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Post-Eviction Motions to Restore—Part I

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POST-EVICTION MOTIONS TO RESTORE - Part I

*By Gerald Lebovits**

I. Introduction and Overview

Like the Baudelaire orphans in the Lemony Snicket children's books, parties to a summary proceeding in New York's First and Second Departments sometimes suffer through what can only be described as a series of unfortunate events. Landlords and tenants often suffer unfortunate iniquities when an eviction occurs or does not occur.

Before executing the warrant of eviction, the marshal, the court's enforcement officer, must serve a notice of eviction on the tenant.[1] A tenant who does not obtain a stay of the execution of the warrant of eviction will be evicted. In the case of a legal possession, the marshal will remove the tenant from the premises, change the locks or direct that the locks be changed, and remain until the landlord secures possession.[2] If the marshal conducts a full eviction, the tenant's possessions are also removed.[3]

Once the tenant is evicted, what can the tenant do to be restored to possession? Under what circumstances may a court grant the relief the tenant requests? If the tenant is entitled to restoration, what must the court do to ensure that the landlord does not suffer losses for enforcing lawful rights? This paper addresses these issues.

Motions to restore are typically brought by order to show cause and are scheduled to be heard one or two days, and usually the next day, from the tenant's request. All post-eviction proceedings are emergency applications. Once the tenant is evicted, the landlord can re-let the premises to a third party. The order to show cause to restore a tenant to possession therefore contains an order directing the landlord not to re-rent, sublet, or place anyone else in possession of the subject premises until the court resolves the tenant's motion to be restored. In the court's discretion, the tenant may be granted access to the premises before the hearing date to allow the tenant to collect medication or personal belongings that remain locked in the premises.

*Gerald Lebovits is judge of the New York City Civil Court, Housing Part, in Manhattan. An earlier version of this article was published in 33 N.Y. Real Prop. L.J. 84-95 (Spring 2005). Judge Lebovits has updated and expanded it for the June 2007 Landlord-Tenant Monthly.

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Because the motion is heard before the marshal can be served, the court often calls the marshal to say that a post-eviction order to show cause has been signed. That call assures that a legal-possession case will not become an eviction. Service on the landlord's attorneys is done by fax or personally. There is no time to await a mailing. If the landlord's attorneys appear regularly in the court, some judges direct service by calling counsel to inform them to go to the courtroom to pick up the order to show cause.

If the eviction did not arise out of a nonpayment or holdover proceeding in which the court awarded the landlord a final judgment of possession, the tenant must bring an illegal-lockout proceeding under RPAPL 713(10) instead of an order to show cause to restore in the existing proceeding.[4]

Many landlords consent to restoring tenants to possession. Landlords have their reasons. Landlords have no incentive to evict an otherwise good tenant if reletting to someone new will not increase the rent. This is often the case in New York City if the home is hard to rent, if the tenant pays a high free-market rent, or if the apartment is federally subsidized and the rent will not be increased upon vacancy. If the tenant in one of these situations is not objectionable, the landlord often allows the tenant to be restored because the landlord will be paid all arrears and expenses, often by the Department of Social Services (DSS). DSS, which perhaps had declined to assist earlier, but might assist in the event of an eviction (in which event it will now also pay the landlord's expenses), can put the tenant on the budget and thus assure that the landlord will be protected in the future by having DSS forward checks to the landlord directly.

In many other cases, landlords' attorneys consent to restoration because they believe that the judge will order it anyway or because they believe it morally the right thing but request that the court issue an order they can show their clients so that their clients will not blame them but rather the judge, the tenant, or the legal system in general.

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"Good scholarship doesn't have to be boring."

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That leaves a small percentage of cases actually litigated. But litigated motions to restore are hotly contested in both the First and Second Departments.

The procedure in court on a motion to restore is outlined below.

