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A TALE OF TWO CITIES: THE RESIDENTIAL LANDLORD'S DUTY TO MITIGATE IN NEW YORK

JEREMY N. SHEFF *

Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.¹

INTRODUCTION

The past half century has seen sweeping changes to the legal regime applicable to the landlord-tenant relationship, particularly for residential properties.² As every first-year law student learns, the ancient feudal conception of a lease as a present transfer of an interest in land has given way to a more modern understanding of leases as contracts between a provider of a package of goods and services and their consumer.³ Among the changes wrought by this conceptual shift has been the imposition of previously unknown obligations on landlords in the event of tenant abandonment. Called either the duty to mitigate or, perhaps more accurately, the avoidable consequences rule,⁴ the rule requires a landlord seeking recovery of damages from a defaulting tenant who has abandoned possession to establish that he has made reasonable efforts to minimize the

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¹ ANATOLE FRANCE, *LE LYS ROUGE* 118 (Calmann-Levy ed., 1896) (1894).

² See generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520-21 (1984) (discussing the revolution of landlord-tenant law, specifically referencing back to 1968).

³ See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (1970).

⁴ Stephanie G. Flynn, *Duty to Mitigate Damages Upon a Tenant's Abandonment*, 34 REAL PROP. PROB. & TR. J. 721, 723-24 (2000) ("A more accurate phrase that has been suggested for the duty to mitigate is the 'avoidable consequences rule'").

damages flowing from the tenant's abandonment, for example by attempting to re-let the abandoned property.⁵ This is a departure from the traditional rule that a landlord could, if he chose, allow property abandoned by a tenant during the term of a lease to sit vacant and idle, and still hold the tenant liable for the full rent due under the lease for the entire term thereof.⁶ One recent survey reports that the District of Columbia and all but six states have adopted this rule by statute or judicial decision in the four decades since it first entered the American legal landscape.⁷

New York has been a studied exception to this trend. For decades, the lower courts in the state have variously imposed and rejected the landlord's duty to mitigate, at least in the context of residential leases.⁸ This unsettled situation came to an apparent end in the summer of 2008, when the Appellate Division, Second Department, of the New York Supreme Court handed down its decision in the case of *Rios v. Carrillo*.⁹ That case, extending the no-mitigation rule reaffirmed by the Court of Appeals with respect to commercial leases in *Holy Properties, Ltd. v. Kenneth Cole Productions, Inc.*,¹⁰ sided with those lower courts that had held that residential landlords have no duty to mitigate, and in so doing, effectively imposed the traditional no-mitigation rule statewide for the foreseeable future.¹¹

⁵ See generally Glen Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends*, 53 TEMP. L. Q. 1, 1-3 (1980) (summarizing the evolution of the law that has led up to the treatment of leases as "agreement[s] between [] merchant[s] and [] consumer[s] for goods and services").

⁶ Flynn, *supra* note 4, at 780-81 ("In the states that adhere to the non-mitigation rule . . . the landlord may (1) terminate the lease, thereby releasing the tenant from the further obligation to pay rent, (2) obtain another tenant and hold the original tenant liable for any deficiency that occurs (*i.e.*, mitigation), or (3) allow the premises to remain vacant and collect the remaining rent from the original tenant. A fourth option has been suggested by scholarly commentators: accepting a substitute tenant proposed by the original tenant." (footnotes omitted)).

⁷ Joshua R. Cohn, Effecting a "Petrifying Rigidity": Why New York, Under Certain Circumstances, Needs to Impose a Duty to Mitigate on Residential Landlords in the Event of Tenant Abandonment 24-25 (2010) (unpublished scholarly note, St. John's University School of Law) (on file with author).

⁸ The New York Court of Appeals rejected the duty to mitigate rule in the context of commercial leases in *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 637 N.Y.S.2d 964 (1995). This was the Court of Appeals' first pronouncement on the issue since its decision over a hundred years earlier in *Becar v. Flues*, 64 N.Y. 518 (1876), a case that unsurprisingly applied the traditional rule to a residential lease. Lower court cases addressing the residential landlord's duty to mitigate are discussed further *infra* at notes 13-21 and the accompanying text.

⁹ 861 N.Y.S.2d 129 (N.Y. App. Div.-2d 2008) (extending the no-mitigation rule for commercial leases to residential leases).

¹⁰ 87 N.Y.2d 130, 134 (1995) (distinguishing the no-mitigation rule as an exception to the general contract law duty to mitigate in the event of a breach).

¹¹ See Cohn, *supra* note 7, at 22 n.95 (noting that tenants who abandon leases for lack of funds are unlikely to have the resources to put their case before the Court of Appeals).

This Article argues that the *Rios* decision is worthy of criticism, but not because imposing a duty to mitigate on landlords is necessarily the best rule for every dispute arising out of a residential tenant's abandonment. Rather, *Rios* is bad law because it is the product of an unfortunate confluence of a poorly framed legal issue, a poorly organized judicial hierarchy, and an economically diverse jurisdiction.¹² Rather than argue the merits of the traditional or modern positions on the legal question of landlord mitigation in the abstract, this Article argues that courts in New York have traditionally responded to residential tenant abandonment by weighing the equities and the good faith of the parties in each case, and that they should continue to do so. *Rios* forecloses this type of factually sensitive inquiry on the part of trial courts, creating incentives for undesirable strategic behavior by landlords.

To be fair, the duty to mitigate imposed in many jurisdictions creates incentives for strategic behavior by tenants, though such jurisdictions appear to have made the policy judgment that such behavior is either less likely or less harmful than strategic behavior by landlords under the traditional rule. But the experience of New York in this area suggests that by tolerating a modicum of discretion on the part of judges, a jurisdiction may be able to discourage—or at least decline to reward—strategic behavior of any kind in residential landlord-tenant relationships. Moreover, such judicial discretion allows for more sensitive balancing of the policy issues at stake in residential landlord-tenant relationships, which are highly dependent on the economic circumstances of particular landlords and tenants. In a jurisdiction like New York, which is home to stunning economic diversity, the argument in favor of flexible standards rather than bright-line rules on economically contingent issues such as residential tenant abandonment is particularly strong.

This Article proceeds as follows: Part I analyzes the cases in this area of landlord-tenant law and identifies trends in the doctrine leading up to the decision in *Rios*—chief among them a sensitivity of courts to the particular equities of the parties before them—and situates *Rios* as a natural result of these trends. Part II discusses the features of the New York Unified Court System that allow *Rios*, while consistent with pre-existing trends in the caselaw, to upend those trends and eliminate the equitable sensitivity that has characterized residential tenant abandonment cases in New York. Part

¹² Whether the *Rios* court's invocation of *Holy Properties* as precedent was appropriate is yet another point on which the opinion can be criticized. See *infra* notes 79-83 and accompanying text.

III demonstrates the likely effects of this shift in the law by reference to demographic data on housing characteristics in the downstate region. In particular, the diversity of housing stock and the economic positions of landlords and tenants in this region suggests that the equitable flexibility that characterized the tenant abandonment cases prior to *Rios* was desirable, and that the features of the New York court system that allowed *Rios* to disrupt this flexibility are undesirable. Part IV concludes with a critique of *Rios*, not simply as a wrongly decided case (which it arguably was in terms of its legal analysis), but as an example of how things can go wrong in a common-law system of adjudication.

