. It is not, however, a proper concern in the discussion of § 223-b.

74. See notes 8-14 *supra* and accompanying text.

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

cially decreed extensions of tenancies. Accordingly, the probative approach embodied in section 223-b represents a well-conceived basis for courts to deal with the problem of retaliatory eviction in that it is neither exceedingly pro-tenant nor pro-landlord.

The section 223-b standard is a not-for-bad-cause eviction standard<sup>76</sup> rather than a good cause standard. It recognizes that a landlord will rarely have a motive that can be characterized as 100% nonretaliatory and that the holdover tenant will have engaged in some sort of protected activity prior to the eviction proceeding. It prevents a tenant from being placed in a more secure position merely because he engaged in protected activities prior to the landlord's conduct<sup>77</sup> but nevertheless gives those activities the respect they must be accorded. The tenant is protected from retaliation, but the landlord retains adequate control over his property. Thus, in the case of a tenant's affirmative cause of action, the standard of proof should not be less than that used when he raises the retaliatory issue defensively.<sup>78</sup> As a practical matter, the educated tenant or his attorney, who is aware that the presumption will not be available in this situation, will simply wait for the landlord to bring a possessory suit, assert the affirmative defense, and consequently receive the benefit of the presumption. In any event, the comprehensiveness of the procedure and standard of proof set forth in section 223-b should lead courts to utilize this basic standard, applying the presumption regardless of how the issue of retaliation has been raised.

### III. REMEDIES FOR RETALIATORY EVICTION

#### A. *Preventive Relief*

Once retaliation is successfully proven,<sup>79</sup> the court must determine how long the tenant can continue in possession. Section 223-b simply states that a landlord cannot be obligated to extend the tenancy for more than one year,<sup>80</sup>

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76. This more accurately reflects the intent behind the retaliatory eviction prohibition, which is not "based on the tenant's right to possession, per se, but rather seeks to deny possession to the landlord because of his tainted motive in evicting the tenant." *Markese v. Cooper*, 70 Misc. 2d 478, 480, 333 N.Y.S.2d 63, 66 (Monroe County Ct. 1972). It is a negative standard, rather than one which requires cause, i.e., a showing of tenant misconduct. Compare the Minnesota standard described in note 72 *supra*.

77. This consideration was enunciated by the Supreme Court in a labor relations retaliation case. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The employee was an untenured teacher who was dismissed one month after he informed a local radio station of a new school policy. He claimed that this exercise of first amendment rights was the reason behind the board's decision not to rehire him. This teacher, however, had previously engaged in other misbehavior which included making obscene gestures to students. The Court was careful not to place the employee "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285. The important consideration was to ensure that the employee was "placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-86.

78. In addition, when an injunction is sought, a considerable showing of future unlawful conduct must be made. See note 31 *supra* and accompanying text.

79. See pt. II *supra*.

80. N.Y. Real Prop. Law § 223-b(2) (McKinney Supp. 1979). "[A] landlord shall not be required under this section to offer a new lease or a lease renewal for a term greater than one year

but does not establish any other guidelines. In the case of a tenant with a lease of one year or more, the statute is clear—the court can grant injunctive relief for, at most, one year.<sup>81</sup>

There is less statutory direction for courts with regard to the relief that should be made available to periodic tenants following a decision in their favor. For example, once a month-to-month tenant successfully asserts the defense of retaliation, the court must determine the period during which the landlord will be prohibited from instituting another action for possession.<sup>82</sup> One New York court, attempting to resolve this issue prior to the enactment of section 223-b, stated that such a tenant should be given enough time to make other living arrangements.<sup>83</sup> Another judicial answer has been to allow the tenant to remain in possession until the landlord's "illegal purpose is dissipated."<sup>84</sup> Under this standard, "[t]he question of permissible or impermissible purpose is one of fact for the court or jury."<sup>85</sup> This standard is not desirable because it does not firmly establish a definite grace period for the tenant. Instead, it creates the need for yet another judicial determination of motive in a subsequent action.

