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Disclosure and Disclosure-Like Devices in the NYC Housing Court

Gerald Lebovits

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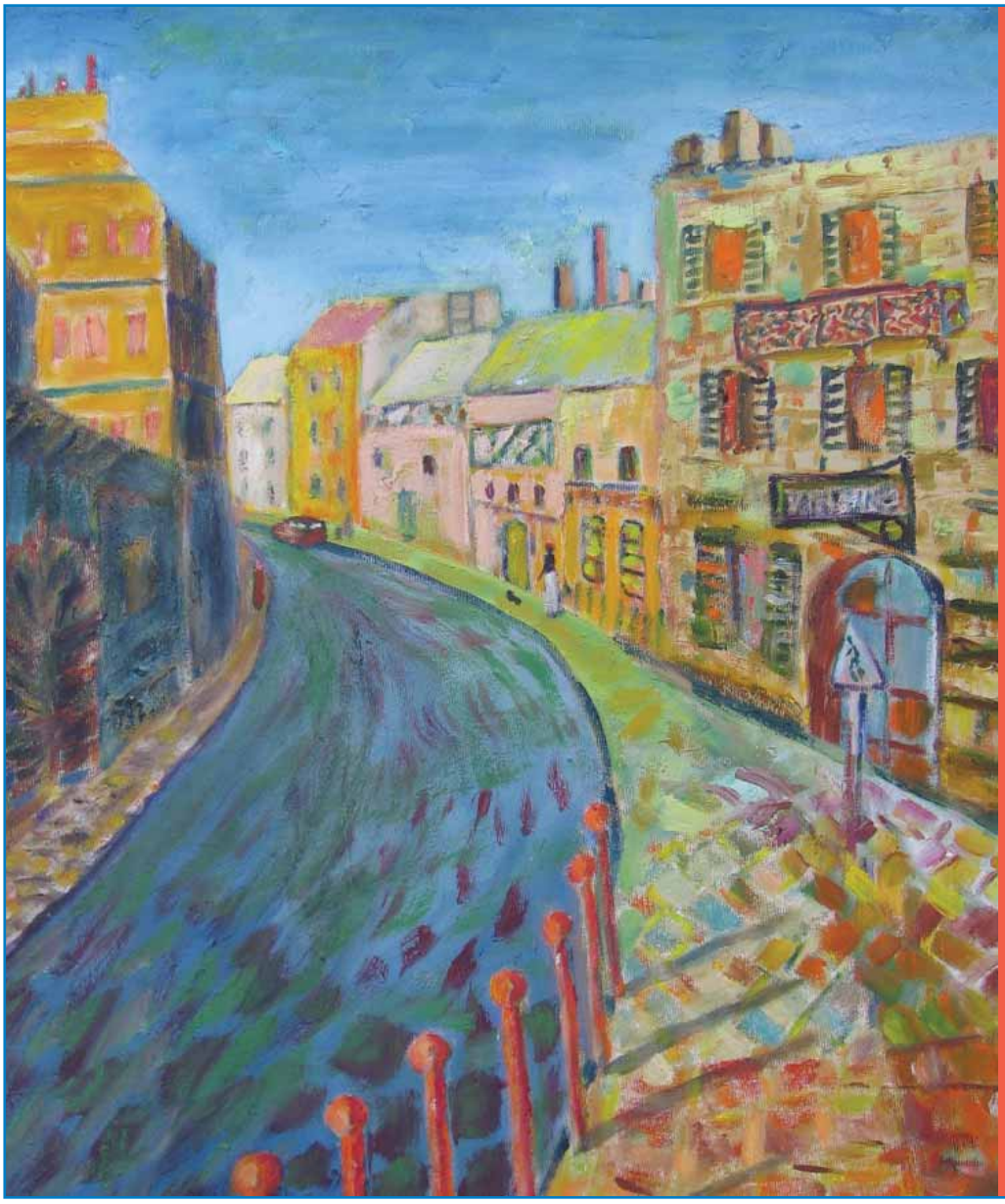

Inside

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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]

Two types of cases—primary residence and owner's-use proceedings—enjoy almost automatic permission for disclosure in Housing Court, while for other cases the likelihood of permission for disclosure is reduced or nonexistent. This article discusses disclosure in some Housing Court proceedings: owner's use, nonprimary-residence, and illegal-sublet proceedings. The article also considers disclosure when the following defenses are raised: rent overcharge, horizontal multiple dwellings, illusory tenancies, succession rights, and economic infeasibility. The article further considers privacy issues arising from disclosing medical records and Social Security numbers and information from video surveillance. Disclosure and disclosure-like vehicles such as subpoenas, notices to admit, and bills of particulars are also examined.

"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."

Although disclosure devices are available on notice without leave of court in plenary actions and served between parties, parties to a summary proceeding are not entitled to disclosure as a matter of right. Parties must move under CPLR 408 to obtain permission from the court to conduct examinations before trial, serve demands to produce and interrogatories, and conduct physical and mental examinations. A CPLR 408 request for admissions, called a notice to admit, is the only disclosure device that does not require leave of court.

A motion for leave to conduct disclosure should contain an affidavit from the party seeking disclosure, be carefully tailored to the lawsuit's pleadings, and annex a copy of the proposed document demand, interrogatories, and any other type of disclosure device sought to be used. If a movant fails to attach a copy of the proposed disclosure device to the motion papers, the courts might deny the motion without prejudice to renew.[2] The opposing party might take this procedural infirmity a step further and move to preclude disclosure altogether. The required procedure preserves the purposes of the summary proceeding: to avoid delay, promote judicial economy, and reduce the possibility of disclosure or trial by ambush.

Disclosure should be germane to the proceeding and sufficiently narrow to permit ready compliance.[3] Examinations Before Trial (EBTs)—called depositions in federal court—can be intimidating, expensive, and time-consuming. Courts allow EBTs in summary proceedings only if the movant demonstrates ample need—justice should not be sacrificed for speed. Document demands should also be germane and narrow. Courts prefer not to prune overbroad disclosure requests. The motion court might reject overbroad and oppressive requests for document production with leave to move a more reasonable discovery demand. The court's goal when considering disclosure demands is to avoid having to cull the good from the bad while simultaneously protecting sensitive, private information about the person subject to disclosure.[4] This goal encourages attorneys to tailor disclosure requests to avoid wasting time, money, and effort.

Although some Civil Court clerks might prefer otherwise, most Housing Court judges who grant disclosure will mark a case off calendar pending the completion of disclosure and allow either side to restore the proceeding on notice.

Courts that hear disclosure must be sensitive to the needs and rights of the unrepresented. For example,

many *pro se* litigants consent in stipulations to onerous, unfair disclosure. The courts must examine and allocate stipulations before they so-order them. To assure compliance and to make sure that the unrepresented will understand their disclosure obligations, the courts should consider setting out in its disclosure order the dates for the EBT and compliance with document production, which can occur about a week before the EBT. Courts should also consider inquiring whether the should EBTs take place in the courthouse—neutral territory—rather than at the landlord's lawyer's office.

Early disclosure in summary proceedings can yield beneficial results. Disclosure might assist in rapidly disposing of or settling a case. Disclosure helps both sides clarify issues to be presented at trial and might help a party with a motion for summary judgment. The historical hesitation with granting disclosure, on the other hand, is that disclosure mechanisms increase cost and conflict with the purpose of summary proceedings by causing delay.[5] The introduction of the ample-need standard, however, has clarified the usage of disclosure and preserved judicial discretion in granting disclosure in appropriate situations.

II. The Ample-Need Standard

To obtain an order granting the right to proceed with disclosure, the litigant must demonstrate "ample need" to prosecute or defend a summary proceeding.[6] The type of proceeding initiated will dictate the showing needed to obtain disclosure. Motions for disclosure require the court's attention to the particular factual circumstances in each case.