I. LANDLORD-TENANT DISPUTES: EQUITABLE WEIGHING OR BRIGHT-LINE RULES?

A review of the history of the issue of landlord mitigation in New York's lower courts prior to *Rios* helps to identify some of the concerns that appear to motivate courts in cases of residential tenant abandonment.

The duty to mitigate appears to be a judicial response to the economic stresses of modern urban living.¹³ Unsurprisingly then, in New York, where the applicability of the rule has been uncertain,¹⁴ courts have been

¹³ See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir. 1970):

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society . . . But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. . . . "The complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees . . ." Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. quoting RICHARD POWELL, *REAL PROPERTY* 221 (1967). See also *Paragon Indus., Inc. v. Williams*, 473 N.Y.S.2d 92, 93 (App. Term-2d 1983) (citing *Javins* and imposing a duty to mitigate on residential landlords).

¹⁴ This qualification excludes cases in which a particular rule was treated as directly applicable and binding precedent. Thus, it excludes cases that mechanically follow the no-mitigation rule of *Holy Properties* without discussion of the distinction between residential and commercial leases. See, e.g., *Callender v. Titus*, 791 N.Y.S.2d 868, 868 (App. Term-2d 2004); *Solow Mgmt. Corp. v. Lovelace*, N.Y. L.J., June 28, 2000, at 27 (Civ. Ct. N.Y. County); *Commuter Hous. Co. v. Saunders*, N.Y. L.J., Dec. 11, 2000, at 35 (N.Y. App. Term-2d 2000); *McMorrow v. Dorian*, N.Y. L.J., Apr. 23, 1998, at 37 (N.Y. App. Term-2d). Conversely, it also excludes cases which mechanically follow the pro-mitigation rule of *Paragon* without discussing *Holy Properties* or *Becar v. Flues*, 64 N.Y. 518 (1876). See, e.g., *Palumbo v. Donalds*, 754 N.Y.S.2d 856, 866 (Civ. Ct. Kings County 2003); *Richard G. Roseetti, LLC v. Werther*, 800 N.Y.S.2d 355, 355 (City Ct. Albany 2005). Also excluded from the analysis in this section are cases in which the duty to mitigate was not directly at issue. See, e.g., *Wallis v. Falken-Smith*, 523 N.Y.S.2d 827, 828 (App. Div.-1st 1988); *Birchwood Assocs. v. Stern*, 390 N.Y.S.2d 505, 506 (App. Term-2d 1976) in which landlords' diligent efforts to relet the premises moot the question of whether they had a duty to do so. See also *Grays v. Brooks*, 561 N.Y.S.2d 515, 516 (Civ. Ct. Queens County 1990) in which the court found that the landlord had a duty to mitigate, even after the decision in *Becar*, because the tenant vacated after service of a warrant of eviction.

more likely to impose a duty to mitigate on residential landlords in urban settings than in non-urban settings, but less likely to do so where the rental property at issue might be characterized as a luxury property. So, for example, a duty to mitigate was found in cases involving a moderately priced apartment in the Belmont section of the Bronx,¹⁵ an inexpensive apartment in Queens,¹⁶ and a rent-stabilized apartment in the Borough Park section of Brooklyn.¹⁷ In contrast, landlords were not expected to mitigate damages in cases involving a high-rise apartment in the affluent Turtle Bay section of Manhattan's East Side,¹⁸ an over-\$9,000-per-month rental home in the waterfront community of Kings Point in Nassau County,¹⁹ a suburban home in Webster (a suburb of Rochester),²⁰ or a weekly rental of a vacation cottage in the Finger Lakes.²¹

¹⁵ 29 Holding Corp. v. Diaz, 775 N.Y.S.2d 807, 814 (Sup. Ct. Bronx County 2004). The leased premises in *Diaz* were located at 707 East 187th Street in Bronx County, and the monthly rent—according to the landlord's claim for 12 months' unpaid rent from April 1997 to May 1998, totaling \$6963.84—was approximately \$580—roughly equivalent to \$776 in 2010. See *Diaz*, 775 N.Y.S.2d at 810; U.S. BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR (2010), http://www.bls.gov/data/inflation_calculator.htm. According to the most recent census data available as of this writing, the median rent in this section of the Bronx is currently \$782. U.S. CENSUS BUREAU, 2007-2009 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES: PUBLIC USE MICRODATA AREA 5 03705, NEW YORK: SELECTED HOUSING CHARACTERISTICS: 2007-2009, available at <http://factfinder2.census.gov>.

¹⁶ Parkwood Realty Co. v. Marciano, 353 N.Y.S.2d 623 (Civ. Ct. Queens County. 1974). The apartment at issue was rented for \$175 per month in 1973, roughly equivalent to \$845 in 2009. See *id.*, 353 N.Y.S.2d at 627; U.S. BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR (2010), http://www.bls.gov/data/inflation_calculator.htm. According to the most recent census data, the median rent in Queens County is currently \$1,136. U.S. CENSUS BUREAU, 2006-2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES: QUEENS COUNTY, NEW YORK: SELECTED HOUSING CHARACTERISTICS: 2006-2008, available at <http://factfinder2.census.gov>.

¹⁷ Lora Equities, Inc. v. Galindo, 821 N.Y.S.2d 377 (Civ. Ct. Kings County 2006). The regulated monthly rent in the case was \$645.86. *Id.* at 378.

¹⁸ Whitehouse Estates, Inc. v. Post 662 N.Y.S.2d 982 (App. Term-1st 1997) (involving a dispute over an apartment at 350 East 52nd Street in Manhattan); cf. C.J. Hughes, *Living in Turtle Bay: In the Many Enclaves, One Neighborhood*, N.Y. TIMES, Mar. 30, 2008, available at <http://www.nytimes.com/2008/03/30/realestate/30livi.html> (noting that in early 2008 one-bedroom apartments in Turtle Bay rented for around \$3,200 per month). The opinion in *Whitehouse Estates* does not disclose the amount of rent agreed to under the lease at issue.

¹⁹ Gordon v. Eshagoff, No. 6246-04, 2007 WL 2815546, (N.Y. Sup. Ct. Nassau County Sept. 04, 2007) (the rent was \$9,450 from September 2005 – July 2006 and \$9,925 from July 2005 – July 2006).

²⁰ Wienecke v. Evans, 15 Misc.3d 1128(A), 841 N.Y.S.2d 222, 2007 WL 1240413, at *4 (Just. Ct. Town of Webster Apr. 30, 2007). In *Wienecke* the court rejected an argument that *Holy Properties* and similar Fourth Department precedent should be read to apply only to commercial leases. *Id.* at *3.

²¹ Spohn v. Fine, 479 N.Y.S.2d 139, 140 (County Ct. Yates County 1984). The litigation in *Spohn* originated in the small claims part of the town court of Jerusalem, New York, in Yates county, the heart of the Finger Lakes region. The court in *Spohn* felt bound by *stare decisis* to follow an ancient Court of Appeals case on the question of a landlord's duty to mitigate, but acknowledged the growing body of precedent in the Second Department departing from this rule. *Id.* at 140-41.

