Civil Court of the City
Of New York County of New York
Index No. L&T 69265/2007

New York County Clerk's Index No.
570204/2010

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

WADSWORTH VENTURA ASSOCIATES 367 LLC,

Petitioners-Landlord-Appellee,

—against—

CARMEN FRIAS,

Respondent-Tenant-Appellant,

BRIEF OF *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Court's decision in this matter has the potential to adversely affect thousands of people who are elderly or have disabilities and are facing homelessness. Between 200,000 and 300,000 residential eviction cases are commenced in New York City Housing Court every year.[1] In the vast majority of these cases, the landlord is represented by counsel but the tenant is not.[2] Most of these cases are settled rather than proceeding to trial.[3] Landlords' attorneys often draft settlement agreements that condition continued tenancy on compliance with the agreement.[4] When compliance is in question, a tenant has to present a Housing Court judge with an Order to Show Cause to prevent his eviction.[5]

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[1] See, e.g., N.Y. Cty Civ. Ct., Statistical Information for L&T Clerk's Office 2011 (2012) (showing that there were 247,386 residential nonpayment and holdover proceedings commenced during 2011), available at http://www.cwtfhc.org/images/stories/pdf/EvictionStats/casefilings2011.pdf; N.Y. Cty Civ. Ct., Statistical Information for L&T Clerk's Office 2010 (2011) (showing that there were 202,631 residential nonpayment and holdover proceedings commenced during 2010), available at http://www.cwtfhc.org/images/stories/pdf/casefilings2010.pdf; N.Y. Cty Civ. Ct., Statistical Information for L&T Clerk's Office 2009 (2010) (showing that there were 278,082 residential nonpayment and holdover proceedings commenced during 2009), available at http://www.cwtfhc.org/images/stories/pdf/casefilings2009citywide.pdf; N.Y. Cty Civ. Ct., Statistical Information for L&T Clerk's Office 2008 (2009) (showing that there were 298,174 residential nonpayment and holdover proceedings commenced during 2008), available at http://www.cwtfhc.org/images/stories/pdf/Case_Filings_OCA_2008.pdf [hereinafter, collectively, Civ. Ct. Statistical Information 2008-2011].

[2] See Paris Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court, 3 Cardozo Pub. L. Pol'y & Ethics J. 659, 661 at n.5 (2006) (noting that a 1993 study found 11.9% of tenants were represented and that evidence suggests this number has not increased significantly since that time); see also Woodruff Corp. v. Lacrete, 154 Misc.2d 301, 304 585 N.Y.S.2d 956, 958 (Civ. Ct. Kings Cty 1992) (then-Housing Court Judge Marcy S. Friedman cited a variety of studies confirming that "landlords are represented in approximately eighty to ninety percent of summary eviction proceedings, while tenants are unrepresented in all but ten to fifteen percent of such proceedings…"). The recent economic downturn and decreased funding for legal services both suggest that this disparity may be more drastic at present. See C.J. Jonathon Lippman, The State of the Judiciary 2012, 2012 N.Y. C.J. Ann. Rep. at 1, 11-12 (February 14, 2012), available at http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf.

[3] See N.Y. Cty Civ. Ct., Housing Pt., Stipulations and Settlements, http://nycourts.gov/courts/nyc/housing/stips.shtml (last visited July 9, 2012); see also N.Y. Cty. L. Ass'n, The New York City Housing Court in the 21st Century: Can it Better Address the Problems Before It? 11 (2005) (report of Working Group II observes that the overwhelming majority of cases in N.Y.C. Housing Court are settled).

[4] Judith S. Kaye & Jonathon Lippman, N.Y. St. Unified Ct. Sys., Breaking New Ground 2 (1997), available at http://www.courts.state.ny.us/courts/nyc/housing/pdfs/housing_initiative97.pdf.

[5] Each year, pro se litigants alone file more than 150,000 motions and Orders to Show Cause in New York City Housing Court. See Civ. Ct. Statistical Information 2008-2011, supra note 1.

On a daily basis, tenants who potentially cannot manage their affairs because of age, illness, or disability are being evicted from their homes and becoming homeless. A recent study showed that "[t]he number of elderly homeless people in New York City shelters has shot up 55% in the last 10 years, a hidden and growing population among the city's most vulnerable adults."[6] Adult Protective Services ("APS") is required to protect individuals who, "because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from [abuse or exploitation] without assistance from others . . . ."[7] The New York City Marshal's Handbook requires a marshal to take certain steps prior to eviction "to protect the rights, health, and safety of children, mentally ill, handicapped, elderly, or other persons not able to take care of themselves."[8] Between 2008 and 2011, over 8,000 families or individuals were evicted after a marshal notified APS about their pending eviction.[9]

Housing Court judges presiding over the enforcement of settlements have long had the discretion to ensure that tenants are not unnecessarily evicted because of unfavorable settlements or *de minimis* defaults. Housing Court judges have invoked that discretion to prevent people who are elderly or have disabilities from ending up in homeless shelters. That discretion was

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[6] Heidi Evans, Hard Times: Elderly Homeless Rates Jump in NYC, New York Daily News, Jan. 27, 2012, available at http://articles.nydailynews.com/2012-01-27/news/30672059_1_shelter-system-new-york-city-shelters-homeless-services.

[7] SSL § 473(1).

[8] N.Y.C. Dep't of Investigations, N.Y.C. Marshal's Handbook of Regulations, Ch. IV § 6-6 (Oct. 24, 1997), available at http://www.nyc.gov/html/doi/html/marshals/mar4.shtml.

[9] See City-Wide Task Force on Housing Ct. Inc., Summary of Evictions, Possessions & Ejectments Conducted 2011 (2012), available at http://www.cwtfhc.org/images/stories/pdf/EvictionStats/2011marshalsevictions.pdf; City-Wide Task Force on Housing Ct. Inc., Summary of Evictions, Possessions & Ejectments Conducted 2010 (2011), available at http://www.cwtfhc.org/images/stories/pdf/EvictionStats/2010marshalsevictions.pdf; City-Wide Task Force on Housing Ct. Inc., Summary of Evictions, Possessions & Ejectments Conducted 2009 (2010), available at http://www.cwtfhc.org/images/stories/pdf/evictions_marshals_2009.pdf; City-Wide Task Force on Housing Ct. Inc., Summary of Evictions, Possessions & Ejectments Conducted 2008 (2009), available at http://www.cwtfhc.org/images/stories/pdf/evictions_marshals_2008.pdf [hereinafter, collectively, Housing Court Task Force Summary of Evictions 2008-2011]. This figure excludes the significant number of evictions APS is able to prevent after notification by a marshal. No figures are available as to what percentage of these evictions resulted from noncompliance with a settlement.

questioned, however, after this Court's 2009 decision in Chelsea 19 Associates v. James, 67 A.D.3d 601, 889 N.Y.S.2d 564 ("Chelsea"). The problem of unwarranted evictions existed before Chelsea,[10] but Chelsea has exacerbated the problem. It has been incorrectly interpreted to suggest that a Housing Court judge lacks the authority to take any action except to enforce a settlement as written or vacate a settlement in those limited cases where there is evidence of fraud, unconscionability, overreaching, or illegality.

Chelsea's impact is apparent in the procedural history of this case. Carmen Frias, who lived in the subject premises for approximately 28 years, allegedly defaulted on a probationary settlement by making rent payments that were late for a combined total of merely 48 hours over the course of almost two years of regular rent payments. Despite her longstanding tenancy and the *de minimis* delay in payment, both the trial court and the appellate term refused to exercise their judicial discretion to stay the warrant of eviction.

This Court recently helped reaffirm the scope of a Housing Court judge's discretion in Harvey 1390 LLC v. Bodenheim, 2012 NY Slip Op 05116 (App. Div. 1st Dep't 2012) ("Bodenheim"). As set out more fully below, this case presents an opportunity for this Court to reaffirm the importance of broad judicial discretion. This case also presents this Court with an opportunity to provide Housing Court judges with guidelines so that they can exercise their discretion more effectively.

[10] See Housing Court Task Force Summary of Evictions 2008-2011, supra note 9; see also infra notes 20, 21 and 23.

INTERESTS OF AMICI CURIAE

As both an agency of the City of New York and an Area Agency on Aging under the federal Older Americans Act, the Department for the Aging (DFTA) receives federal, state and city funds to provide essential services to seniors. DFTA contracts with community-based organizations (CBOs) to provide needed programs throughout the five boroughs. Meals and activities at senior centers, case management, home care and legal services are among the many services these CBOs provide. DFTA also provides services directly to seniors through programs that include its Senior Employment Services Unit, Elderly Crime Victims Resource Center and Alzheimer's and Caregiver Resource Center. Additionally, certain seniors at risk of eviction from their homes are referred to DFTA's Assigned Counsel Project by the City's Housing Courts to receive free legal and social service assistance. Given the implications for the most vulnerable of the City's seniors, DFTA has a vital interest in the outcome of this matter.

The NYC Department of Health and Mental Hygiene (DOHMH) is responsible for protecting and promoting the physical and mental health of all New Yorkers. DOHMH focuses on public policies that improve environmental, economic, and social conditions impacting health; improving access to and quality of care; and informing, educating, and engaging New Yorkers to improve their health and the health of their communities. The Division of Mental Hygiene oversees a portfolio of hundreds of contracts for several hundred million dollars of services covering mental health, alcohol and drug services, early intervention and developmental disabilities. Within the Division, the Bureau of Mental Health is responsible for mental health service delivery and planning for New York City residents with mental health and their co-occurring substance use and physical health needs. Through contracting directly with NYC service providers, the Bureau is responsible for procuring and overseeing over 500 treatment,

rehabilitation, housing, case management, advocacy, and Assisted Outpatient Treatment programs with a total value of over $200 million. Through these contracts and through its policy, planning and advocacy work, the Bureau seeks to facilitate access, quality care and recovery for all New York City residents. As this matter may affect all New Yorkers with Disabilities, DOHMH has a substantial interest in the outcome of this case.

MFY Legal Services, Inc. is a not-for-profit organization established in 1963 that provides free civil legal services to approximately 7,600 poor and low-income New Yorkers annually in housing, benefits, health, consumer, and employment rights. Twenty-one percent of MFY's clients are elderly. MFY serves people who are elderly in eviction, benefits, foreclosure, consumer, and health matters, including obtaining personal care and home health services, to ensure that they can age in place with dignity. MFY's representation also enables people with mental illness to avoid homelessness and to remain in the community by ensuring the preservation of their incomes and affordable housing. During 2011 alone, MFY advised or represented more than 2,500 people with mental illness. Because of the far-reaching implications of this matter for its clients, MFY has a substantial interest in its outcome.

Bronx Independent Living Services (BILS) is a non-profit, community-based organization dedicated to empowering all people with disabilities to understand and exercise their civil and human rights in order to live fully integrated lives in mainstream society. BILS assists individuals by providing them with the necessary tools to make informed decisions about their own lives through access to education, skills development, and access to the appropriate resources. On a systemic level, BILS is committed to facilitating social, economic, and civic change by advocating for the removal of architectural, communication, and attitudinal barriers that have limited the disabled community for far too long. BILS is deeply concerned about the

outcome of this matter, because it will have an impact on the ability of people with disabilities to remain in their homes and avoid unnecessary institutionalization.