The seminal case of *New York University v. Farkas*[7] involved a summary proceeding based on a landlord's allegations that the tenant did not occupy the premises as the tenant's primary residence. The *Farkas* court identified and defined the ample-need standard, which consists of six factors a court should consider to determine whether and when disclosure should be permitted in a summary proceeding. The factors are (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether the movant has demonstrated a need to determine information directly related to the cause of action; (3) whether the information requested is carefully tailored and is likely to clarify the disputed facts; (4) whether granting disclosure would lead to prejudice; (5) whether the court can alleviate the prejudice; and (6) whether the court can structure disclosure to protect *pro se* tenants against any adverse effects of a landlord's disclosure requests.

These factors must exist in a summary proceeding to obtain a court order permitting disclosure. They reflect the court's concerns with the availability of information relevant to the material facts of a claim or defense in the context of special proceedings, of which a landlord-tenant summary proceeding is an example. The ample-need standard ensures that an owner or landlord does not request disclosure simply to formulate a cause of action and prevents the occupant or tenant from conducting a fishing expedition to discern a defense. Each party must demonstrate ample need for disclosure, and the court will then tailor an order addressing the party's specific needs. Requiring a showing of ample need in summary proceedings allows the court to structure disclosure orders to safeguard both the efficiency of summary proceedings and each party's rights and defenses.

Although a presumption favors disclosure in some proceedings, not all cases are amenable to disclosure. In a standard nonpayment proceeding, no reason exists to allow disclosure for either side if no disputed factual issues arise—if, for example, the proceeding is about whether the tenant either paid or did not pay and the movant wants to learn only what the other side knows or intends to prove at trial. A more complicated nonpayment case in which the tenant raises defenses for nonpayment, such as breaching the warranty of habitability, will increase the likelihood that the court will allow disclosure, as long as a party demonstrates ample need. The court can allow disclosure in proceedings with no presumption of disclosure if the party meets the ample-need requirements.

III. Types of Proceedings

A. Owner's-Use Proceedings

In owner's-use cases, the landlord seeks to recover a rent-regulated apartment based on the claim that the landlord or the landlord's immediate family will reside in the apartment as their primary residence after possession of the apartment is obtained. Disclosure in the tenant's favor is presumed in owner's-use proceedings. Tenants need not accept the landlord's representations; they may seek leave of court to conduct disclosure to ascertain the truth of the landlord's representations. No presumption exists that a tenant possesses facts sufficient to prepare a defense to a proceeding predicated on the landlord's alleged good-faith intent to use a tenant's apartment as a personal, primary residence.[8] The operative facts are within the landlord's knowledge.[9] Landlords' mere declaration that they have the good-faith intent to recover the space for personal use is not enough: allegations are not dispositive of the landlord's real intentions. The tenant is entitled to conduct disclosure on the issue of the landlord's intention to use the space.

To acquire information about a landlord's intentions, a tenant may seek disclosure of the landlord's building renovation plans to determine whether the building can convert into a single-family home.[10] Additionally, a tenant may conduct disclosure when a landlord seeks to recover the tenant's apartment for use as a retirement home but the tenant suspects that the building will really be the landlord's primary residence.[11] A landlord's other properties are within the realm of disclosure. In an owner's-use proceeding, a tenant

will be allowed to conduct disclosure to ascertain whether the landlord will use the space as a primary residence or whether the landlord desires to replace the tenant and charge a higher rent. Because the operative facts are exclusively within the landlord's knowledge, the tenant will be permitted to obtain disclosure on this issue.[12]

B. Nonprimary-Residence Proceedings

In New York, the failure of a rent-regulated tenant to occupy an apartment as a primary residence constitutes incurable ground to evict.[13] The same is true for a market-rate or cooperative proprietary lessee who agrees to that provision in a lease.

The earlier-mentioned *Farkas* case involved a holdover proceeding based on the landlord's allegations that the tenant was not using the apartment as a primary residence. In *Farkas*, the landlord sought to depose the tenant and demanded documents to support its claim that the tenant did not occupy the apartment as a primary residence. The landlord sought the production of the tenant's New York City Resident Income Tax Returns and the address the tenant listed on those returns. The landlord also sought to ask questions about what specific portion of time the tenant lived at the subject apartment.[14] In considering whether to grant an order allowing the landlord to proceed with disclosure, the court noted that disclosure could be viewed as inconsistent with the speedy determination of rights. But the court relied on the rationale that disclosure, when used properly, aids the speedy disposition of a case because the information learned could clarify issues at trial, possibly lead to settling the case, or present a successful motion for summary judgment[15]—which, when made without pretrial disclosure, is sometimes called "poor-person's disclosure" because it can be used to force the non-moving side to disclose its proof.

If a summary proceeding involves a landlord's allegations of nonprimary-residence, the court will permit disclosure because the information is exclusively within the respondent-tenant's knowledge. This exclusivity of knowledge drives the presumption favoring disclosure in nonprimary-residence cases.[16]

In *390 West End Associates L.P. v. Atkins*,[17] for example, the court illustrated the types of discoverable documents in a nonprimary-residence action: driver's licenses, vehicle registrations, employment / business records, tax returns, frequent-flyer statements, bank statements, utility bills, and credit-card statements. These documents are discoverable because they contain information showing the extent and duration of the respondent-tenant's tenures at various residences. Although most courts allow landlords to obtain documents going back about two years before the *Golub*, or nonrenewal, notice (a predicate notice often combined with the termination notice),[18] facts particular to each proceeding could lengthen or shorten the relevant period for which disclosure might be available. The *390 West End* court allowed the landlord to demand the documents dating back from the inception of the landlord-tenant relationship, a period of five years. The documents would let the landlord evaluate the tenant's primary residence throughout the period of the tenancy.[19]

Given that primary residence involves determining tenant intent, examining the tenant's documents and subjecting the tenant and necessary, knowledgeable nonparties affiliated with the tenant to examinations before trial and will supply evidence to ascertain the purpose and duration of the residence in dispute and any alleged alternative residence.[20]

Tenants, on the other hand, rarely if at all obtain leave to conduct disclosure in nonprimary-residence proceedings. The tenant might seek disclosure to learn about what evidence is in the landlord's possession. But that is not a ground to get disclosure, and the information sought is in the tenant's exclusive possession and control in any event.

The parties in *Farkas* and *390 West*—and in thousands of similar cases—have used disclosure devices to maximize the speed and efficiency of the trial process. Abusing the disclosure process in nonprimary-residence proceedings is limited because leave of court is necessary, but some landlords can and do harass tenants through disclosure, a process that that forces tenants to turn over private information and makes them spend time, effort, and money. At the same time, disclosure, when used honestly, ferrets out the truth.

C. Illegal-Sublet Proceedings

Unlike nonprimary-residence holdovers, cases regarding illegal sublets reserve no presumption favoring disclosure. In sublet cases, the courts do not blindly grant disclosure but, instead, safeguard the summary proceeding by narrowly crafting disclosure orders.

If a landlord incorrectly frames an illegal-sublet summary proceeding as a nonprimary-residence proceeding, the court might deny permission for the landlord to seek disclosure. In *Metropolitan Life Insurance v. Butler*,[21] for example, the landlord in a summary proceeding based upon the tenant's illegal subletting of the subject apartment drafted a petition that never alleged that the tenants did not use the apartment as their primary residence. Despite the petition's illegal-sublet framework, the landlord sought to disclose documents related to a nonprimary-residence case. The proof the landlord sought was inconsistent and inapplicable to the cause of action alleged in the petition, and the court denied the landlord leave to depose the tenant. The court would not permit the landlord to "bootstrap" a nonprimary-residence case into an illegal-sublet proceeding. Because the documents the landlord sought had nothing to do with its theory and allegation of an illegal

sublet, the court held that disclosure under these circumstances would not promote judicial efficiency.

The ruling in *Butler* does not stand for the proposition that courts will categorically deny disclosure in illegal-sublet proceedings. To the contrary, in cases like *Jane Street v. John*,[22] the Appellate Term, First Department, reversed and granted the landlord's motion for disclosure in a sublet proceeding because the "[l]andlord's assertion, in support of discovery, that tenant does not primarily reside at the premises is consistent with the theory of illegal sublet or assignment alleged in the petition, and the nature of her relationship with the other respondent and the extent to which their occupancy is contemporaneous are related issues." Rather, *Butler* stands for the proposition that courts will supervise and tailor disclosure orders.

