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Thomas D. Giordano

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LANDLORD-TENANT

Real Prop. Law § 235-b: Landlord's failure to provide essential services during strike by building employees breaches implied warranty of habitability and justifies ten percent rent abatement

Under section 235-b of the Real Property Law, a warranty is implied in every residential lease that the dwelling place is habitable and that no dangerous conditions exist on the premises.²⁸⁸ Although traditional landlord-tenant law did not recognize the existence of an implied warranty of habitability,²⁸⁹ section 235-b essentially codified a rule that had been developing among modern lower courts of the state that such a warranty could be implied in residential leases.²⁹⁰ The courts and the legislature considered the implied

²⁸⁸ Section 235-b provides:

1. 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 and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony.

N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1979-1980).

²⁸⁹ See, e.g., *Widmar v. Healey*, 247 N.Y. 94, 159 N.E. 874 (1928); *Franklin v. Brown*, 118 N.Y. 110, 23 N.E. 126 (1889); *Graham v. Wisenburn*, 39 App. Div. 2d 334, 334 N.Y.S.2d 81 (3d Dep't 1972); *Looney v. Smith*, 198 Misc. 99, 96 N.Y.S.2d 607 (Sup. Ct. Queens County 1950). The common law deemed the lease a conveyance of an interest in real property. 2 POWELL, REAL PROPERTY ¶ 221[1] (Rohan ed. 1977). Accordingly, the courts held that, once the landlord delivered possession, he fulfilled his obligations under the lease and the tenant became liable for rent. See Comment, 21 N.Y.L.F. 613, 616 (1976) [hereinafter cited as Comment]. The onus was on the tenant to inspect the premises before he signed the lease because, under the common law, he took the premises as he found them. *Franklin v. Brown*, 118 N.Y. 110, 115, 23 N.E. 126, 127 (1889). Absent an express covenant, the landlord had no duty to make any repairs during the term of the lease. Comment, *supra*, at 616. Thus, regardless of the condition of the premises, the tenant's obligation to pay rent continued, even if the premises were destroyed. See POWELL, *supra*, ¶ 233; Comment, *supra*, at 616.

²⁹⁰ Lipsig, *Breach of Implied Warranty of Habitability in Residential Leases*, N.Y.L.J., Oct. 30, 1979, at 1, col. 1; see, e.g., *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975); *Kipsborough Realty Corp. v. Goldbetter*, 81 Misc. 2d 1054, 367 N.Y.S.2d 916 (N.Y.C. Civ. Ct. N.Y. County 1975); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y.C. Civ. Ct. N.Y. County 1973); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. N.Y. County 1971); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. N.Y. County 1971). For a discussion

warranty of habitability to be necessary in order to respond to the needs of the modern tenant in a rapidly expanding urban society.²⁹¹ Recently, in *Park West Management Corp. v. Mitchell*,²⁹² the Court of Appeals addressed section 235-b for the first time and demonstrated its approval of the implied warranty of habitability by according the statute a liberal interpretation. The Court held that where a landlord failed to supply services essential to his tenants' health and safety during a strike by building maintenance employees, the warranty was breached and a ten percent rent abatement justified.²⁹³

In *Park West*, the tenants in a Manhattan apartment complex withheld their rent after a 17-day strike of the building's maintenance and janitorial staff.²⁹⁴ The owner of the complex brought a summary nonpayment proceeding in New York City Civil Court to recover the unpaid rent.²⁹⁵ As an affirmative defense, the tenants claimed that the owner had breached the implied warranty of habit-

of the early cases recognizing the warranty of habitability, see Comment, *An Assessment of the Impact of an Implied Warranty of Habitability in New York State*, 24 BUFFALO L. REV. 189 (1974).

²⁹¹ Prior to the lower courts' recognition of the implied warranty of habitability, courts began to realize the harshness often occasioned by applying the "caveat emptor" doctrine to the lease. Therefore they created exceptions to the traditional common-law rules. See POWELL, *supra* note 289, ¶ 233. A significant development was the concept of constructive eviction. If the tenant could prove that the landlord had wrongfully interfered with his enjoyment of the premises, the courts held that the tenant was relieved of his duty to pay rent, provided he vacated the premises within a reasonable time. See *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970); *Perry Properties v. Servico Protective Covers, Inc.*, 59 App. Div. 2d 1014, 399 N.Y.S.2d 744 (4th Dep't 1977). The constructive eviction doctrine, however, was not always effective because the tenant never could be sure that a jury would agree that his use of the premises had been impaired. If it later were decided that the tenant was not warranted in abandoning the premises, he remained liable for all the unpaid rent. An additional difficulty, especially for the modern tenant in an urbanized area, was that it was often difficult, if not impossible, to find another residence in the same area at a comparable price. See generally POWELL, *supra* note 289, ¶ 225[3]; Comment, *supra* note 289, at 619-20. The legislatures attempted to alleviate the harsh consequences of the common-law doctrines by enacting housing, building, and sanitation codes establishing standards of habitability. See Comment, *supra* note 289, at 620-21. See generally *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080-81 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). In addition, the New York legislature authorized a tenant who is the victim of conditions that are, or are likely to become, dangerous to life, health, or safety to withhold rent and deposit it with the court if the landlord seeks to evict. RPAPL § 755 (1979).