A better approach is for courts to set a specific period during which the landlord may not attempt to evict, and thereafter allow him to do so regardless of motive. This approach is preferable because it eliminates successive possessory actions by persistent landlords.<sup>86</sup> The length of this grace

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and after such extension of a tenancy for one year shall not be required to further extend or continue such tenancy." *Id.* In this regard, § 223-b represents a significant departure from prior New York law because courts previously held that there was no way, either legal or equitable, to renew a lease against the desire of the landlord. *Robinson v. Jewett*, 116 N.Y. 40, 51, 22 N.E. 224, 226-27 (1889); *Toms Point Apts. v. Goudzward*, 72 Misc. 2d 629, 631, 339 N.Y.S.2d 281, 285 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973). This rule of law, of course, applied when there was no option or automatic renewal clause in the lease.

81. The year period would be measured from the point at which the tenancy would have been terminated had the retaliation issue not been raised. See N.Y. Real Prop. Law § 223-b(2) (McKinney Supp. 1979).

82. Prior to the adoption of § 223-b, a New York court observed that "[s]uccessful interposition of the defense of retaliatory eviction fails to afford [a] tenant any meaningful protection, for it does not deter [a] landlord from commencing a subsequent proceeding shortly thereafter." 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 87, 368 N.Y.S.2d 122, 125-26 (Long Beach City Ct. 1975).

83. *Markese v. Cooper*, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972). Specifically, the court wanted to allow a tenant "sufficient time, without the pressure normally exerted in a holdover eviction proceeding, to find other suitable housing." *Id.* at 489, 333 N.Y.S.2d at 75.

84. *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 517, 476 P.2d 97, 103, 90 Cal. Rptr. 729, 735 (1970) (en banc); *Toms Point Apts. v. Goudzward*, 72 Misc.2d 629, 633, 339 N.Y.S.2d 281, 287 (Nassau County Dist. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 2d Dep't 1973); *Markese v. Cooper*, 70 Misc. 2d 478, 489, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972).

85. *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

86. This approach would also eliminate the need for courts to decide how many times per year a month-to-month tenant, for example, will be permitted to assert the retaliatory defense.



period should be established by courts on a case-by-case basis. At a minimum, the tenant should be allowed adequate time to obtain another residence; at most, courts should permit the retaliatory protection to extend for one year as provided in section 223-b.<sup>87</sup>

Another issue arises from the language in section 223-b which provides that a successful tenant may remain in possession.<sup>88</sup> Under this language, it is possible for a court to order the landlord to grant another lease with the exact terms of the original lease.<sup>89</sup> Such an order may entitle the tenant to remain in possession at the same rental charge. The landlord, however, may have planned to raise the rent upon the tenant's ouster. Thus, he will not only be prevented from getting a new tenant, but must also forego the planned rent increase. Moreover, while other tenants in the same building must pay rent increases when their leases expire, the tenant who was retaliated against may enjoy rent and eviction protection for possibly another year.<sup>90</sup> The protections of section 223-b, therefore, may result in a type of rent control. In order to avoid this effect, courts should allow landlords who have been ordered to extend a tenancy to present data in support of a rent increase.<sup>91</sup> If it is established that the increase is uniform throughout the building, then it should be allowed.

### B. Damages

Section 223-b allows a tenant to recover damages caused by retaliation by a landlord.<sup>92</sup> Neither section 223-b nor previous New York case law, however, provides specific guidelines concerning the type or amount of damages flowing from a retaliatory eviction action.<sup>93</sup>

In *Markese v. Cooper*,<sup>94</sup> which declared the existence of a damage cause of action for retaliatory eviction in New York prior to the enactment of section

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California allows the defense of retaliation to be invoked by a tenant only once per year. Cal. Civ. Code § 1942.5(b) (West Supp. 1980). Under this law, a month-to-month tenant could be evicted quite easily by a landlord. Once the tenant successfully uses the defense, he is without retaliatory protection during the next 12 months, unless the court establishes a grace period.

87. There is nothing in the legislative history which indicates the length of time that a periodic tenant may stay. A landlord, however, cannot be required to continue a tenancy based on a lease for more than a year. N.Y. Real Prop. Law § 223-b(2) (McKinney Supp. 1979). It would be consistent to apply this limit to the extension of periodic tenancies.

88. N.Y. Real Prop. Law § 223-b(2) (McKinney Supp. 1979).

89. *See id.*

90. The Connecticut statute specifically permits a landlord to increase the rent following determination of retaliation where the landlord has incurred increased operating costs and taxes. Conn. Gen. Stat. Ann. § 47a-20(b)(2), as amended by Pub. Act No. 79-571, reprinted in Conn. Public and Special Acts 876, Jan. 1979.