In *Hartsdale Realty Company v. Santos*, [23] the landlord alleged that the tenant illegally sublet her apartment. In addition to a request to disclose the apartment's occupants' identities, the landlord sought disclosure helpful to a nonprimary-residence case. Landlords' attorneys argue that landlords in sublet cases must prove that the prime tenant does not live in the premises—that is the difference between an unapproved sublessee and a lawful roommate—and thus that they need disclosure akin to the kind they can get in nonprimary-residence cases. But the courts have found that nonprimary-residence disclosure is irrelevant to the landlord's cause of action for an illegal sublet. Nevertheless, landlords are given leave to depose the tenant and the subtenant in sublet cases. That deposition was restricted in *Santos* to the landlord's allegations that the tenant illegally sublet the subject apartment.[24] Similarly, in *Wong v. Khoo*,[25] the court permitted disclosure of the identity of the apartment's occupants and their relationship to the tenant of record to aid the landlord's illegal-sublet claim. The landlord proved ample need by submitting the managing agent's affidavit.

Based on the *Butler* and *Hartsdale* proceedings, and many other cases, litigants should carefully craft their petitions for summary proceedings and requests for disclosure to correspond with their specific causes of action.

IV. Types of Defenses

A. Rent-Overcharge Cases

When a landlord seeks to increase the tenant's rent based on an alleged substantial rehabilitation, the tenant may seek disclosure to determine whether the rental increase is or was justifiable. Courts have granted tenants permission to depose the landlord to ascertain whether the landlord substantially rehabilitated the apartment or instead had made only minor alterations.[26] Courts also allow tenants to learn whether a rent increase was lawful relative to the improvements made.[27] When a tenant disputes the rent and claims a rent overcharge, the tenant's ability to defend at trial might be impaired without access to the landlord receipts and invoices.[28] This is an example of one party's having most of the operative facts in its possession and the courts' attempt to balance the conflict between summary proceedings and judicial fairness.

B. Horizontal Multiple Dwelling Cases

A multiple dwelling is a dwelling rented, leased, let, or hired as a home of three or more families living independently of each other in cities with populations of 325,000 or more.[29] The landlord of a multiple dwelling has a non-delegable duty to maintain the premises in a reasonably safe and habitable condition.[30] Recognizing the high stakes for tenants in summary proceedings, courts allow tenants to proceed with disclosure in horizontal multiple-dwelling cases. A horizontal multiple dwelling invokes the benefits of rent-stabilization protection.

In *480-486 Broadway LLC v. No Mystery Sound, Inc.*,[31] the tenant defended on the basis that the premises were a residential rent-stabilized horizontal multiple dwelling, not commercial space. The court in that commercial landlord-tenant holdover proceeding found that the only way to resolve that proceeding was to allow the tenant to discover evidence proving whether the subject premises was a *de facto* horizontal multiple dwelling. The court allowed the disclosure to demonstrate whether the subject premises had been converted to residential use.

C. Illusory Tenancy

An illusory tenancy exists if the prime tenancy is a sham. The hallmark of an illusory tenancy is a subtenancy set up to profit improperly by violating rental laws.[32] An illusory tenancy exists if an owner creates a residential leasehold in persons who do not occupy the premises for their own residential use and who then sublease it for profit.[33] To determine whether an illusory tenancy exists, courts will consider the extent of the prime tenant's dominion and control over the premises,[34] whether the subtenant reasonably expected to continue in possession indefinitely as a rent-regulated tenant when the sublease ended, and whether the landlord or its agents knew whether parties other than the prime tenants were residing in the premises for a substantial period of time.[35] Under illusory-tenancy doctrine, when the sublet is from a rent-stabilized apartment, the subtenant in certain circumstances can be recognized as the legal rent-regulated prime tenant.[36]

Disclosure in these cases is crucial to the subtenant's defense because much is at stake for the subtenant. For example, in *125 Church Street Development Co. v. Grassfield*,[37] the landlord sought to remove the prime tenant from the subject apartment because the prime tenant did not occupy the premises as a primary residence. The subtenant sought to establish an illusory-tenancy defense on the basis that the prime tenant engaged in illegal-rent profiteering

by overcharging the subtenant. The subtenant sought information exclusively within the prime tenant's knowledge—whether the tenant gave up his primary residence in the subject premises years ago and had since illegally profited from subletting the apartment while holding onto the space in hopes of a substantial buyout from the landlord. The court ordered that if the landlord proceeded to take the deposition, the subtenant would be allowed to appear at the deposition to question the prime tenant under CPLR 3113(c).

Another way a subtenant can establish a defense is by deposing the landlord's employees. Leases, renewals, rental log payments, correspondence and papers about the tenants or occupants of the apartment, photographs and videos of the respondent's presence in the building, and the apartment's maintenance records are examples of relevant documents to a respondent's seeking to establish an illusory tenancy. These documents might show whether the landlord knew or should have known about the occupancy agreement between the respondent and the prime tenant.

Examinations before trial of the landlord's employees can be key disclosure devices to establish illusory-tenancy defenses. The examinations might disclose the landlord's actual or constructive notice of the subleasing arrangement.[38]

Courts have authorized the examinations of nonparties in these types of cases. In *255 West 88th Co. v. Gelband*,[39] the subtenant lived in the subject apartment for 14 years. The subtenant sought to depose the building's porter, superintendent, and doorman to establish whether the landlord had either actual or constructive knowledge of the illegal-subletting scheme. Despite the landlord's attempt to oppose the motion for disclosure by offering an affidavit that the landlord was unaware of the subtenant's presence, the court granted the tenant's motion to obtain those three EBTs. Nonparty disclosure can therefore occur in the proceeding if the notice or subpoena advises the nonparty of the disclosure and the reasons that disclosure is sought.

Elevator operators and maintenance staff have also been subjected to EBTs to establish the subtenant's illusory-tenancy defense.[40] Subtenants can try to prove that from the inception of their sublease, the owner's employees knew about their occupancy and of the prime tenant's absence from the premises. The EBTs of the owner's employees might demonstrate that the owner knew whether the elevator operators saw the subtenants every day and whether maintenance personnel were on the premises several times to effect repairs. Whether the subtenant seeks the EBT of a doorman or elevator personnel, no restriction is placed on which of the owner's employees must be aware of the sublease for the respondent to establish an illusory-tenancy defense.[41] The court is more concerned with disclosing whether an illusory-tenancy defense might be meritorious.

D. Succession Rights

Courts allow disclosure in summary proceedings involving succession rights. In dispute in these cases is whether and when the prime tenants permanently vacated the apartment, whether and when the successor resided in the apartment for two years with the prime tenant, and whether the successor tenant is either an immediate family member or a nontraditional family member entitled to succeed to the tenancy. Courts have found that documents relating to acquiring the tenant's home, records of the tenant's children's school attendance, telephone records, voter-registration records, newspaper and magazine subscriptions, utility bills, rent statements, bank and credit records, motor-vehicle registration, and use of the premises address for mail are all subject to disclosure.[42] A tenant asserting succession rights—an affirmative defense—must make documents available to establish the same facts the tenant in a nonprimary-residence case will seek to prove: the customary indicia of continuous residence, specifically the ongoing, substantial, and physical nexus with the regulated premises for actual living purposes.[43]

The tenant may oppose the disclosure motion or move for a protective order under CPLR 3103 to limit the scope of disclosure.[44] Although a court will preclude irrelevant documents, i.e., documents not addressed to ascertaining the time period in which a respondent has lived on the premises, a court will order that a respondent provide all relevant documents evidencing billing and mailing addresses. Specifically, addresses listed on W-2 forms, federal and New York State income tax returns, mailing and billing addresses for credit cards, monthly bank statements, Con Edison, New York Telephone Company bills, and voter registration might evidence a respondent's address, and are all related to succession rights.[45] The court is concerned only with billing and mailing addresses. Therefore, although a respondent will be ordered to provide copies of medical bills, the respondent would not be required to disclose the basis and type of treatment prescribed. The respondent would be required, however, to list the address to which the medical bills were sent. The same is true for financial information—and this is so in all cases, whether a nonprimary-residence case or an illegal-sublet case—in which a party seeks Housing Court disclosure. The rationale behind producing these documents is that the respondent should disclose accurate information, but to limit their intrusive value, that would substantiate whether or not succession rights apply.

