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Section 8: New York's Legal Landscape—Part II

Gerald Lebovits

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Section 8: New York's Legal Landscape - Part II of II

By Gerald Lebovits, Sateesh Nori, and Jia Wang *

IV. SECTION 8 LITIGATION: THE LONG AND WINDING ROAD

Litigation has shaped many of the key elements of Section 8 in New York City. While tenants have sued to maintain procedural due process, landlords have fought to ease the program's restrictions and requirements.

A. Williams Consent Judgments and their Progeny

NYCHA settled several landmark class-action lawsuits with agreements that established and strengthened procedural safeguards for tenants. The most important of these is *Williams v. New York City Housing Authority.*[77] The case began on March 26, 1981, in the United States District Court for the Southern District of New York at a time when the older rental-certificate and rental-voucher programs were still in effect. The class-action plaintiffs represented "all families who are or will be assisted under the Section 8 Existing Housing or Voucher program."[78] They sued NYCHA and Section 8 landlords, challenging the existing termination and eviction procedures as violating their due process.

The parties entered into their first partial consent judgment — sometimes called "decree" — on October 4, 1984.[79] This initial settlement established procedures under which Section 8 tenants could challenge a NYCHA decision to terminate their Section 8 subsidy payments.[80] Under this settlement, tenants must first receive a warning notice from NYCHA and have an opportunity to correct conditions that form the basis for the proposed termination.[81] If the tenant does not remedy the situation or otherwise disagrees with the allegations, a second notice is then sent. Tenants can then request a hearing before a NYCHA impartial hearing officer, who renders a determination. Subsidy payments continue while a determination is pending.

The hearing officer can order outright termination, termination

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unless certain conditions are corrected, or the continuation of the subsidy.[82] The NYCHA board reserves the right to review the hearing officer's ruling. If the NYCHA board chooses to issue a ruling less favorable to the tenant, the board must give an explanation. If the hearing officer or the NYCHA board orders a termination, the tenant is entitled to seek judicial review in a CPLR Article 78 proceeding in Supreme Court. Tenants are unable to continue receiving assistance if they are found to have defrauded the Section 8 program.[83] A tenant who does not respond to a second notice is sent a default notice. The tenant's subsidies are automatically terminated after forty-five days if the default is not challenged. NYCHA must send all notices in English and Spanish by regular and certified mail.

On April 27, 1994, the district court approved a second partial consent judgment that resolved the remainder of the plaintiffs' claims.[84] This agreement set out new procedures for landlords who sought to evict Section 8 tenants in nonpayment cases. Before Williams, federal law allowed landlords to evict Section 8 tenants "for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause."[85] Before the Williams settlement, a landlord's eviction proceeding had to be preceded only by "written notice to the tenant specifying the grounds for such act."[86]

The second Williams partial consent judgment added procedural safeguards for tenants. Landlords seeking to evict a NYCHA Section 8 tenant must now give both the tenant and NYCHA twenty-five-days' notice before commencing eviction proceedings.[87] The notice must contain specific factual allegations. The tenant is given ten days to respond. NYCHA has twenty days to accept or object to the basis advanced for eviction.[88] NYCHA may object, for example, if it finds that the facts in the landlord's twenty-five-day notice fail to set forth a good cause to evict even if the facts are proven. NYCHA may also object if a landlord alleging nonpayment of rent seeks to recover more than the tenant's actual share of the rent.[89] If NYCHA objects to the eviction proceeding, the landlord must name NYCHA as a respondent in the proceeding.[90]

The defendant-landlords argued that the additional procedures in the second Williams partial consent judgment, when added to the time required to serve a demand and a petition, would cost them several extra months of lost rent even in legitimate eviction proceedings.[91] The court found,

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however, that "[t]he proposed settlement, while less than perfect, is fair, reasonable, and adequate."[92] The court reasoned that although NYCHA was providing a service to the tenants, "the fact that Section 8 tenants receive a portion of their rent from the government should not deprive them of the right to feel secure in their dwellings, without concern of being unjustly evicted."[93] The court also praised the opportunity for NYCHA to object and be involved in the case, stating that "[f]or the Section 8 program to function effectively, [NYCHA] must maintain a monitoring role in the process."[94] The court further approved of giving tenants time to find out their rights, seek assistance, and determine how they want to proceed.

The procedures set out in the second Williams partial consent judgment initially applied only to nonpayment cases.[95] On September 29, 1994, the district court approved an extension of the agreement to include holdovers that "arise out of or are related to the termination or suspension of the Section 8 subsidy."[96] For all other holdover proceedings, the landlord may proceed as if the tenant were not subsidized, although a copy of the petition must be sent to NYCHA.[97]

Importantly, the second Williams partial consent judgment made it clear that nonpayment proceedings may not be brought against tenants solely to recover unpaid Section 8 subsidies. A nonpayment proceeding can be brought against a tenant only if the tenant's share of rent is outstanding.[98]

The Williams consent judgments apply only to NYCHA. They do not bind federal agencies or other PHAs.[99] Although Williams was settled before the Housing Choice Voucher Program replaced the older certificate and voucher programs, the procedures outlined in the consent judgment are still in effect.[100]

In *McNeil v. New York City Housing Authority*, tenants again filed a class-action lawsuit against NYCHA and Section 8 landlords over what they believed were NYCHA's inadequate procedures and policies when subsidies were suspended or terminated over Housing Quality Standards violations.[101] Tenants demanded notice, advice, and assistance when HQS violations were found in their apartment.[102] Tenants were often sued for nonpayment when subsidies were withheld, and tenants were often unclear about their rights. As long as their apartment contained HQS violations, it was ineligible for Section 8 assistance. Thus, tenants also demanded help to find alternative housing when violations are found and not remedied.[103]

In a settlement agreement dated April 29, 2002, NYCHA agreed to provide new and existing Section 8 landlords with notices explaining that landlords cannot seek judgments from Section 8 tenants for the subsidy portion of the rent.[104] In addition, NYCHA agreed to inform tenants if it found HQS violations in the tenant's apartment. NYCHA also agreed not to terminate subsidy contracts with the landlord for HQS violations. Instead, NYCHA would "suspend" the subsidy, allowing the tenant to be eligible for the protections guaranteed to voucher recipients.[105] If the landlord did not correct the HQS violations, tenants would be granted transfer vouchers to find alternative housing.