CAAAV is a non-profit organization founded in 1986 that works with New York City's diverse Asian communities around the issues of housing, immigration, workers rights, and education. CAAAV founded the Chinatown Tenants Union project in 2005 to work with immigrant tenants in Chinatown who were and are facing displacement and eviction from their homes. Many of the tenants CAAAV works with are elderly residents who are monolingual Chinese speakers and face additional challenges of finding legal representation when they are taken to Housing Court. Because of the potential implications for its members and for many Chinatown residents, CAAAV has a substantial interest in the outcome of this matter.

Cardozo Bet Tzedek Legal Services is a clinical legal program at the Benjamin N. Cardozo School of Law. Since its creation in 1985, Cardozo Bet Tzedek Legal Services has been representing elderly and disabled New York City residents in a range of civil matters, including housing court litigation and litigation involving health-related services and disability benefits that enable its clients to reside in community settings and maximize their independence. Because of the far-reaching implications of this matter for its clients, Cardozo Bet Tzedek Legal Services has a substantial interest in its outcome.

The Center for Independence of the Disabled in New York (CIDNY) is a non-profit disability-rights organization founded in 1978. CIDNY's goal is to ensure full integration, independence and equal opportunity for all people with disabilities by removing barriers to the social, economic, cultural and civic life of the community. In 2011, CIDNY reached nearly 14,000 New Yorkers with community education, advocacy, and benefits advisement. CIDNY piloted the current New York State deinstitutionalization program for people with disabilities,

the Nursing Home Transition and Diversion Waiver—in doing so it documented the fact that the primary obstacle to community living is housing. CIDNY piloted the New York State Accessible Housing Registry—which has consistently documented the paucity of affordable and accessible housing available for people with disabilities. On a daily basis in its benefits advisement work, CIDNY helps consumers understand, enroll in, navigate, and solve problems with public housing, housing subsidy programs, waiting lists, and temporary housing. We advocate for home attendant, personal care and home health services, cleaning services, rent arrears payments from public agencies or charitable entities and other supports to prevent loss of housing and institutionalization. CIDNY staff advocate informally on behalf of consumers, teach them to self-advocate and, where necessary, CIDNY peer advocates accompany individuals to housing court. Although CIDNY refers individuals to legal services providers, its consumers often do not have an attorney to represent them in housing court. The most frequent presenting issue for individuals seeking assistance from CIDNY is housing. Virtually all of CIDNY's consumers have difficulty affording housing. A large percentage come to CIDNY when they are facing eviction or are involved in a dispute with a landlord. CIDNY has a vital interest in the outcome of this matter.

Disabled in Action ("DIA") is a civil rights organization committed to ending discrimination against people with all disabilities. DIA fights to eliminate the barriers that prevent people with disabilities from enjoying full equality in American society. Founded in 1970, DIA is a democratic, membership organization consisting primarily of and directed by people with disabilities providing an organizational basis for disabled activists to join in effective unified political action. Because of the potentially far-reaching implications for its members, DIA has a susbtantial interest in the outcome of this matter.

The Elder Law Clinic is part of Main Street Legal Services, the not-for-profit law firm which is the in-house part of CUNY School of Law's clinical program. The Elder Law Clinic handles a variety of cases, including guardianships for adults alleged to be incapacitated (including serving as Court Evaluator and representing parties in Article 81 guardianships), supplemental needs trusts for people with disabilities, wills and advance directives (health care proxies, living wills, powers of attorney), government benefits (e.g., Medicaid, Medicare, Social Security income programs), and elder abuse (primarily financial). Because of the far-reaching implications for its clients, the Elder Law Clinic has a substantial interest in the outcome of this case.

The Harlem Independent Living Center's (HILC) mission is to provide persons with disabilities with professionally-managed and delivered independent living services and related social services that promote, support and enhance the individual's growth, development, and integration into community living. HILC emphasizes meeting the needs of minorities with disabilities who have been un-served or who are under-served. HILC aims to make all community programs accessible to individuals with disabilities, thereby altering community behavior to improve the quality of life of all individuals. HILC is deeply concerned about the outcome of this matter, because it will have an impact on the ability of people with disabilities to remain in their homes and avoid unnecessary institutionalization.

JASA/Legal Services for the Elderly in Queens' (LSEQ) mission is to sustain and enrich the lives of older persons so that they may remain living in the community with dignity and autonomy. LSEQ provides free legal services to Queens' residents sixty and older who are in the greatest social and economic need on a wide variety of legal problems of critical importance to older people including: evictions, foreclosures; public benefits, healthcare and elder abuse. Last

year LSEQ assisted over 700 clients facing eviction helping them to remain safely in their homes and communities. Many of these clients had both physical and mental impairments which affected their ability to access the courts. Because of the direct and profound impact this case will have on LSEQs clients and Queens' seniors, LSEQ has a substantial interest in the outcome of this Court's decision.

University Settlement, the nation's first social settlement, has provided neighborhood-based services to the low-income, immigrant community within Manhattan's Lower East Side since 1886, working from within the community to strengthen the lives of individuals, families and the collective whole. University Settlement serves more than 20,000 people each year throughout 21 program locations in Manhattan and Brooklyn. University Settlement's offerings include childcare and preschool; after-school and summer programs; youth development, academic support and college advisement; adult literacy; comprehensive housing counseling and eviction prevention services; mental health services; specialized senior services; arts programs; a credit union; and community centers. Throughout its 125-year history, the Settlement has always taken an active role in fighting poverty by making systemic changes for the long-term benefit of neighborhood residents. University Settlement's Project Home has worked with at-risk residents of Manhattan's Lower East Side, Chinatown and more recently Northern Brooklyn to help them maintain permanent housing, personal safety and financial stability. The Settlement's holistic case management system ensures that every client receives targeted support to address both immediate needs and the root problems of housing and financial instability. Project Home offers extensive services to address issues which negatively affect housing stability, including poverty, domestic violence, child welfare, addiction, unemployment, mental or physical health issues, low literacy and education levels, lack of financial literacy, landlord

harassment, lack of affordable housing stock, and/or secondary displacement due to gentrification. Because of the far-reaching implications of this matter for its clients, University Settlement has a substantial interest in its outcome.

ARGUMENT

I. Settlements and Housing Court

Between 2008 and 2011, approximately 1,026,273 residential eviction cases were commenced in New York City Housing Court.[11] In the vast majority of these cases, the tenant was unrepresented but the landlord was represented by counsel.[12] The vast majority of these cases were settled pursuant to stipulations that landlords' attorneys[13] drafted on terms that are favorable to landlords.[14] These terms often condition continued tenancy on compliance with the settlement.[15] Where compliance is in question, it is often necessary for a tenant to file an Order to Show Cause to prevent his or her eviction.[16] Between 2008 and 2011, 664,733 motions and Orders to Show Cause were prepared by *pro se* clerks in New York City Housing Court.[17]

This is not a new problem. Housing Court was established in 1972.[18] It is one of the busiest courts of its kind in the nation, typically handling upwards of 350,000 new filings each year for the last 20 years.[19] Study after study has called for increased attention to, and proposed ways to address, the problem of unequal bargaining power between represented landlords and *pro se* tenants – particularly as it informs the prevalence of settlements based on terms that are potentially unfair to tenants.[20]

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[11] Civ. Ct. Statistical Information 2008-2011, supra note 1.
[12] See supra text accompanying notes 1-3.
[13] Id.
[14] Id.
[15] See Kaye & Lippman, supra note 4, at 2.
[16] Id.
[17] Civ. Ct. Statistical Information 2008-2011, supra note 1.
[18] The Housing Part of the Civil Court of the City of New York was established in 1972 by the passage of § 110 of the New York City Civil Court Act. See NYCCCA § 110.
[19] N.Y. Cty Civ. Ct., Housing Pt., Civil Court History, http://www.nycourts.gov/courts/nyc/housing/civilhistory.shtml (last visited July 9, 2012).
[20] See, e.g., Russell Engler, And Justice for All – Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987 (1999); Paula Galowitz, The Housing Court's Role in Maintaining Affordable Housing, in Housing and Community Economic Development in New York City: Facing the Future 180 (Michael H. Schill, ed., 1999); Fund for Modern Cts., N.Y. County Ct. Monitors: Report on the Housing Ct. 51-57 (1994); Fund for Modern Cts., The Bronx Citizen's Ct. Monitoring Project, Inc.: Report on the

At least one Housing Court judge has attempted to draw attention to the problem and has called on her colleagues to abandon the "illusion" that "settlements in Housing Court are generally the result of arm's length transactions between parties of equal bargaining power."[21]

Housing Ct. 41-46 (1993); Fund for Modern Cts., The Brooklyn Citizen Ct. Monitors: Report on the Housing Ct. 43-48 (1993); Baldacci, supra note 2, at 661; (citing City-Wide Task Force on Housing Ct. Inc., Five Minute Justice or "Ain't Nothing Going on But the Rent!" (1986)); Comm. on Legal Assistance, N.Y. Cty. B. Ass'n, Proposed Legislation for New York Housing Court Reform (1989); Comm. on Legal Assistance, N.Y. Cty. B. Ass'n., Housing Court Pro Bono Project Part II: Law Reform (1988); Access to Justice Project Advisory Comm., ACLU, Justice Evicted (1987).

[21] In 144 Woodruff Corp. v. Lacrete, 154 Misc.2d 301, 585 N.Y.S.2d 956 (Civ. Ct. Kings Cty 1992), then-Housing Court Judge Marcy S. Friedman observed the following in granting a tenant's motion to vacate a pro se stipulation of settlement:

> On the date of the final settlement of the case, this court had 36 cases on its calendar. The settlement was made between the parties in the hallways of the courthouse and was brought into the court for "so ordering". At the time, only petitioner had counsel. The court's "allocution" (or review of the stipulation) lasted approximately six minutes and was devoted chiefly to questioning respondent about how she would make the payments due under the stipulation and to ascertaining whether respondent understood the stipulation *as written* and the consequences of default. The allocution was not designed to elicit whether respondent had an overcharge defense to petitioner's rent claims. Nor could it have done so, as an overcharge defense is based on complex legal and factual issues, and respondent had no knowledge of the facts supporting her defense until she subsequently obtained counsel.
>
> Moreover, at the time of the allocution, respondent not only lacked knowledge of her defenses but was apparently also unaware even of the possible usefulness of legal representation. *307 The record is devoid of any evidence that respondent made an informed or knowing choice to proceed without counsel. Quite the opposite appears from the record of the allocution and the factual showing made in respondent's motion papers as to the circumstances under which respondent attempted to defend this proceeding *pro se*. Respondent is indigent and initially settled this proceeding based on the expectation that the Department of Social Services (DSS) would pay her rent arrears. She was unsuccessful in obtaining assistance, and failed to pay the arrears due under the first stipulation. She then defaulted on petitioner's motion for judgment under the stipulation, apparently on the advice of a public assistance caseworker that DSS would not pay and that she had no choice but to move. After receiving a marshal's 72- hour notice of eviction, she obtained an order to show cause to stay the eviction, and proceeded to enter into the final stipulation, based on another effort to obtain the assistance from DSS which had thus far eluded her. It was not until the allocution of that stipulation, when the court pointed out that she might qualify for special benefits to stop the eviction under the *Jiggetts* case *(Jiggetts v Grinker,* 75 NY2d 411) and that she needed to see a lawyer to find out whether this was so, that she finally appreciated the need for legal representation.
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> Respondent's case is not atypical. The vast majority of cases in Kings County are nonpayment proceedings settled by stipulations to pay out the rent arrears. Based on allocutions of approximately 5,000 such cases in the past year, this court's conclusion is that the stipulations are generally signed without knowledge of possible defenses and out of fear of eviction or the sense that there is no alternative. The overwhelming majority of unrepresented tenants lack even basic understanding about their legal rights and the