91. This possible rent control effect may also appear in cases in which the landlord has attempted to increase the rent in retaliation. The landlord risks this result whenever he unwisely doubles or triples the rent in attempting to force indirectly a tenant to vacate.

92. N.Y. Real Prop. Law § 223-b(3) (McKinney Supp. 1979).

93. Some states explicitly provide guidelines as to the types and amount of damages with regard to retaliatory eviction. *See, e.g.*, Del. Code Ann. tit. 25, § 5516(d) (1975) (three months' rent or treble damages, whichever is greater, and cost of the suit); Ky. Rev. Stat. § 383.655-.705(2) (Supp. 1978) (up to three months' rent and a reasonable attorney's fee).

94. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

223-b, the court stated that there could be a recovery of "compensatory and special damages, and, in a proper case, . . . exemplary or punitive as well."<sup>95</sup> The court did not elaborate or indicate the precise point in time upon which damages could be obtained. The cases cited by the court in *Markese* as a basis for damages involved a landlord's forcible dispossession of a tenant during the rental period,<sup>96</sup> a landlord's failure to deliver possession at the beginning of a rental period,<sup>97</sup> and an encroachment in violation of a restrictive covenant.<sup>98</sup> None of these cases are similar to a retaliatory eviction.<sup>99</sup> Thus, although *Markese* provides general guidance, New York courts will have to break new ground in determining the compensable elements flowing from a retaliatory eviction in various factual settings.

To determine appropriate damages for retaliatory eviction, it is helpful to compare that situation with wrongful eviction. In the usual wrongful eviction, the tenant has been actually or constructively evicted from the premises by the landlord *during* the rental period.<sup>100</sup> Damages vary depending upon the theory behind the cause of action. If a contractual theory is used, a successful damage cause of action yields the difference between the fair market value of the remainder of the rental term and the rent reserved in the rental agreement for the period of eviction.<sup>101</sup> Alternatively, a successful tort action results in the recovery of damages proximately caused by the eviction.<sup>102</sup>

Although a retaliatory eviction can be similar in form to a wrongful

95. *Id.* at 489, 333 N.Y.S.2d at 75 (citations omitted)

96. *Eten v. Luyster*, 60 N.Y. 252 (1875); *I.H.P. Corp. v. 210 Cent. Park S. Corp.*, 16 A.D.2d 461, 228 N.Y.S.2d 883 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963).

97. *Burkhard v. Morris*, 206 A.D. 366, 201 N.Y.S.2d 225 (4th Dep't 1923) (*per curiam*).

98. *Frey Realty Co. v. Ten West 46th St. Corp.*, 1 Misc. 2d 371, 145 N.Y.S.2d 670 (Sup. Ct. 1955).

99. They are dissimilar in that the cases cited in *Markese* concern breach of covenants in a lease. In contrast, retaliatory eviction, in its most prevalent form, involves the displacement of a tenant at the end of the rental period. Hence, there is no contract-type breach. *See* 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 87, 368 N.Y.S.2d 122, 125-26 (Long Beach City Ct. 1975) (rejecting a damage cause of action for retaliatory eviction in the absence of statute).

100. *See, e.g., Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 83, 308 N.Y.S.2d 649, 653, 256 N.E.2d 707, 710 (1970) (constructive eviction requirements), *Seigel v. Neary*, 38 Misc. 297, 300, 77 N.Y.S. 854, 857 (App. Term 2d Dep't 1902) (actual eviction).

101. *E.g., Clarkson v. Skidmore*, 46 N.Y. 297, 302 (1871); *Peerless Candy Co. v. Halbreich*, 125 Misc. 889, 892, 211 N.Y.S. 676, 677-78 (App. Term 2d Dep't 1925). Of course, the tenant is not liable for any rent during the period of eviction. *Seigel v. Neary*, 38 Misc. 297, 300, 77 N.Y.S. 854, 856 (App. Term 2d Dep't 1902).