In *Frunzescu v. Martinez*, tenants sued NYCHA over the timely provision of transfer vouchers.[106] Tenants complained that NYCHA's slow response to transfer requests caused Section 8 tenants to be evicted because their leases would expire in the interim. Under the stipulated settlement, if a Section 8 tenant request a transfer, NYCHA would respond within two weeks with a decision. This agreement was in effect for only three years — through 2004.

Williams's impact on holdover proceedings commenced against Section 8 tenants is less significant than its impact on nonpayment proceedings. Holdover proceedings may be commenced against Section 8 tenants at the expiration of the lease term[107] or if the tenant triggers a conditional limitation in a lease. A conditional limitation is a clause in a lease that provides for its automatic expiration a certain number of days after a contingency occurs.[108]

Tenants in breach of lease clauses and terms that are not conditional limitations must be given ten days to correct the violation. The lease is not automatically terminated. A landlord may not bring a holdover proceeding against a tenant while a lease is still in effect.[109] This opportunity to cure is statutorily guaranteed to Section 8 tenants.[110]

HUD provides a cause of action in a holdover against tenants if there is a finding of fraud in the tenant's income recertification. The HUD Housing Handbook requires that the landlord first notify the tenant in writing of the allegedly fraudulent act.[111] The tenant then has ten days to meet with the landlord to discuss the allegations before the landlord makes a final decision.[112] Although the HUD Handbook is not formally published in the Federal Register, the courts have found that the HUD Handbook is binding and properly sets forth procedures to be followed under the Section 8 program.[113]

B. Housing Quality Standards and the Warranty of Habitability in Section 8 Units

As McNeill and its settlement provisions suggest, a possible termination of subsidy payments

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for HQS violations is controversial. In *Nichols v. Drake*, a New York City court held that a landlord's failure to pass an HQS inspection and the cessation of Section 8 subsidy payments do not automatically bar a landlord's eviction proceeding if the tenants do not pay their share of the rent.[114] As in Nichols, landlords may proceed with a nonpayment case if they can show that a tenant caused the violations by neglecting to maintain the dwelling or by interfering with the landlord's good-faith attempts to repair.[115] The court acknowledged that a landlord's failure to repair creates problems for Section 8 tenants, who often must move to another eligible apartment if they want to continue receiving assistance.[116] The court added, however, that enhanced due-process rights for tenants cannot come at the complete expense of the landlord's due-process rights.[117]

In *Cashmere Realty Corp. v. Hersi*, a landlord argued that because it failed to make repairs that NYCHA and HPD ordered, its HAP contract with NYCHA was terminated and it was no longer bound by the Williams consent judgments.[118] The court disagreed. It found that if a subsidy is suspended or terminated after a failed inspection, the landlord still must comply with the Williams consent judgments.[119] NYCHA's Policy Memorandum LHD # 04-43 provides that Williams must be followed even if the tenant is no longer a voucher holder, provided that the subsidy was suspended because of the landlord's HQS violations.[120] According to the Hersi court, Section 8 landlords cannot escape their contractual obligations by failing to repair. The landlord's failure in Hersi to notify NYCHA of the eviction proceeding resulted in the dismissal of the petition.

Further repair-related legal problems arise because Section 8 voucher arrangements involve three parties, not two. When assessing a tenant's abatement claim for the landlord's violation of the warranty of habitability, compensation is determined using the fair market value of the premises.[121] The tenant is entitled to recover the difference between the fair market rent and the reduced value of the premises as a result of inadequate conditions.[122] In *Committed Community Associates v. Croswell*, a King's County nonpayment case, the tenant asserted a counterclaim alleging breach of the warranty of habitability and sought an abatement. The landlord argued that the abatement should be calculated according to the tenant's share of the rent and not the full contract rent. The trial court held that the proper measure of the fair market rent is the contract rent — the subsidy and the tenant's share combined.[123] The court reasoned that the total amount the landlord collected reflected the value of services provided to the tenant and that the HUD Housing Handbook, 4350.3, § 3-23, supported this.[124]

The Appellate Term affirmed.[125] The Appellate Term found that if the monthly rent of an apartment is $1000, and the tenant's share is $300, a warranty of habitability violation that reduced the value of the apartment by one-fifth should entitle the tenant to an abatement of $200. It would be unjust to use the tenant's share to calculate damages; doing so would give the tenant in the above example only a $60 abatement even though the landlord provided only $800 worth of housing.[126] However, the Appellate Term added that because recovery from a breach of the warranty of habitability depends on paying rent, Section 8 tenants receiving vouchers cannot recover damages that exceed their share of the rent.[127] With the Appellate Term's cap, if the landlord's violations in the above example reduced the value of the apartment by one-half, the tenant's recovery would be capped at $300 even though the violations reduced the value of the apartment by $500.[128] The Appellate Division affirmed.[129]

C. Challenging the Termination of a Section 8 Subsidy

Issues surrounding termination of subsidies provide grist for the Section 8 litigation mill. To maintain eligibility for NYCHA's Section 8 program, participants must be reviewed each year to assure that their income and household composition continue to meet eligibility requirements.[130] Should NYCHA determine that a tenant is no longer eligible for the program or should a tenant somehow fail to comply with the eligibility requirements, subsidy payments might be terminated.[131] A subsidy might also be terminated if a tenant does not grant access to PHA inspectors to verify the landlord's continuing compliance with Housing Quality Standards.[132]