In 1997, then-Chief Judge of the State of New York, Judith S. Kaye, and then-Chief Administrative Judge, Jonathan Lippman, attempted to respond to some of these calls for reform by instituting a number of changes to the Housing Court system and proposing others.[22]

More than fifteen years later, problems stemming from the disproportionate bargaining power between landlords and tenants seem to have grown worse. At least one prominent report has questioned whether there is any way to address the problem without Housing Court judges drastically expanding their role.[23] On January 23, 2012, Deputy Administrative Judge of New

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> defenses which they may have to the petitioners' claims for rent. Most have repair problems but do not know that housing code violations may affect their landlords' entitlement to rent. Many are unaware that they may even seek repairs if they are behind in their rent. Few tenants have any idea whether their rents are legal. Virtually none understand the differing legal consequences of the various enforcement remedies for which the stipulations provide (for example, the difference between an installment agreement with a provision for entry of judgment upon default, and a judgment with issuance of a warrant of eviction forthwith and stay of execution provided payments are made). Many do not seem to be aware that the stipulations are *308 supposed to be the result of negotiations, and that they are not required to sign the stipulations as drafted by the landlords' attorneys. Most tenants do sign whatever is presented to them, frequently without reading it or having it read to them first, and often even when they are not sure whether they owe or dispute the amount the landlord claims is due. Startlingly, many tenants appear to be unaware not only of what their defenses are but of the fact that they may have defenses. Perhaps for this reason, tenants frequently do not see the need to seek counsel even when given the opportunity to do so.
> The critical problems caused by lack of representation for tenants in Housing Court can only be addressed from a number of perspectives. Greater availability of counsel is the obvious but crucial long-term solution. In the short-term, the Housing Court itself needs to develop procedures which will better ensure that the claims of unrepresented tenants are asserted and considered. *(See generally, Housing Court Pro Bono Project,* part II, op cit [recommendations].) The Bar also must further consider its ethical responsibilities in dealing with *pro se* litigants.
>
> Most important for present purposes, when it is called to the court's attention that the lack of representation has resulted under the circumstances of the particular case in an inequitable stipulation, the court cannot permit itself the illusion, comforting though it might be but which our own Chief Administrators have rejected, that settlements in Housing Court are generally the result of arm's length transactions between parties of equal bargaining power.

[22] Kaye & Lippman, supra note 4, at 14-17. Measures that were adopted included an improved case management system creating resolution parts "to effectively manage the settlement process" and a number of other measures designed to accommodate self-represented litigants. Id.

[23] In N.Y. Cty L. Ass'n, The New York City Housing Court in the 21st Century: Can it Better Address the Problems Before It? 11 (2005), the report of Working Group II observed:

> The overwhelming majority of tenants and a not insignificant number of landlords (primarily outside of Manhattan) are unrepresented in Housing Court. The primary

emphasis of the Court, bar associations and advocacy groups in recent years has been assisting unrepresented parties in understanding their legal rights and negotiating fair settlements of their cases. However, settlements either articulate or presume that the parties are knowingly and willingly giving up their right to go to trial. Indeed, unrepresented litigants are frequently advised by the Court that if they do not settle their cases, they will have to go to trial. Litigants are also further advised (in materials prepared by the Court, bar associations and individual judges) that if they choose to go to trial, the only assistance the Court (the judge) will/can provide is to explain procedures. It cannot help them to establish their claims or defenses.

Under such circumstances, it is appropriate to ask whether the right of such unrepresented litigants to have their claims or defenses adjudicated by a trier of fact, rather than to accept what they may believe is an unfair settlement, is effectively nullified, thus denying them access to justice and due process. On the other hand, it also appropriate to ask whether demanding that the Court provide assistance, in addition to the procedural explanations, would significantly and negatively alter the role of the judge as an impartial arbiter of claims and defenses based on facts and claims presented in evidentiarily admissible form to it by adversaries.

The report goes on to recommend the following:

In Housing Court, the issue is whether judges may and should play a more active role in the oversight and resolution of cases in which only one side has representation. The group recognized that Housing Court judges are understandably concerned that if they deviate from the traditional model of impassive decision-maker, if they take a more active role in cases involving pro se litigants, they will violate or appear to violate this duty of impartiality. The group agreed, however, that in order to provide a fair and meaningful opportunity to be heard in cases where only one side has representation, judges have a necessary and legitimate oversight function that can be performed without violating the duty to maintain impartiality. This function, which involves "leveling the playing field," is properly performed by making sure that pro se's understand the court process, are aware of options (e.g., settlement versus trial), have a meaningful opportunity to explain their claims or defenses and, if a case is settled, have a meaningful understanding of the terms of the stipulation. There was general agreement that some neutral techniques for providing a fair hearing to pro se's, without compromising impartiality, would include the following:

As finders of fact, Housing Court judges may and should ensure that the parties are heard by asking questions in a way that will be likely to obtain information from both sides. For example, by eliciting narrative from a pro se, the Court will be giving the pro se an opportunity to speak in a familiar manner about facts and claims or defenses that may be relevant to the resolution of the case (whether by trial or settlement).

If the narrative indicates a colorable defense or claim, judges may and should pursue inquiry to assure that the defense or claim is not being waived unknowingly or unwillingly and, where appropriate, judges may and should refer pro se's for possible legal assistance. There was also strong consensus that judges should review all stipulations of settlement to make sure pro se's understand them, even where such stipulations have been reviewed by a court attorney or where they do not contain a judgment of eviction. It was noted that a 1997 Administrative Notice (AN LT-10) advised that "[n]o stipulation in which any party is pro se should be approved by the Court unless the Judge is convinced that a pro se litigant understands the terms of the stipulation and an allocution is conducted on the record." This Administrative Notice also provided that "[t]he judge should also ascertain if a pro se litigant's claims or defenses are adequately addressed prior to so ordering any stipulation," and that review of stipulations by court attorneys "should be in addition to the allocution." The group agreed that this procedure is not being followed and that in many Resolution

York City Courts, Fern A. Fisher, issued Civil Court Directive DRP-195 requiring court attorneys to employ safeguards for settlement conferences involving unrepresented litigants.[24]

Housing Court was never intended to be a forum for mere contract disputes. Although the powers of Housing Court judges are limited in certain ways,[25] they have also been given additional authority in recognition of the significant stakes of the disputes over which they preside.[26]

II. Courts Have Long Been Empowered to Consider a Number of Factors in Deciding Whether to Strictly Enforce a Stipulation of Settlement.

When asked to enforce settlement agreements, Housing Court judges have long exercised discretion to ensure that the interests of justice are served. See, e.g., Parkchester Apartments Co. v. Heim, 158 Misc. 2d 982, 607 N.Y.S.2d 212 (App. Term 1st Dep't 1993) (holding that each

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> Parts stipulations are not being allocuted by the judge if they have been reviewed by a court attorney or if they do not contain a judgment. The group strongly agreed that all stipulations should be reviewed by the Resolution Part judge, not only because review gives the judicial imprimatur to the stipulation, but also because even first-time stipulations without judgments define the parties' rights and obligations for the future, and are the basis for future enforcement action and the potentially severe remedy of eviction. The group further agreed that while judges should review all settlements to make sure they are understood, judges should exercise heightened scrutiny of facts and claims where an apartment is being surrendered.

[24] N.Y. Cty Civ. Ct., DRP-195, Subject: Housing Ct. Atty. Conferences of Stipulations in Non-Payment and Holdover Cases (2012), available at http://www.nycourts.gov/courts/nyc/civil/directives/DRP/DRP195.pdf. DRP-195 is based on the fact that "judges rely on Court Attorneys to ensure that the stipulations they allocute are thoroughly reviewed" and requires increased scrutiny of: the parties involved; every allegation in the petition; every defense pled or potentially omitted; and every term in the proposed stipulation, including consequences of noncompliance as well as alternatives to settlement based on potential defenses. Id.

[25] For example, except for proceedings for the enforcement of housing standards and applications for certain provisional remedies, Housing Court may not grant injunctive relief. NYCCCA §§ 110(a)(4), 203(O), 209(B); Broome Realty Ass'n v Sek Wing Eng, 182 Misc. 2d 917, 703 N.Y.S.2d 360 (App. Term 1st Dep't 1999); Goldstein v. Stephens, 118 Misc. 2d 614, 463 N.Y.S.2d 137 (App. Term 1st Dep't 1983); but see NYCCCA § 212 (providing that "in the exercise of its jurisdiction the court shall have all of the powers that the supreme court would have in like actions and proceedings"); and RPAPL §743 (providing that an answer in a summary proceeding may contain any legal or equitable defense or counterclaim).

[26] See, e.g., NYCCCA § 110(c) (providing, in relevant part, that "[r]egardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest…"). That is, a Housing Court judge's role is different than other judges' roles given the importance of housing. Part of this difference can be found in the very statute that created the Housing Court as it gives judges atypical powers toward certain goals, including preserving the housing stock in New York City.

Order to Show Cause adjudication "requires a sui generis inquiry devoted to the particular facts and circumstances of the case then before the court . . . as well as a delicate balancing of the equities between the parties.").[27] The Court of Appeals affirmed the importance of such discretion in Teitelbaum Holdings Ltd. v Gold, 48 N.Y.2d 51, 54, 421 N.Y.S.2d 556 (1979):

> [T]he power of a trial court to exercise supervisory control over all phases of pending actions and proceedings has long been recognized *(e.g., Barry v Mutual Life Ins. Co., 53 NY 536, 539 (1873)).* Incident to this general authority, a court possesses discretionary power to relieve parties from the consequences of a stipulation effected during litigation.

The principles of contract law instruct that stipulations, as contracts, should be construed and enforced in such a way as to avoid substantial forfeiture. See, e.g., Sharp v. Norwood, 223 A.D.2d 6, 643 N.Y.S.2d 39 (App. Div. 1st Dep't 1977), aff'd, 89 N.Y.2d 1068, 659 N.Y.S.2d 834 (1977).[28] Forfeiture is particularly inappropriate when there has been substantial compliance with a settlement. See, e.g., 512 E. 11th St. HDFC v. Als, 2006 N.Y. Slip Op. 50079U (App.

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[27] See also Pomeroy Co. v. Thompson, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004) (holding that "a careful balancing of the equities . . . warranted the court's exercise of its discretionary authority in tenant's favor")(internal citations omitted); 102-116 Eighth Avenue Assocs. v. Oyola, 299 A.D.2d 296, 749 N.Y.S.2d 724 (App. Div. 1st Dep't 2002) (holding that "[u]nder the particular facts and circumstances of the record in this summary nonpayment proceeding, Civil Court properly exercised its discretion . . . ."); 1420 Concourse Corp. v. Cruz, 175 A.D.2d 748, 573 N.Y.S.2d 669 (App. Div. 1st Dep't 1987) (holding that a "court possesses the discretionary power to relieve parties from the consequences of a stipulation effected during litigation upon such terms as it deems just and, if the circumstances warrant, it may exercise such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it."); Jones v. Allen, 185 Misc. 2d 443, 712 N.Y.S.2d 306 (App. Term 2nd, 11th & 13th Jud. Dists. 2000) (in explaining that the exercise of discretion requires a court to consider the particular facts and circumstances of a case, the court held: "It is elementary that the mandate of the court to achieve a just resolution of the legal dispute pending before it requires the court to evaluate the concrete facts of the case. Both the determination whether to vacate the judgment or warrant (and of the terms of such vacatur) and the determination whether to grant a temporary stay (and of the terms of such stay) require judicial evaluation of the merits of the particular application and the exercise of judicial discretion."); accord Ladd v. Stevenson, 112 N.Y. 325, 19 N.E. 842 (1889) (announcing that this power "does not depend on any statute, but is inherent").