An evicted tenant secures an order to show cause. If the tenant defaults by not appearing on the return date, the motion is denied as "denied; no appearance moving party"; the court will enter the acronym DNAM on the computer-generated motion-decision/order form and on the court file. If neither side appears, the motion will be denied as "denied; no appearance either side"; the court will enter the acronym DNEAS on the computer-generated motion-decision/order form and on the court file. If the tenant appears but the landlord does not, the court will ascertain whether service on the landlord was valid and, if it was, will consider the merits of the motion on the landlord's default.

If both sides appear on the return date, and the motion is not settled but instead is contested, the court will resolve the issues in this order:

If the tenant argues that eviction was illegal and the court agrees, the court must order the tenant restored forthwith and unconditionally.

If the eviction was legal, then the court will consider any personal-jurisdiction defense. In a nonpayment proceeding in which the tenant was evicted having never filed an answer and having never appeared, or in a holdover proceeding in which the court held and sustained an inquest without the tenant's having ever appeared, the court must determine whether the tenant properly raises a traverse issue. If so, and if the court sustains traverse on the papers or after a hearing, the tenant must be restored forthwith and unconditionally.

If the eviction occurred after a default but (1) traverse is overruled, (2) the tenant does not raise traverse, or (3) the tenant appeared in court one some date and defaulted thereafter, the court will consider whether the tenant has an excusable default and a meritorious defense. If the court finds an excusable default and meritorious defense, the court must vacate the default, adjourn the proceeding for trial, and restore the tenant to possession. In restoring the tenant, the court has the broad discretion to vacate the default under terms it finds just in accordance with CPLR 5015(a).[5] The terms might include directing the tenant to pay to the landlord or deposit in court some or all prior and current rent and even the landlord's costs.

If the eviction was legal and if there was either no default or there was a default and the tenant did contest service or traverse was overruled and the court finds no excusable default and meritorious defense, the law applicable to the next step depends on whether the matter arises in the First Department or the Second Department. In the First Department, the court must exercise its discretion whether to restore by weighing a variety of factors like the reason the rent was not paid (if nonpayment is what led to the eviction) and the length of the tenancy. A court in Second Department, where the law is unsettled, will decide whether to restore post-eviction based on whether it would have stayed execution of the warrant pre-eviction on good cause had the tenant sought a pre-eviction stay. If the tenant prevails under either the First or Second Department framework, the court will condition restoration upon the tenant's paying all prior and current rent or use and occupancy and upon paying reasonable costs and fees. The court will stay re-letting of the premises for a brief period in the court's discretion for the tenant to pay these sums.

In any of the above scenarios, the tenant who seeks to be restored must serve any new tenant in occupancy. Before the court may restore the evicted tenant, the court must balance the equities between the evicted tenant and the tenant in occupancy.

This article explains these scenarios in detail.

II. Vacating Defaults

If a tenant defaults, the court can grant the landlord a judgment. If a tenant defaults in a holdover case, the court must hold an inquest before the court may enter a default against the tenant. If a tenant

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fails in a nonpayment case to answer or answers but later fails to appear in court, the court will not hold an inquest but will award a final judgment of possession on default.[6] A number of different approaches support vacating a default judgment in both holdover and nonpayment proceedings. The court may vacate a default judgment and restore the tenant to possession if the tenant demonstrates a meritorious defense and excusable default under CPLR 5015, or the court may vacate a default in the exercise of the court's inherent power to vacate its own judgments. To do so the court may hold a *Torres* hearing. A *Torres* hearing, named after *New York City Housing Authority v. Torres*,[7] is a hearing at which the court entertains a motion to vacate a warrant of eviction based on the "good cause" provision of RPAPL 749(3).

CPLR 5015(a)(1) requires a movant to demonstrate an excusable default and meritorious defense before a court will vacate a default.[8] A tenant's claim of constructive eviction is sufficient to demonstrate excusable default and meritorious defense.[9] Granting a motion to vacate a default is discretionary.[10] Vacating a default is inappropriate if the tenant does not establish a meritorious defense or an excusable default.[11] Strong public policy in New York favors opening default judgments so that disputes are resolved on their merits.[12]

A. Excusable Default

The court will first determine whether the tenant has presented a valid excuse for the default. The list of factors that will establish a tenant's excusable default is non-exhaustive. The following are examples of excusable defaults.