A key procedural due-process safeguard for tenants is the right to challenge an administrative determination in an Article 78 proceeding. Article 78 proceedings, derived from the corresponding CPLR article, are rooted in the common-law writs of mandamus, certiorari, and prohibition. Courts have upheld tenants' right to assert in an Article 78 proceeding all the procedural safeguards set out in the first Williams consent judgment.[133] Section 8 tenants can prevail in a Supreme Court Article 78 proceeding if the court finds that NYCHA's termination of their Section 8 benefits was arbitrary or capricious.[134] A failure to comply with the procedures in the Williams consent judgments might be arbitrary or capricious.[135]

New York courts have been strict about the notice requirements set out in the first Williams consent judgment. In *Baldera v. Hernandez*, the court found that a Brooklyn tenant's subsidy was

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improperly terminated when NYCHA's records showed that the default notice sent by certified mail had never been claimed and when NYCHA had no evidence that the notice was sent by regular mail.[136] Courts have also ruled that boilerplate notices in English and Spanish are insufficient to satisfy Williams's notice requirements.[137] In *Almieda v. Hernandez*, the court restored a tenant's subsidy when NYCHA sent notices in English and Spanish but the specific claims against the tenant were filled out only in English.[138] The court found that this violated Williams's requirement that the tenant be made aware of the grounds for termination.[139] The courts have also strictly scrutinized other mailing and language requirements as set out in Williams.[140]

A tenant must commence an Article 78 action within four months of the administrative agency's final determination.[141] If a tenant does not respond to the PHA's termination warnings, the termination is considered final and binding once the tenant receives the default notice.[142] New York courts have recognized a rebuttable presumption that a default notice is received five days after mailing.[143] Failure to receive a default notice tolls the statute of limitations. In the event of a default, the four-month statute of limitations begins to run from the date that a tenant's application to vacate a default is denied.[144]

D. Opting Out of Tenant-based Section 8

Several issues arose as Section 8 matured as a wide-reaching public-housing program. First, owners were concerned about the statute's "take-one, take-all" provisions.[145] The take-one, take-all rule came from Section 8(t) of the U.S. Housing Act of 1937. That section forbade an owner who already entered into a HAP contract on any tenant's behalf in a multifamily housing project to refuse to lease a unit in the owner's multifamily housing projects, if the proximate cause of the refusal was that the family was a Section 8 certificate or voucher holder. Second, owners protested against what they called the Housing Act's "endless lease" provisions. Section 8(d)(1)(B)(ii) provided that an owner may not terminate a Section 8 tenancy except for serious or repeated lease violations, for violating applicable federal, state, or local law, or for other good cause. Third, owners disliked the opt-out requirements under which before a HAP contract was terminated, they had to send written notice to HUD.[146] Section 8(c)(9) required an owner to provide written notice to a HUD field office and the family not less than ninety calendar days before a tenant-based HAP contract ended.

In 1996, Congress attempted to address what in the legislative history is referred to as "disincentives" to Section 8 owner participation. This act temporarily amended the U.S. Housing Act of 1937 to suspend the "take-one, take-all" provision. It also amended Sections 8(d)(1)(B)(ii) and (iii) so that landlords need good cause to terminate a Section 8 tenancy only during the term of the lease. In other words, landlords — with important exceptions explained below — are now free to stop accepting Section 8 subsidies without cause if they do so at the end of a lease term.

This act also amended Housing Act Section 8(c)(9) to eliminate the requirement that owners participating in the certificate or voucher programs provide a ninety-day termination notice to families that are voucher holders and one-year termination notices to HUD for project-based HAP contracts. In 1998, Congress made these amendments permanent.

Although the 1996 amendment is straight-forward as applied to non-regulated tenancies, controversy arose when applying it to rent-stabilized tenancies in New York State. New York's Rent Stabilization Code requires that landlords offer to renew all stabilized leases and that these renewal leases be "on the same terms and conditions of the expired lease."[147] In *Bran-Trav Development LLC. v. Matus*, a Kings County court found that accepting a Section 8 subsidy is "a material term and condition of a rent stabilized lease."[148] The court held that stabilized leases must be renewed and that a landlord's acceptance of Section 8 subsidies is a part of a stabilized lease also subject to renewal. Citing In re *Mott v. Department of Housing and Community Renewal*, the Matus court held that the Section 8 regulatory scheme did not pre-empt state law regarding rent regulation.[149] In *M 1849 LLC v. Inniss*, a Bronx County court cited Matus with approval, adding that from a public-policy perspective, allowing landlords to opt out of Section 8 when renewing rent-stabilized leases would put tenants on the street and violate the Rent Stabilization Code.[150]

Other New York courts disagreed. In *Seminara Pelham, LLC v. Formisano*, a New Rochelle court found that Congress intended to allow landlords to opt out.[151] The court added that because Section 8 is a federal program, Congress was free to control who would receive benefits.[152] The court further found no conflict between state and federal law, because the Rent Stabilization Code and Mott dealt with rent regulation while the 1996 amendment controlled who would participate in the Section 8 program.[153] Similarly, in *Licht v. Moses*, a Kings County court noted that the 1996 amendment was introduced to improve landlord cooperation with the Section 8 program. Federal law should prevail over the New York Rent Stabilization Code because, according to the Licht court, the latter would

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obstruct the 1996 amendment's goals.[154]

Some New York courts took a middle ground, holding that although rent-stabilized leases must be renewed on the same terms and conditions, accepting Section 8 subsidies was not such a term and condition unless the original lease expressly provided for it.[155] These courts found that although HAP contracts between a local PHA and the landlord run concurrently with a rent-stabilized lease, they were independent contracts.[156] Landlords choosing to opt out would terminate their HAP contract with the PHAs, and the rent-stabilized lease would continue without Section 8 subsidies unless the lease expressly allowed it.