[28] See also 2246 Holding Co. v. Nolasco, 52 A.D.3d 377, 860 N.Y.S.2d 516 (App. Div. 1st Dep't 2008) (citing Sharp, 223 A.D.2d at 11); Lake Anne Realty Corp. v. Sibley, 154 A.D.2d 349, 545 N.Y.S.2d 828 (App. Div. 2d Dep't 1989) ("The law abhors a forfeiture of a lease"); 361 W. 121st Hous. Dev. Fund Corp. v. Frazier, 26 Misc.3d 46, 894 N.Y.S.2d 315 (App. Term 1st Dep't 2009) (quoting Bank of N.Y. v. Forlini, 220 A.D.2d at 378) Bradhurst Ave. Ass'n., LLC v. Glover, 2003 N.Y. Slip Op. 51107U, at *2 (App. Term 1st Dep't 2003) (finding that "*de minimis* deviation from the stipulation's payment terms should not result in a forfeiture of the rent stabilized premises" even where deviation was late payment and stipulation had "time is of the essence" clause).

Term 1st Dep't 2006).[29] In fact, case law is clear that no set of facts categorically precludes a judge from exercising discretion. See, e.g., Hyman Embroidery Works, Inc. v. Action House, Inc., 89 A.D.2d 515, 452 N.Y.S.2d 61 (App. Div. 1st Dep't 1982) ("Under almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief.").[30] Consistent with statutory law, judges consider a number of factors in deciding whether to strictly enforce a stipulation of settlement.

a. Factors to Be Considered in Deciding Whether to Strictly Enforce a Stipulation of Settlement.

Appellate case law identifies a number of factors that a Housing Court judge should consider in properly exercising discretion. These factors commonly include: the length of tenancy; the circumstances prior to and surrounding the default, including efforts to comply; and prejudice to the landlord. See, e.g., 326-330 East 35th Street Assoc. v. Sofizade, 191 Misc.2d 329, 741 N.Y.S.2d 380 (App. Term 1st Dep't 2002).[31] One of the more important factors for a judge to consider is the length of the tenancy at issue, because the longer the tenancy, the more potentially inequitable its forfeiture. See, e.g., Jemrock Realty Co., LLC v. Garfinkel, 11 Misc.3d 132(A), 816 N.Y.S.2d 696 (Table) (App. Term 1st Dep't 2006).[32] Courts have also

[29] See also J&H Mgmt. Corp. v. W.W.R.S. Auto., Inc., 2005 N.Y. Slip Op. 50742U (App. Term 2nd, 11th & 13th Jud. Dists. 2005) (citing Lemish v. East-West Renovating Co., 156 A.D.2d 313, 549 N.Y.S.2d 11 (App. Div. 1st Dep't 1989)); Future 40th St. Realty, LLC v. Mirage Night Club, Inc., 2002 N.Y. Slip Op. 50243U (App. Term 1st Dep't 2002).

[30] See also Bank of New York v. Forlini, 220 A.D.2d 377, 631 N.Y.S.2d 440 (App. Div. 2d. Dep't 1995); Central Valley Concrete Corp. v. Montgomery Ward & Co., 34 A.D.2d 860, 310 N.Y.S.2d 925 (App. Div. 3rd Dep't 1970); Goldstein v. Goldsmith, 243 A.D. 268, 276 N.Y.S. 861 (App. Div. 2d. Dep't 1935).

[31] See also Herald Towers, LLC v. Perry, 2003 WL 355663, 2003 N.Y. Slip Op. 50564(U) (App. Term 1st Dep't 2003); Century Apartments Associates v. Kleinman, 2002 WL 1770744, 2002 N.Y. Slip Op. 50303(U) (App. Term 1st Dep't 2002).

[32] See also Clark Wilson, Inc. v. Mitchell, 10 Misc.3d 139(A), 814 N.Y.S.2d 560 (Table) (App. Term 2nd, 11th & 13th Jud. Dists. 2005) (involving 34-year tenancy); BJB Realty Corp. v. Holloway, 10 Misc.3d 133(A), 814 N.Y.S.2d 560 (Table) (App. Term 2nd, 11th & 13th Jud. Dists. 2005) (involving a 30-year tenancy); 576 Realty Corp. v. Sneed, 6 Misc.3d 127(A), 800 N.Y.S.2d 346 (Table) (App. Term 2nd, 11th & 13th Jud. Dists. 2004) (involving a 20-year tenancy).

examined the circumstances surrounding an alleged breach. When a lapse in payment is brief, eviction is not warranted. See, e.g., Sherman Nagle Realty Corp. v. Felipe, 15 Misc. 3d 136(A), 839 N.Y.S.2d 437 (Table) (App. Term 1st Dep't 2007) ("[m]easuring the tenant's brief lapse in payment against the harsh result which would obtain upon literal enforcement of the default provision in the parties' settlement stipulation" [internal citations omitted]).[33] In reviewing the circumstances surrounding an alleged default, judges have also traditionally been instructed to ascertain whether there is any prejudice to a landlord. When the alleged default has not prejudiced the landlord, eviction is disfavored. See, e.g., Hitchcock Plaza, Inc. v. Willard, 8 Misc.3d 127A, 801 N.Y.S.2d 778 (Table) (App. Term 1st Dep't 2005).[34]

In this context and others, courts have considered the age and mental and physical capacity of the tenant seeking relief. Courts will vacate stipulations when a tenant did not understand its terms or alternatives to settlement. See, e.g., Solack Estates, Inc. v. Goodman,

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[33] See also Hunter Hale, LLC v. Peguero, 10 Misc. 3d 141A, 814 N.Y.S.2d 561 (Table) (App. Term 1st Dep't 2005) ("Measuring the tenants' brief lapse in payment against the harsh result which would obtain upon literal enforcement of the default provision in the parties' settlement stipulation . . . . we exercise our discretion to relieve tenants of their payment default so as to avoid a forfeiture of their long-term rent stabilized tenancy.") (internal citations omitted); Hitchcock Plaza Inc. v. Willard, 8 Misc.3d 127A, 801 N.Y.S.2d 778 (Table) (App. Term 1st Dep't 2005) (sustaining a "Civil Court's discretionary determination to relieve tenants of what the court fairly described as their 'very minor and technical' defaults" in their "brief lapse in payment."); Bradhurst Ave. Assoc., LLC v. Glover, 2003 N.Y. Slip Op. 51107U, at *2 (App. Term 1st Dep't 2003) (staying eviction where the landlord received payment on the twelfth day of the month, rather than on the tenth day as required by the terms of settlement); Ruxton Towers, LLP v. Hughes, 6/20/2002 N.Y.L.J. 20, col. 4, (App. Term. 1st Dep't) (holding that the default by respondent in the amount or form of payment was insubstantial, not prejudicial and excusable by the court pursuant to its continuing supervision over the stipulation's enforcement.); 62 W. 45 St. Assocs. v. Brazilnet Corp., 10/11/2000 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't) (where tenant's defaults under the stipulation were promptly cured, the court properly exercised its discretion to avoid forfeiture of the leasehold.); 1030 Southern Blvd. Realty Assocs. v. Ash Bronx, Inc., 2/10/1998 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't) (holding that payment made one day late is a *de minimis* deviation from the stipulated terms which should not result in a forfeiture of the tenancy.); River Drive Co. v. Overberg, 10/18/1993 N.Y.L.J. 23, col. 1 (App. Term. 1st Dep't) (accidental failure to pay a small amount on a stipulation held to warrant equitable intervention of court to prevent collection of substantial penalty for default.);Turin Housing Dev. Co. v. Morris, 1/13/1985 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't) (where tenant was ready to pay the full amount owed eleven days after the due date under a stipulation, and the landlord's agent could have accepted the payment without prejudice if the check failed to clear, court held a "minimal departure from the stipulated date for payment will justify a court in exercising its discretion to prevent ouster where the landlord has not been demonstrably prejudiced.").

[34] See also 2246 Holding Co. v. Nolasco, 52 A.D.3d 377, 860 N.Y.S.2d 516 (App. Div. 1st Dep't 2006); Bank of New York v. Forlini, 220 A.D.2d 377, 631 N.Y.S.2d 440 (App. Div. 2nd Dep't 1995); 361 West 21st HDFC v. Frazier, 26 Misc.3d 46, 894 N.Y.S.2d 315 (App. Term 1st Dep't 2009).

102 Misc. 2d 504, 425 N.Y.S.2d 906 (App. Term 1st Dep't 1979), aff'd, 78 A.D.2d 512, 432 N.Y.S.2d 3 (App. Div. 1st Dep't 1980) (upholding vacatur of stipulation as the "hearing, as well as the trial court's observations of the tenant at the time of settlement, amply support the conclusion that the elderly tenant, in a state of extreme emotional distress, lacked a basic understanding of the situation confronting her and the significance of the settlement."); University Heights Development Corp. v. Rogers, 1/13/84 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't) (vacating surrender agreement signed by a 71-year-old tenant acting under mistaken belief she had no way to pay rental arrears actually covered by a federal subsidy).[35] Courts have also considered age and capacity in granting stays of eviction or restoring tenants to possession. See, e.g., Parkchester Apartments Co. v. Scott, 271 A.D.2d 273, 707 N.Y.S.2d 55 (App. Div. 1st Dep't 2000) (restoring to possession recently ill, senior-citizen, long-term tenant); Bromley Co. LLC v. Rachman-Coakley, 24 Misc.3d 144(A), 901 N.Y.S.2d 898 (Table) (App. Term 1st Dep't 2009) (excusing default resulting from issues with elderly tenant's Senior Citizen Rent Increase Exemption based on equitable powers of court); 835 Carroll Street Corp. v. Reap, 11 Misc.3d 132(A), 816 N.Y.S.2d 695 (Table) (App. Term 2d & 11th Jud. Dists 2006) (excusing default and staying eviction in part because defaults were determined to be neither willful nor deliberate as

[35] See also Genesis Holding, LLC v. Watson, 5 Misc.3d 127(A), 798 N.Y.S.2d 709 (Table) (App. Term 1st Dep't 2005) (upholding vacatur of stipulation where hearing evidence supported express finding that tenant suffered from some form of "mental disability"); 169 Realty v. Wolcott, 2003 WL 22519432, 2003 N.Y. Slip Op. 51371(U) (App. Term 2d & 11th Jud. Dists.) (upholding vacatur of stipulation agreeing to surrender of rent controlled apartment occupied by 73-year old tenant for last 43 years on finding that "elderly, distraught tenant, erroneously persuaded that she had no defense to the proceeding and anxious for time to acquire alternate accommodations, unknowingly waived defenses and the opportunity to cure"); City of New York v. Hicks, 2/3/1992 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't) (tenant was weak and ill from a recent hospitalization and lacked a basic understanding of the situation at hand); 2002-06 Ellis Ave. Corp. v. Santos, 11/6/1991 N.Y.L.J. 22, col. 6 (Civ. Ct. Bronx Cty) (vacating stipulation where it was clear to the court that the tenant did not "comprehend the contents of the document she signed"); Fishel v. Hodges, 1/21/1983 N.Y.L.J. 14, col. 2 (Civ. Ct. Kings Cty) (tenant was aged, infirm, partially blind, and could only read with a magnifying glass).