E. The Economic-Infeasibility Defense

The affirmative defense of economic infeasibility is available to an owner in a Housing Part (HP) repair proceeding if the owner's cost to restore the premises and cure the

housing violations would exceed the value of the premises after restoration. The owner may then demolish the premises and pay the rent-regulated tenant(s) the value of their rent-regulated premises. The burden of this defense is placed on the owner, which must prove this defense by a preponderance of the evidence. If an owner asserts economic infeasibility, a presumption favors disclosure under CPLR 408, and the tenants will be allowed to serve interrogatories on this issue.[46] The interrogatories can be tailored to ask about the assessed value of the premises, the current offers for the property, and the financial operating statements of the premises, including the rent roll. This information is likely within the owner's exclusive knowledge and control.

The economic infeasibility defense might also arise in a nonpayment proceeding. In *City of New York v. Cordero*, the landlord instituted a nonpayment proceeding, and the tenant counterclaimed that the landlord breached the warranty of habitability.[47] The court granted the tenant leave to conduct disclosure relevant to the landlord's contention that repairing the subject premises was economically infeasible. The court found that disclosure would promote the overall efficiency of the trial process.[48] This demonstrates that a petitioner-landlord does not have an exclusive right to obtain disclosure. Disclosure necessary for a respondent's defense will be granted.

V. Privacy Concerns

A. Medical Records

A person's medical records are generally privileged materials not subject to disclosure. In summary proceeding disputes involving medical conditions, however, courts have ordered disclosure of medical records.

In *Stern v. Levine*,[49] the landlord's medical records were subject to disclosure. The landlord sought to recover the tenant's third-floor apartment for the landlord's personal use. The tenant sought to establish the landlord's bad faith; according to the tenant, the landlord could not use the third-floor apartment due to a physical disability. The tenant sought the disclosure of an administrative hearing before the Social Security Administration in which the landlord testified before an administrative law judge that he was unable to climb the stairs without difficulty. As part of that proceeding, the landlord submitted medical records relating to the landlord's ability to climb the stairs. Those medical records became material and necessary to the tenant's defense that the landlord had neither an intention nor an ability to live in the third-floor apartment. Remaining sensitive to the confidentiality and privilege of the records, the court allowed the landlord to redact any nonmedical, otherwise irrelevant material submitted to the Social Security Administration.

A landlord is likewise able to seek disclosure of tenants' medical condition when tenants put their medical condition in issue. In *Banchik v. Ruggieri*,[50] the landlord sought to recover an apartment for his personal use. The tenant claimed protection under the Rent Stabilization Code due to a permanent and incurable medical disability that prevented the landlord from ousting the tenant, but the tenant objected to providing her medical records to the landlord. The landlord's motion seeking leave to disclose of the tenant's medical, financial, and business records was granted, and the court entered an order directing the tenant to be subjected to a physical examination by an independent physician.

A landlord who does not move for leave of court to obtain disclosure to inquire into the validity of the tenant's disability may not, on a tenant's summary-judgment motion in an owner's-use proceeding, argue that he cannot disprove without a trial the tenant's disability claim. In *Mozaffari v. Schatz*,[51] the landlord sought possession of the premises on owner's-use grounds. The tenant asserted a disability that, if true, would prevent the landlord from refusing to renew the lease unless, under Rent Stabilization Code § 2524.4(a)(2), the landlord offered the tenant an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area. In a motion for summary judgment, the tenant submitted expert medical testimony establishing her disabilities, but the landlord did not offer any evidence to contradict this testimony and thus create a triable issue of material fact.

The issue whether to disclose medical records also arises in holdover proceedings based on nonprimary residence. Sometimes tenants are confined to nursing homes due to a medical condition. In dispute is whether a rent-regulated tenant placed in a nursing home might have the ability or intention to return to the original primary residence.

A tenant's severe mental condition can provide an excuse to prevent a landlord's petition to evict a tenant on the grounds of nonprimary residence.

If tenants place their mental disability in issue by asserting the affirmative defense that a mental disability shields the tenant from an eviction and the tenants have already submitted to a psychiatric examination by their own doctor, the landlord will be given a reciprocal right to conduct a psychiatric examination of the tenant. CPLR 3121(a) provides the basis for the statutory right to conduct a psychiatric medical examination.

If a tenant refuses to submit to the landlord's psychiatric examination, the court has the power to grant the landlord's motion to strike the tenant's affirmative defense of mental disability. The Appellate Division, First Department, in *TOA Construction Co., Inc. v. Tsitsires*,[52] for example, conditioned the striking of tenant's affirmative defense of mental disability on his production of medical records pursuant to the landlord's disclosure demands. The court

compelled the tenant to submit to an independent psychiatric examination to retain his affirmative defense.

Deposing a tenant's physician has been found necessary to support a landlord's allegations of a tenant's nonprimary residence. In *65 Central Park West, Inc. v. Greenwald*,[53] the EBT of the tenant's physician was relevant to determine whether the tenant's medical condition was grave enough to prevent the tenant from ever returning to the apartment. The tenant was unable to assert a privilege in this context because whether there is the possibility of a tenant returning to the apartment is not a determination that can be summarily decided without disclosure. Additionally, the tenant relied on her physician's statement that although the tenant's medical condition was grave, it was reasonable to expect that the tenant would return to her apartment given the substantial progress in her health. Because the physician's statement was ambiguous, the court granted the landlord's request to depose the physician to clarify this statement. This is an example of the court's finding it appropriate for a landlord to depose a nonparty witness under CPLR 3101(a)(4).

Courts will allow disclosure to be conducted by both the landlord and tenant depending on the nature of the factual disputes. Litigants who place their physical or medical conditions in issue waive the claim of privilege. A party may not assert a physical or mental condition in a claim or a defense and at the same time assert a medical privilege to prevent the other party from ascertaining the truth of the claim, nature, and extent of the injury.[54]

B. Social Security Numbers

Like medical records, an individual's Social Security number is privileged information. The party asserting the privilege can successfully cite New York State General Business Law § 349(h), a consumer-protection statute, to invoke the protection and preclude disclosure of this confidential information.[55] A petitioner-landlord may not demand that tenants reveal their Social Security numbers to complete a form detaining the number of occupants in their apartment.[56] Although the New York City Administrative Code permits landlords to inquire about apartment occupants,[57] this does not authorize the landlord to demand Social Security numbers. The potential for misusing Social Security numbers outweighs the benefits of disclosure in a summary proceeding—obtaining a Social Security number can lead to obtaining a person's welfare or Social Security benefits, credit-card information, personal checks, or even a person's paycheck.

A landlord is presumptively entitled to disclosure of tax records and bank records in a nonprimary-residence holdover proceeding. But a landlord is not presumptively entitled to a tenant's Social Security number to obtain unredacted versions of a tenant's tax records and bank records.

In *Alta Apartments LLC v. Wainwright*,[58] the landlord sought leave to renew and reargue its motion for disclosure of the tenant's Social Security number in connection with its nonprimary-residence holdover proceeding. The landlord sought the Social Security numbers to issue subpoenas on the New York State Department of Taxation and the tenant's banks. The purported ample need for the disclosure was the landlord's contention that these documents would demonstrate how much time the tenant spent at her New York address. The landlord's alleged ample need for the tenant's Social Security number was dispelled by the persuasive evidence of the tenant's cooperation throughout the discovery process. The tenant had fully cooperated in disclosing evidence to the landlord. The tenant disclosed over 400 pages of requested documents and was subjected to a three-hour EBT. Among the documents the tenant turned over were the tenant's redacted tax forms and bank account information—documents the landlord never moved for disclosure but which the tenant voluntarily provided. The landlord already possessed the information necessary to prove its case, if it could.