102. *See, e.g., Eten v. Luyster*, 60 N.Y. 252, 259-60 (1875) (recovery allowed for injury to personal property and building of tenant); *I.H.P. v. 210 Cent. Park S. Corp.*, 16 A.D.2d 461, 466-67, 228 N.Y.S.2d 883, 888-89 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963) (damage to property and cost of guarding premises to prevent recurrence of wrongful acts by the landlord, along with punitive damages, recoverable); *Lopez v. City of New York*, 78 Misc. 2d 575, 576-77, 357 N.Y.S.2d 659, 660-61 (Civ. Ct. N.Y. 1974) (tenant recovered for loss of earnings, food spoilage, miscellaneous expenses and for mental distress due to the eviction). In the appropriate case, both contract and tort damages can be obtained. *Eten v. Luyster*, 60 N.Y. 252, 259-61 (1875) (recovery for losses sustained because of the landlord's trespass, along with the value of the unexpired term following the eviction)

eviction, such as when a retaliatory reduction in services<sup>103</sup> causes the tenant to vacate the premises during the rental period, it is usually dissimilar. Generally, retaliatory eviction concerns a termination at the end of a periodic tenancy or the refusal to renew a term for years.<sup>104</sup> Under these circumstances, the tenant is not being "evicted" in the normal sense because the landlord's action has not occurred during the rental period. Accordingly, a contract action in this situation should yield no damages. No part of the lease or rental agreement remains at the time in question. Since contract damages serve to compensate for a contractual loss,<sup>105</sup> a fully performed contract cannot be the basis for damages because there has been no breach of contract.<sup>106</sup> Hence, damages must follow tort principles.

The most important factor in a determination of damages is the point in time at which a claim of retaliation has been raised. For example, if at the time of litigation the tenant is still in possession and prevails on the issue of retaliation,<sup>107</sup> it is uncertain whether any damages would be recoverable due to the landlord's retaliatory motive in attempting to terminate the tenant's periodic tenancy or refusing to renew a term for years. In *Markese v. Cooper*,<sup>108</sup> the court held that the reason to grant damages is a landlord's unlawful motive in bringing the eviction proceedings,<sup>109</sup> thereby indicating that the tenant need not have been put out of possession to recover damages. A recent case in a New York federal court<sup>110</sup> also held that a tenant could be awarded damages although there had been no dispossession.<sup>111</sup> In that case, the landlord gave proper notice to terminate the tenant's month-to-month tenancy. The tenant, who was active in a tenants' association, brought an action seeking injunctive and declaratory relief and damages. The landlord then decided to drop the request to terminate and filed a motion to dismiss the tenant's complaint.<sup>112</sup> The court ruled that if "the threatened eviction was in retaliation for the exercise of First Amendment activities, [the tenant] may recover nominal damages as well as actual damages for proved emotional

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103. See note 46 *supra* and accompanying text.

104. See notes 35-38 *supra* and accompanying text.

105. 11 Williston on Contracts § 1338 (3d ed. 1968).

106. The inapplicability of contract law in this respect is notable, because contract law has recently been utilized in other areas of landlord tenant relations in order to give tenants greater rights. In particular, contract principles have been applied to the concept of habitability within the last 10 years, creating new contractual remedies for tenants. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Goodman v. Ramirez*, 100 Misc. 2d 881, 888-89, 420 N.Y.S.2d 185, 189-90 (Civ. Ct. N.Y. 1979). See also *Geraci v. Jenrette*, 41 N.Y.2d 660, 666, 394 N.Y.S.2d 853, 857, 363 N.E.2d 559, 564 (1977) (a lease is a contract governed by the Statute of Frauds).

107. Either the tenant has raised the defense of retaliation during a landlord action for possession or the tenant has initiated the action to prevent eviction after receiving a notice to quit the premises.

108. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

109. *Id.* at 489, 333 N.Y.S.2d at 75.

110. *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978).

111. *Id.* at 464.

112. *Id.* at 462.

distress over the *prospective loss* of her home."<sup>113</sup> This case, then, provides a basis for the recovery by a tenant of damages despite the fact that there has been no displacement from the premises.<sup>114</sup>

A second possible situation is one in which the tenant has been evicted in retaliation at the end of a rental period<sup>115</sup> and subsequently brings an action solely for damages. If this is the first point in time that the issue of retaliation is being determined and the court finds that there was a retaliatory motive under section 223-b, it must decide which of the tenant's financial losses are compensable. A hypothetical illustrates this point. Assume that the tenant was paying \$200 per month for an apartment which had a fair market value of \$220 per month at the time the tenant vacated. Due to the retaliation the tenant moves to another apartment of similar quality which rents for \$230 per month, incurring moving expenses of \$100. One possible measure of damages would be the difference between the rent of the tenant's original apartment and its fair market value at the time of the dispossession for the period of eviction, in the above example \$20 per month.<sup>116</sup> Another measure would involve the difference between the original rent and the new rental cost. This measure would yield \$30 per month. It is submitted that the latter should be used because it more accurately reflects the actual harm sustained by the tenant due to the landlord's wrongful act.