tenant was hospitalized).[36] However, age and mental and physical capacity are not as consistently considered as other some factors.[37]

Prior to Chelsea, case law seemingly reflected judges' attempts to balance the competing interests of a landlord to resolve the alleged problems and of a tenant to preserve his home. After duly considering the factors discussed above, a judge would deem eviction to be warranted only where there were multiple, serious, or completely unabated defaults on the terms of a settlement – occasionally inquiring as to whether there were not circumstances otherwise warranting exercising discretion such as age or illness. See, e.g., Boston 167 LLC v. Smalls, 25 Misc.3d 131(A), 901 N.Y.S.2d 904 (Table) (App. Term 1st Dep't 2009) (declining to stay execution of warrant after tenant defaulted on four so-ordered stipulations "in view of tenant's extensive history of rent defaults, both prior to and during the pendency of this proceeding.").[38]

In 2246 Holding Corp v. Nolasco, 52 A.D.3d 377, 860 N.Y.S.2d 516 (App. Div. 1st Dep't 2008) ("2246 Holding"), this Court explained a judge's obligation to enforce settlements

[36] See also Deutsche Bank Nat. Trust Co. v. Oliver, 24 Misc.3d 838, 879 N.Y.S.2d 674 (Dist. Ct. Nassau Cty 2009) (granting stay to 92-year old tenant under Section 2201 of the CPLR); Totaram v. Cordero, 4/16/2003 N.Y.L.J. 22, col. 3 (Civ. Ct. Kings Cty) (granting stay exceeding six months to disabled tenant under Section 2201 of the CPLR); Niego Properties, Ltd. v. Schuette, 5/22/2002 N.Y.L.J. 25, col. 4 (City Ct. Westchester Cty) (granting stay to elderly tenants where husband also suffered from cancer).

[37] One reason for this may be that they are implicated in fewer cases. However, it may also be a function of their omission from those factors commonly listed for proper consideration.

[38] See also Grady Inc. v. Johnson, 23 Misc.3d 137(A), 886 N.Y.S.2d 70 (Table) (App. Term 1st Dep't 2009) ("extensive" defaults with no excuses offered by tenant); 1114 Morris Avenue HDFC v. Johnson, 23 Misc.3d 142(A), 890 N.Y.S.2d 370 (Table) (App. Term 1st Dep't 2009) ("repeated" delinquencies); 530 Manhattan Avenue HDFC v. Malloy, 19 Misc.3d 141(A), 866 N.Y.S.2d 92 (Table) (App. Term 1st Dep't 2008) (multiple defaults); 225 East 10th Street, LLC v. Durante, 13 Misc.3d 132(A), 831 N.Y.S.2d 350 (Table) (App. Term 1st Dep't 2006) (repeated failure to comply with terms of stipulation continued "unabated"); Riverton Assocs v. Garland, 10 Misc.3d 144(A), 814 N.Y.S.2d 892 (Table) (App. Term 1st Dep't 2006) (motion for further stay of execution of warrant denied based on repeated defaults of multiple orders); 2285 Sedgwick Realty Corp. v. Afua, 2005 N.Y. Slip Op. 50668(U) (App. Term 1st Dep't 2005) ("Civil Court did not abuse its discretion in denying tenant relief from her (second) default in tendering rent due pursuant to the unambiguous, "time of the essence," payment terms of the parties' settlement stipulation."); Strong Assocs. v. Vargas, 2005 N.Y. Slip Op 50933U (App. Term 1st Dep't 2005) ("Civil Court did not abuse its discretion in denying tenant relief from her repeated defaults . . . particularly where, as here, the rent delinquencies underlying the landlord's holdover petition continued unabated into the probationary period agreed to by the parties."); Henry Hudson Gardens, L.L.C. v. Bareda, 2004 N.Y. Slip Op 51234U (App. Term 1st Dep't 2004) ("Civil Court did not abuse its discretion in denying tenant relief from his repeated defaults . . . particularly where, as here, the rent delinquencies underlying the landlord's holdover petition continued unabated into the six-month probationary period agreed to by the parties.").

fairly and with a view to all of the attendant factors. 2246 Holding, like this case, involved a holdover proceeding based on allegations of chronic nonpayment of rent brought against an indigent tenant who had been in possession of the relevant apartment for approximately 30 years. Also like this case, 2246 Holding was settled by a stipulation that included a provision stating "time is of the essence" with respect to payments. Due to circumstances beyond the tenant's control, payment was offered several months late, and the landlord rejected it. The tenant brought a motion seeking a stay of the execution of the warrant, and the housing court judge granted the stay. In holding that the housing court judge's stay of the eviction "was appropriate," this Court declared:

> It is a well-settled principle of equity that courts do not look favorably upon the forfeiture of leases (*Sharp v Norwood*, 223 AD2d 6, 11 [1996], *affd* 89 NY2d 1068 [1997]). The policies underlying the rent stabilization laws are generally better served by holding out to a tenant the opportunity usually afforded in a nonpayment proceeding to cure the breach of his rent obligations (*Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 323 [App Term 1980], *affd* 84 AD2d 700 [1981], *affd* 56 NY2d 1025 [1982]). . . . . An indigent tenant who resides in an apartment for many years should not be evicted where she has made diligent efforts to comply with the terms of the settlement agreement, only to be stymied by events beyond her control.

The import of 2246 Holding is clear: courts must consider a number of important factors before evicting someone from his home. A tenant need not be forced to risk his tenancy on the strictest of compliance for a landlord to have effectively received the benefit of its settlement bargain. Where, as in this case, a landlord alleges that a tenant has been chronically late in paying his rent, payments that are late by a combined total of approximately two days over a course of 20 months of timely payments should be considered substantial compliance. Where a tenant's compliance is substantial, a landlord has benefited from the settlement without reaping the economic windfall that comes with evicting a long-time tenant from a rent-regulated

apartment. Where a tenant's noncompliance is arguably the result of age or illness, there are even more compelling reasons for a judge to exercise discretion.

b. The Statutory Basis for Discretion.

Enforcement of settlements fairly and with a view to all of the attendant factors is consonant with and grounded in statutory law. The Real Property Actions and Proceedings Law ("RPAPL"), which governs summary eviction proceedings, supports the understanding that judges should exercise a fair measure of discretion in considering whether to evict someone. Section 749(3) of the RPAPL, for example, allows a court to cancel a warrant of eviction on "good cause shown."[39] Section 753(4) of the RPAPL guarantees respondents in certain types of holdover proceedings an opportunity to "cure" even after a warrant of eviction has been issued.[40]

The Civil Practice Law and Rules ("CPLR"), which govern all civil litigation in the State, confirm this judicial discretion.[41] Section 2201 of the CPLR allows a court to stay its own proceedings "upon such terms as may be just."[42] Similarly, Section 5015 of the CPLR has been

[39] RPAPL § 749(3) states that "the issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant, **but nothing contained herein shall deprive the court of the power to vacate such warrant for good cause shown** prior to the execution thereof…" (emphasis added). Appellate case law has not limited application of this provision to a period prior to execution of the warrant. See e.g., Brusco v Braun, 84 N.Y.2d 674, 621 N.Y.S.2d 291 (1994) (Court of Appeals held that "[t]he Civil Court may in appropriate circumstances vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed.").

[40] RPAPL § 749(4) states that "[i]n the event that such proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court **shall** grant a ten day stay of issuance of the warrant, during which time the tenant may correct such breach" (emphasis added). Appellate case law has likewise not limited application of this provision to this ten-day period. See, e.g., Chew v. McKenzie, 2011 NY Slip Op 52308(U) (App. Term 1st Dep't) (allowing post judgment cure after ten day period had elapsed).

[41] The CPLR applies to summary proceedings in Housing Court under N.Y. City Civ. Ct. Act § 2102, which provides that "[t]he CPLR and other provisions of law relating to practice and procedure in the supreme court, notwithstanding reference by name or classification therein to any other court, shall apply in this court as far as the same can be made applicable and are not in conflict with this act."

[42] The full text of CPLR § 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Appellate courts have upheld the use of this provision by the Housing Court in a post judgment context. See, e.g., 326-330 East 35th Street Assoc. v. Sofizade, 191 Misc.2d 329, 741 N.Y.S.2d 380 (App. Term 1st Dep't 2002) (permanently staying judgment of possession under CPLR § 2201 conditioned on tenant's continued compliance with court order).

described by at least one appellate court as the Legislature's recognition that courts need to have discretion to consider the equities of a case.[43]

When people who have age-related or other disabilities are involved in litigation, a court must consider whether a reasonable accommodation might be necessary.[44] The Americans with Disabilities Act ("ADA") [45] prohibits discrimination by public entities, which include state and local governments as well as any "department, agency, special purpose district, or other instrumentality of a State or States or local government."[46] The ADA clearly covers Housing Court and its administration, and the Supreme Court has held that the ADA gives people with disabilities "the right of access to the courts."[47] Almost all landlords who bring cases in Housing Court are covered by the Fair Housing Act ("FHA") as well as the New York State and New

[43] In Jones v. Allen, 185 Misc. 2d 443, 446-47, 712 N.Y.S.2d 306 (App. Term 2nd, 11th & 13th Jud. Dists. 2000), the court observed:

> The inherent judicial powers are those which do not derive from legislative grant but are required in order for the court "to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction" (*Gabrelian v. Gabrelian,* 108 AD2d 445, 448). For a court to exercise its constitutional mandate, it must have certain incidental powers (*Wehringer v. Brannigan,* 232 AD2d 206, 207). One of these "essential, inherent powers" (*Lowber v. Mayor of N. Y.,* 15 How. Pr. 123, 26 Barb. 262) is the power of a court to grant relief from its own judgments and processes. This power "does not depend upon any statute, but is inherent" (*Ladd v. Stevenson,* 112 N.Y. 325, 332). Indeed, by enacting CPLR 5015, which codifies some of the instances in which this power may be exercised (*see also,* Fed Rules Civ Pro, rule 60 [b]), the Legislature has acknowledged the need for an efficient procedural mechanism for the correction of a judgment that has been procured through irregular means, that is, contrary to the equities of the case, or that works a substantial injustice (10 Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.01). Similarly, the Legislature has acknowledged and preserved the inherent power of the court to vacate the warrant (RPAPL 749 [3]).

[44] See generally Kevin M. Cremin and Judge Gerald Lebovits, Accommodations and Modifications for Litigants with Disabilities in the New York City Housing Court, 38 N.Y. Real Prop. L.J. 30 (2010).

[45] See The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 – 12213.

[46] Id. at § 12131(1).

[47] Tennessee v. Lane, 541 U.S. 509, 531 (2004), held that "title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." In reaching this conclusion, the Court noted that "[t]he Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." Id. at 523.

York City Human Rights Laws.[48] These laws also require that reasonable accommodations be made for people with disabilities.[49]

Housing Court is therefore required to consider whether reasonable accommodations might be necessary for tenants who have age-related or other disabilities.[50] The failure to do so constitutes discrimination.[51] Based on this obligation, Housing Court judges have, for example, taken into account a tenant's disability in staying an eviction under CPLR § 2201 to allow a post-judgment cure period.[52]

These bases for judicial discretion are as well-established as the need for it. The factors included in the common exercise of judicial discretion should include those considerations mandated by the ADA and other statutes.