Granting the landlord's request for disclosure of the tenant's Social Security number would give the landlord a free pass to obtain privileged information like unredacted tax forms and bank records containing information not relevant to proving the tenant's primary residence. The *Alta Apartments* court therefore denied the unimpeded disclosure of tenant's documents.

C. Video Surveillance

Debate fragmenting the Appellate Division's four departments has arisen over disclosing video surveillance in personal-injury cases. The First Department has treated surveillance films as discoverable in their entirety. The Second and Fourth Departments have treated surveillance tapes as material prepared for litigation and held that a substantial need and undue hardship must be established to obtain disclosure. For instance, the party seeking disclosure must demonstrate that it will be unable to obtain the substantial equivalent of the surveillance materials by any other means.

The Fourth Department had held that video surveillance tapes are discoverable before trial, but only after the party had submitted to depositions.[59] Soon after that decision, the New York Legislature enacted CPLR 3101(i), which mandates the full disclosure of films, photographs, videotapes, and audiotapes involving a party to the action. Because CPLR 3101(i) is silent about the timing of videotape disclosure, that issue remained open issue for the courts to decide.

For a time, the Court of Appeals had resolved this dispute in *DiMichel v. South Buffalo*.[60] The court found that a court's determining whether surveillance tapes should be turned over before trial but after a plaintiff is

deposed prevents parties from withholding tapes and tailoring testimony and protects the other party's need to authenticate the videotape. But the legislature's enactment of CPLR 3101(i) overruled *DiMichel*'s disclosure rule. Under CPLR 3101(i), videotapes and other specified materials are now subject to full disclosure. A party seeking to disclose any of the specified items under CPLR 3101(i) need not make a showing of "substantial need" and "undue hardship." The provision compels the disclosure of all listed materials, including "outtakes," regardless whether the materials will be used at trial. Therefore, a party must disclosure all portions of this material, including outtakes, rather than only those portions the party intends to use at trial.

The Court of Appeals in *DiMichel* agreed with the Fourth Department and held that surveillance tapes should be treated as material prepared in anticipation of litigation and thus subject to a qualified privilege that a factual showing of substantial need and undue hardship can overcome.

In *Tran v. New Rochelle Hospital Medical Center*,[61] the Court of Appeals later clarified the open issue presented in *DiMichel*: whether CPLR 3103(i) overruled that aspect of *DiMichel* allowing defendants to withhold surveillance tapes until after a plaintiff has been deposed. The *Tran* court found that CPLR 3101(i) requires full disclosure of videotapes with no limitation as to timing. The court refused to declare otherwise until the Legislature acted again. To date, the Legislature has not acted, and the Court of Appeals decision in *Tran* is good law.

Video recording and photographs are helpful in nonpayment proceedings if the tenant contends that the apartment is in disrepair. When a tenant seeks to rely on video recordings or photographs and refers to them in motion papers, the landlord will be allowed, at the landlord's expense, to require the tenant to provide videotapes and better quality photographs.[62] The court has found that this clarification is a reasonable request for a landlord seeking to defeat claims that a roof had not been fixed and to demonstrate whether a rent abatement is an appropriate remedy.[63] Requiring the tenant to provide clearer photographs and videotape will clarify the substance of the claim and promote the ends of justice.[64]

"Because most subpoenas do not need to be court-ordered unless directed at a government agency, subpoena requests face less scrutiny than disclosure motions."

Video recordings and photographs can also help proving whether a tenant violated a stipulation settling an eviction proceeding. Practitioner should be mindful that spoliation-of-evidence issues can emerge in the context of a summary proceeding. In *Russell Place Associates LLP v. Super*,[65] the landlord sought to introduce into evidence a video demonstrating that the tenant allowed her daughter to enter into a building in violation of the stipulation of settlement. But the landlord's building manager inadvertently erased the film and destroyed the evidence. The court found that these actions amounted to spoliation of evidence and therefore drew a negative inference that the daughter was not observed entering or leaving the building. As a result, the landlord was unable to prove that the tenant violated the stipulation. *Russell Place* demonstrates that the existence of video surveillance requires landlord to preserve relevant evidence before and during litigation. A failure to do so can lead to consequences.

A landlord may evict a tenant on the ground that the tenant is using the subject premises for illegal purposes—for example, selling illegal drugs. Examples of the type of evidence that would support an eviction include (1) increased pedestrian traffic at unusual hours, (2) broken front-door locks, (3) noise complaints, (4) strange cars parked in front of the building, (5) unfamiliar people loitering about, (6) tenants who pay or prepay rent in cash, (7) holes in apartment doors to pass money and drugs, and (8) evidence of drug paraphernalia.[66] Video surveillance of the lobby, elevators, stairways, and hallways could provide support of this evidence and could help a landlord evict a tenant on grounds of illegal use.

Video surveillance is also often used to prove a nonprimary-residence holdover. Reliable tapes will prove how often the tenant came to and left the apartment as well as the duration of the tenant's stays in the apartment.

VI. Disclosure-Like Devices

A. Subpoenas

Subpoenas are not regulated by the disclosure provisions in CPLR 408 or 3102, but they serve discovery purposes similar to the disclosure mechanisms described above. Subpoenas are required to be closely tailored to the case's particulars.[67] Because most subpoenas do not need to be court-ordered unless directed at a government agency, subpoena requests face less scrutiny than disclosure motions.

Practitioners regularly draft subpoenas *duces tecum* and subpoenas *ad testificandum*. The former requires the production of books, papers, and other physical objects and papers; the latter requires the witness attendance to give testimony. Each type of subpoena must be drafted carefully and strictly served in accordance with the CPLR's rules and procedures. A careless practitioner who abuses the subpoena system will face sanctions and discipline and might lose the informational benefits of a subpoena.

In a summary proceeding, CPLR 2301 allows a party to issue a subpoena *duces tecum* ordering production of documents for trial. CPLR 2303(a) provides that subpoenas be promptly

served on each party so that they are received after service on witnesses and before producing books, papers, and other things. Unlike disclosure mechanisms, the subpoena produces material for trial and not for pretrial proceedings. The subpoena should not direct the witness to turn over the documents directly to the attorney for whichever party served the subpoena.[68] Courts have criticized this practice, known as "back-door discovery," as circumventing the CPLR's requirement to produce documents for the court.[69]

A trial subpoena may not be used as a fishing expedition to acquire materials obtainable through pretrial disclosure.[70] The subpoena should be tailored to the nature of the Housing Court proceeding to ensure that a court will not quash it. If an attorney drafts and serves a subpoena that fails to comply with the express terms of a court order, the subpoena will be quashed.[71]

Notice requirements must be strictly observed when nonparties are subpoenaed.[72] The failure to provide the statutory notice might preclude that party from introducing into evidence any information illegitimately obtained, and the court may also impose sanctions and award costs and attorneys' fees incurred by the aggrieved party in connection with a motion to quash the subpoena.[73] If an aggrieved party's substantial right has been prejudiced as a result of an improper subpoena, the court might preclude any improperly or irregularly obtained disclosure.[74]

It is improper for an attorney to use letter requests urging a tenant to send subpoenaed documents directly to the attorney, rather than to the court, in this way subverting the court's procedure for receiving, maintaining, and releasing subpoenaed records.[75] An attorney's soliciting and obtaining documents through a subpoena circumvents the Housing Court's rules and procedures meant to protect parties from subversive layering practices.

B. Demand for Bills of Particulars

CPLR Article 31 provides a comprehensive list of disclosure devices. A demand for a bill of particulars is not a disclosure device under Article 31, and CPLR 408 does not require leave of court for its use in a special, summary proceeding.[76] A bill of particulars is an amplification of a pleading rather than a disclosure device and can help ascertain the facts on which a special proceeding is based.[77] Only the party bearing the burden of proof on a disputed issue must provide a bill of particulars with respect to that disputed issue.[78]

In *City of New York v. Valera*,[79] the court endorsed the use of the bill of particulars to provide a statement of facts in connection with a holdover proceeding based on nuisance. The landlord was required to produce a bill of particulars to notify the tenant of any potential defenses it may have.[80] A bill of particulars is a useful tool for the tenant in preparing a defense in a summary proceeding.