(1) *Tenant Never Received Validly Served Process*

The court may, in a proper case, vacate the possessory judgment even if the tenant was properly served with the petition and notice of petition. Vacating a default judgment may be appropriate if the movant did not receive actual notice of the litigation until after the entry of judgment.[13] The tenant may establish an excusable default by proving that the tenant was out of state at the time service was attempted.[14] In *Brooklyn Properties v. Shade*,[15] the Appellate Term, Second Department, found that a tenant's allegations need not rise to the level of requiring a traverse hearing to excuse a default. The *Shade* court found that Civil Court should have ascertained whether the tenant, at work elsewhere as a live-in aide when the landlord served process, had an excuse for defaulting.[16] If the tenant establishes a meritorious defense but not an excusable default, vacating the default judgment is inappropriate.[17]

(2) *Law-Office Failure*

Under CPLR 2005 and CPLR 5015(a)(1), courts have the discretion to vacate a default for law-office failure in the case of a represented litigant. To establish an excusable default, the movant must submit a sworn statement from someone with knowledge of the specific failure.[18] Merely asserting law-office failure without supporting facts to explain and justify the default will be insufficient to excuse a default.[19] Not all law-office failures are sufficient to establish an excusable default. Isolated mistakes or instances of neglect might permit the court to exercise its discretion to vacate a default, but evidence of serious negligence or a pattern of neglect will not.[20] Waiting 11 months before moving to vacate the default, for example, is unreasonable and is not office failure sufficient to establish an excusable default.[21]

B. Meritorious Defense

If the tenant establishes an excusable default, then the court will consider whether the tenant has a meritorious defense. To vacate a default, a meritorious defense need not be a complete defense. But the defense must be complete to restore a tenant to possession. If the defense is only partial, such as a partial claim under the warranty of habitability, the court, assuming an excusable default, will, before restoring a tenant, attach conditions making the landlord whole, consistent with the viability and degree of the partial defense. The tenant need establish only a prima facie showing of a meritorious defense.[22]

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(1) *Lack of Personal Jurisdiction*

After being evicted, the tenant may raise the defense of lack of personal jurisdiction when moving to be restored to possession. This might arise either in a nonpayment proceeding when the tenant does not answer the petition and has never appeared and the court awards a judgment and issues a warrant that a marshal executes, or it might arise in a holdover proceeding if the tenant has never appeared and the court holds an inquest, awards a judgment, and issues a warrant that a marshal executes.

The landlord's failure to make a reasonable effort to complete personal (in-hand or substituted) service before resorting to conspicuous-place service is sufficient to establish a meritorious defense.[23] The defense of improper service of the petition and notice of petition satisfies both requirements that a tenant offer the court an excusable default and a meritorious defense. As the First Department has noted, if "Civil Court did not have in personam jurisdiction over the tenant, the court, even after the eviction has taken place, may open the default and dismiss the petition."[24] The tenant must present the court with a sworn statement that the landlord did not properly serve the petition and notice of petition. A traverse hearing should then be held to determine whether the tenant received proper notice of the proceeding. If traverse is sustained, the judgment and warrant must be vacated and tenant must be restored to possession forthwith and without condition.[25]

A default will not be vacated and the tenant will not be restored to possession if the proceeding's only defect is that the marshal's notice of eviction was served improperly or not at all.[26] The tenant's only recourse in that event is to sue the marshal.

(2) *Payment of the Money Owed*

Tenants who can prove that they tendered to the landlord all the rent owed before the warrant of eviction issued will show excusable default and a meritorious defense sufficient to support vacating the judgment.[27] Tenants who pay before a warrant is issued are entitled to restoration. Landlords who are paid in full are not entitled to a warrant and may not evict.[28] Courts should also vacate a default and restore the tenant to possession if, before the warrant issues, the landlord refuses to accept a proper tender of the rent owed.[29]

(3) *Other Defenses*

Courts have recognized other defenses available to tenants that satisfy the meritorious-defense requirement. Breach of the warranty of habitability is a meritorious defense.[30] A landlord's engaging in rent overcharging is a meritorious defense.[31] A landlord's failure to file a certificate of occupancy with the Department of Buildings is a meritorious defense.[32] This list is not exhaustive. Any substantive or procedural defense that has seeming validity will satisfy the meritorious-defense requirement a tenant may assert in a motion to restore.

