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INVASION OF THE NIGHT CRAWLERS!

Imagine sleeping with hundreds of bed-dwelling vampires. Brown to reddish-brown, oval-shaped, and flattened, these creatures pierce the skin of their victims and feed. As they do, their bodies elongate and swell, and take on a dark, reddish hue only to disappear into the deepest recesses of bedding and mattresses to digest their meals while their unknowing victims are left with bloodstained sheets and a series of hard bumps along their extremities.

One might suppose this creature to be a figment of a science-fiction writer's imagination but, alas, these creatures are all too real. *Cimex Lectularis*—a/k/a, the "bedbug"—was no stranger to the United States prior to World War II and has remained a persistent problem in many third-world countries. With the advent of synthetic insecticides such as DDT, bedbugs had all but disappeared from our country. However, globalization and a resulting increase in international travel have led to the resurgence of these unwanted critters.

New York City is not immune from this phenomenon. As *New York Times's* reporter Andrew Jacobs observed in, "Just Try to Sleep Tight. The Bedbugs are Back, (Nov. 27, 2005), "Bedbugs are back and spreading through New York City like a swarm of locusts on a lush field of wheat." Other media outlets like, *Newsweek*, *The New Yorker*, and MSNBC, just to name a few, have also reported on the bedbug "plague."

Unlike many other types of health hazards, a bedbug infestation can take hold regardless of cleanliness or hygiene with sightings reported in dwellings ranging from hospitals and hotels to homeless shelters and prisons. These pests know no socioeconomic boundaries. And, ironically, eradication measures can be extraordinarily cumbersome and costly; ranging from several hundred dollars to well into the hundreds of thousands. A simple spraying might do the trick, but in more severe cases one might have to disassemble furniture, discard mattresses and box springs, and wash all bedroom contents, before an exterminator can even begin the eradication process. In any event, according to the New York City

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Department of Health and Mental Hygiene, (http://www.nyc.gov/html/doh), one should consult "a pest control professional licensed by the New York State Department of Environmental Conservation to evaluate what type of pest is present, and exterminate them if required." An inordinate amount of time and money can be wasted by untrained amateurs attempting to remedy the problem themselves, not to mention the dangers associated with mishandling or misapplying pesticides.

Depending on the underlying facts and circumstances, it may be a landlord's ultimate responsibility to address the condition, and, when significant, may entitle a tenant to a rent "reduction" or abatement. In *Ludlow Props., LLC v. Young*, a 2004 case decided by the Honorable Cyril K. Bedford, then a Housing Court Judge of the Civil Court of the City of New York, the landlord commenced a case against the tenant for unpaid rent. In response to the owner's claim, the tenant asserted that his apartment had been infested with bedbugs for over a year and a half. Although the landlord tried to correct the situation, all attempts at remediation failed and the bedbugs continued to pester the tenant. After characterizing the dispute as a "case of first impression involving warranty of habitability due to bedbugs," Judge Bedford concluded that an infestation that is "intolerable" may trigger a statutory breach, while a "mere annoyance" would not. And, under the circumstances of this case, the court decided that the infestation was extreme and awarded a 45% abatement.

The Housing Court's decision is quite graphic in describing the perils of a bedbug infestation: "Feeding upon one's blood in hoards nightly turn[s] what is supposed to be bed rest or sleep into a hellish experience." Yet, what constitutes an "intolerable" infestation remains unresolved and undefined.

In *Jefferson House Associates, LLC v. Boyle*, a 2005 decision rendered by the Honorable Edwin S. Shapiro, a Justice Court Judge of the Town of Ossining, the tenant asserted a bedbug-related breach of the warranty of habitability within the context of a nonpayment proceeding. Specifically, the tenant had notified her landlord of a bedbug infestation, but her requests for assistance were ignored. The tenant complained to the Buildings Department, which prompted the agency to dispatch an inspector to the premises. That, in turn, forced the landlord to send an exterminator to the premises. Ultimately, the court concluded that a continuous infestation of bedbugs comprised a breach of the warranty of habitability, and awarded the tenant a rent abatement. Thus, according to both of the examined decisions, it would be in a landlord's interests to attempt to eliminate an infestation upon notification.