Equitable considerations also appear to strongly influence the choice of rule in disputes implicating landlord mitigation. Such considerations may include the economic hardship faced by the parties, their relative sophistication, and their record of good faith. For example, in *Duda v. Thompson*,²² the landlord was an individual who, along with a partner, has held an interest in several small properties in Westchester County over the past thirty years.²³ The defendant, a tenant in a two-family dwelling in Yonkers at which the plaintiff apparently also resided for at least some time,²⁴ remained in occupation for three months without paying rent, contested the suit subsequently brought by the landlord, and then vacated the leased premises in secret. Defendant did not notify the landlord of his departure until nearly two months after the fact when directly asked by the presiding justice more than a month after dispositive motions had been fully briefed.²⁵ The court held that the aggrieved landlord had no duty to mitigate, noting that the same rule had been applied in *Becar* where the tenant's breach was the result of his death prior to the start of the lease term—apparently contrasting the equitable implications of circumstances outside of the tenant's control in *Becar* with those of the defendant's deliberate acts in *Duda*.²⁶

In *Lefrak v. Lambert*,²⁷ the court found a duty to mitigate in sharply different circumstances. The plaintiff in *Lefrak* was “one of the largest (if not The largest) individual owner of residential apartment houses” in New York City, who demanded relief under an apparently punitive liquidated damages clause and made no showing of specific efforts to re-let the apartment in question—one in a complex of five thousand—instead relying on the inclusion of the apartment on an “availability list” for the 17 months

²² 647 N.Y.S.2d 401 (Sup. Ct. Westchester County 1996).

²³ Westchester Records Online, Land Records Search for Carol Duda, executed on September 14, 2010 (search results on file with author).

²⁴ See *Duda*, 647 N.Y.S.2d at 404-05 (noting that ancillary proceedings could be brought in Yonkers City Court); Deed dated September 1, 1987, Westchester County Clerk's Office Liber 8965 Page 122 (on file with author) (listing Carol A. Duda as residing at an address corresponding to the only parcel in the city of Yonkers in which she has a recorded interest). Ms. Duda and her partner sold the property in 1999, some three years following the decision of their suit against their tenant, Mr. Thompson. Deed dated August 24, 1999, Westchester County Clerk's Office Liber 12387 Page 113 (on file with author). A search for the property address (not listed here for privacy purposes) on Google Maps reveals it to be one of several structures in what appears to be a subdivision of two-family dwellings.

²⁵ *Duda*, 647 N.Y.S.2d at 402.

²⁶ *Id.* at 403.

²⁷ 390 N.Y.S.2d 959 (Civ. Ct. Queens County 1976).

it remained vacant.²⁸ The defendant tenants who benefited from this ruling were a middle-class couple who had timely notified the landlord that they were forced to abandon their apartment due to the simultaneous birth of a child and loss of the mother's income. Appearing *pro se*, the defendants offered no defense at trial and agreed to pay "any Fair amount decided upon," despite the fact that the rent due for their period of actual occupancy was covered by their security deposit and a post-abandonment payment.²⁹

As the *Lefrak* court noted, the question of mitigation in tenant abandonment cases "test[s] the mettle of a judge's ability to live up to th[e] time-honored precept" of Mosaic law: "Thou shalt not respect the person of the poor, nor favour the person of the mighty. . . ."³⁰ The cases discussed above seem to suggest that New York courts in residential abandonment cases have been cheating on this test. Framing their opinions as part of a live debate over the selection of an appropriate bright-line legal rule, the judges in these cases seem to be obscuring—perhaps unintentionally—a deeper equitable inquiry. At the core of this equitable inquiry is a moral judgment concerning who *ought* to bear the costs of tenant abandonment *in a particular case*. Notably, this inquiry appears to weigh not only the moral culpability of the parties' conduct, but also each party's ability to bear the costs of abandonment, as reflected by their relative economic might.³¹

In light of these trends in the application of a duty to mitigate on residential landlords,³² the outcome of *Rios* is unsurprising. The apartment at issue in *Rios* was a condominium unit in a luxury high rise on East 79th Street in Manhattan.³³ The landlord, Maria Rios, owned the individual unit

²⁸ *Lefrak*, 390 N.Y.S.2d at 960-61 (internal quotation marks omitted).

²⁹ *Id.* at 960.

³⁰ *Id.* at 960 (quoting *Leviticus* 19:15).

³¹ This tendency is not particular to the New York courts. The case with which most first-year law students are introduced to the landlord's duty to mitigate, *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977), reprinted as abridged in JESSE DUKEMINIER ET AL., PROPERTY 410 (6th ed. 2006), involves parties in similarly powerful equitable circumstances: the tenant, a returning veteran who was unable to take possession due to the breakup of his engagement, and the landlord, an owner of a large apartment complex who declined to respond to the tenant's timely notice of abandonment and refused to re-let the apartment to a suitable substitute tenant.

³² Of course, the occasional case defies these trends. See, e.g., *Kabushi Kaysha Iwasa Tekkojo v. Comico Entm't, Inc.*, N.Y. L.J., Apr. 16, 1997, at 25 (N.Y. Sup. Ct. N.Y. County) (finding a duty to mitigate in a dispute over a "luxury duplex condominium apartment" in midtown Manhattan being leased to celebrity comedian Jackie Mason).

³³ The apartment in *Rios* sold in August of 2010 for \$1.15 million. AUTOMATED CITY REGISTER INFORMATION SYSTEM [hereinafter "ACRIS"] Doc. ID # 2010081600549003, available at <http://a836-acris.nyc.gov/>.

as an investment property, and actually made her home in Westchester.³⁴ Ms. Rios's tenant, Mr. Carrillo, was paying \$3,500 per month in rent, and in a declining market he apparently tried to walk away from the lease to take a better deal on another apartment in the same building.³⁵ Claiming she hoped to sell the apartment, Ms. Rios opted not to re-let it so it could be more easily shown to prospective purchasers.³⁶ Based on the judicial tendencies discussed above, it should be no surprise that the *Rios* court found no duty to mitigate on these facts: the landlord is an individual investor rather than an institution; the property, while urban, is a luxury property; and the facts before the court suggested the tenant acted in bad faith.³⁷ The trends identified above would have predicted the outcome in *Rios* even in the absence of a clear and consistent rule regarding a landlord's duty to mitigate. As such, framing the issue as the choice and application of a "rule" rather than a weighing of the equities adds little interpretive value, and may actually invite error by obscuring the determinative issues in play.³⁸

If the effects of the decision in *Rios* were limited to the parties to the action, casting a weighing of equities as the application of a legal rule would be of little moment. But because of the hierarchy of the New York court system, this idiosyncratic case is no longer limited to the particular equities presented by its facts. Precisely because the duty to mitigate is

³⁴ ACRIS, *supra* note 33, Doc. ID # FT_1640008794564; Interview with Peter Piddoubny, counsel to Maria Rios, October 23, 2009. The fact that neither party to the case resided in Queens County calls the propriety of venue in the case into question, *see* *Friedman v. Law* 400 N.Y.S.2d 562, 563 (App. Div.-2d 1978) (ruling that place of business does not constitute residence for purposes of determining proper venue), but Mr. Carrillo never contested venue.

³⁵ Brief of Appellant at 1, *Rios v. Carrillo*, No. 2007-00058 (N.Y. App. Div.-2d June 20, 2007); Interview with Peter Piddoubny, counsel to Maria Rios, October 23, 2009.

³⁶ Interview with Peter Piddoubny, counsel to Maria Rios, October 23, 2009. Ms. Rios did in fact sell the unit shortly before the end of Mr. Carrillo's lease term. *Compare* Deed dated August 12, 2002, ACRIS, *supra* note 33, Doc. ID # FT_1640008794564; *with* Brief of Appellant at 1, *Rios v. Carrillo*, No. 2007-00058 (N.Y. App. Div.-2d June 20, 2007) (noting that the lease at issue did not expire until August 14, 2002); *Rios v. Carrillo*, 861 N.Y.S.2d 129, 130 (App. Div.-2d 2008) (noting that Ms. Rios filed suit in 2003).