C. Tenant's Incompetence

Vacating a default judgment may be appropriate independent of CPLR 5015 if the default judgment was entered against a tenant who suffers from some condition or impairment that contributed to or caused the default. Under CPLR 1203, vacatur may also be appropriate if the landlord was aware of the tenant's condition and did not bring it to the court's attention. In *Surrey Hotel Assocs. LLC v. Sabin*,[33] for example, Civil Court vacated the default judgment because the landlord did not inform the court that the tenant was incompetent, although the landlord was aware that Adult Protective Services (APS) paid the tenant's rent and the landlord had observed the tenant's strange behavior. If the landlord does not know or have reason to know that the tenant is incompetent, the landlord may rely on a presumption of competence.[34]

Vacatur is proper even if a tenant is not judicially declared incompetent or appointed a guardian ad litem. In *Sengstack v. Sengstack*,[35] the Court of Appeals articulated the special duty courts have to protect rigorously the interests of incompetent persons. Courts may not turn blind eye to protecting

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incompetent litigant, even those not yet judicially declared to be incompetent.[36] Public policy is to protect the rights of the mentally infirm.[37]

III. Tenants' Failure to Adhere to Stipulations

A tenant evicted for failing to comply with a stipulation that awards a landlord a final judgment may move to be restored by urging that the stipulation be vacated. That would restore the tenant to the status quo ante—a time before the tenant consented to the judgment that led to the eviction.

Enforcing stipulations, like enforcing the enforcing courts' own orders, remains subject to court supervision.[38] The Appellate Division, First Department, has stated that Civil "[C]ourt possesses the discretionary power to relieve parties from the consequences of a stipulation effected during litigation upon such terms as it deems just and, if the circumstances warrant, it may exercise such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it."[39] Courts should vigilantly investigate the facts underlying a proposed stipulation of settlement before so-ordering it. In *Hegeman Asset LLC v. Smith*,[40] for example, the Appellate Term, Second Department, restored the tenant after finding that Civil Court erred in so-ordering a stipulation that contained a discrepancy between amount sought in the petition and amount owed when the proceeding began.

Courts apply a good-cause test to determine whether the tenant is entitled to relief from a stipulation.[41] The Appellate Division, Second Department, quoting from the Court of Appeals's *In re Estate of Frutiger v. Frutiger*, has stated that "good cause is demonstrated where . . . a party has 'inadvertently, unadvisably or improvidently entered into an agreement."[42]

Another line of cases holds, however, that stipulations are binding contracts and that absent fraud, overreaching, or duress, one should not be relieved from the agreement's obligations and burdens.[43] The argument that stipulations are like contracts assumes that the parties came to an agreement after an arms-length negotiation.[44] Vacatur may be appropriate if the tenant was not represented in the negotiation process.[45] But courts are reluctant to vacate stipulations that two attorneys negotiate.[46]

Some courts have declined to follow the contract standard due to the reality that many tenants appear pro se and are unaware of their rights and possible defenses.[47] Courts will look to whether a tenant has agreed to give up valuable defenses to determine whether tenant should be relieved from the stipulation.[48] Courts may look at the facts underlying the tenant's decision to sign the stipulation to decide whether the stipulation should be vacated.[49] This is especially true of mentally incompetent tenants.[50]

IV. A Court's Inherent Power to Vacate Judgments and Restore Tenants

In both the First and Second Departments, a court may grant restoration following a tenant's eviction in a nonpayment proceeding conditioned on the tenant's paying all arrears and landlord's costs, preferably by cash, certified check, or money order to prevent any problems requiring re-execution of the warrant.