²⁹² 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 48 U.S.L.W. 3387 (Dec. 11, 1979).

²⁹³ 47 N.Y.2d at 329-30, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

²⁹⁴ *Id.* at 326, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315. Two-thirds of the entire staff refused to report to work during the strike. *Id.*

²⁹⁵ *Id.*

ability by not providing essential services during the strike,²⁹⁶ which precipitated a declaration of a health emergency on the premises.²⁹⁷ The civil court found a breach of the implied warranty of habitability and allowed the tenants a ten percent rent reduction for the month during which the strike had occurred.²⁹⁸ The decision was affirmed by both the appellate term and the Appellate Division, First Department.²⁹⁹

In a unanimous affirmance, the Court of Appeals initially observed that the nature of the residential lease has evolved from primarily a conveyance of an interest in real property³⁰⁰ to essentially a sale of shelter and services.³⁰¹ Writing for the Court, Chief Judge Cooke stated that section 235-b of the Real Property Law similarly treats the lease as a sale with an implied warranty that the leased premises are safe and suitable for both human occupation and the uses reasonably intended by the parties.³⁰² Chief Judge Cooke declared that, pursuant to section 235-b, the tenant's duty to pay rent depends upon the landlord's satisfaction of his obligations under the warranty.³⁰³

Determining that the warranty of habitability places an absolute duty on the landlord to maintain leased premises in a habitable condition,³⁰⁴ the court stated that even conditions caused by "work

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 327, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315. The civil court's opinion was not reported. In reaching the 10% reduction, the civil court utilized a formula established by the Department of Rent and Housing Maintenance, an agency that supervises rent-controlled apartments. 62 App. Div. 2d at 294, 404 N.Y.S.2d at 117.

²⁹⁹ 47 N.Y.2d at 327, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315; 62 App. Div. 2d at 298, 404 N.Y.S.2d at 119.

³⁰⁰ *Id.* at 322, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; see note 289 *supra*.

³⁰¹ *Id.* at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314; see *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The Court concluded that since the modern lease is more like a contract for the sale of shelter and services, "the law of sales, with its implied warranty of fitness" provides a useful reference for determining the rights and duties of today's landlord and tenant. 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314; see N.Y.U.C.C. § 2-314 (1964).

Chief Judge Cooke also commented on the minimal power of most modern tenants to force the landlord to provide maintenance and repair services. 47 N.Y.2d at 324-25, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. Additionally, the Court noted that as a result of the current housing shortages in most urbanized areas, landlords have little motivation to comply with a tenant's demands. *Id.*

³⁰² 47 N.Y.2d at 325, 391 N.E.2d at 1293, 418 N.Y.S.2d at 314-15. The Court stated that § 235-b repudiates the historical notion of the lease as being a conveyance of land and "place[s] 'the tenant in parity legally with the landlord.'" *Id.* at 325, 391 N.E.2d at 1292-93, 418 N.Y.S.2d at 314 (quoting Sen. Barclay, [1975] N.Y. SEN. J. 7766-7776).

³⁰³ 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

³⁰⁴ *Id.* The Court noted, however, that the statute does not make landlords "absolute

stoppages by employees” are covered by the landlord’s warranty of habitability.³⁰⁵ Chief Judge Cooke looked to housing, building, and sanitation code standards for guidance and concluded that “substantial violation of [these] code[s] . . . constitutes prima facie evidence that the premises are not in habitable condition.”³⁰⁶ The Court stressed, however, that the decisive factor is whether the health and safety of the tenants have been endangered.³⁰⁷

Applying these standards to the situation in *Park West*, the Court concluded that the warranty of habitability had been breached, because the discontinuance of sanitation, janitorial, and maintenance services occasioned by the strike not only resulted in several housing and sanitation code violations, but so threatened the health and safety of the tenants that a health emergency was declared.³⁰⁸ The Court measured the damages by subtracting the fair market value of the premises during the breach from the value of the premises as warranted, the latter determined by the rent due under the lease.³⁰⁹ Considering the severity of the conditions during

insurers of services which do not affect habitability,” but merely requires the landlord to provide a dwelling free from health and safety hazards. *Id.* at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 315-16.