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[48] See Fair Housing Act, 42 U.S.C. §§ 3601–31; New York State Human Rights Law, N.Y. Exec. Law § 291; and New York City Human Rights Law, N.Y.C. Admin. Code §8-107.

[49] See 42 U.S.C. § 3604 (f)(3).

[50] See 42 U.S.C. § 12131(2).

[51] See 42 U.S.C. § 12132 (providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

[52] See 1021-27 Ave. St. John Hous. Dev. Fund Corp. v. Hernandez, 154 Misc. 2d 141, 146-48, 584 N.Y.S.2d 990, 994 (Civ. Ct. Bronx Cty 1992) (staying execution of final judgment of possession to permit tenant to obtain psychiatric treatment and to disengage himself from illegal drug use and sales in subject premises); 506-508 Holding Corp. v. Glatzel, Index No. L&T 58754/05, at *5-9 (Civ. Ct. N.Y. Cty 2006) (unpublished opinion) (citing a recent adjustment of respondent's medications and his reasonable accommodation request under the FHA in granting a stay of the warrant of eviction); 301 E. 69th St. Assocs. v. Eskin, 11/13/1993 N.Y. L.J. 24, col. 2 (Civ. Ct. N.Y. Cty)(modifying court's prior judgment to allow a post-judgment cure of a nuisance based on new evidence that a change in medication had led to a change in respondent's behavior); Hertwig-Brilliant v. Michetti, 11/9/1993 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y. Cty) (remanding case to DHPD for further consideration after concluding that petitioner should be given the "opportunity to demonstrate that he can continue to reside at his apartment without posing a threat or danger to others or otherwise engaging in acts or behavior constituting a nuisance to those who come in contact with him at his development" based on the "affirmative duty to accommodate to the special problems of the mentally disabled so that they may be able to live within the general population" set forth in city, state, and federal statutes that prohibit housing discrimination based on disability); see also Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1126-27 (D.C. 2005) (holding that "the tenant's request for a brief stay of the eviction proceeding" to allow time for her apartment to be cleaned is a reasonable accommodation under the FHA).

III. The Disproportionate Effect of Chelsea 19 v. James.

Approximately a year and a half after 2246 Holding, this Court decided Chelsea.[53] Chelsea involved a stipulation to pay approximately $30,000 in back rent by December 31, 2006.[54] The apartment in question had a monthly rental of approximately $3,000. The landlord waited until April of 2007 to move for entry of judgment, which included unpaid rent for every month since the stipulation was executed. The tenant failed to appear in court on the motion's return date and the landlord was awarded a default possessory and monetary judgment.

The tenant then returned to court in July 2007 – seven months after the money was due – with no reasonable excuse for the delays or the default. The delay was neither minimal nor inadvertent. The tenant did not offer a reasonable excuse for the default. By most standards, the tenant's noncompliance with the stipulation of settlement was egregious. This Court held that, under such circumstances, a tenant's claimed difficulty in obtaining funds was neither sufficient grounds to vacate a default judgment or void a stipulation, nor was it "good cause" to vacate a warrant under RPAPL § 749(3).

Chelsea involved these extraordinary facts. This Court's recent decision in Bodenheim limited Chelsea to its facts. After discussing these facts, the Court explained that "[u]nder those circumstances, the *Chelsea 19* tenant's 'claimed difficulty in obtaining funds,' standing alone, did not provide good cause to vacate the warrant."

Chelsea's limited holding – that unspecified difficulty in obtaining funds does not explain a seven-month delay in compliance and does not warrant vacatur of a stipulation, a calendar default, or a warrant of eviction – is not novel. As described above, appellate courts

[53] Chelsea 19 v. James, 67 A.D.3d 601, 889 N.Y.S.2d 564 (App. Div. 1st Dep't 2006).

[54] The underlying facts of Chelsea are detailed in 443 East 78 Realty LLC v. Tupas, 26 Misc.3d 1240(A), 910 N.Y.S.2d 404 (Table) (Civ. Ct. N.Y. Cty 2010), in 24-25 Sickles St. Investor LLC v. Cruz, 6/23/2010 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y. Cty) and in Bodenheim.

have long countenanced strict enforcement of stipulations of settlement where unexplained, "repeated," or entirely "unabated" defaults by a tenant are concerned. See, e.g., Henry Hudson Gardens LLC v. Baredo, 25 A.D.3d 466, 808 N.Y.S.2d 67 (App. Div. 1st Dep't 2008).[55]

Falling easily within a long line of decisions, Chelsea reaffirmed the rule that unexplained noncompliance with a stipulation cannot be excused. As recognized in Bodenheim, Chelsea does not stand for the proposition that trial courts are prohibited from exercising their discretion to consider the totality of the circumstances in evaluating a motion to stay or vacate a warrant of eviction. Chelsea's suggestion that eviction for noncompliance with a settlement is not forfeiture to be avoided but "the contracted for consequence of noncompliance" helped fuel its overly-broad influence on lower courts.

Since it was issued, Chelsea has been cited by no fewer than 18 appellate courts.[56] No fewer than seven of these courts have cited Chelsea as standing for the proposition that courts must strictly enforce stipulations without regard for the equities of the particular case.[57] For

[55] See also Boston 167 L.L.C. v. Smalls, 25 Misc.3d 131(A), 901 N.Y.S.2d 904 (Table) (App. Term 1st Dep't 2009) (tenant defaulted on no less than three so-ordered stipulations and the court declined to grant a stay of the execution of the warrant on the fourth such default "in view of tenant's extensive history of rent defaults, both prior to and during the pendency of this proceeding"); 1114 Morris Avenue H.D.F.C. v. Johnson, 23 Misc.3d 142(A), 890 N.Y.S.2d 370 (Table) (App. Term 1st Dep't 2009) (tenant's "repeated" delinquencies justified denial of request for vacatur); Grady Inc. v. Johnson, 23 Misc.3d 137(A), 886 N.Y.S.2d 70 (Table) (App. Term 1st Dep't 2009) ("extensive" defaults with no excuses offered by tenant); 377 Broome St. Corp. v. McManamon, 20 Misc.3d 134(A), 867 N.Y.S.2d 378 (Table) (App. Term 1st Dep't 2009) (defaults continued "unabated into probationary term"); 530 Manhattan Avenue H.D.F.C. v. Malloy, 19 Misc.3d 141(A), 866 N.Y.S.2d 92 (Table) (App. Term 1st Dep't 2008) (multiple defaults); 225 East 10th Street, LLC v. Durante, 13 Misc.3d 132(A), 831 N.Y.S.2d 350 (Table) (App. Term 1st Dep't 2006) (repeated failure to comply with terms of stipulation continued "unabated"); Riverton Assocs v. Garland, 10 Misc.3d 144(A), 814 N.Y.S.2d 892 (Table) (App. Term 1st Dep't 2006) (motion for further stay of execution of warrant denied based on repeated defaults of multiple orders); 960 Mgt. Corp. v Dzaba, 3 Misc.3d 127(A), 787 N.Y.S.2d 682 (Table) (App. Term 1st Dep't 2004) (delinquencies continued "unabated"); Jannarone v. Ware, 7/18/1996 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't) (holding it was not an abuse of discretion to deny tenant's motion to vacate warrant when tenant defaulted on no less than three separate stipulations).

[56] This figure does not include an unspecified number of unreported decisions.

[57] Harvey 1390 LLC v. Bodenheim, 29 Misc.3d 77, 912 N.Y.S.2d 369 (App. Term 1st Dep't 2010) (noting, however, that there may be circumstances where exercise of discretion is appropriate but declining to do so based on absence of circumstances warranting such); Westside Plaza, LLC v. Bhawnaney, 2012 N.Y. Slip Op. 50044(U) (App. Term 1st Dep't); 223-225 West 10th Street Equities, LLC v. Stokes, 31 Misc.3d 137(A), 927 N.Y.S.2d 820 (Table) (App. Term 1st Dep't 2011) (decision based on procedural issue but court noted that based on Chelsea there would have been no basis to disturb the settlement which had already been amended); 368 Chauncey Ave. Trust v.

example, in 1215 Realty Associates, LLC v. Thomas, 32 Misc.3d 131(A), 934 N.Y.S.2d 35 (Table) (App. Term 2nd, 11th & 13th Jud. Dists. 2011), the court interpreted Chelsea as mandating denial of a tenant's first Order to Show Cause, which followed settlement of a nonpayment proceeding.

At least 10 of these 18 appellate decisions have cited Chelsea as arguably reaffirming the rule that strict enforcement is warranted where there have been repeated or unexplained defaults on the terms of a settlement.[58] However none of these decisions discusses the length of tenancy at stake, the tenant's efforts at compliance, the circumstances surrounding the default(s), or prejudice to the landlord. Nor is there any discussion of the tenant's age, disability, or other potentially extenuating circumstances.

Whitaker, 28 Misc.3d 130(A), 911 N.Y.S.2d 696 (Table) (App. Term 2d, 11th and 13th Jud. Dists. 2010) (treating a stipulation requiring payment of scarcely more than the current month's rent and finding the tenant had not substantially complied where most of the money paid was applied to future rent and not arrears, the court found strict enforcement appropriate despite noting that it would not be appropriate if it were unjust – still more troubling, in response to a dissenting opinion, the majority found that "the authority of the court to vacate a warrant for good cause shown is not appropriately invoked to override or alter" the standards that supposedly require strict enforcement); Harlem 522-147 Assocs, LLC v. Jeantilus, 26 Misc.3d 140(A), 907 N.Y.S.2d 437 (Table) (App. Term 1st Dep't 2010); Stevenson Commons Assocs, LP v. Bishop, 26 Misc.3d 140(A), 907 N.Y.S.2d 441 (Table) (App. Term 1st Dep't 2010) (though strict enforcement was based in some part on fact that tenant, represented by counsel, had expressly acknowledged the legality of his eviction).

[58] BPIV-556 West 188th St v. Seka, 33 Misc.3d 131(A), 2011 N.Y. Slip Op. 51888(U) (Table) (App. Term 1st Dep't 2011) (noting tenant's repeated failure to comply with settlement); George Units, LLC v. Galan, 32 Misc.3d 145(A), 2011 N.Y. Slip Op. 51731(U) (Table) (App. Term 1st Dep't) (noting "repeated" failure to comply with settlement); 601 West Realty, LLC v. Castro, 32 Misc.3d 143(A), 2011 N.Y. Slip Op. 51675(U) (Table) (App. Term 1st Dep't) (noting tenant's "repeated" noncompliance); 100 Audubon Holdings v. Hernandez, 31 Misc.3d 128(A), 927 N.Y.S.2d 818 (Table) (App. Term 1st Dep't 2011) (noting "repeated failure to comply" with settlement); Diagonal Realty LLC v. Gil, 29 Misc.3d 126(A), 2010 N.Y. Slip Op. 51690(U) (Table) (App. Term 1st Dep't 2010) (noting "repeated failure to comply" with settlement and several court orders); M&R Realty Co., LLC v. Brumfield, 28 Misc.3d 139(A), 2010 N.Y. Slip Op. 51537(U) (Table) (App. Term 1st Dep't) (noting "repeated and unexplained failure to comply" with settlement and several court orders); RR Reo II, LLC v. Miah, 28 Misc.3d 131(A), 911 N.Y.S.2d 695 (Table) (App. Term 1st Dep't 2010) (noting lack of explanation for noncompliance); First Pine Realty Corp. v. Morales, 28 Misc.3d 126(A), 2010 N.Y. Slip Op. 51138(U) (Table) (App. Term 1st Dep't) (noting "repeated, unexcused violations" of settlement); Beaux Arts II, LLC v. Oyoue, 26 Misc.3d 139(A), 907 N.Y.S.2d 435 (Table) (App. Term 1st Dep't 2010) (noting failure to comply with multiple extensions of payment deadlines already provided by court). Another appellate case arguably followed Chelsea without actually citing to it and denied a stay to a 30-year tenant who had obtained full approval for a grant from the Department of Social Services for all arrears owed prior to execution of the warrant though after a default on two stipulations and a subsequent order. East 22nd Equities, LLC v. Staggers, 2011 NY Slip Op 52451(U) (Table) (App. Term 2d, 11th & 13th Jud. Dists.).