A respondent-occupant demand for a bill of particulars, if granted, requires the petitioner-owner to refine and formally detail its claim against the respondent. Respondents may use the motion to limit the items at trial to gain detailed information about all allegations that the petitioner will raise. Like a subpoena, a bill of particulars is an alternative pretrial disclosure method that can streamline the judicial process. It is improper to use the bill of particulars as a disclosure device to disclose evidentiary matters. Leave of court will be necessary to serve a disclosure device disguised as a bill of particulars.[81]

C. Notices to Admit

The one disclosure device expressly permitted in a special proceeding without court order under CPLR 408 is a notice to admit as provided in CPLR 3123. Under CPLR 3123(a), a failure to respond to the notice to admit, to deny any portion thereof, or to explain why neither an admission nor a denial can be provided is deemed an admission of the truth or genuineness of the notice. A notice to admit may be used to dispose of uncontested questions of fact or those easily provable. The notice to admit should not be used to compel admissions of fundamental or ultimate facts that can be resolved only after a full trial.[82]

The notice to admit does not offer the same breadth of inquiry as do other disclosure devices: It does not allow a party to obtain any type of document or testimony from witnesses, and it cannot be used in another action or proceeding against the party making the admission.[83] Thus, a party may not use a notice to admit or a bill of particulars as a disguised disclosure device to obtain evidentiary matters, and neither device may be used as a tactic to delay a speedy proceeding.

Given the advantage of not having to obtain a court order to serve a notice to admit, some parties have disguised interrogatories in the form of notices to admit. In *Blanca Realty Corp. v. Espinal*,[84] the 72-paragraph-long notice to admit that the landlord served on the tenant was a red flag to the court that ultimate issues of fact were in dispute. That notice to admit was found improper because it essentially mirrored an interrogatory subject to leave of court under CPLR 408. As *Blanca Realty* explained,

> While there may be a couple of items in the Notice that are proper, it is unwise and unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit . . . . Accordingly, the respondent's motion to strike the notice to admit and for a protective order is granted.[85]

VII. Compelling Disclosure and Penalties for Failing to Disclose

If a party fails to comply with a court order and frustrates the CPLR's

disclosure scheme, the resolution judge may dismiss the petition or strike the answer.[86] This power parallels the wide discretion that courts retain over crafting and granting disclosure orders. To combat a common scenario of ignoring court orders, the Court of Appeals unanimously stated the following in a 1999 decision:

> a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action. . . . [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully . . . .[87]

In response to a failure to disclose, except with notices to admit, a party may move under CPLR 3124 to compel disclosure properly requested under the other provisions of Article 31. If the original request was proper, a motion to compel is a proper method to enforce disclosure.

Often the court will strike pleadings conditionally, giving the litigant one more chance. But the court may strike pleadings or preclude if a failure to comply with disclosure demands is willful, deliberate, and contumacious.[88] Answers are stricken only in cases of severe noncompliance.[89] In *Miller v. City of New York*, the Supreme Court struck the defendant's answer after determining defendant had failed to comply with five different orders,[90] displaying a pattern of non-compliance.[91] In *305 Riverside Corp. v. Parnassus*, the court explained that although the tenants failed to comply with two disclosure requests, the evidence displayed no proof of deliberate non-cooperation and non-compliance; thus, the court denied the motion to strike the answer.[92] Striking an answer is a drastic remedy. Requiring a pattern of non-compliance assures that it is used solely in the most appropriate and narrow manner.

No penalty may accrue against a party who legitimately does not have the document. Parties subject to disclosure need not produce documents, such as tax returns or other official forms, they do not have or never had. Instead, they may sign an affidavit averring the lack of possession and a notarized release authorizing the moving party to acquire the document from its original source.

VIII. Use of Interrogatories if a Person Cannot Appear at an EBT

Requiring the deposition of some individuals can be unduly burdensome due to a person's age, health, and location. In *65 Central Park West*,[93] the court rejected the landlord's request for an EBT because the elderly tenant's residence in a nursing home created an unnecessary burden to appear at the EBT. Instead, the court allowed the EBT of a nonparty physician to determine the tenant's primary residence.[94]

"When permitted, disclosure allows the parties to press their cases forward, to force the other side to reveal otherwise hidden facts, and to avoid trial by ambush."

In a different type of proceeding, facts might be disclosed by interrogatories. In *Lewis v. Katzev*,[95] the court denied the landlord's motion to compel an elderly tenant to submit to a pretrial EBT and physical and mental examinations connected to the landlord's nonprimary-residence holdover proceeding. In consideration of the tenant's physical condition and two-year residence in a nursing home, the court limited the landlord's disclosure to interrogatories. The court determined that the interrogatories would be sufficient for the landlord to investigate the nature of the tenant's nursing-home residency without forcing the tenant to appear at a deposition.[96]

IX. Conduct at EBTs

Part 221 of the Uniform Rules for Trial Courts went into effect On October 1, 2006. The new modifications expand the scope of disclosure during EBTs.The rules create new limitations about objections. Objections are noted and not ruled on during a deposition.[97] The court will not rule in advance on whether a particular question is proper. Instead, the question is posed, the objection taken, and, with exceptions noted below, the answer given, and then the court may rule on the question at trial. Each objection shall be stated succinctly and framed so as not to suggest an answer to the witness and shall clearly state the defect in form or other basis of error or irregularity.[98] This avoids manipulating the facts during deposition and seeks to improve EBTs' efficiency as a disclosure mechanism. If the deponent refuses to answer a question based on privilege, to enforce a limitation set forth in a court order, or when the question is plainly improper, the refusal to answer must be accompanied with a succinct and clear statement of the basis.[99] Because Housing Court tailors discovery methods in summary proceedings, this is the most common ground of objection at a deposition. Attorneys and *pro se* litigants should be aware of this right to refuse to answer based on the court's order to preserve their rights, further the goals of discovery, and effectuate a court's order.

X. Conclusion

Summary landlord-tenant proceedings are designed to move quickly and efficiently. Disclosure, although requiring leave of the court to obtain, is available in some cases in which ample need is shown. When permitted, disclosure allows the parties to press their cases forward, to

force the other side to reveal otherwise hidden facts, and to avoid trial by ambush. Practitioners have in their arsenal numerous aids to enable their clients' theories to prevail. Disclosure and disclosure-like devices remain at the top of the arsenal.