A landlord in neither department may appeal the court's decision to restore if the landlord accepts payment. In that event, the landlord will no longer be an aggrieved party under CPLR 5511.

Issuing an eviction warrant terminates the landlord-tenant relationship.[51] But a court has the power to grant relief after the warrant issues if the tenant can demonstrate that the judgment resulted from fraud, misrepresentation, or misconduct.[52] Courts also have the power to open a judgment if the landlord fails to accept a proper tender of rent before the warrant issues.[53] Beyond these grounds are grounds to restore on which the First and Second Departments agree and disagree.

A. Important Factors in the First and Second Departments

If the tenant seeks to vacate a warrant of eviction before it has been executed in the Second Department or to be restored to possession in the First Department, courts in both departments

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consider some of the same factors when deciding whether to restore a tenant.

Both departments consider the reason for the tenant's default an important factor. For example, both departments consider a default attributable to DSS delays to be excusable because the delay is beyond the tenant's control.[54]

Both departments further consider the landlord's bad acts when deciding whether to restore the tenant to possession.[55] Failing to credit the tenant with money already paid is therefore something on which courts rely when restoring tenants to possession.[56] A landlord's right to evict the tenant could be vitiated by accepting rent from the tenant after the judgment is satisfied and then refusing to reimburse money after tenant is evicted.[57] A landlord's fraud or misconduct in facilitating the warrant's execution is grounds to restore the tenant to possession.[58]

A landlord's acceptance of rent after the warrant issues but before it is executed will revive the landlord-tenant relationship if the tenant can show that the landlord accepted the rent with the intent to revive the landlord-tenant relationship.[59] The lease is not automatically revived if the landlord accepts rent after the warrant issues. The tenant must prove that both parties intended to revive the tenancy.[60] The tenant may prove the intent to revive by showing that the landlord ratified a renewal lease after the warrant issued.[61]

A split exists between the First Department and the Second Department about what other circumstances allow Civil Court to vacate a judgment and restore the tenant to possession.[62]

B. First Department

In the First Department, Civil Court has the discretion to restore a tenant to possession in a nonpayment proceeding and stay re-letting of the premises. The court will consider equitable factors and exercise its discretion to restore a tenant who shows good cause to be restored, tenders the rent, and makes the landlord whole. Failing to restore if a tenant shows good cause is an abuse of discretion that will lead to reversal and appellate restoration.

First Department courts cite a variety of sources for this discretionary power. Some courts cite only case law for the proposition that Civil Court may in appropriate circumstances vacate a warrant of eviction and restore the tenant to possession even after a tenant has been evicted.[63]

Other courts resort to equity. In *New York City Housing Authority-Edenwald Houses v. Roque*,[64] the court articulated the equitable principle that a court may grant relief from its judgments. The *Roque* court held that the principle is embodied in CPLR 5015 and made applicable to Civil Court through Civil Court Act § 212.[65]

Still other courts cite RPAPL 749(3) for the proposition that courts may vacate a warrant of eviction and restore for good cause shown.[66] These First Department courts cite RPAPL 749(3) despite its express language. RPAPL 749(3) provides:

> The issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant, but nothing contained herein shall deprive the court of the power to vacate such warrant for good cause shown prior to the execution thereof. Petitioner may recover by action any sum of money which was payable at the time when the special proceeding was commenced and the reasonable value of the use and occupation to the time when the warrant was issued, for any period of time with respect to which the agreement does not make any provision for payment of rent.

On its face, RPAPL 749(3) might not seem the logical source on which a court may grant post-eviction relief to a tenant. From its plain language, RPAPL 749(3) applies only until the warrant of eviction is executed and the tenant is evicted. But many First Department courts rely on its good-cause language nonetheless.

Wherever the power comes from, First Department courts have adopted the "good cause"

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provision of RPAPL 749(3) to determine whether factors make it appropriate to restore a tenant to possession.[67] If the tenant shows good cause, the court will then look to whether the tenant has the ability to make the landlord hole.[68]

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(Endnotes)

[1] RPAPL 749(2).