Even the PHAs disagreed on how to address the issue. DHCR took the position that the HAP contract and the actual lease were not "inextricably merged."[157] NYCHA, on the other hand, issued an opinion letter stating that "[i]f a landlord of an occupied rent stabilized apartment offers the tenant a renewal lease . . . the landlord cannot offer the tenant a renewal term without also renewing Section 8 subsidy for the tenant."[158]

In July 2007, the New York Court of Appeals resolved the controversy in *Diagonal Realty, L.L.C. v. Rosario*.[159] The court found that a landlord's decision to accept Section 8 rental subsidy payments was a term of every Section 8 lease executed with a rent-stabilized tenant.[160] The court pointed to HUD's regulations, which require landlords to include tenancy addendums in every lease they sign with Section 8 beneficiaries.[161] This addendum must state that the tenant is receiving Section 8 assistance and is not responsible for paying the subsidy portion of the rent. The court found this was sufficient to make "acceptance of Section 8 subsidies a term of every lease that a landlord signs with a Section 8 tenant."[162] Thus, the court ruled, landlords may not opt out of Section 8 arrangements with rent-stabilized tenants. Because the Rent Stabilization Code refers only to the "existing" lease, it does not matter whether the tenants were Section 8 recipients when they first moved into the home.[163] The addendum would have been written into the lease when the tenants began to receive Section 8 benefits, and all subsequent renewals would contain that provision.

Turning to the pre-emption question, the court found that one of the defenses Congress advanced to support repealing the endless-lease provision was that "protections will be continued under State . . . and local tenant laws."[164] The court found no conflict between state and federal law to suggest implied preemption. Landlords remain free to opt out when the tenancy is unregulated. The New York Rent Stabilization Code applies only when rent-regulated tenancies are involved.[165]

A landlord's ability to opt out might be restricted in some additional circumstances. For example, landlords that received tax benefits under New York City Administrative Code § 11-243 may not decline to accept Section 8 subsidies. Subdivision (k) of § 11-243 is an anti-discrimination provision that prohibits landlords receiving tax benefits from discriminating against Section 8 participants. The Appellate Term, First Department, has held that allowing opt out when the landlord receives tax benefits "would have the effect of rendering the anti-discrimination provision meaningless."[166]

E. Opting Out of Project-based Section 8

Project-based Section 8 assistance first became available in the 1970s. Participating landlords typically committed their housing project to a twenty-year term.[167] Landlords have always been free to opt out of Section 8 after their project-based contract expired.[168] When a landlord opts out, many low-income tenants become unable to pay their rent. As a result, Congress amended the Housing Act in 1999 to provide these tenants with "enhanced vouchers," also called "sticky vouchers."[169] These vouchers allow tenants to keep paying the rent they owed when their building was still under project-based assistance, as long as the tenant lived in the same building.[170] Enhanced vouchers are typically of higher value than the typical tenant-based, fixed-value voucher. In New York City, HPD administers enhanced vouchers.

Some landlords opted out of a project-based contract at the end of its term and then tried to opt out of taking the enhanced vouchers at the end of the next lease term. Federal law, however, prohibits landlords from refusing to accept enhanced vouchers. In *Esteves v. Cosmopolitan Associates, L.L.C.*, building owners argued that the Housing Act grants tenants a right to receive an enhanced voucher from PHAs but does not require landlords to accept them.[171] The District Court for the Southern District of New York disagreed, holding that because enhanced vouchers were created to allow tenants to keep their homes, a landlord must accept the voucher. Otherwise, the federal "right to remain would be illusory."[172] The owners argued that this interpretation would essentially be an "end run" around the 1996 repeal of the endless-lease provision. The court disagreed, finding that if anything, enhanced vouchers were created because of the 1996 repeal as a special exception "granting extra protection to [a] subgroup of tenants."[173] The court warned that if owners tried to circumvent this by refusing to enter

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into HAP contracts with HPD, they would be barred from suing an enhanced voucher-holder for the voucher portion of the rent.[174]

F. Nonpayment Issues after the Termination of Section 8 Subsidies

As long as a NYCHA Section 8 lease continues and the landlord is unable to opt out — for example, if the tenant is rent-stabilized — a landlord is prohibited by the second *Williams* partial consent judgment from suing the tenant to collect the subsidy portion of the rent. Even if a Section 8 subsidy is properly terminated, a landlord may not initiate a nonpayment proceeding to recover the subsidy portion of the rent from the tenant; under a Section 8 lease, the tenant agrees to pay only the tenant's portion of the rent.[175] If the PHA has properly terminated the HAP contract, the landlord is similarly unable to recover the value of the subsidy from the PHA.[176]

This does not mean that a landlord is without recourse. A landlord may seek what was formerly the subsidy portion of the rent from the tenant if, after the subsidy is terminated, the landlord and tenant enter into a new agreement "in which the tenant agrees to pay the non-tenant share of the rent."[177] This must be a new lease agreement, not merely a renewal lease.[178] If a tenant signs a new agreement, the landlord may initiate a nonpayment proceeding if the tenant fails to pay any portion of the specified rent.[179] In addition, landlords may refuse to offer a renewal lease or a new rental agreement. They may then initiate a holdover proceeding and possibly recover market-value use and occupancy for the holdover period.[180]

A stipulation to settle a nonpayment proceeding in which the tenant agrees to pay the subsidy portion of the rent does not constitute a new rental agreement and is invalid.[181] The implication is that because a nonpayment proceeding could not have been initiated in the first instance, there could be no settlement. The New York State rule for nonpayment proceedings prevents tenants from ever being "liable for the Section 8 share of the rent as *rent*"[182] absent a new agreement.

G. Section 8 and Succession

Under the Section 8 program, federal law recognizes the entire family as the tenant-household.[183] If a family member were to vacate or pass away, the remaining family members may succeed a tenant-based voucher if they were part of the household for one year (NYCHA vouchers) or six months (HPD vouchers), provided the household remains eligible.[184] It is possible for minor children to succeed the subject premises.[185] To succeed to a tenant-based voucher, remaining family members must be registered with the PHA. In *Evans v. Franco*, the New York Court of Appeals held that the remaining family members of a Section 8 tenant-based voucher holder could not succeed to the subsidy; they had not been certified as family members and did not appear on income affidavits.[186] The court reasoned that allowing succession based solely on evidence of extended cohabitability would open the door to possibly fraudulent claims against the Section 8 program.[187] To succeed to a tenant-based voucher, remaining family members must register with the PHA and have their income factored into the household's eligibility calculation.