³⁷ The fact that Ms. Rios apparently entered, contracted to sell, and conveyed title to the apartment during the unexpired term of Mr. Carrillo's lease, and still sought to recover the full rent due for that term, might call her own good faith into question. However, to the extent the Appellate Division panel was aware of these facts, its decision to remand for a determination of the factual question whether Ms. Rios had accepted Mr. Carrillo's surrender of the premises may demonstrate the court's determination to consider the parties' good faith under a doctrine other than the duty to mitigate, at least in this case. *Rios*, 861 N.Y.S.2d at 131.

³⁸ *See infra* notes 79-83 and accompanying text (critiquing the legal reasoning of the *Rios* opinion).

framed as a rule rather than an equitable balancing test, *Rios* will now govern the rights and duties of landlords and tenants in all cases of tenant abandonment in New York State, regardless of whether parties in such cases stand in the same equitable position as the parties in *Rios*. As the cases discussed above demonstrate, this precedent will work a significant change in the relationships between residential landlords and tenants in the state. An examination of New York's judicial hierarchy will demonstrate the causes and extent of this shift.

II. A TALE OF TWO COURTS: THE CONFLICT BETWEEN SUBJECT-MATTER AND AMOUNT-IN-CONTROVERSY JURISDICTION

The complexity of New York's court system likely contributed to the uncertainty of the state's rule on residential landlords' duty to mitigate, and the duration of that uncertainty. A claim for rent against a residential tenant who has abandoned possession could follow no less than six possible tracks through the New York court system:

1. If the total unpaid rent due under the lease exceeds \$25,000, the landlord would bring suit in Supreme Court;³⁹ appeal could be taken as of right to the appropriate department of the Appellate Division;⁴⁰ discretionary appeal could then be taken to the Court of Appeals.⁴¹
2. In the five boroughs of New York City, if the total unpaid rent due under the lease is \$25,000 or less, the landlord would bring suit in the New York City Civil Court; appeal could be taken as of right to the appropriate Appellate Term;⁴² discretionary appeal could then be taken to the appropriate Department of the Appellate Division,⁴³ and then again to the Court of Appeals.⁴⁴
3. In Nassau and western Suffolk Counties, if the total unpaid rent due under the lease exceeds \$15,000 and is no more than \$25,000,

³⁹ N.Y. CONST. art. VI, § 7.

⁴⁰ N.Y. C.P.L.R. § 5701(a) (Consol. 2011).

⁴¹ N.Y. C.P.L.R. § 5602(a)(1) (Consol. 2011).

⁴² N.Y. CITY CIV. CT. ACT § 202 (Consol. 2011) (establishing the \$25,000 cap on the court's jurisdiction); N.Y. CITY CIV. CT. ACT § 1702 (Consol. 2011) (providing the right to appeal to the Appellate Term).

⁴³ N.Y. C.P.L.R. § 5703(a) (Consol. 2011).

⁴⁴ N.Y. C.P.L.R. § 5602(b)(2) (Consol. 2011).

the landlord would bring suit in County Court;⁴⁵ appeal could be taken as of right to the Appellate Term for the 9th and 10th Judicial Districts;⁴⁶ discretionary appeal could then be taken to the appropriate Department of the Appellate Division,⁴⁷ and then again to the Court of Appeals.⁴⁸

4. In Nassau and western Suffolk Counties, if the total unpaid rent due under the lease is \$15,000 or less, the landlord would bring suit in District Court;⁴⁹ appeal could be taken as of right to the Appellate Term for the 9th and 10th Judicial Districts;⁵⁰ discretionary appeal could then be taken to the appropriate Department of the Appellate Division,⁵¹ and then again to the Court of Appeals.⁵²

5. Outside of New York City, Nassau County, and western Suffolk County, if the total unpaid rent due under the lease exceeds \$15,000

⁴⁵ See N.Y. CONST. art. VI, § 11(a) (“The county court shall have jurisdiction over . . . actions and proceedings for the recovery of money . . . where the amount sought to be recovered or the value of the property does not exceed twenty-five thousand dollars . . .”).

⁴⁶ See N.Y. SUP. CT. R. § 730.1(d)(2)(iii) (Consol. 2011) (“[T]he Appellate Term . . . shall have jurisdiction to hear and determine all appeals . . . in civil matters, from any county court within either the ninth judicial district or the tenth judicial district.”).

⁴⁷ See N.Y. C.P.L.R. § 5703(a) (Consol. 2011) (“An appeal may be taken to the appellate division, from an order of the appellate term which determines an appeal from a judgment or order of a lower court, by permission of the appellate term or, in the case of refusal, of the appellate division.”).

⁴⁸ See N.Y. C.P.L.R. § 5602(a)(1) (Consol. 2011) (“An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. . . . Such appeal may be taken in an action originating in . . . a county court . . .”).

⁴⁹ See N.Y. CONST. art. VI, § 16 (providing authority for the continuation and establishment of district courts); N.Y. UNIFORM DIST. CT. ACT § 202 (Consol. 2011) (“The court shall have jurisdiction of actions and proceedings for the recovery of money . . . where the amount sought to be recovered . . . does not exceed \$ 15,000.”); DAVID D. SIEGEL, NEW YORK PRACTICE § 20 (4th ed. 2005) (There are two district courts in the state, one covering Nassau County and the other the western part of Suffolk County.”).

⁵⁰ See N.Y. UNIFORM DIST. CT. ACT § 1701 (Consol. 2011) (“Appeals in civil cases shall be taken from the district court to the county court, unless an appellate term of the supreme court has been established by the appellate division of the department and such appellate division has directed that such appeals be taken to such term, in which case the appeal shall be taken to the appellate term.”); N.Y. SUP. CT. R. § 730.1(d)(2)(i) (Consol. 2011) (“Appellate Term shall have jurisdiction to hear and determine all appeals from the District Court of Nassau County [and] the District Court of Suffolk County . . .”).

⁵¹ See N.Y. C.P.L.R. § 5703(a) (Consol. 2011) (“An appeal may be taken to the appellate division, from an order of the appellate term which determines an appeal from a judgment or order of a lower court, by permission of the appellate term or, in the case of refusal, of the appellate division.”).

⁵² See N.Y. C.P.L.R. § 5602(b)(2) (Consol. 2011) (“An appeal may be taken to the court of appeals by permission of the appellate division . . . in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.”).

and is no more than \$25,000, the landlord would bring suit in County Court;⁵³ appeal could be taken as of right to the appropriate department of the Appellate Division;⁵⁴ discretionary appeal could then be taken to the Court of Appeals.⁵⁵

6. Outside of New York City, Nassau County, and western Suffolk County, if the total unpaid rent due under the lease is no more than \$15,000, the landlord would bring suit in City, Town, or Village Court;⁵⁶ appeal could be taken as of right to the County Court;⁵⁷ and again as of right to the appropriate Department of the Appellate Division,⁵⁸ discretionary appeal could then be taken to the Court of Appeals.⁵⁹

The most obvious feature of this complex set of litigation paths is the two-tiered system of jurisdiction it creates based on the amount-in-controversy. Cases with the highest stakes will originate in Supreme Court and be appealed to the Appellate Division in the first instance; cases with lower stakes will originate in a court of limited original jurisdiction and be appealed to an inferior appellate court; they can only reach the Appellate Division through discretionary review. But this tiered system of judicial administration based on amount-in-controversy exists alongside another

⁵³ See N.Y. CONST. art. VI, § 11(a) (“The county court shall have jurisdiction over . . . actions and proceedings for the recovery of money . . . where the amount sought to be recovered or the value of the property does not exceed twenty-five thousand dollars”); *but see* DAVID D. SIEGEL, *NEW YORK PRACTICE* § 14 (4th ed. 2005) (“The practitioner should inquire about which categories of jurisdiction the county court in a particular county customarily exercises. It may be found that in a given county the court is used primarily as the felony court, while civil matters are brought in the Supreme Court. These are administrative variations one meets notwithstanding that the court may technically have jurisdiction over a range of things.”).