This measure has been used in an analogous situation under a rent control law. In *Gorman v. Gould*,<sup>117</sup> for example, a tenant vacated premises pursuant to a certificate of eviction which had been granted to the landlord so that the premises could be used by the landlord's immediate family. In fact, the premises were rented to a third party. In the meantime, the tenant had moved to another apartment with a higher rental charge.<sup>118</sup> Since the eviction had become unlawful under the rent control law because of the improper use by the landlord of the certificate of eviction, the court held that the tenant was entitled to damages.<sup>119</sup> The applicable statutory provisions stated that the landlord would "be liable to the tenant for three times the damages sustained on account of such removal"<sup>120</sup> and the court held that one basis for

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113. *Id.* at 464 (emphasis added). The court indicated that attorneys' fees were also recoverable. *Id.*

114. The Maryland retaliatory eviction statute has an interesting approach. It provides for attorney's fees and costs where, in the eviction proceeding, "the judgment [may] be in favor of the tenant for any of the aforementioned [retaliatory] defenses." Md. Real Prop. Code Ann. § 8-208.1 (Supp. 1979). This provision thereby takes note of the fact that if the tenant thinks he is being evicted in retaliation and raises a retaliatory defense, then the issue of retaliation will be determined while the tenant is still in possession. At this point, actual damages are likely to be non-existent, unless mental distress, if claimed, is recoverable. Once the issue of retaliation is resolved by the court, there are two possibilities: (1) the tenant wins, remains in possession and receives compensation for court expenses; or (2) the tenant loses and must vacate.

115. The tenant vacated either pursuant to a notice to quit or because of a large rent increase.

116. As this measure is similar to the one applied in wrongful evictions, *see* notes 100-01 *supra* and accompanying text, it is certainly a questionable measure in that no part of the rental period remained at the time of eviction. *See* notes 103-05 *supra* and accompanying text.

117. 37 Misc. 2d 553, 235 N.Y.S.2d 957 (Civ. Ct. N.Y. 1962).

118. *Id.* at 554, 235 N.Y.S.2d at 958.

119. *Id.* at 554-55, 235 N.Y.S.2d at 958-60.

120. *Id.* at 555, 235 N.Y.S.2d at 960.

measurement would be the difference between the rents of the original apartment and new apartment for a period of two years.<sup>121</sup>

Although *Gorman* interpreted a rent control statute, an analogy to section 223-b can be drawn, as both laws provide eviction restrictions. Accordingly, a tenant who has been evicted in retaliation should be able to recover the difference in rent between the original and new premises. This would be a damage cause of action arising out of the landlord's breach of his duty not to retaliate.

Because a tenancy to which section 223-b is directed is not burdened with the severe eviction regulations which are present under rent control, a recovery of this differential for two years would not be appropriate. A fair measure would allow for the differential to be recovered for up to one year, since a year is the maximum period for which the tenant could have remained in possession had the issue of retaliation been raised before the tenant was evicted.<sup>122</sup> Additionally, moving costs<sup>123</sup> and emotional distress<sup>124</sup> should be compensable.

Courts should be wary, however, of tenants who, upon moving, have suddenly discovered, or think they have discovered, the real cause of their eviction, and who, therefore, raise the issue of retaliation many months after they have moved.<sup>125</sup> In any event, section 223-b is governed by a one year statute of limitations,<sup>126</sup> which will limit the commencement of such suits.

A third possible scenario is when the issue of retaliation has been decided in the landlord's favor and the tenant moves out of the premises. On appeal, the tenant sues for damages, claiming that the landlord had acted in retaliation. In *Pohlman v. Metro Trailer Park, Inc.*,<sup>127</sup> a New Jersey case with facts similar to the above, the appellate court reversed the lower court and awarded the

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121. *Id.* at 556, 235 N.Y.S.2d at 960-61.

122. See note 80 *supra* and accompanying text. In addition, a court may decide to award separate punitive damages. See, e.g., *I.H.P. Corp. v. 210 Cent. Park S. Corp.*, 16 A.D.2d 461, 466-67, 228 N.Y.S.2d 883, 888-89 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963); *Markese v. Cooper*, 70 Misc. 2d 478, 489, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972). For a discussion of the deterrent purpose of punitive damages and the requirement of malicious conduct, see *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490, 179 N.E.2d 497, 498 (1961); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158 (1966).