³⁰⁵ *Id.* at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. Since the landlord’s duty is absolute, there is no requirement of fault. Thus, the Court noted that latent or patent defects, catastrophes, normal wear or even the acts of third parties which render the premises untenable will result in actionable breach. *Id.* In addition, the Court stated that the landlord’s position of “ultimate control” over the premises mandates that his responsibility to keep the leasehold habitable be nonwaivable. *Id.*

³⁰⁶ *Id.* at 327-28, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. Upon establishing a code violation, the Court explained, the parties “must come forward with evidence concerning” the seriousness of the defect, its possible threat to health and safety, and the landlord’s attempts to cure. *Id.*

³⁰⁷ *Id.* at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. The ultimate test, according to the Court, is whether the reasonable person would perceive the “defects in the dwelling [as depriving] the tenant of those essential functions which a residence is expected to provide.” *Id.* at 328, 391 N.E.2d at 1294-95, 418 N.Y.S.2d at 316-17.

³⁰⁸ *Id.* at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317; see notes 294-297 and accompanying text *supra*.

³⁰⁹ 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. The formula adopted by the Court has been utilized by lower courts both before and after passage of § 235-b. *See, e.g.,* *Leris Realty Corp. v. Robbins*, 95 Misc. 2d 712, 714, 408 N.Y.S.2d 166, 167 (N.Y.C. Civ. Ct. N.Y. County 1978); *Kekilas v. Saddy*, 88 Misc. 2d 1042, 1045-46, 389 N.Y.S.2d 756, 759 (Dist. Ct. Nassau County 1976).

The determination of the diminution in value of the premises caused by the breach does not require expert testimony. N.Y. REAL PROP. LAW § 235-b(3) (McKinney Supp. 1977-1978); see note 288 *supra*. Therefore, the Court noted that since the landlord and the tenant generally will be well aware of the condition of the property in question, they are competent to testify to their opinion on the diminished value of the premises. 47 N.Y.2d at 329-30, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

the strike and the landlord's lack of effort to correct the situation,³¹⁰ the *Park West* Court held that the ten percent rent abatement was reasonable and should not be disturbed.³¹¹

By interpreting section 235-b as placing "an unqualified obligation on the landlord to keep the premises habitable,"³¹² the *Park West* Court has indicated that landlords may be held responsible for conditions caused by events beyond their control.³¹³ It is submitted that this construction is fully consistent with the purpose of section 235-b.³¹⁴ Moreover, by analogizing the lease to a contract for the sale of goods, the Court acknowledged the practical situation of the tenant under present housing conditions.³¹⁵ Just as the buyer of goods must rely on the skill and integrity of the seller in today's market, the modern tenant must depend upon the landlord to supply the shelter and services necessary to live in safety and comfort.³¹⁶ Ac-

³¹⁰ 47 N.Y.2d at 317, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

³¹¹ *Id.* at 330, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

³¹² *Id.* at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

³¹³ *Id.* The nature of the duty imposed by the habitability warranty is much more far-reaching than the corresponding duty stemming from the covenant of quiet enjoyment which is the basis of the constructive eviction doctrine. To establish breach of the covenant of quiet enjoyment it must be proved that either the landlord or someone authorized by him has substantially restricted the tenant's use of the leased premises. See note 291 *supra*. According to *Park West*, however, no such causal link between landlord and defect need be shown in the breach of warranty action. See note 305 and accompanying text *supra*. It should be noted that the Court in *Park West* apparently made an effort to temper its absolute liability approach. For example, the Court stated that any attempts made by the landlord to improve the conditions of the premises could be considered as mitigating factors both in the initial determination whether the warranty was breached and in computing the damages. 47 N.Y.2d at 328-39, 391 N.E.2d at 1294-95, 418 N.Y.S.2d at 316-17.

The appellate division in *Park West* also recognized the relevance of the landlord's good faith efforts to alleviate defects when the court stated that, "[i]f, for example, a landlord at considerable expense did all that might reasonably be done to respond to conditions that developed from events truly beyond his control, a fair and realistic accommodation of the legitimate interests of both parties might suggest another approach." 62 App. Div. 2d at 296, 404 N.Y.S.2d at 118.

³¹⁴ See text accompanying note 291 *supra*.