⁵⁴ See N.Y. C.P.L.R. § 5701(a) (Consol. 2011) (“An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court”).

⁵⁵ See N.Y. C.P.L.R. § 5602(a)(1) (Consol. 2011) (“An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application Such appeal may be taken in an action originating in . . . a county court. . . .”).

⁵⁶ N.Y. UNIFORM CITY CT. ACT § 202 (Consol. 2011) (setting amount-in-controversy limit in City Court at \$15,000); N.Y. UNIFORM JUST. CT. ACT § 202 (Consol. 2011) (establishing amount-in-controversy limit for Justice Courts (Town and Village Courts) at \$15,000).

⁵⁷ N.Y. UNIFORM CITY CT. ACT § 1701 (Consol. 2011) (providing for appeal from City Court to County Court where no Appellate Term has been established); N.Y. UNIFORM JUST. CT. ACT § 1701 (providing for appeal from Justice Courts to County Court where no Appellate Term has been established).

⁵⁸ N.Y. C.P.L.R. § 5703(b) (Consol. 2011) (“An appeal may be taken to the appellate division as of right from an order of a county court or a special term of the supreme court which determines an appeal from a judgment of a lower court.”).

⁵⁹ N.Y. C.P.L.R. § 5602(b)(2) (Consol. 2011).

tiered system of administration: one based on subject-matter specialization.

The vast majority of residential landlord-tenant matters are allocated to particular courts throughout the state. This owes largely to the fact that the procedural mechanism for most such disputes is the summary proceeding established by Article 7 of the Real Property Actions and Proceedings Law.⁶⁰ The Housing Part of the New York City Civil Court has exclusive jurisdiction over such proceedings within the five boroughs of New York City, regardless of the amount in controversy on ancillary monetary claims.⁶¹ Outside of the City of New York the courts with original jurisdiction over summary proceedings are also the courts of limited amount-in-controversy jurisdiction.⁶² In short, judicial specialization in and expertise with residential landlord-tenant disputes is concentrated in the courts whose amount-in-controversy jurisdiction is at the lower end of the spectrum.

A notable exception to this allocation of jurisdiction in residential landlord-tenant cases based on subject matter is a claim for purely monetary relief, such as an action for rent against a tenant not in possession. Because possession is not at issue in such cases, the summary proceeding is not available⁶³ and original jurisdiction over such a dispute will be based solely on the amount in controversy. Of course, this is precisely the circumstance in which the existence of a landlord's duty to mitigate damages would be relevant.

In most instances, the exception will make no difference; residential rents are low enough, and lease terms short enough, that it will be very unusual for a residential lease to meet the amount-in-controversy threshold necessary to put it on litigation path 1 or 5 above. But unusual does not mean impossible, and an action for rent against the abandoning tenant of an extremely expensive residence is perhaps the only type of residential landlord-tenant dispute that is likely to originate in Supreme Court (or, in upstate counties, County Court) and come before the Appellate Division on an appeal as of right. An exploration of the demographics of housing in

⁶⁰ N.Y. REAL PROP. ACTS. LAW §§ 701 *et seq.* (Consol. 2011).

⁶¹ N.Y. CITY CIV. CT. ACT §§ 110, 204 (Consol. 2011).

⁶² *See supra* notes 45, 49 & 56 for the amount-in-controversy limits for County Court, District Court and Justice Courts, respectively.

⁶³ Landlords may only bring two types of claims in the Housing Part—nonpayment and holdover proceedings—and because both are summary proceedings relying on special statutory remedies for recovery of possession, they are not available where the tenant is not in possession. N.Y. CITY CIV. CT. ACT §110(a)(5); N.Y. REAL PROP. ACTS. LAW art. 7 (Consol. 2011). For the same reason, the summary proceeding is not available against a tenant no longer in possession anywhere else in the state.

New York demonstrates just how unusual such a case would be.

FIGURE 1: MEDIAN MONTHLY HOUSING COSTS FOR RENTAL HOUSEHOLDS, BY COUNTY⁶⁴

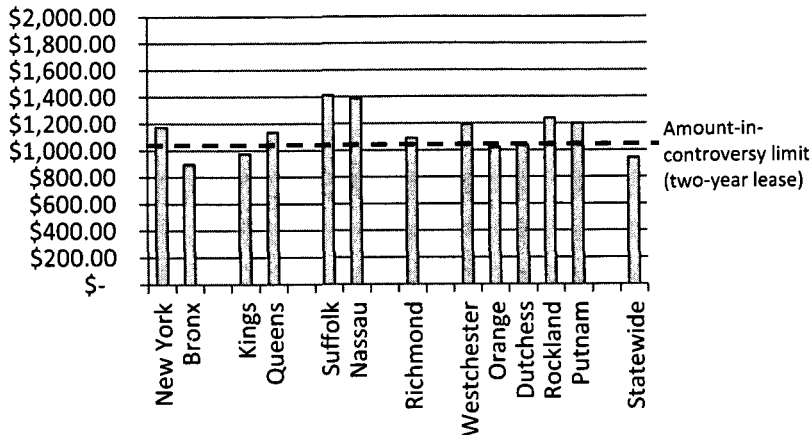


Figure 1 shows median monthly housing costs for each county in the First and Second Departments, as well as the statewide median. The horizontal line represents the amount-in-controversy limit for the courts of limited original jurisdiction—\$25,000—divided by 24—to represent the distribution of the amount in controversy over a 24-month lease. As the chart demonstrates, in most downstate counties the median tenant could only be sued in Supreme Court if he signed a two-year lease and never took possession. In fact, in the Bronx and Brooklyn, even the tenant who never took possession under a two-year lease could not, at median rents, injure his landlord in excess of the jurisdictional limits of the Civil Court. Moreover, as suggested by the fact that the statewide median is significantly lower than the median in the downstate counties within the First and Second Departments, median monthly housing costs in most

⁶⁴ Data compiled from the U.S. Census Bureau's American Community Survey ("ACS"). U.S. Census Bureau, 2006–2008 American Community Survey 3-Year Estimates, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-context=gct&-ds_name=ACS_2008_3YR_G00_&-CONTEXT=gct&-mt_name=ACS_2008_3YR_G00_GCT2514_ST2T&-tree_id=3308&-redoLog=true&-geo_id=04000US36&-format=ST-2T&-_lang=en.

upstate counties are typically far lower than those in most of the downstate counties,⁶⁵ making it even less likely for a tenant abandonment case in upstate counties to originate in Supreme Court. And in the common situation of a one-year residential lease, it will be extremely rare to exceed the jurisdictional limits of the inferior trial courts in any county—the corresponding horizontal line would literally be off the chart in Figure 1. In short, simply by virtue of demographics and amount-in-controversy limits, the residential landlord-tenant case that originates in Supreme Court and is appealable as of right to the Appellate Division is, by definition, an outlier. Of course, *Rios* is exactly such a case—the monthly rent due under the lease in *Rios* (\$3,500) is also too high to be captured by the scale in Figure 1.