123. This would be an expense caused by the breach of duty and hence recoverable. Cf. *Burkhard v. Morris*, 206 A.D. 366, 367, 201 N.Y.S. 225, 225 (4th Dep't 1923) (*per curiam*) (special damages arising out of a lessor's failure to deliver possession to a month-to-month tenant held to include the cost of moving).

124. E.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978); *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 281-82, 97 Cal. Rptr. 650, 652 (1971). But see *Timberlee Apts. v. Able*, 39 Or. App. 93, —, 591 P.2d 399, 401 n.1 (1979) (no recovery obtained for mental suffering following a retaliatory eviction).

125. See *Frank v. 903 Park Ave. Co.*, 77 Misc. 2d 421, 423, 354 N.Y.S.2d 329, 331 (Civ. Ct. N.Y. 1974), *aff'd per curiam*, 83 Misc. 2d 271, 382 N.Y.S.2d 280 (App. Term 1st Dep't 1975).

126. N.Y. Civ. Prac. Law § 215 (McKinney Supp. 1979). Subdivision seven includes section 223-b of the Real Property Law within the one-year statute of limitations. The statute would start to run, for example, upon a landlord's serving of a notice to quit.

127. 126 N.J. Super. 114, 312 A.2d 888 (Super. Ct. Ch. Div. 1973).

tenant compensatory damages.<sup>128</sup> Such a holding has interesting implications for landlords. Resolving the issue of retaliation in the landlord's favor in a lower court necessarily requires removal of the tenant from the premises. According to *Pohlman*, however, the tenant can recover damages long after the dispossession. The outcome is that the landlord gains possession of the premises but must pay damages to the tenant. This appears to be both inefficient and undesirable. One answer to this problem would be to allow the unsuccessful tenant in the initial court to request an order upon which the status quo is preserved until the outcome of the appeal. If the tenant does not choose to appeal, however, the litigation should be considered final, allowing no further damage suits to be brought by the tenant.<sup>129</sup>

### CONCLUSION

The retaliatory eviction prohibition considerably refines the traditional landlord-tenant relationship. Although a New York landlord remains free to initially rent to whomever he chooses,<sup>130</sup> his freedom to discontinue a tenancy has been limited by section 223-b. While this law provides the foundation for retaliatory protection, courts will have the responsibility of giving definition to its ambiguous provisions. The proof procedure and the remedies arising out of a finding of retaliatory motive are the principal areas of the statute that will require judicial interpretation. In resolving these issues, courts must keep in mind the interests of tenants in having protection for reporting housing violations and exercising constitutional rights, as well as the desire of landlords to control rental property. Indeed, the strength of section 223-b is its ability to balance these two interests in its proof provisions; it embodies the concern of giving retaliatory protection to tenants while not unduly restricting evictions in all cases. An additional concern for the courts in applying the law is the maintenance of the integrity of the summary proceeding. The affirmative defense of retaliation, if abused by tenants, has the potential of seriously impeding such proceedings brought by landlords. One thing is certain, however: possessory proceedings will become less summary in nature because of the introduction of the substantive issue of retaliation.

In any event, the effectiveness of the law will be difficult to measure. It will not be accurately reflected in the number of times that the issue of retaliation

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128. *Id.* at 123, 312 A.2d at 892.

129. For example, in an Oregon case, a tenant, on appeal from a lower court decision in which the landlord had gained possession of the premises, sought damages for retaliation. The court of appeals held that since the tenant did not request damages in the possessory action below, he could not thereafter sue for damages. *Timberlee Apts. v. Able*, 39 Or. App. 93, —, 591 P.2d 399, 401-02 (1979).

130. *Kramarsky v. Stahl Management*, 92 Misc. 2d 1030, 1032, 401 N.Y.S.2d 943, 945 (Sup. Ct. 1977) ("Absent a supervening statutory proscription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim. He may decide not to rent to singers because they are too noisy, or not to rent to bald-headed men because he has been told they give wild parties.").

is raised by tenants. Rather, its success or failure will be verified by the deterrent effect that it has on retaliatory conduct of landlords. The full impact of the law, therefore, will be known only by landlords.

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