New York law governing the succession of project-based Section 8 assistance is less clear than the law governing tenant-based Section 8 assistance. After Evans was decided in 1999, several courts, including the Appellate Term, First Department, applied the Evans holding to project-based subsidies as well as to tenant-based vouchers and rejected succession claims by persons the PHA did not approve as family members.[188] In *Manhattan Plaza Associates L.P. v. Department Housing Preservation and Development*, however, the Appellate Division declined to extend Evans to project-based subsidies.[189] The Manhattan Plaza court held that HPD's rules for project-based assistance did not preclude the possibility of a hearing to determine succession even if the claiming party was not certified on income affidavits.[190]

Later cases appeared to follow Manhattan Plaza. In *2013 Amsterdam Avenue Housing Associates v. Wells*, the Appellate Term, First Department, held that "the absence of [Wells's] name on the family composition document was not fatal to her succession claim otherwise established by the trial evidence."[191] Wells could succeed because she could prove she lived in the apartment for two years before her mother's death, as required under New York tenancy succession law (i.e., not voucher succession).[192] Wells was followed by a New York City court in *Upaca Site 7 Associates v. Hunter-Crawford*.[193]

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The Manhattan Plaza decision relied on New York City Mitchell-Lama regulations stating that the absence of income affidavits created only a presumption against co-occupancy.[194] However, these regulations have since been amended to require listing on affidavits in addition to proof that the applicant seeking to succeed lived in the dwelling for two years before the succession claim.[195] Few cases dealing with this question have arisen since Wells. It is unclear whether Wells represents a permanent departure from cases that applied Evans to project-based Section 8.[196]

Other laws governing succession of project-based Section 8 are more well-settled. Because some housing projects are contracted to provide housing for a specific class of tenants, tenants who fall outside that class cannot succeed a project-based subsidy even if they are certified and can otherwise prove extended co-residency. In *St. Phillips Church Housing Corporation v. George*, a forty-five-year-old son's application to succeed his father's unit was denied because the Housing Corporation had been granted a project-based contract to provide housing for low-income senior citizens.[197] A court found that because project-based subsidies are not portable, "the right to possession and the right to the subsidy cannot be separated."[198] Those ineligible to occupy an apartment may not succeed a project-based Section 8 subsidy tied to that apartment.

It is therefore possible in New York City for individuals to succeed to both tenant-based vouchers and project-based subsidies, especially if they are listed as members of the household in the recertification documents.

V. SECTION 8: ANTI-DISCRIMINATION ISSUES

Tenant advocates and policy-makers have long struggled to prevent landlords from discriminating against Section 8 recipients.[199] Many landlords cite bureaucratic entanglements, delays, and the burden of inspections as reasons for their refusal to accept Section 8 from tenants. Other landlords would reject Section 8 tenants to discriminate against the poor and minorities.

Various state and local jurisdictions throughout the United States have adopted anti-discrimination laws to protect Section 8 voucher holders. A statute in Los Angeles, California, provides that "It shall be unlawful for any landlord to terminate or fail to renew a rental assistance contract with the Housing Authority of the City of Los Angeles (HACLA), and then demand that the tenant pay rent in excess of the tenant's portion of the rent under the rental assistance contract."[200]

The New York City Council attempted to enact its own anti-discrimination law but was initially thwarted. According to the New York Times, Mayor Michael Bloomberg said that the bill, while well-intentioned, prohibited landlords from making sound business decisions and required them to enter into contracts with government agencies they might otherwise avoid. In a press release, the Mayor stated that the bill "fails to recognize that the onus should be on government to make the program more attractive for private sector participation, not the other way around."[201]

On March 26, 2008, the City Council voted to override the Mayor's veto. According to a statement from Speaker Christine Quinn: "This legislation . . . will not only increase access for people eligible for Section 8 vouchers to affordable housing, it will fully protect an individual's right to housing, regardless of their financial circumstances."[202]

Specifically, this law amended chapter one of title eight of the administrative code to proscribe lawful source of income as a category of discrimination and to define lawful source of income as "income derived from social security, or any form of federal, state or local public assistance or housing assistance including Section 8 vouchers."[203] This law does not apply to owners of buildings containing fewer than six units.

Although it is difficult to predict the long-term effects of this law, at least one court has already cited it in favor of tenants who sued their landlord to force it to accept Section 8. In In re *Rizzuti v. Hazel Towers*, the court found that the new law is unambiguous: It requires landlords to accept Section 8 vouchers from otherwise eligible tenants.[204]

VI. CONCLUSION

The Section 8 program continues to be a boon for thousands of tenants and landlords in New York City. Its rules and regulations, while confounding to many, have provided steady rents for landlords and stable homes for tenants. As with any federal program, the story of Section 8 will continue to be

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written through litigation, legislation, and compromise. Its theme of a public-private partnership to provide safe, decent, and affordable housing will probably endure.

(Endnotes)

[77] *Williams v. N.Y. City Hous. Auth.*, 81 Civ. 1801, 1994 WL 323634 (S.D.N.Y 1994) [hereinafter *Williams Approval*] (decision approving class-action settlement).

[78] *Williams v. N.Y. City Hous. Auth., Second Partial Consent Judgment*, 81 Civ. 1801, at 2 (S.D.N.Y 1995) [hereinafter *Williams II*].

[79] *Williams v. N.Y. City Hous. Auth., First Partial Consent Judgment*, 81 Civ. 1801 (S.D.N.Y 1995) [hereinafter *Williams I*].

[80] *Id.* at 1.

[81] *Id.* at 2.

[82] *Id.* at 8.

[83] *Id.* at 10.

[84] *Williams II*, 81 Civ. 1801.

[85] 42 U.S.C. § 1437f(d)(1)(B)(ii).

[86] 42 U.S.C. § 1437f(d)(1)(B)(iv).

[87] *Williams Approval*, 1994 WL 323634 at *3.