This idiosyncrasy of *Rios* is especially significant in light of the weight accorded to appellate precedent in the courts of New York State. Within the City of New York, the Appellate Term will hear appeals regarding residential landlord-tenant disputes, with the exception of suits against abandoning tenants of extremely expensive residences.⁶⁶ The same will be true for most of Long Island.⁶⁷ Elsewhere in the state, the County Courts will have appellate jurisdiction over most such cases and original jurisdiction over the remainder.⁶⁸ Despite the depth of experience of these inferior appellate courts in residential landlord-tenant disputes, the weight of their authority is quite limited. Precedent of the Appellate Term binds only courts subject to their direct review⁶⁹—notably excluding the Supreme Court, which is free to disagree with Appellate Term precedent.⁷⁰ Conversely, the Appellate Division is treated as a single state-wide court divided into geographic departments merely for administrative

⁶⁵ See generally U.S. Census Bureau, *supra* note 64.

⁶⁶ N.Y. CITY CIV. CT. ACT §§ 204, 1702 (Consol. 2011).

⁶⁷ N.Y. UNIFORM DIST. CT. ACT §§ 204, 1701 (Consol. 2011).

⁶⁸ N.Y. CONST. art. VI, § 11(a); N.Y. UNIFORM DIST. CT. ACT § 1701 (Consol. 2011).

⁶⁹ *People v. Garcia*, 870 N.Y.S.2d 851, 856 (Sup. Ct. Bronx County 2008) (explaining that the opinions of the Appellate Term “are merely persuasive authority”); *People v. Pestana*, 762 N.Y.S.2d 786, 789 (Crim. Ct. N.Y. County 2003) (noting that a decision of an appellate term is not binding on the supreme court of another department).

⁷⁰ *29 Holding Corp. v. Diaz*, 775 N.Y.S.2d 807, 813 (Sup. Ct. Bronx County 2004) (“No authority has been found suggesting that the Supreme Court is bound by decisions of the Appellate Term within its own judicial department”); *Mfrs. & Traders Trust Co. v. Village of Forestville*, 294 N.Y.S.2d 59, 62 (Sup. Ct. Erie County 1968) (“A decision of an Appellate Term of one Judicial Department is not binding upon the Supreme Court in another Department which has decided to the contrary”).

convenience;⁷¹ in theory, the decision of any Department of the Appellate Division is binding authority on all courts of original jurisdiction in the state.⁷²

The result of this allocation of appellate authority is to allow most residential landlord-tenant issues to be resolved in a manner sensitive to local conditions and individual circumstances. Because the reach of binding appellate precedent in most landlord-tenant cases is so short, courts in New York have been largely free to adapt their approach to residential landlord-tenant disputes with the type of fact-sensitive balancing of equities described in the previous Part. To be fair, the downstate Appellate Term panels that have considered the issue since *Holy Properties* appeared to have interpreted its applicability to residential leases in the same way as the *Rios* court.⁷³ But the availability of an appeal as of right to the Appellate Division in a high-stakes action for rent has always posed a threat to the lower courts' flexibility in this regard,⁷⁴ and in *Rios* that threat materialized. Now, a single atypical case in an atypical procedural posture will likely determine the substantive rights and duties of landlords and tenants in residential leases throughout the state. Moreover, it will do so by imposing a resolution crafted for the circumstances of a luxury residence in perhaps the most expensive housing market in the country on a variety of parties in qualitatively different situations. In short, this area of residential landlord-tenant law is now governed throughout the state by rules designed for the state's wealthiest citizens and interests. The next part of this Article demonstrates just how problematic this outcome is by showing how unusual the facts of *Rios* are when compared to the typical residential lease in New York State.

⁷¹ *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919 (App. Div.-2d 1984) (describing the framework of the Appellate Division); *People v. Hill*, 834 N.Y.S.2d 840, 845 (Crim. Ct. N.Y. County 2007) (stating that the status of the Appellate Division justifies lower courts following Appellate Division precedent).

⁷² *Mountain View Coach Lines*, 476 N.Y.S.2d at 919-20; *Hill*, 834 N.Y.S.2d at 845. In practice, many courts of original jurisdiction appear to consider only the precedent of the Appellate Division Department in which they sit to be binding, and treat precedent from other departments as persuasive authority. 1 CARMODY-WAIT 2d, NEW YORK PRACTICE § 2:317 (2010).

⁷³ See, e.g., *Callender v. Titus*, 791 N.Y.S.2d 868, 4 Misc.3d 126(A), (App. Term-2d & 11th Jud. Dist. 2004); *Commuter Hous. Co. v. Saunders*, N.Y. L. J., Dec. 11, 2000, at 35 (N.Y. App. Term-9th & 10th Jud. Dist.); *McMorrow v. Dorian*, N.Y. L. J., Apr. 23, 1998, at 37 (N.Y. App. Term-2d & 11th Jud. Dist.); *Whitehouse Estates, Inc. v. Post* 662 N.Y.S.2d 982 (App. Term-1st 1997).

⁷⁴ In particular, at least one court subject to review by the Appellate Term appears to have ignored the latter court's application of *Holy Properties* to residential leases. *Palumbo v. Donalds*, 754 N.Y.S.2d 856 (Civ. Ct. Kings County 2003).

III. A TALE OF TWO CITIES: RICH LAW IN POOR COMMUNITIES

There are huge economic differences between the various communities of New York City and of New York State, and these differences are perhaps nowhere better reflected than in housing markets. Figure 1 demonstrated how atypical the *Rios* controversy was in the context of the state's court system; the following charts demonstrate how atypical the *Rios* parties' economic situation is in the context of the state's housing markets.

FIGURE 2: MEDIAN HOUSING COSTS AS A FRACTION OF MEDIAN INCOME, BY COUNTY⁷⁵

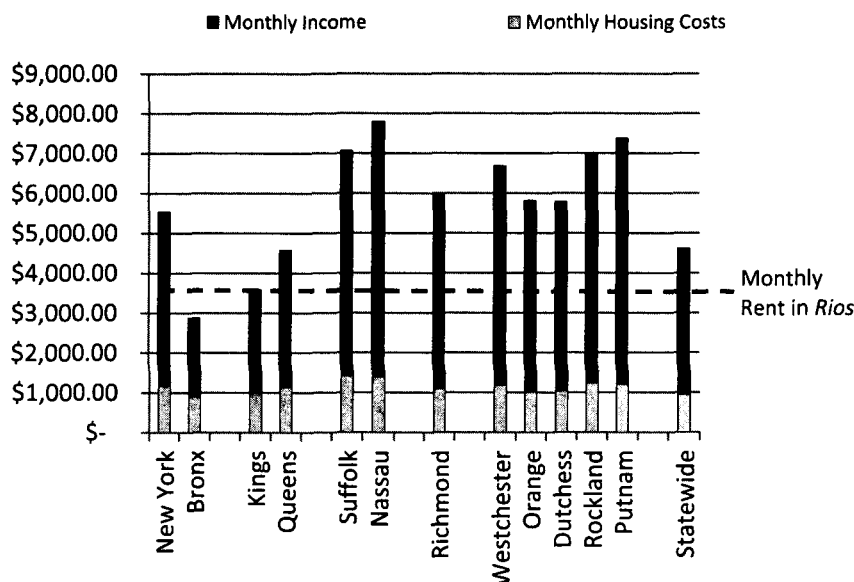


Figure 2 demonstrates just how different the economic position of the tenant in *Rios* is from the economic position of most residential tenants in the state. The agreed rent in *Rios* was over three times the median housing