Endnotes

1. For good articles on disclosure, see Dov Treiman, *Discovering Disclosure—Parts 1-4*, Volume 2, Issues 2-5, Landlord-Tenant Monthly (Feb., Mar., Apr. & May 2004), and Anthony J. Fiorella, Outside Counsel, *A Judicial Perspective on Permissible Discovery in Summary Proceedings*, N.Y.L.J., Aug. 19, 1999, at 1, col. 1. For a good disclosure outline from which some research in this article was borrowed, see Samuel J. Himmelstein & David M. Skaller, *Disclosure in Housing Court Proceedings* (unpublished outline for the 2008 Summer Judicial Seminars in Rye Brook, New York). The authors thank Mr. Skaller, Mr. Himmelstein, and Mr. Santo Golino for kindly reviewing a draft of this article.
2. *But see* Alan D. Kucker & Santo Golino, Real Estate and Title Insurance Trends, *Discovery in Summary Landlord-Tenant Proceedings: Some Controversies Still Exist*, N.Y.L.J., Mar. 20, 2000, at S2, col. 1 (citing unstated inference from *Hart v. Blackwood*, N.Y.L.J., July 23, 1998, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*) in arguing that disclosure is warranted even if the movant does not append the document demand as an exhibit).
3. *Bouton v. DeAlmo*, 12 Misc. 3d 132(A), 2006 N.Y. Slip Op. 51166(U) at *1 (App. Term 1st Dep't 2006) (*per curiam*); *Benjamin Shapiro Realty Co. v. Henson*, 162 Misc. 2d 1, 9, 615 N.Y.S.2d 570, 575 (Civ. Ct., N.Y. Co. 1994) ("Courts have permitted narrowly tailored disclosure in summary proceedings upon a demonstration of 'ample need.'").
4. *See, e.g., Profile Enters. LP v. Sanzo*, N.Y.L.J., July 13, 2005, at 21, col. 3 (Civ. Ct., N.Y. Co.) (denying disclosure motion as overbroad and oppressive but allowing petitioner to make more reasonable disclosure demand without Social Security numbers and financial information); *see also Grotallio v. Soft Drink Leasing Corp.*, 97 A.D.2d 383, 383, 468 N.Y.S.2d 4, 5(1st Dep't 1983) (mem.) (discussing overbroad subpoena request).
5. *See Atkinson v. Trehan*, 70 Misc. 2d 612, 613, 334 N.Y.S.2d 291, 292 (Civ. Ct., N.Y. Co. 1972) ("One purpose of requiring parties to proceed by motion is to prevent an unwarranted delay in proceeding intended to be summary. . . . ").
6. *Dubowsky v. Goldsmith*, 202 A.D. 818, 818-19, 195 N.Y.S. 67, 67 (2d Dep't 1922); *Antillean Holding Co., Inc. v. Lindley*, 76 Misc. 2d 1044, 1047, 352 N.Y.S.2d 557, 561 (Civ. Ct., N.Y. Co. 1973).
7. *New York Univ. v. Farkas*, 121 Misc. 2d 643, 648, 468 N.Y.S.2d 808, 811–12 (Civ. Ct., N.Y. Co. 1983).
8. *Smilow v. Ulrich*, 11 Misc. 3d 179, 184, 806 N.Y.S.2d 392, 396 (Civ. Ct., N.Y. Co. 2005) (Gerald Lebovits, J.).
9. *Miller v. Vosooghi*, N.Y.L.J., Apr. 18, 2001, at 18, col. 1 (App. Term 1st Dep't) (*per curiam*).
10. *Smilow*, 11 Misc. 3d at 187, 806 N.Y.S.2d at 398.
11. *Teichman v. Ciapi*, 160 Misc. 2d 182, 185, 612 N.Y.S.2d 293, 295 (App. Term 1st Dep't 1994) (*per curiam*).
12. *Miller*, N.Y.L.J., Apr. 18, 2001, at 18, col. 1.
13. *See Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 7-8, 651 N.Y.S.2d 418, 421 (1st Dep't 1996), *lv. denied in part & dismissed in part*, 90 N.Y.2d 829, 683 N.E.2d 17, 660 N.Y.S.2d 552 (1997); *see also* N.Y.C. Admin. Code § 26-504(a)(1)(f).
14. *Farkas*, 121 Misc. 2d at 644, 468 N.Y.S.2d at 810.
15. *See Id.* at 645-49, 468 N.Y.S.2d at 811-13.
16. *Id.* at 647, 468 N.Y.S.2d at 811.
17. N.Y.L.J., June 3, 1998, at 26, col. 3 (Hous. Part Civ. Ct., N.Y. Co.).
18. *See, e.g., Profile Enters.*, N.Y.L.J., July 13, 2005, at 21, col. 3 ("At the deposition petitioner's inquiry is limited to facts that have occurred from two years before the date of the notice of termination.").
19. N.Y.L.J., June 3, 1998, at 26, col. 3.
20. *See Heller v. Joy*, N.Y.L.J., Feb. 22, 1984, at 6, col. 1 (Sup. Ct., N.Y. Co.).
21. N.Y.L.J., Dec. 19, 2001, at 24, col. 2 (Hous. Part Civ. Ct., N.Y. Co.), *aff'd*, 2002 WL 83691, 2002 N.Y. Slip Op. 50014(U) (App. Term 1st Dep't) (*per curiam*).
22. N.Y.L.J., Apr. 25, 1991, at 25, col. 4 (App. Term 1st Dep't) (*per curiam*) (citations omitted).
23. 170 A.D.2d 260, 260, 565 N.Y.S.2d 527, 528 (1st Dep't 1991) (mem.).
24. *See id.*, 565 N.Y.S.2d at 528.
25. N.Y.L.J., Jan. 23, 1997, at 27, col. 3 (App. Term 1st Dep't) (*per curiam*).
26. *See, e.g., Herman v. Lancaster*, N.Y.L.J., Mar. 27, 1991, at 22, col. 6 (Hous. Part Civ. Ct., N.Y. Co.).
27. *See, e.g., Singh v. Pierson*, N.Y.L.J., Aug. 11, 1999, at 28, col. 4 (Hous. Part Civ. Ct., Kings Co.).
28. *Clark v. Kellogg*, N.Y.L.J., July, 28, 1982, at 6, col. 1 (App. Term 1st Dep't) (*per curiam*).
29. *See* N.Y. Mult. Dwell. L. § 3.
30. *See id.* § 78.
31. 11 Misc. 3d 1056(A), 815 N.Y.S.2d 494 (Civ. Ct. N.Y. County 2006), *aff'd*, 16 Misc. 3d 1056(A), 851 N.Y.S.2d 57 (App. Term 1st Dep't 2007) (*per curiam*).
32. *270 Riverside Dr., Inc. v. Wilson*, 195 Misc. 2d 44, 50, 755 N.Y.S.2d 215, 220 (Hous. Part Civ. Ct., N.Y. Co. 2003).
33. *Partnership 92 LP v. N.Y. St. Div. of Hous. & Comm. Renewal*, 46 A.D.3d 425, 429, 849 N.Y.S.2d 43, 47–48 (1st Dep't 2007) (mem.).
34. *See, e.g., Art Omi Inc. v. Vallejos*, 15 Misc. 3d 870, 832 N.Y.S.2d 915 (Hous. Part Civ. Ct., N.Y. Co. 2007) (Gerald Lebovits, J.), *aff'd*, 21 Misc. 3d 129(A), 2008 N.Y. Slip Op. 52012(U) (App. Term 1st Dep't 2008) (*per curiam*).
35. *Treasure Tower Corp. v. Chen*, 20 Misc. 3d 1109(A), 2008 N.Y. Slip Op. 51288(U), 2008 WL 2548796, at *2 (Hous. Part Civ. Ct., N.Y. Co. 2008) (Gerald Lebovits, J.).
36. *Primrose Management v. Donahoe*, 253 A.D.2d 404, 405, 676 N.Y.S.2d 585, 586 (1st Dep't 1998) (mem.); *Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 284, 500 N.Y.S.2d 1019, 1023 (1st Dep't 1986).
37. 170 Misc. 2d 31, 34, 648 N.Y.S.2d 515, 518 (Civ. Ct., N.Y. Co. 1996); *accord 545 Eighth Ave. Assocs. LP v. Shanaman*, N.Y.L.J., Feb. 4, 2004, at 21, col. 3 (Hous. Part Civ. Ct., N.Y. Co.) (permitting disclosure to establish illusory tenancy by demonstrating unlawful rent profiteering through prime tenant's over-collection of electricity charges from the subtenant), *aff'd*, 12 Misc. 3d 66, 819 N.Y.S.2d 813 (App. Term 1st Dep't 2006) (*per curiam*).
38. *Goldman v. Richards*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3 (Hous. Part Civ. Ct., N.Y. Co.).
39. *255 W. 88th Co. v. Gelband*, N.Y.L.J., Jan. 5, 2005, at 20, col. 1 (Hous. Part Civ. Ct., N.Y. Co.).
40. *Goldman*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3.
41. *Id.*
42. *See, e.g., Cox v. J.D. Realty Assocs.*, 217 AD.2d 179, 185, 637 N.Y.S.2d 27, 31 (1st Dep't 1995).
43. *Emay Props. Corp. v. Norton*, 136 Misc. 2d 127, 128-29, 519 N.Y.S.2d 90, 92 (App. Term 1st Dep't) (*per curiam*).
44. *See Cohen & Zerenowitz Realty Corp. v. Asero*, N.Y.L.J., Nov. 29, 1991, at 26, col. 5 (App Term 1st Dept) (*per curiam*).
45. *E.g., id.*
46. *See 153-155 Essex Street Tenants Assocs. v. Kahan*, N.Y.L.J., June 9, 2004, at 22, col. 1 (Hous. Part. Civ. Ct., N.Y. Co.).
47. *See City of New York v. Cordero*, N.Y.L.J., Apr. 14, 1999, at 29, col. 4 (Civ. Ct., Kings Co.).
48. *Id.*

49. *Stern v. Levine*, 10 Misc. 3d 129(A), 809 N.Y.S.2d 484, 2005 N.Y. Slip Op. 51931(U) (App. Term 2d Dep't 2d & 11th Jud. Dists. 2005) (mem.).