[88] *Id.*

[89] N.Y. City Hous. Auth., *Consequences of* Williams *Consent Judgment for Housing Court Proceedings*, 5 (1997) (prepared by NYCHA for Housing Court seminar of Oct. 27, 1997) [hereinafter *Consequences*].

[90] *Id.* 3.

[91] *Williams Approval*, 1994 W.L. 323634, at *3.

[92] *Id.*

[93] *Id.* at *2.

[94] *Id.* at *4.

[95] *Consequences* at 5.

[96] *Williams v. N.Y. City Hous. Auth.*, 81 Civ. 1801, 1994 WL 533572 (S.D.N.Y 1994) (decision extending scope of second partial consent judgment).

[97] *Consequences* at 5.

[98] *Id.* at 3.

[99] *Id.* at 1.

[100] See, *e.g.*, N.Y. City Hous. Auth., *Section 8 Frequently Asked Questions*, http://www.nyc.gov/html/nycha/html/section8/lh_ll_faqs.shtml#q8 (last visited Aug 4, 2008).

[101] *McNeill v. N.Y. City Hous. Auth., Stipulation of Settlement*, 88 Civ. 5870 (S.D.N.Y. 2002).

[102] *Id.* at 1.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Frunzescu v. N.Y. City Hous. Auth., Stipulation of Settlement*, CV 00 6838 (E.D.N.Y. 2002).

[107] *D'Alesso v. Haggins*, 9 Misc. 3d 138(A), 2005 N.Y. Slip Op. 51799(U), *4, 2005 WL 2937287, at *2, 2005 N.Y. Misc. LEXIS. 58, at *5 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2005) (Belen, J., concurring) (citing *Perrotta v. Western Regional Off-Track Betting Corp.*, 98 A.D.2d 1, 2, 469 N.Y.S.2d 504, 505 (4th Dep't 1983)).

[108] *Perrotta v. Western Regional Off-Track Betting Corp.*, 98 A.D.2d 1, 2, 469 N.Y.S.2d 504, 505 (4th Dep't 1983).

[109] *D'Alesso*, 9 Misc. 3d 138(A), 2005 N.Y. Slip Op. 51799(U) at*4, 2005 WL 2937287 at *2, 2005 N.Y. Misc. LEXIS 2458 at *6 (Belen, J., concurring).

[110] *See Lemle Realty Corp. v. Desjardin*, N.Y.L.J., Mar. 24, 2004, at 19, col. 1 (Hous. Part. Civ. Ct. Bronx County 2004); 42 U.S.C. § 1437f(9)(C)(ii).

[111] *Impac Assocs. Redev. Co. v. Robinson*, 9 Misc. 3d 1065, 1066, 805 N.Y.S.2d 253, 254 (Hous. Part Civ. Ct. N.Y. County 2005).

[112] *Id.*, 805 N.Y.S.2d at 254.

[113] *Robinson*, 9 Misc. 3d at 1067, 805 N.Y.S.2d at 254 (citing *Nelson v. Roberts*, 304 A.D.2d 20, 757 N.Y.S.2d 41 (1st Dep't 2003)).

[114] *Nichols v. Drake*, 2 Misc. 3d 902, 905, 771 N.Y.S.2d 823, 825-26 (Hous. Part Civ. Ct. N.Y. County. 2004).

[115] *Id.*, 771 N.Y.S.2d at 825-26.