³¹⁵ 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

³¹⁶ A leading argument for the adoption of an implied warranty of merchantability in sales to consumers emphasized the reliance by buyers on sellers' representations concerning the quality of their goods. It was also contended that the mere marketing of the goods creates an inference that they are fit for their intended purposes. W. PROSSER, *LAW OF TORTS* 651 (4th ed. 1971). Pervading the evolution of the law of products liability in New York, which began with *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050 (1916) and culminated in *Codling v. Paglia*, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469 (1973), was the theory that the manufacturer and seller should be held responsible for injuries occasioned by their products, because they are in the best position to prevent or detect any defects. *Id.* at 340, 298 N.E.2d at 627, 345 N.Y.S.2d at 468 (1973). Modern day tenants

ording to the *Park West* Court, the tenant's duty to pay rent is contingent upon the landlord satisfactorily maintaining the premises in a habitable condition.³¹⁷ Thus, whenever the dwelling is rendered untenable for any reason other than the fault of the tenant,³¹⁸ the warranty has been breached, and the tenant is entitled to a reduction in rent.³¹⁹

In addition to utilizing breach of warranty as a defense in a nonpayment proceeding, the *Park West* Court sanctioned the tenant's right to institute a plenary action for rent abatement.³²⁰ Whether the Court of Appeals will extend "the full range of [contract] remedies"³²¹ to the injured tenant, however, remains to be seen.³²² In any event, the protections provided by the warranty

are in precisely the same situations as the consumer; as a result of urbanization tenants must rely almost entirely on the landlord to supply services and remedy defects. 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

³¹⁷ 47 N.Y.2d at 327, 329, 391 N.E.2d at 1294, 1295, 418 N.Y.S.2d at 316, 317.

³¹⁸ Notwithstanding the unconditional nature of the landlord's duty, uninhabitable conditions do not constitute a breach if caused by the tenant's misconduct or that of persons authorized by him. N.Y. REAL PROP. LAW § 235-b(1) (McKinney Supp. 1979-1980).

³¹⁹ 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

³²⁰ *Id.* This holding is supported by the remarks of Senator Barclay who sponsored § 235-b: "The legislature also provided that this warranty is available as a cause of action or as an affirmative defense or counter claim." Memorandum of Sen. Barclay, reprinted in [1975] N.Y. LEGIS. ANN. 315.

³²¹ *Park West*, 62 App. Div. 2d at 297, 404 N.Y.S.2d at 119 (quoting Sen. Barclay, [1975] N.Y. SEN. J. 7766-7776).

³²² Governor Carey, in his message of approval accompanying the signing of § 235-b stated:

Many of the comments received on this bill have expressed concern over its failure to establish procedures for enforcement and remedies for breach of the warranty. It may have been possible to expressly provide for procedures and remedies. However, the circumstances and situations in which tenants will be seeking to enforce the warranty will take many forms. Tenants have utilized the doctrine affirmatively as well as defensively; as a counterclaim, set-off, and defense in non-payment of rent proceedings. The remedies have been complete or partial abatement of rent and reimbursement for repairs made by tenants themselves. It will be the courts' function to fashion remedies appropriate to the facts of each case.

Governor's Memorandum on Approval of ch. 597, N.Y. Laws (Aug. 1, 1975), reprinted in [1975] N.Y. Laws 1760-61 (McKinney).

It generally is agreed in many other jurisdictions that all contractual and equitable remedies—damages, rescission, reformation and specific performance—are available. See, e.g., *Lemle v. Breden*, 51 Haw. 426, 462 P.2d 470 (1969); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); POWELL, *supra* note 289, ¶ 225[2]. For a discussion of possible available remedies under § 235-b, see Comment, *supra* note 289, at 627-31.

One commentator has suggested that the strict liability imposed on the landlord under § 235-b should be available to a tenant to recover for personal injuries suffered as a result of the landlord's breach of the implied warranty of habitability. Lipsig, *Breach of Implied Warranty of Habitability in Residential Leases*, N.Y.L.J., Oct. 30, 1979, at 1, col. 1. At least

of habitability, as construed by the *Park West* Court, are much more effective than any other means of redress previously available to the tenant.³²³

While the *Park West* Court has reached a result that recognizes the reasonable expectations of the contemporary urban tenant, its application of the warranty to conditions caused by a strike of building employees may have a particularly harsh effect on landlords. By

one lower court has recognized such a cause of action. See *Kaplan v. Coulston*, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (N.Y.C. Civ. Ct. Bronx County 1976).