[2] *See* New York City Marshals Handbook of Regulations Chap. IV, § 6-3 (1997), at <http://www.nyc.gov/html/doi/html/marshals/mar4.html> (last visited May 12, 2007).

[3] *See id.* (defining changing locks as "legal possession" and fully removing tenant and property as "eviction"). Landlords effect full evictions to prevent tenants from returning and to make room for new tenants.

[4] *E.g., Ric-Mar Equity Ventures, Ltd. v. Murrell*, 184 Misc. 2d 298, 299, 708 N.Y.S.2d 562, 563-64 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.).

[5] CPLR 5015(a) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . ."

[6] *See Brusco v. Braun*, 84 N.Y.2d 674, 678, 621 N.Y.S.2d 291, 292, 645 N.E.2d 724, 725 (1994).

[7] 61 A.D.2d 681, 403 N.Y.S.2d 527 (1st Dep't 1978) (per curiam).

[8] *See Dash Realty Corp. v. Barbosa*, 198 A.D.2d 89, 89, 603 N.Y.S.2d 841, 841 (1st Dep't 1993) (mem.) (finding that tenant failed to establish either excusable default or meritorious defense); Daniel Finkelstein & Lucas Ferrara, *Landlord and Tenant Practice in New York* § 14:227, at 14-122 (2007 ed.).

[9] *Manoocherian v. Soffer*, N.Y.L.J., Mar. 26, 1983, p. 14, col. 4 (App. Term 1st Dep't) (per curiam).

[10] *See Flexro, Ltd. v. Korn*, 9 A.D.3d 445, 445-46, 780 N.Y.S.2d 184, 185 (2d Dep't 2004) (per curiam); *38 Holding Corp. v. City of New York*, 179 A.D.2d 486, 487, 578 N.Y.S.2d 174, 175 (1st Dep't 1992) (mem.); *Beneficial Finance Co. of N.Y., Inc. v. Kramer*, 48 A.D.2d 822, 822, 368 N.Y.S.2d 266, 267 (2d Dep't 1975) (mem.) (holding that movants established excusable default because court clerk gave them wrong hearing date and that bankruptcy discharge was meritorious defense).

[11] *See Forthy Central Parking v. McClean*, N.Y. L.J., Jan. 8, 1985, p. 11, col. 1 (App. Term 1st Dep't) (per curiam).

[12] *See Ackerson v. Stragmaglia*, 176 A.D.2d 602, 604, 575 N.Y.S.2d 44, 46-47 (1st Dep't 1991) (mem.) (quoting *Picinic v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 508, 497 N.Y.S.2d 924, 926 (1st Dep't 1986) (mem.)).

[13] *See, e.g., Bishop v. Galasso*, 67 A.D.2d 753, 753, 412 N.Y.S.2d 214, 215 (3d Dep't 1979) (mem.).

[14] *See Martine Assocs. LLC v. Minck*, 5 Misc. 3d 61, 62, 785 N.Y.S.2d 648, 649 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2004) (mem.) (holding that tenant established excusable default when landlord served process while tenant was out of state); *Dupont Mgmt. Co. v. Fischman*, N.Y. L.J., June 10, 1982, p. 6, col. 2 (App. Term 1st Dep't) (per curiam) (vacating default because tenant was in San Diego at time of service).

[15] 4 Misc. 3d 29, 31, 780 N.Y.S.2d 467, 469 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).

[16] *See id.*, 780 N.Y.S.2d at 469.

[17] *See, e.g., City of New York v. Rogers*, 165 Misc. 2d 240, 241, 629 N.Y.S.2d 628, 629 (Hous. Part Civ. Ct. Kings Co. 1995).

[18] *See Gourdet v. Hershfeld*, 277 A.D.2d 422, 422, 716 N.Y.S.2d 714, 714 (2d Dep't 2000) (mem.) (finding attorney's conclusory affirmation insufficient to excuse default).