Only three reported decisions have explicitly distinguished Chelsea or found it otherwise inapplicable. These cases did so based on the specific facts before the court rather than by limiting Chelsea's application to the specific facts that were before the Chelsea Court. See Einhorn v. McCloud, 30 Misc.3d 20, 914 N.Y.S.2d 854 (App. Term 1st Dep't 2010) (choosing to apply 2246 Holding instead of Chelsea based on "tenant's diligence during the short period of time at issue, the long-term nature of the tenancy and the particular terms of the stipulation"); 421 W 22 LLC v. Walberg, 30 Misc.3d 136(A), 926 N.Y.S.2d 344 (Table) (App. Term 1st Dep't 2011) ("Walberg") (finding that, where there was apparent confusion regarding a due date which fell on a weekend, there was good cause to stay a warrant of eviction for a senior citizen who had been the tenant of the relevant apartment for 34 years); and 443 East 78 Realty LLC v. Tupas, 26 Misc.3d 1240(A), 910 N.Y.S.2d 404 (Table) (Civ. Ct. NY Cty 2010) (in restoring senior citizen tenant, who had lived in his apartment for 38 years, to possession after default and consequent eviction based, in some part, on tenant suffering heart attack and being hospitalized, court explicitly held that Chelsea did not preclude granting relief post-eviction and did not divest the Housing Court of its discretion to hear the equities of a case). Finally, three other decisions did not follow Chelsea seemingly without citing to 2246 Holding in its place.[59]

Post-Chelsea, 2246 Holding has been explicitly followed only seven times in reported decisions, and these cases invariably base its application on specific facts before the court. See, e.g., Bushwick Properties, LLC v. Wright, 34 Misc.3d 135(A), 946 N.Y.S.2d 65 (Table) (App. Term 2nd, 11th & 13th Jud. Dists.) (reversing Housing Court and declining to evict based on

[59] In P&T Management Co., LLC v. Galanis, 33 Misc.3d 21, 931 N.Y.S.2d 205 (App. Term 2d, 11th and 13th Jud. Dists. 2011), the court declined to evict a tenant after finding that the tenant's default on the terms of settlement of holdover proceeding was based on a misunderstanding. See also 117 W. 142, LLC v. Matthews, 31 Misc.3d 138(A), 930 N.Y.S.2d 175 (Table) (App. Term 1st Dep't 2011). Bodenheim also did not cite 2246 Holding. 2012 N.Y. Slip Op. 05116

tenant's diligent application to several organizations for assistance with arrears, his long-term tenancy and the particular terms of the settlement).[60] 2246 Holding has been factually distinguished by only one appellate court. See 377 Broome Street Corp. v. McManamon, 20 Misc.3d 134(A), 867 N.Y.S.2d 378 (Table) (App. Term 1st Dep't 2008) (where rent delinquencies of the sort on which the holdover proceeding was predicated went "unabated into the probationary term").[61]

Some part of Chelsea's influence is apparent in the fact that 18 appellate decisions have followed Chelsea while only seven appellate and lower courts have followed 2246 Holding in reported decisions. Still more of this influence is apparent in the fact that courts that follow 2246 Holding do so based on specific facts before the court while Chelsea's application has seemingly required no similar factual inquiry. In other words, courts appeared to be treating Chelsea as if it were the rule and 2246 Holding as if it were the exception. This is only partially explicable by the fact that Chelsea was issued approximately a year and a half after 2246 Holding. Chelsea did not expressly overrule 2246 Holding, leading to the peculiar situation where the leniency mandated by 2246 Holding appeared applicable to settlements of holdover proceedings while the

[60] Einhorn v. McCloud, 30 Misc.3d 20, 914 N.Y.S.2d 854 (App. Term 1st Dep't 2010) (applying 2246 Holding based on "tenant's diligence during the short period of time at issue, the long-term nature of the tenancy and the particular terms of the stipulation"); 361 West 121st Housing Dev. Fund Corp. v. Frazier, 26 Misc.3d 46, 894 N.Y.S.2d 315 (App. Term 1st Dep't 2009) (where $8 lapse in payment only had to do with attorney's fees, court declined to evict); 4220 Broadway, LLC v. Gomez, 33 Misc.3d 1207(A), 2011 N.Y. Slip Op. 51803(U) (Table) (Civ. Ct. NY Cty) (after discussion of 2246 Holding, court declined to evict indigent, single mother of three instead extending time to pay and extending by an additional 24 months a probationary settlement of holdover); Yorkville 82 LLC v. Ruiz, 29 Misc.3d 131(A), 918 N.Y.S.2d 401 (Table) (App. Term 1st Dep't 2010) (applying 2246 Holding "under the particular facts of the case"); 443 East 78 Realty LLC v. Tupas, 26 Misc.3d 1240(A), 910 N.Y.S.2d 404 (Table) (Civ. Ct. NY Cty 2010) (in restoring 38-year tenant to possession after default and consequent eviction were based, in some part, on tenant suffering heart attack and being hospitalized, court explicitly held that Chelsea did not preclude granting relief post-eviction and did not divest the Housing Court of its discretion to hear the equities of a case); Chong King Enterprises, Inc. v. Nunez, 21 Misc.3d 129(A), 873 N.Y.S.2d 232 (Table) (App. Term 1st Dep't 2008) (based on 40-year rent controlled tenancy and fact that all money was ultimately paid by the Human Resources Administration ("HRA") and a charity, the court declined to evict).

[61] In a separate matter, this same court discussed 2246 Holding but declined to follow it. Harvey 1390 LLC v. Bodenheim, 29 Misc.3d 77, 912 N.Y.S.2d 369 (App. Term 1st Dep't 2010), *rev'd*, 2012 NY Slip Op 05116 (App. Div. 1st Dep't 2012).

strictness mandated by Chelsea seemed to apply to nonpayment proceedings. Added to this peculiarity is that, based on Court of Appeals and other precedent, it seemed that judges had more discretion after a warrant was executed than before. See Brusco v. Braun, 84 N.Y.2d 674, 621 N.Y.S.2d 291 (1994) (upholding a court's power to consider the equities and restore a tenant to possession after a warrant of eviction has been executed).

Chelsea's influence was even more apparent in the lower courts where many judges have deemed their hands tied by Chelsea's seemingly admonitory language. The majority of these decisions in Housing Court often went unreported unless they were appealed. In Walberg, for example, the lower court decision, which ultimately was reversed, used a mere three sentences to explain why a tenant who was a senior citizen who had lived in his apartment for 34 years should be evicted. [62] In reversing the lower court, the Appellate Term determined that the tenant had merely been confused about a due date falling on a weekend.

Likewise, in the case at bar, the Housing Court wrote a mere six sentences to explain why it was denying the motion for a stay that was filed by a tenant who had lived in the subject premises for 28 years.[63] The court denied the stay even though there had been a combined total of only 48 hours in payment lapses over the course of approximately 20 months of the settlement term.

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[62] Decision dated June 23, 2010 by Brenda Spears, J.H.C. n.o.r., L&T Index No. 57285/2010: "The respondent's motion is denied as respondent defaulted on the 4/19/10 stipulation. All stays are vacated. No further notice of eviction required."

[63] See decision/order of Peter Wendt J.H.C. dated February 26, 2010 in original record, providing, in pertinent part:

> This is a holdover proceeding based on a chronic default in timely rent payment. Respondent herein entered into two probationary stipulations. She violated the first agreement, and the parties agreed to a second stipulation, with much stricter language stating that *any* violation including *any* lateness would be material. The language of the second stipulation (Par. 5) stated *no* default would be de minimis. Respondent has violated both stipulations, which are enforceable as agreed and written. Accordingly motion denied, except that execution of warrant stayed 2 weeks to 3/12/10 for respondent to vacate with dignity.

In the lower court decision upheld by East 22nd Equities, LLC v. Staggers, 2011 NY Slip Op 52451(U) (App. Term 2d, 11th & 13th Jud. Dists. 2011), Judge Stanley described the influence of Chelsea on lower courts:[64]

> . . . The Appellate Division by the plain meaning of the terms of its decision [in Chelsea] severely constricts this court's discretion to enforce stipulations of settlement. The Appellate Division states in no uncertain terms that housing court judge's [*sic*] must enforce a settlement stipulation when the tenant's failure to comply with the terms stems from difficulty in paying the arrears…
>
> It seems as if the long standing caselaw regarding the court's abhorrence of forfeiture of rent stabilized apartments with a low rent and a long term occupancy has been turned on end. The above quoted language gives this court no discretion and without further elucidation from the higher courts this court has no alternative but to follow the *James* decision . . . .

Another measure of Chelsea's influence may have been found in the lengths that some lower court judges had to go to in order to distinguish it. The length of these decisions is meaningful because it demonstrated the obstacle that Chelsea presented to judges seeking to fairly preside over issues arising from stipulations of settlement. For example, Judge Schreiber wrote 11 paragraphs to distinguish Chelsea in restoring a tenant, who had lived in the subject premises for 38 years, to possession after a default and consequent eviction. The decision emphasized that the alleged default was based, in some part, on the tenant suffering a heart attack and being hospitalized and that the landlord had been paid all rent due including legal and marshal fees. See 443 East 78 Realty LLC v. Tupas, 26 Misc.3d 1240(A), 910 N.Y.S.2d 404 (Table) (Civ. Ct. NY Cty 2010). Similarly, Judge Wendt wrote approximately 30 paragraphs to meticulously distinguish Chelsea in a case where the tenant's entire rent was being paid by the HRA and the delays in payment were entirely the fault of the HRA despite the tenant's diligent efforts. See 24-25 Sickles St. Investor LLC v. Cruz, 6/23/10 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y.

[64] Decision/ order of John Stanley, J.H.C. dated February 22, 2010, n.o.r., L&T Index No. 88860/2009.

Cty). Judge Waithe provided 11 paragraphs of analysis in granting the Order to Show Cause of a tenant who had lived in his apartment for 33 years. See First Housing Co. Inc. v. Taylor, 2/1/12 N.Y.L.J. 21, col. 1 (Civ. Ct Queens Cty). The decision emphasized that the tenant, who was suffering from cancer, was only slightly late in making the required payment even though all of the money had been approved by charities and the HRA. Judge Katz wrote over 13 paragraphs to grant the motion of a senior-citizen veteran who had lived in the apartment for over 30 years and who had all the money due. See Waterside 1 LLC v. Christian, L&T Index No. 75783/2011 (Civ. Ct. Queens Cty, March 1, 2012).[65]

Bodenheim will undoubtedly go a long way in limiting the effect of Chelsea:

> We note that nothing in *Chelsea 19* abrogates a court's authority, in the exercise of its discretion, to vacate a warrant of eviction based on a showing of good cause. Nor does the case stand for the proposition that a court may never consider a tenant's difficulty in obtaining funds when determining, under all the circumstances, whether good cause exists to stay an eviction warrant. These cases involve fact-sensitive inquiries, and must be decided after review of all the circumstances, including the extent of the delay, the length and nature of the tenancy, the amount of the default and the particular tenant's history, as well as a balancing of the equities of the parties (*see Parkchester Apts. Co. v Heim*, 158 Misc 2d 982, 983-984 [App Term 1993]).