⁷⁵ U.S. Census Bureau, *supra* note 64. Calculation of the monthly income was performed by the author using ACS data and an Excel spreadsheet. An Excel spreadsheet with full data and calculations is on file with the author.

costs of a New York State household and roughly three times the median housing costs in any downstate county. In fact, the agreed monthly rent in *Rios* exceeds the median monthly *income* in the Bronx, nearly exceeds the median monthly *income* in Brooklyn, and would consume over three-quarters of the *income* of the median household in the state. To be blunt, the tenant in *Rios*, whatever his troubles, was not confronted with the kind of economic pressures most residential tenants in the state face. And given courts' tendency to decide cases based at least in part on the economic position of the parties, treating the disposition of an outlier case such as *Rios* as a generally applicable rule is likely to be an ill fit for the vast majority of landlord-tenant relationships throughout the state.

A fuller picture of the economic pressure on residential tenants in New York can be obtained by looking beyond median incomes and housing costs to the housing mix of communities throughout the state.

FIGURE 3: FIRST AND SECOND DEPARTMENT HOUSING STOCK,
BY COUNTY⁷⁶

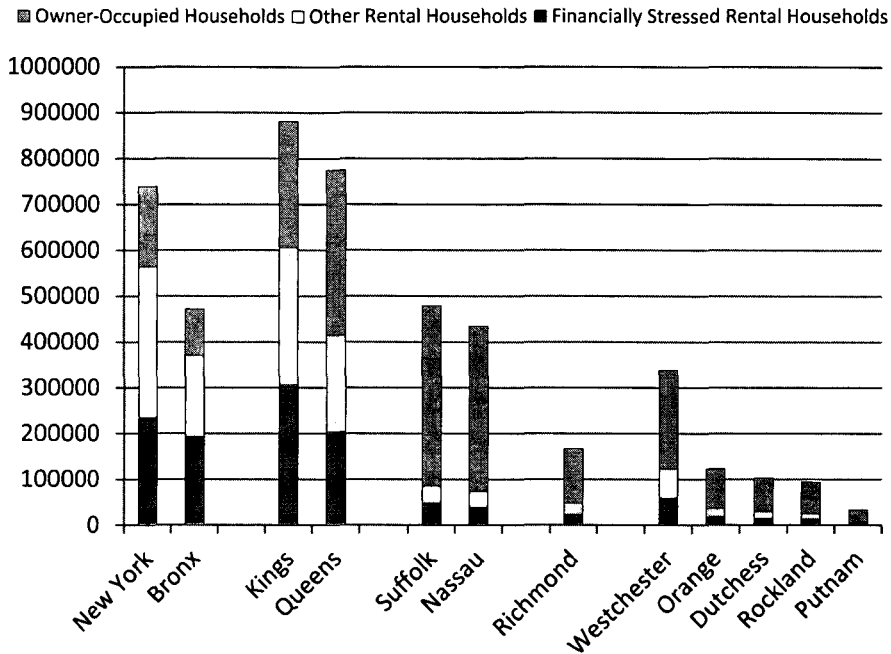
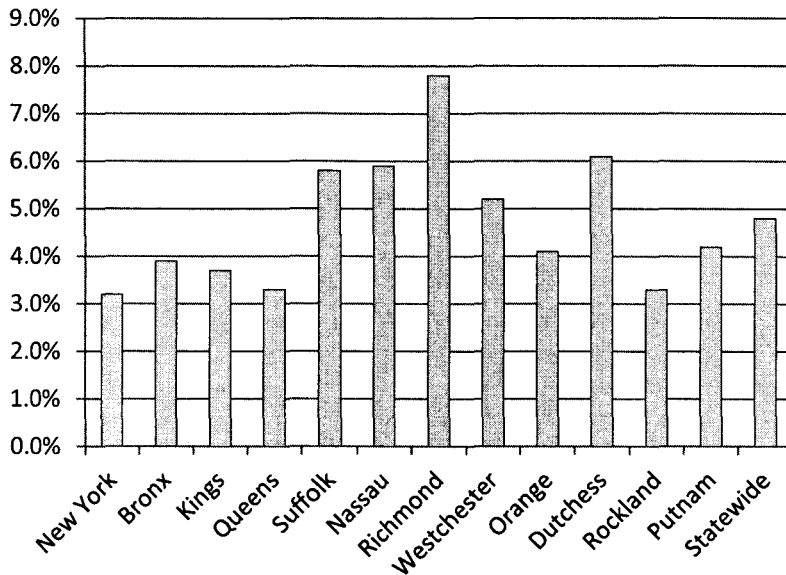


Figure 3 presents a comparison of residential households in each of the counties in the First and Second Departments. It shows the number of households that own versus the number that rent, and further differentiates rental households under financial stress—defined as those spending more than thirty percent of their household income on housing costs. As the chart demonstrates, the urban counties of New York, Bronx, Kings, and Queens each have more rental households than owner-occupied households (vastly more in New York, Bronx, and Kings), while in the suburban counties owner-occupied households outnumber rental households by as much as four to one. Moreover, a far higher number and proportion of households in the urban counties—which have lower incomes to begin with—dedicate an outsized proportion of their incomes to rental housing

⁷⁶ *Id.*

costs. There are more financially stressed rental households in each of these counties than there are rental households in any other downstate county, and more financially stressed households in Brooklyn alone than there are total households in any of the lower Hudson Valley counties other than Westchester. In short, the system of residential landlord-tenant law has tremendous ramifications for the housing stability and economic well-being of a large population concentrated in the urban counties of New York City. But such legal rules are of far smaller impact—both in absolute terms and as a proportion of the population—outside of those counties. Given the historical willingness of courts to consider these economic stresses of urban life in deciding residential tenant abandonment cases, the adoption of a statewide bright-line rule based on the unusual economic circumstances of the parties in *Rios* is a matter of serious concern for a large population that was not represented before the *Rios* panel.

Finally, turning to the economic position of landlords, again we see wide variation between urban and suburban communities.

FIGURE 4: VACANCY RATE 3-YEAR ESTIMATE, 2006-2008, BY COUNTY⁷⁷

As Figure 4 demonstrates, despite having higher volumes of rental housing, urban counties, in general have far tighter rental housing markets than suburban counties. Thus we would expect there to be less justification for protecting the income of landlords who leave an abandoned rental property vacant in, for example, Brooklyn (Kings County) than in Staten Island (Richmond County), given that in the former location the vastly greater supply of rental housing⁷⁸ does not appear to make it difficult to find suitable tenants. In contrast, where rental housing markets are thinner and demand is weaker (as in Richmond County in particular and the suburban counties in general), forcing landlords to bear the costs of tenant abandonment may be inappropriate.

The broad divergence of economic circumstances between the urban and suburban counties of downstate New York alone suggests, given the tendencies of courts to take such circumstances into account in tenant abandonment cases, that a single, statewide, bright-line rule on a landlord's duty to mitigate damages will be an ill fit for a significant number of

⁷⁷ U.S. Census Bureau, *supra* note 64.