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[116] *Id.*, 771 N.Y.S.2d at 825-26.
[117] *Nichols*, 2 Misc. 3d at 904, 711 N.Y.S.2d 823 at 825.
[118] *Cashmere Realty Corp. v. Hersi*, 2005 N.Y. Misc. LEXIS 3573, at *5-6 (Hous. Part Civ. Ct. N.Y. County 2005).
[119] *Id.* at *10.
[120] Memorandum LHD #04-43 from Gregory A. Kern, Director of the N.Y. City Hous. Auth. Leased Hous. Dep't to all Leased Hous. Dep't supervisors (Nov. 5, 2004), *available at* https://a996-housingauthority.nyc.gov/Landlord/view_doc.aspx?id=92 (last visited Aug. 4, 2008).
[121] *Committed Cmty. Assocs. v. Croswell*, 164 Misc. 2d 756, 757, 625 N.Y.S.2d 441, 442 (Hous. Part Civ. Ct. N.Y. County 1995).
[122] *Committed Cmty. Assocs. v. Croswell*, 171 Misc. 2d 340, 342, 659 N.Y.S.2d 691, 692 (App. Term 1st Dep't 1997) (per curiam).
[123] *Croswell*, 164 Misc. 2d at 758, 625 N.Y.S.2d at 443.
[124] *Id.* at 757, 625 N.Y.S.2d at 442.
[125] *Croswell*, 171 Misc. 2d at 345, 659 N.Y.S.2d at 694.
[126] *Id.* at 344-45, 659 N.Y.S.2d at 693; for the reader's convenience, the numbers in this example have been modified from those given in the *Croswell* opinion.
[127] *Id.* at 344, 659 N.Y.S.2d at 693.
[128] *Id.* at 344-45, 659 N.Y.S.2d at 693.
[129] *Committed Cmty. Assocs. v. Croswell*, 250 A.D.2d 845, 846, 673 N.Y.S.2d 708, 708 (2d Dep't 1998) (mem.).
[130] 24 C.F.R. 982.516; 24 C.F.R. 982.551(b).
[131] *See Singletary v. Hernandez*, 9 Misc. 3d 1127(A), 2005 N.Y. Slip Op. 51807(U), 2005 WL 2997752, 2005 N.Y. Misc. LEXIS 2470 (Sup. Ct. Kings County 2005).
[132] 24 C.F.R. 982.405.
[133] *See Matos v. Hernandez*, 10 Misc. 3d 1068(A), 814 N.Y.S.2d 562, 2005 N.Y. Slip Op. 52188(U), 2005 WL 3617745, 2005 N.Y. Misc. LEXIS 2980 (Sup. Ct. N.Y. County 2005).
[134] *Matos*, 10 Misc. 3d at 1068(A), 814 N.Y.S.2d at 562, 2005 N.Y. Slip Op. 52188(U) at *2, 2005 WL 3617745 at *2, 2005 N.Y. Misc. LEXIS 2980.
[135] *Id.*, 814 N.Y.S.2d at 562, 2005 N.Y. Slip Op. 52188(U) at *2, 2005 WL 3617745 at *2, 2005 N.Y. Misc. LEXIS 2980.
[136] N.Y.L.J, Dec. 28, 2005, at 19, col. 1 (Sup. Ct. N.Y. County).
[137] *Almieda v. Hernandez,* 9 Misc. 3d 986, 991, 804 N.Y.S.2d 648, 651 (N.Y. Sup. Ct. Kings County 2005).
[138] *Id.*, 804 N.Y.S.2d at 651.
[139] *Id.*, 804 N.Y.S.2d at 651.
[140] *See Quesada v. Hernandez*, 5 Misc. 3d 1028(A), 2004 N.Y. Slip Op. 51597(U), 799 N.Y.S.2d 163, 2004 WL 2903633, 2004 N.Y. Misc. LEXIS 2620 (Sup. Ct. N.Y. County 2004).
[141] *Id.*, 5 Misc. 3d 1028(A), 2004 N.Y. Slip Op. 51597(U) at *2, 799 N.Y.S.2d at 163, 2004 WL 2903633 at *2, 2004 N.Y. Misc. LEXIS 2620 at *2.
[142] *Matos*, 10 Misc. 3d at 1068(A), 814 N.Y.S.2d at 562, 2005 N.Y. Slip Op. 52188(U) at *4, 2005 WL 3617745 at *3, 2005 N.Y. Misc. LEXIS 2980 at *3.
[143] *Singletary*, 9 Misc. 3d 1127(A), 2005 N.Y. Slip Op. 51807(U) at *4, 2005 WL 2997752 at *3, 2005 N.Y. Misc. LEXIS 2470 at *9.
[144] *In re Yarbough v. Franco,* 95 NY2d 342, 346, 740 N.E.2d 224, 225, 717 N.Y.S.2d 79, 80 (2000).
[145] *Licht v. Moses*, N.Y.L.J., Dec. 15, 2004, at 19, col. 3 (Hous. Part Civ. Ct. Kings County).
[146] *Montero*, 8 Misc. 3d 1007(A), 801 N.Y.S.2d at 778, 2005 N.Y. Slip Op. 50974(U) at*2, 2005 WL 1528750 at *2, 2005 N.Y. Misc. LEXIS 1275.
[147] 9 N.Y.C.R.R. 2522.5(g)(1).
[148] N.Y.L.J., Aug. 11, 2004, at 19, col. 3 (Hous. Part Civ. Ct. Kings County).
[149] *Id.* (citing 211 A.D.2d 147, 151-154, 628 N.Y.S.2d 712, 715-17 (2d Dep't 1995)).
[150] N.Y.L.J., Nov. 10, 2004, at 20, col. 3 (Hous. Part Civ. Ct. Bronx County).
[151] 5 Misc. 3d 695, 782 N.Y.S.2d 898 (New Rochelle City Ct. 2004).
[152] *Id.* at 698, 782 N.Y.S.2d at 901.
[153] *Id.*, 782 N.Y.S.2d at 901.
[154] *Licht*, N.Y.L.J, Dec. 15, 2004, at 19, col. 3.
[155] *See Cosmopolitan Assocs. L.L.C. v. Ortiz*, N.Y.L.J., Nov. 12, 2004, at 20, col. 1 (Hous. Part Civ. Ct. Queens County).
[156] *Id.*
[157] *In re Admin. Appeal of Highland Mgmt. Corp.*, DHCR Dkt. No. QB910041RO, Nov. 6, 2002.
[158] *Tibout Estates, L.L.C. v. Coleman*, N.Y.L.J., Oct. 19, 2004, at 20, col. 1 (Hous. Part Civ. Ct. Bronx County) (citing Memorandum LHD #03-22 from the N.Y. City Hous. Auth. Leased Hous. Dep't (Aug. 19, 2004)).