50. *Banchik v. Ruggieri*, N.Y.L.J., Nov. 18, 1998, at 29, col. 4 (Civ. Ct., N.Y. Co.).

51. *Mozaffari v. Schatz*, N.Y.L.J., Oct. 8, 2008, at 26, col. 1 21 Misc. 3d 1103(A), 2008 WL 4355437, 2008 N.Y. Slip Op. 51942(U) (Civ. Ct., N.Y. Co.) (Gerald Lebovits, J.).

52. *TOA Construction Co., Inc. v. Tsitsires*, 4 A.D.3d 141, 142, 772 N.Y.S.2d 24, 25–26 (1st Dep't 2004) (mem.).

53. 127 Misc. 2d 547, 551, 486 N.Y.S.2d 668, 672 (Civ. Ct., N.Y. Co. 1985).

54. *Koump v. Smith*, 25 N.Y.2d 287, 295, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858 (1969).

55. *Meyerson v. Prime Realty Services, LLC*, 7 Misc. 3d 911, 917-18, 796 N.Y.S.2d 848, 854 (Sup. Ct., N.Y. Co. 2005).

56. *Goldman*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3.

57. *See* N.Y.C. Admin. Code § 27-2075(c).

58. 4 Misc. 3d 1009(A), 791 N.Y.S.2d 867, 2004 N.Y. Slip. Op. 50797(U), 2004 WL 1717573, at *5 (Civ. Ct., N.Y. Co. 2004) (Gerald Lebovits, J.).

59. *Id.; see DiMichel v. South Buffalo*, 80 N.Y.2d 184, 196, 604 N.E.2d 68, 70, N.Y.S.2d 1, 196 (1992) (discussing rule in the Second, Third, and Fourth Departments).

60. *Id.* 80 N.Y.2d at 197, 604 N.E.2d at 68, 590 N.Y.S.2d at 2.

61. 99 N.Y.2d 383, 390, 786 N.E.2d 444, 451, 756 N.Y.S.2d 509, 515 (2003).

62. *Katz v. Bellmore Kickboxing Academy, Inc.*, 16 Misc. 3d 1108(A), 847 N.Y.S.2d 897, 2007 N.Y. Slip Op. 51340(U) at *2-3 (Dist. Ct., Nassau Co.).

63. *Id.* at *2.

64. *Id.* at *2.

65. N.Y.L.J., July 21, 2004, at 17, col. 2 (Dist. Ct., Nassau Co.).

66. Scott E. Mollen, Realty Law Digest, Landlord / Tenant, *Eviction Based on Illegal Activity*, N.Y.L.J., Dec. 6, 1989, at 4, col. 3.

67. *See Discovering Disclosure, Part 2*, at 1, and cited cases.

68. *See, e.g., Building Mgmt. Co., Inc. v. Schwartz*, 3 Misc. 3d 351, 353-54, 773 N.Y.S.2d 242, 244-45 (Civ. Ct., N.Y. Co. 2004).

69. *Id.; see also* CPLR 2301.

70. *Mestel & Co. v. Smythe Masterson & Judd*, 215 A.D.2d 329, 637 N.Y.S.2d 37 (1st Dep't 1995) (mem.).

71. *See, e.g., 1050 Tenants Corp. v. Lapidus*, 17 Misc. 3d 133(A), 851 N.Y.S.2d 64, 2007 N.Y. Slip Op. 52049(U) (Civ. Ct., N.Y. Co. 2007) (Gerald Lebovits, J.).

72. *Henriques v. Boitano*, N.Y.L.J., Oct. 27, 1999, at 30, col. 3 (Civ. Ct., N.Y. Co.).

73. *See* 22 N.Y.C.R.R. 130-1.1.

74. *See generally*, N.Y. CPLR 3101(c).

75. *See Henriques*, N.Y.L.J., Feb. 2, 2000, at 5, col. 1; *see also* CPLR 2301, cmt. 4.

76. *See Tower Properties, Inc. v. Castro*, 99 Misc. 2d 405, 406–07, 416 N.Y.S.2d 508, 509-10 (Rockland County Ct. 1979).

77. *See* David D. Siegel, New York Practice, § 555, at 772.

78. *See Holland v. St. Paul Fire & Marine Ins. Co.*, 101 A.D.2d 625, 475 N.Y.S.2d 156, 157 (3d Dep't 1984).

79. 216 A.D.2d 237, 238, 628 N.Y.S.2d 695, 696 (1st Dep't 1995) (mem.).

80. *Id.*

81. *Tower Properties, Inc. v. Castro*, 99 Misc. 2d at 406-07, 416 N.Y.S.2d at 509–10. (Rockland County Ct. 1979).

82. *See Meadowbrook-Richman, Inc. v. Cicchiello*, 273 A.D.2d 6, 6-7, 709 N.Y.S.2d 521, 521–22 (1st Dep't 2000) (mem.).

83. Richard T. Walsh, Outside Counsel, *Disclosure in Special Proceedings Under CPLR § 408*, N.Y.L.J., Dec. 5, 1995, at 1, col. 1.

84. N.Y.L.J., Apr. 5, 2006, at 17, col. 1 (Hous. Part. Civ. Ct., N.Y. Co.).

85. *Id.* (quoting *Berg v. Flower Fifth Ave. Hosp.*, 102 A.D.2d 760, 761, 476 N.Y.S.2d 895, 896 (1st Dep't 1984) (mem.)).

86. *See Zletz v. Wetanson*, 67 N.Y.2d 711, 713, 499 N.Y.S.2d 933, 934, 490 N.E.2d 852, 853 (1986) (mem.).

87. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87, 89, 722 N.E.2d 55, 58 (1999) (quoting CPLR 3126).

88. *See, e.g., Dexter v. Horowitz Mgmt.*, 267 A.D.2d 21, 21, 698 N.Y.S.2d 33, 34 (1st Dep't 1999) (mem.).

89. *305 Riverside Corp. v. Parnassus*, 2008 WL 2548754, 2008 N.Y. Slip Op. 51287(U) at *4-5 (Civ. Ct., N.Y. Co. 2008) (Gerald Lebovits, J.).

90. *See Miller v. City of New York*, 15 Misc. 3d 1127(A), 841 N.Y.S.2d 219, 2007 WL 1238601, 2007 N.Y. Slip Op. 50882(U) (Sup. Ct., Bronx Co. 2007).

91. *Id.* at *3; *accord Figdor v. City of New York*, 33 A.D.3d 560, 561, 823 N.Y.S.2d 385, 386 (1st Dep't 2006) (mem.) (striking answer because defendant resisted myriad court discovery orders over two years).

92. *See 305 Riverside Corp.*, 2008 N.Y. Slip Op. 51287(U) at *4-5.

93. *See* 127 Misc. 2d at 549, 486 N.Y.S.2d at 670–71.

94. *Id.*, 486 N.Y.S.2d at 670–71.

95. N.Y.L.J., Dec. 11, 1996, at 25, col. 1 (Civ. Ct., N.Y. Co.).

96. *See id.*

97. *See id.* at 221.3. Because an attorney may not interrupt a deposition to communicate with a deponent without permission of the other party, a skillful objection can advise a deponent of an appropriate answer to a difficult question. The rules are designed to defeat this type of EBT manipulation.

98. *Id.* at 221.1(b).

99. *Id.* at 221.2.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University School of Law. Rosalie Valentino is an associate at Goetz Fitzpatrick LLP in New York, New York. Rohit Mallick is a second-year student at Fordham University School of Law.