However, certain questions undoubtedly remain, including just what circumstances must be reviewed and what weight those circumstances should be accorded in balancing the equities of the parties. In the two years prior to Chelsea, nearly as many people were evicted as in the two years following Chelsea.[66] As a result, merely limiting the effect of Chelsea and resuming the pre-Chelsea state of the law is not sufficient to remedy this long-standing problem.

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[65] See also Audobon 189-190 LLC v. Cabrera, 12/14/2010 N.Y.L.J. 25, col. 1 (Civ. Ct. N.Y. Cty), Judge Scheckowitz offered approximately 20 paragraphs to find Chelsea applicable under the specific circumstances of the case while recognizing that a court would have discretion to find differently in the interests of justice.

[66] See Housing Court Task Force Summary of Evictions 2008-2011, supra note 9. See supra text accompanying note 9 for a description of the types of evictions these numbers encompass.

IV. Courts Must Consider the Equities of a Particular Case in Enforcing Settlements.

Bodenheim was the first time this Court agreed to hear the issue of a Housing Court judge's discretion since Chelsea and together with the Court's disposition of this case may present the final word on the subject for years to come. This case presents an opportunity for this Court to clarify the factors that a Housing Court judge should consider in exercising discretion.

As explained above, while there are no clear rules regarding when relief from a default is appropriate, a number of factors have long been identified as appropriate for a court's consideration. These factors commonly include: the length of tenancy; the circumstances prior to and surrounding the default, including efforts at compliance; and prejudice to the landlord. Courts have also sometimes considered the age and capacity of the tenant. Leading up to Chelsea, and in certain ways despite Chelsea, there has been an understanding that after due consideration of these factors, eviction is rarely appropriate in the absence of repeated or unexplained defaults on the terms of a settlement.

However, the question may be asked just how successful this bid for fairness can be in the absence of a clear statement from this Court on the importance of considering all of these factors. For example, if a judge may or may not consider these factors at her discretion, how can there be certainty that a default that is merely "unexplained" is not the result of a factor that must be considered, such as a tenant's mental capacity? If a tenant is inartful in framing his or her arguments in a pro se Order to Show Cause and, like the tenant in Audubon 189-190 LLC v. Cabrera, 12/14/10 N.Y.L.J. 25, col. 1 (Civ. Ct. N.Y. Cty), merely states that he has had "economic and emotional" problems, how can a court be sure that the tenant does not have disabilities that might be important to consider?

The pro se tenant in Bodenheim retained counsel and brought another Order to Show Cause in Housing Court after the Appellate Term had issued its decision. Judge Lebovitz found that "[r]espondent now shows facts, which petitioner does not contest, that led the court to the inescapable and certain conclusion that, had he presented them to the court on 3/9/10, show that he had good cause to require the court to stay execution of the warrant."[67] These facts presumably included that the tenant was diagnosed with a psychiatric disability and had undisputedly made diligent efforts at compliance, including securing assistance from three separate charities and appealing HRA's wrongful denial of certain other assistance. That tenant's plight, as much as any, shows the need for judges to be searching in the application of their broad discretion in cases involving pro se tenants.

Judge Friedman's decision in Woodruff Corp. v. Lacrete, 154 Misc.2d 301, 585 N.Y.S.2d 956 (Civ. Ct Kings Cty 1992), also points out the need for judges to act affirmatively in exercising their discretion:

> Based on allocutions of approximately 5,000 such cases in the past year, this court's conclusion is that the stipulations are generally signed without knowledge of possible defenses and out of fear of eviction or the sense that there is no alternative. The overwhelming majority of unrepresented tenants lack even basic understanding about their legal rights and the defenses which they may have to the petitioners' claims.... Virtually [no tenants] understand the differing legal consequences of the various enforcement remedies for which the stipulations provide… Many do not seem to be aware that the stipulations are supposed to be the result of negotiations, and that they are not required to sign the stipulations as drafted by the landlords' attorneys. Most tenants do sign whatever is presented to them, frequently without reading it or having it read to them first…Startlingly, many tenants appear to be unaware not only of what their defenses are but of the fact that they may have defenses. Perhaps for this reason, tenants frequently do not see the need to seek counsel even when given the opportunity to do so.

[67] Decision/order of Gerald Lebovitz, J.H.C. dated November 19, 2010, n.o.r., L&T Index No. 86724/2009.

If most tenants find themselves at such a dramatic disadvantage in entering a settlement stipulation, their disadvantage is still greater when they need to adequately articulate the reasons why a subsequent default should not result in their eviction.

The tenant in 2246 Holding was represented by counsel and still the Appellate Term held:

> Tenant repeatedly failed to comply with the "time is of the essence" payment terms of the parties' so-ordered stipulation settling this chronic rent delinquency holdover proceeding. Given tenant's extensive history of defaults, which continued unabated into the probationary term agreed to by the parties, a further (third) stay of execution of the warrant of eviction was unwarranted.

If he, like the vast majority of tenants in New York City Housing Court, had been unrepresented, it is exceedingly unlikely he would have had the wherewithal to successfully appeal the matter. If he was a senior or had a disability that prevented him from effectively communicating with the court, it is likely that he would have been at an even greater disadvantage. In fact, it is unclear whether anything short of tasking judges with certain affirmative inquiries would improve these odds.

According to the New York City Department for the Aging, approximately almost 12% of the population of New York City is aged 65 or older. [68] Approximately 37% of these seniors have a disability that entails limitations on mobility and self-care.[69] Approximately 53.7% of them rent the apartments in which they live,[70] and over half of these renters aged 65 or older live in rent controlled or rent stabilized apartments.[71] As of August 2006, approximately 44,643 seniors in New York City received a Senior Citizen Rent Increase Exemption benefit – then-requiring a total household income of less than $26,000 per year with a monthly rental exceeding

[68] N.Y.C. Dept. for Aging, Quick Facts on the Elderly in New York City (2006).
[69] Id. at 3.
[70] Id. at 4.
[71] Id. at 4.

one third of their total household income.[72] Although no specific data are available as to what percentage of tenants in Housing Court are seniors or people who have disabilities, it is a large and increasing percentage.

Eviction comes at great personal and societal cost for people who are elderly or have disabilities. People who are elderly have a well-documented preference to "age in place."[73] Aging in place "refers to the desire of older people to live in their own housing and communities as long as possible."[74] For many people who are elderly, their home is more than simply a place of shelter:

> The home plays a crucial role in the lives of older adults. A source of identity is cultivated from living in one place for an extended period of time, and the home becomes a place to which older adults have deep-seated ties with family members and close friends. Its location is often near familiar shops, restaurants, and health services. Attachment to place is a reflection of the emotional, cultural, and spiritual connection between a person and their environment. The home is more than a physical structure. Among older adults, housing satisfaction is related to the identity of the home as a harbor of family traditions.[75]

Given the considerable cost of nursing home care—approximately $126,948 per year for an individual in New York City[76]—there is an overwhelming consensus on the importance of, where possible, allowing people who are elderly to remain in their homes. Congress has authorized, for example, The Community Innovations for Aging in Place Initiative to assist communities in their efforts to enable older adults to sustain their independence and age in place

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[72] Id. at 5.

[73] See, e.g., Pierre Filion, et al., Subjective Dimensions of Environmental Adaptation Among the Elderly: A Challenge to Models of Housing Policy, 10 J. of Housing for the Elderly 3, 9 (1992); Alan C. Weinstein, Essay: The Challenge of Providing Adequate Housing for the Elderly... Along with Everyone Else, 11 J.L. & Health 133, 143 (1997).

[74] Jon Pynoos, et al., Aging in Place, Housing, and the Law, 16 Elder L.J. 77, 78 (2008).

[75] Id. at 79 (internal citations omitted).

[76] N.Y. Dept. of Health, Estimated Average New York State Nursing Home Rates, http://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm (last visited July 9, 2012).

in their homes and communities.[77]

For people with age-related or other disabilities, the loss of their home can also lead to unnecessary institutionalization. In passing the ADA, Congress emphasized that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society . . . ." The Congressional findings also note that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[78] The ADA explains that "the Nation's proper goals regarding individuals with disabilities" include assuring "full participation" and "independent living."[79]

In Olmstead v. L.C., 527 U.S. 581, 597 (1999), the United States Supreme Court emphasized that the Department of Justice has "consistently advocated" that "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'" The Supreme Court's decision rested on the ADA's recognition that "unjustified 'segregation' of persons with disabilities [is] a 'for[m] of discrimination.'"[80] The Supreme Court explained that "unjustified segregation" is discrimination because, inter alia, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[81]

Presented with the considerable stakes involved in having seniors with age-related disabilities attempting to navigate Housing Court, New York City and the New York City Civil Court have concluded that this vulnerable population is especially "at risk of homelessness and deteriorating mental and physical health" and established, and more recently expanded, the

[77] Older Americans Act, 42 U.S.C.A. § 3032k.
[78] 42 U.S.C. § 12101(a)(2).
[79] Id. at § 12101(a)(7).
[80] Olmstead, 527 U.S. at 600 (citing 42 U.S.C. § 12101(a)(2) and § 12101(a)(5)).
[81] Id. at 600-01 (citations omitted).

Assigned Counsel Project.[82] This project attempts to pair a limited number of tenants, aged 60 or older, facing eviction in Housing Court with counsel and assistance with social service needs.

Between 2008-2011, approximately 106,935 individuals or families were evicted from their homes in New York City.[83] Of these, over 8,000 evictions took place after notification of APS.[84] Thus, thousands of recent residential evictions involved tenants who potentially could not manage their affairs because of age, illness, or other reasons.[85] Many of these vulnerable individuals have ended up homeless: A recent study has shown that "[t]he number of elderly homeless people in New York City shelters has shot up 55% in the last 10 years, a hidden and growing population among the city's most vulnerable adults."[86]

No figures are available as to what percentage of these evictions resulted from noncompliance with a settlement. It is unknown what percentage of those evictions involved noncompliance based on facts that the court should have known about and considered. What is clear is that decades of studies, directives and proposals have called for improved ways to address the issue of unrepresented tenants settling on unfair terms. These problems existed prior to Chelsea and are likely to continue even after Bodenheim. The Court's decisions in Bodenheim and this case will affect thousands of tenants in New York City. Without clear direction from this Court, it is unlikely that these problems will ever improve.

CONCLUSION

For the foregoing reasons, the reasons stated in the appellant's brief, and any other reasons that may appear to this Court, the decisions of the lower courts should be reversed and eviction of Ms. Frias should be permanently stayed.

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[82] See N.Y.C. Dep't for Aging Newsletter from December 2007 discussing the expansion of the program,
[83] Housing Court Task Force Summary of Evictions 2008-2011, supra note 9 and accompanying text.
[84] Id.
[85] Again, after notification of APS, a significant number of evictions are prevented each year.
[86] See Heidi Evans, Hard Times: Elderly Homeless Rates Jump in NYC, New York Daily News, supra note 6.

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