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[159] *Diagonal Realty, L.L.C. v. Rosario*, 8 N.Y.3d 755, 872 N.E.2d 860, N.Y.S.2d 748 (2007).
[160] *Id.* at 762, 872 N.E.2d at 863, N.Y.S.2d at 751.
[161] *Id.*, 872 N.E.2d at 863, 860 N.Y.S.2d at 751; 24 C.F.R. 982.305(a)(3); 24 C.F.R. 982.308(b)(2).
[162] *Rosario*, 8 N.Y.3d at 762, 872 N.E.2d at 863, 860 N.Y.S.2d at 751.
[163] *Id.*, 872 N.E.2d at 863, 860 N.Y.S.2d at 751.
[164] *Id.* at 763, 872 N.E.2d at 864, 860 N.Y.S.2d at 752; S Rep No. 195, at 32 (1996).
[165] *Rosario*, 8 N.Y.3d at 763, 872 N.E.2d at 864, 860 N.Y.S.2d at 752.
[166] *See Cosmopolitan Assocs, L.L.C. v. Fuentes*, 11 Misc. 3d 37, 812 N.Y.S.2d 738 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2006) (mem).
[167] *Esteves v. Cosmopolitan Assocs. L.L.C.*, N.Y.L.J., Dec. 12, 2005, at 23, col. 3 (S.D.N.Y.).
[168] *Id.*
[169] 42 U.S.C. 1437f(t).
[170] *Id.*
[171] *Esteves*, Dec. 12, 2005, at 23, col. 3.
[172] *Id.* (quoting *Jeanty v. Shore Terrace Realty Ass'n*, N.Y.L.J., Aug. 18, 2004, at 24, col. 1 (S.D.N.Y.)).
[173] *Esteves*, Dec. 12, 2005, at 23, col. 3.
[174] *Id.*
[175] *Rainbow Assocs. v. Culkin*, 2003 N.Y. Slip Op. 50771(U), *2, 2003 W.L. 2004427, at *1, 2003 N.Y. Misc. LEXIS 392, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2003) (mem.).
[176] *See Cooper v. N.Y. City Hous. Auth.*, 13 Misc. 3d 132(A), 831 N.Y.S.2d 347, N.Y. Slip Op. 51874(U), 2006 WL 2829858, 2006 N.Y. Misc. LEXIS 2761 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2006) (mem.).
[177] *See Moshulu Assocs. L.L.C. v. Cortes*, N.Y.L.J., Apr. 5, 2006, at 21, col. 3 (Hous. Part Civ. Ct. Bronx County).
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *See Dawkins v. Ruff*, 10 Misc. 3d 88, 810 N.Y.S.2d 783 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2005) (mem.).
[182] *Prospect Place HDFC v. Gaildon*, 6 Misc. 3d 135(A), 800 N.Y.S.2d 355, 2005 N.Y. Slip Op. 50232(U), *2, 2005 W.L. 487008, *1, 2005 N.Y. Misc. LEXIS 331 (App. Term 1st Dep't 2005) (per curiam) (emphasis added).
[183] *Upaca Site 7 Assocs. v. Hunter-Crawford*, 12 Misc. 3d 1154(A), 819 N.Y.S2d 213, 2006 NY Slip Op. 50887(U), 2006 W.L. 1341018, 2006 N.Y. Misc. LEXIS 1164 (Hous. Part Civ. Ct., N.Y. County 2006).
[184] Edward Josephson & Jennifer Levy, *Federally Subsidized Housing* 16 (2008) (unpublished monograph for 2008 Summer N.Y. St. Jud. Seminars); N.Y. City Dep't of Hous. Pres. & Dev., *Housing Choice Voucher (Section 8) Administrative Plan*, 5-4 (2007).
[185] *See generally Borough Park Courts Assocs. v. Mori*, N.Y.L.J., Sept. 21, 2005, at 19, col. 3 (Hous. Part Civ Ct. Kings County) (citing authority in concluding that minor child can be awarded succession rights).
[186] *Evans v. Franco*, 93 N.Y.2d 823, 825, 687 N.Y.S.2d 615, 616-17, 710 N.E.2d 261, 262-63 (1999).
[187] *Id.*, 687 N.Y.S.2d at 617, 710 N.E.2d at 263.
[188] *See Davidson 1992 Assocs. v. Corbett*, 190 Misc. 2d 813, 738 N.Y.S.2d 813 (App. Term 1st Dep't 2002) (per curiam).
[189] *Manhattan Plaza Assocs., L.P. v. Dep't of Hous. Pres. & Dev.*, 8 A.D.3d 111, 112, 778 N.Y.S.2d 164, 164 (1st Dep't 2002) (mem.).
[190] *Id.* at 112, 778 N.Y.S.2d at 164.
[191] *2013 Amsterdam Ave. Hous. Assocs. v. Wells*, 10 Misc. 3d 142(A), 814 N.Y.S.2d 893, 2006 N.Y. Slip Op. 50084(U), 2006 W.L. 176950, 2006 N.Y. Misc. LEXIS 109 (App. Term 1st Dep't 2006) (per curiam).
[192] *Id.*
[193] 12 Misc. 3d at 1154(A), 819 N.Y.S2d at 213.
[194] *Josephson & Levy*, *supra* note 182, at 17.
[195] *Id.*; 28 R.C.N.Y. § 3-02(p).
[196] *Josephson & Levy*, *supra* note 182, at 17.
[197] N.Y.L.J., Jan. 26, 2005, at 19, col. 1 (Hous. Part Civ Ct. N.Y. County).
[198] *Id.*
[199] "Bias is Seen as Landlords Bar Vouchers," Manny Fernandez, N.Y. Times, Oct. 30, 2007, *available at* http://www.nytimes.com/2007/10/30/nyregion/30section.html?ref=todayspaper (last visited Aug. 4, 2008) (highlighting plight of Section 8 voucher holder unable to locate landlord willing to accept her Section 8 subsidy).
[200] Los Angeles Mun. Code § 151.04(b), Ord. No. 174501.

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[201] "Mayor Vetoes Bill Protecting Section 8 Tenants from Landlord Bias," Manny Fernandez, N.Y. Times, Mar. 1, 2008, *available at* http://www.nytimes.com/2008/03/01/nyregion/01housing.html (last visited Aug. 4, 2008).
[202] N.Y. City Council, Preserving Access to Affordable Housing, Council Votes on Override to protect Low-Income Renters from Discrimination, *available at* http://council.nyc.gov/html/releases/024_032608_prestated_sec8override.shtml (last visited Aug. 4, 2008).
[203] Int. no. 61A.
[204] N.Y.L.J., Apr. 2, 2008, at 27, col. 1 (Sup. Ct. N.Y. County).

Disclosure And Disclosure-Like Devices In The New York City Housing Court

*By Gerald Lebovits, Rosalie Valentino, and Rohit Mallick**

I. INTRODUCTION

Summary residential landlord-tenant proceedings in the New York City Civil Court, Housing Part — the Housing Court — give owners a simple, expedited, and inexpensive way to regain possession of premises when occupants refuse to pay rent or wrongfully hold over without permission or after the expiration of their term. In return for the benefits to an owner of pursuing a summary proceeding, occupants benefit from procedural, jurisdictional, and substantive defenses that do not exist in plenary actions.

Given the goals of summary proceedings, courts must weigh the benefits of permitting disclosure against the potential abuse and delay that disclosure causes. For some time now, the courts have favored and promoted disclosure — called discovery in federal court — in certain types of summary proceedings to help the parties litigate fairly and efficiently. Fairness and efficiency allow the sides seeking disclosure or from which disclosure is sought to prevail quickly, if appropriate. The tension between the judicial economy flowing from summary proceedings and preserving justice for parties in Housing Court comprises most of the debate over disclosure in landlord-tenant proceedings.[1]

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