⁷⁸ See fig. 3, *supra*.

residential lease disputes. This is apparent even without looking to the broad diversity of economic circumstances in the various urban, suburban, and rural communities of upstate New York, and without taking into account the individual equitable considerations that courts have looked to in deciding whether to impose a duty to mitigate in a particular case. In sum, settling the unsettled precedent on the issue of residential landlords' duty to mitigate has brought consistency to an area of law that seemed—based on the diversity of controversies and dispositions in reported cases—well suited to a degree of inconsistency.

CONCLUSION: THE COSTS OF DOCTRINAL ERROR

This Article has focused on the consistency of *Rios* with trends in the caselaw and its likely effects as precedent on the diverse communities of New York State, but largely sidestepped the question of whether the outcome of *Rios* was correct as a matter of doctrine rather than policy. In fact, *Rios* is also a badly reasoned case. It rests on an incorrect—albeit widely shared—interpretation of the Court of Appeals' decision in *Holy Properties*. It is fitting, then, for this Article to conclude with an explanation of that error and a discussion of its implications in light of the analysis in the previous Parts.

The *Rios* panel reasoned that “the broad language employed and the reliance on real property principles negate the possibility that the Court of Appeals [in *Holy Properties*] was confining its determination only to commercial leases. There is simply no basis for limiting the broad language of [*Holy Properties*].”⁷⁹ This pronouncement seems to ignore prominent language in the *Holy Properties* Court's opinion:

Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. *In business transactions, particularly*, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the ‘correct’ rule.⁸⁰

The *Rios* court's implicit treatment of residential leases as “business transactions” ignores a long history of legislative intervention in the market for residential rental housing as well as the Court of Appeals' own

⁷⁹ *Rios v. Carrillo*, 861 N.Y.S.2d 129, 130 (App. Div.-2d 2008).

⁸⁰ *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 134 (1995) (emphasis added).

departures from traditional property law rules in the residential context.⁸¹ Given the fact that *Holy Properties* involved a commercial lease between sophisticated parties for some of the most expensive commercial real estate in New York City⁸² and the Court of Appeals' specific reference to stability of expectations in *business transactions*, the *Rios* court's assertion that there is "no basis" for limiting *Holy Properties* to commercial leases seems dubious.

In defense of the Second Department panel in *Rios*, some other inferior appellate courts appear to have made a similar error, and those courts bind the relevant trial courts in the urban counties so strongly affected by the no-mitigation rule.⁸³ Moreover, there may be arguments that the effects of *Rios* are not terribly significant given the liberality with which state law views the residential tenant's right to sublease and assign.⁸⁴ And of course, there remains the question whether, whatever the default position on a landlord's duty to mitigate, landlords and tenants would be able to contract around the rule.⁸⁵ Still, the fact that all these courts have treated the issue as

81 See, e.g., N.Y. REAL PROP. LAW §§ 223-b, 226-b, 227-a, 227-c, 234, 235-b-f (Consol. 2011) (creating rights unique to residential, as opposed to commercial, tenants); N.Y. CITY ADMIN. CODE tit. 26, ch. 4. §§ 26-501 to 26-520 (2010) (describing rent stabilization); *Garner v. Gerrish*, 63 N.Y.2d 575, 577 (1984) (departing from the traditional rule that a lease made terminable at the will of the tenant must also be terminable at the will of the landlord, in the context of a residential lease).

82 The premises that were the subject of the parties' lease in *Holy Properties* were in a "type A" building located on 57th Street just off of 5th Avenue in midtown Manhattan, and the base rent agreed to by the parties was over \$300,000 per year in 1985 dollars. Brief of Defendant-Appellant at 4-6, *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, No. 1995-0520 (N.Y. App. Div.-1st Feb. 24, 1995), 1995 WL 17050827.

83 See *supra* notes 73-74 and sources cited therein.

84 See N.Y. REAL PROP. LAW §226-b (Consol. 2011); Robert E. Parella, *Real Property*, 47 SYRACUSE L. REV. 681, 683-84 (1997). Of course, even this right will have differential value depending on the ease with which a suitable sublessee or assignee can be found, and as discussed in Part III, *supra*, the urban counties in which landlords would seem to have the weakest justification for leaving a rental property vacant are also those in which a tenant is likely to face the least difficulty in finding a substitute tenant. See *supra* table 4. Accordingly, treating R.P.L. §226-b as a rule-like substitute for equitable weighing of the parties' economic positions and courses of conduct has the same effect as treating the question of landlord mitigation as rule-like: it assumes an allocation of the costs of tenant abandonment without regard to the particular facts and circumstances of an individual dispute.

85 Compare *Holy Properties*, 87 N.Y.2d at 134 (ruling that "the parties to a lease are not foreclosed from contracting as they please."); with N.Y. REAL PROP. LAW §226-b (Consol. 2011) (providing that "[a]ny provision of a lease or rental agreement purporting to waive a provision of this section [regulating the residential tenant's right to sublease or assign] is null and void."). Given the vastly greater bargaining power of landlords in most residential leases, it is unlikely that tenants will be able to bargain for a change to a pro-landlord default rule. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 583 (1984) (positing that "[s]tandard form leases are usually drawn to appeal to the landlords who purchase such forms, and their widespread use constitutes, in effect, a severe impediment to competition for renters on the basis of different lease clauses The tenant seeking to modify such clauses thus faces heavy transaction and

calling for a bright-line rule (rather than the flexible equitable standard that seemed to prevail in past practice) will, in itself, mark a change in the adjudication of tenant abandonment cases. And as discussed in Part II above, to the extent that change is misguided, the injury it works will be vastly compounded due to the weight of the *Rios* court's precedent. A wrongly decided case will now bind not only the parties to the case itself, and not only similarly situated parties in the same community, but all residential landlords and tenants throughout the economically diverse state of New York.

The change in residential landlord-tenant law worked by *Rios* was unnecessary and regrettable. Formulating a single system of universal bright-line rules to govern economic relationships in as diverse a jurisdiction as New York is a questionable aspiration in general, and particularly so with respect to housing, which has the peculiar quality of being both highly variable and economically essential. The flexible approach of courts in residential tenant abandonment cases prior to *Rios* seemed to reflect at least a tacit or unconscious recognition that individualized adjudication might be more appropriate than bright-line rules, particularly in cases that involve the type of strong equitable interests that arise with respect to housing. Nor is there any indication that this somewhat uncertain system of equitable standards-based adjudication was a particular burden to residential landlords and tenants or to the courts themselves—what few cases arose in this area seemed to be ably disposed of by courts based on a sensitive consideration of the totality of the parties' circumstances.

In one sense, blame for the shift from flexible standards to bright-line rules on the question of the duty to mitigate cannot be placed on the *Rios* court—the duty to mitigate has always been discussed (if not implemented) as if it were rule-based rather than standards-based. But viewed another way, the shame of *Rios* is that the court failed to examine this shift or to consider its implications in the context of a complex judicial hierarchy overlaid on a diverse and populous jurisdiction—that it treated its task as one of mechanically applying binding precedent rather than examining the principles motivating the debate over an unsettled legal question. And because it failed even at the task it set itself, the *Rios* court has worked a significant change in the rights and obligations of landlords and tenants far

information costs and a practical absence of competition among landlords concerning the terms of such clauses.”).

removed from the Second Department's courtroom—a change which is likely to persist for some time to come.