³²³ The breach of warranty remedy is superior to constructive eviction, see generally notes 291 & 314 *supra*, because the tenant is no longer in a take or leave-it situation. If the warranty has been breached, the tenant can compel the landlord to remedy an existing defect by remaining in possession and recovering damages in the form of a rent abatement. Although the risk of eviction apparently remains where the tenant withholds rent and subsequently loses his claim of breach of warranty, the tenant can avoid this result by bringing a plenary action for damages as sanctioned in *Park West*. 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. Additionally, where a tenant desires to terminate the lease, he may invoke breach of warranty rather than constructive eviction as grounds for rescission. This generally will represent the more attractive alternative for plaintiffs; in contrast to constructive eviction where the landlord must be proved responsible, see notes 291 & 314 *supra*, the *Park West* decision clearly indicates that no causal link between landlord and defect need be shown in the breach of warranty action. See note 305 and accompanying text *supra*. Furthermore, since there is no requirement of vacating, the tenant need not seek a new residence while the court decides whether he has been constructively evicted and therefore relieved of his duty to pay rent.

The warranty is more effective than statutory remedies because it accrues immediately and results, at the very least, in a reduction of the rent rather than merely a delay in rent payment. RPAPL § 755 entitles a tenant who is a victim of conditions which are dangerous to life, health, or safety to withhold rent and to deposit it with the court if the landlord seeks to evict. RPAPL § 755 (McKinney 1979). The major problem with this section is that the landlord eventually receives all of the rent due under the lease provided he makes the necessary repairs. Article 7a of RPAPL provides an affirmative remedy where one-third of the residents of a multiple dwelling (six or more apartments) unite and bring an action. Rents may be deposited with the court and an administrator appointed if conditions dangerous to life, health, or safety exist. RPAPL §§ 769-782 (McKinney 1979). Problems with this remedy include no abatement of the rent, difficulty in organizing tenants, and limited application (only "multiple dwellings" in New York City, Nassau, Suffolk, Rockland and Westchester). Section 302-a of the Multiple Dwelling Law does allow for abatement of rent where life, health, or safety of tenants is threatened, but not until 6 months after the owner has been notified of the violation. N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974). The delay, plus limited application (only cities with populations of 400,000 or more are included), render this remedy less than totally effective. For a discussion of these statutory remedies, see Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines For The Future*, 38 FORDHAM L. REV. 225 (1969); Comment, *Tenant Remedies for a Denial of Essential Services and for Harassment — The New York Approach*, 1 FORDHAM URB. L.J. 66 (1972).

In contrast, the implied warranty of habitability applies to every residential lease regardless of the size of apartment building or city. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1979-1980); see note 288 *supra*. It requires no special procedure in addition to the ordinary legal action. 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. It results in reduction of rent or a monetary award as compensation for the breach. *Id.*

denying the landlord the amount of rent that corresponds to the diminished value of the property, the Court has left the landlord in the uncomfortable position of having to speculate on the economic consequences of granting or refusing the employees' demands.³²⁴ Nevertheless, it is submitted that it is more socially desirable to put the cost of the decline in housing conditions occasioned by employee work stoppage on the landlord, since it is he who has the "ultimate control and responsibility for the building."³²⁵

Thomas D. Giordano

DEVELOPMENTS IN NEW YORK LAW

Penal Law § 195.00(2): Indictment for official misconduct charging violations of the Code of Judicial Conduct held insufficient

Section 195.00(2) of the New York Penal Law provides that a public servant³²⁶ is guilty of official misconduct where, to his benefit or to the injury of another person, he knowingly fails to perform a duty either "imposed by law or clearly inherent in the nature of his office."³²⁷ Since the section's enactment, however, little guidance

³²⁴ The landlord will have to consider whether the advantages gained from not yielding to employees' demands will justify the risk of loss of rent in a breach of warrant action.

³²⁵ 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

³²⁶ N.Y. PENAL LAW § 10.00(15) (McKinney 1975) defines a public servant as (a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

³²⁷ N.Y. PENAL LAW § 195.00 (McKinney 1975) provides:

A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Section 195.00 condensed approximately 30 separate provisions under the former law pertaining to criminal misfeasance and nonfeasance by a public servant in the performance of his official duties. N.Y. PENAL LAW § 195.00, commentary at 385 (McKinney 1975) [hereinafter cited as *Practice Commentary*]. The absence of a precise definition of a "public servant" under the former penal law necessitated that specific acts or official misfeasance and nonfeasance be delineated. See, e.g., Ch. 676, § 116, [1881] N.Y. Laws 913 (repealed 1965) (former Penal Law § 1840) ("[n]eglecting or refusing to execute process"); *id.* at § 1176 (former Penal Law § 1843) ("[n]eglect of duty by superintendent or overseer of the poor"); *id.* at § 177a