Although cohabiting with bedbugs is a scary prospect, there are relatively simple preventative measures which one can utilize. When traveling, experts recommend inspecting all hotel bedding, furniture, personal carry-ons and luggage for signs of bedbugs and to wash all clothing upon your return. Another precaution is to avoid "adopting" used or discarded furniture. Adherence to these recommendations is not a guarantee that an infestation can be avoided, but it's better than letting the bedbugs bite.

If you have any questions or comments about this analysis, please contact partner Robert Finkelstein 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com.

HAVE PREFERENTIAL RENTS GONE WITH THE WIND?

On March 22, 2006, the New York State Division of Housing and Community Renewal (DHCR) updated its Fact Sheet pertaining to the treatment of "preferential rents" given to rent-stabilized tenants (www.dhcr.state.ny.us). Preferential rents are "reduced" rents granted to occupants of rent-stabilized apartments when market conditions, or other factors, will not support charging the legal regulated rent. A cursory read of that Fact Sheet may leave one with the impression that preferential rents are "dead." The document explains that the 2003 amendment to the Rent Stabilization Law gives owners "the option of charging the higher legally regulated rent upon renewal of the lease of a tenant who was paying a preferential rent as well as when that tenant permanently vacates the apartment." It further provides that, "There is no requirement that the expiring lease contain a provision allowing the owner to terminate the preferential rent upon the occurrence of any event. In fact, if there is such a provision, it is no longer binding." Unsavvy readers, unaware of subsequent developments in the case law, may be misled by that advice.

For decades, tenants who were afforded a "preferential rent" kept this lowered basis for the balance of their tenancies. A landlord could not readily up the rent to the higher base-rent number. That all changed in 2001, when the Appellate Division, First Department, issued its decision *In the Matter of Missionary Sisters of the Sacred Heart III v. DHCR*. The Appellate Division rejected DHCR's contention that a preferential rent, once granted, remains the base-rent's foundation for the entirety of the tenancy relationship. Rather, the court held that explicitly stated intentions and contract provisions are to be enforced. Therefore, since the lease agreement between the landlord and tenant in that case provided that the preferential rent would apply only during the two-year lease term, the landlord was free to raise the rent to the legally-regulated amount upon renewal.

In response to that appellate court's decision, the New York State legislature altered the language of the statute in 2003. The amendment provides that when the amount of rent charged to, and paid by, a stabilized tenant is less than the legally permissible rent, upon renewal or vacancy, the owner may step-up the rent and charge the higher legally-regulated rent (as adjusted by the applicable guideline increases and any other increases authorized by law). Although some, including the DHCR, view this language as clear, the statutory amendment continues to be a source of contention between landlords and tenants.

In *Les Filles Quartre LLC v. Ana McNeur*, Housing Court Judge Peter Wendt held that although the 2003 amendment allows a landlord to increase rents to the lawful amount upon renewal or vacancy, it does not preclude parties from expressly agreeing that the preferential rent will continue throughout the entire tenancy. In other words, Judge Wendt concluded that landlords and tenants may override the 2003 amendment. Thus, if a lease provided that the preferential rent would apply throughout the tenancy, that provision could be upheld. Since that intent was not expressed in either the initial lease or subsequent renewals, the landlord in this case was permitted to raise the rent. This interpretation has been followed in a number of cases, including one recently decided by the Appellate Term, First Department.

In *Colonnade Management, LLC v. Warner*, the Appellate Term held that the 2003 amendment did not preclude a landlord and tenant from agreeing to a preferential rent that would extend into subsequent renewal periods. Because the lease rider in this case clearly provided that the rent concession would last for the tenancy's duration, that more expansive protection controlled.

Although both landlords and tenants have been perplexed by the application of the 2003 amendment and its impact on preferential rents, the statutory modification did not end all preferential rents. Rather, *Colonnade Management* and other cases reinforce that much like love and hope, preferential rents can spring eternal.

If you have any questions or comments about this analysis, please contact partner Lucas A. Ferrara 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

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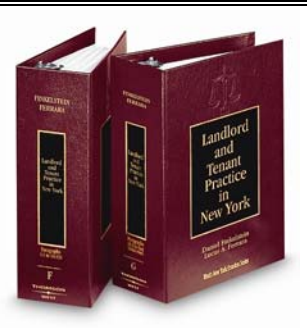

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