[19] *See Bravo v. N.Y.C. Hous. Auth.*, 253 A.D.2d 510, 510, 676 N.Y.S.2d 871, 872 (2d Dep't 1998) (mem.).

[20] *See Burlew-Watkins v. Wood*, 225 A.D.2d 973, 974, 639 N.Y.S.2d 548, 549 (3d Dep't 1996) (finding attorney's behavior neglectful and unreasonable).

[21] *Eveready Ins. Co. v. Devissiere*, 134 A.D.2d 323, 323, 520 N.Y.S.2d 800, 801 (2d Dep't 1987) (mem.).

[22] *See Cadle Co. II, Inc. v. Becker*, 261 A.D.2d 201, 201, 689 N.Y.S.2d 506, 507 (1st Dep't 1999) (mem.) (finding meritorious

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defense in defendant's informal letter before she defaulted); *Nahal v. C&S Bldg. Materials*, 116 A.D.2d 822, 823, 497 N.Y.S.2d 209, 210 (3d Dep't 1986) (mem.) (affirming default's vacatur based on defendant's allegations in supporting affidavit).

[23] *See Eight Assocs. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984) (mem.), *aff'd*, 65 N.Y.2d 739, 492 N.Y.S.2d 15, 481 N.E.2d 555 (1985); RPAPL 735; CPLR 308.

[24] *Hynes,* 102 A.D.2d at 748, 476 N.Y.S.2d at 884.

25 *N.Y.C. Hous. Auth.-Butler Hous. v. Williams*, 7 Misc. 3d 1028(a), 801 N.Y.S.2d 237, 2005 N.Y. Slip Op. 50804(U), 2005 WL 1306064, at *3, 2005 N.Y. Misc. LEXIS 1077, at *7-8 (Hous. Part Civ. Ct. Bronx County Mar. 14, 2005) (sustaining traverse post-eviction, vacating judgment and warrant, and restoring "to possession forthwith") (citing CPLR 5015(a)(4)).

[26] *See 1199 Housing Corp. v. Warren*, 2003 N.Y. Slip Op. 51046(U) ,*2, 2003 WL 21499300, at *1, 2003 N.Y. Misc. LEXIS 817, at *1 (App. Term 1st Dep't June 13, 2003) (per curiam) (holding that Civil Court did not abuse its discretion in refusing to restore tenant who argued that marshal's notice was improperly served); *West Gramercy Assocs. v. Simeonov*, N.Y.L.J., June 18, 1990, p. 26, col. 4 (App. Term 1st Dep't) (per curiam) (same); *but see Sec. of Hous. & Urban Develop. v. McClenan*, N.Y. L.J., Nov. 3, 2004, p. 19, col. 3 (Hous. Part Civ. Ct. Queens County) (continuing stay in favor of temporarily restored tenant pending final resolution of motion to restore because "warrant of eviction was not properly served").

[27] *Siafakas v. Danzy*, N.Y. L.J., June 6, 1997, at 31, col. 6 (Hous. Part Civ. Ct. Kings County) (restoring tenant who paid rent before landlord commenced eviction proceeding).

[28] *See Albany v. White*, 46 Misc. 2d 915, 917, 261 N.Y.S.2d 361, 362 (Civ. Ct. N.Y. Co. 1965).

[29] *See, e.g., Iltit Assocs. v. Sterner*, 63 A.D.2d 600, 601, 405 N.Y.S.2d 68, 68 (1st Dep't 1978) (mem.).

[30] *See Manoocherian*, N.Y.L.J., May 26, 1983, p. 14, col. 4 (holding that tenant's breach-of-warranty-of-habitability claim sufficiently established meritorious defense to stay execution of warrant); *Fazal Realty Corp. v. Paz*, 151 Misc. 2d 396, 399, 573 N.Y.S.2d 399, 401 (Hous. Part Civ. Ct. N.Y. County 1991) (same).

[31] *Fort Greene Assets, Inc. v. Delain*, N.Y. L.J., Mar. 27, 1995, at 30, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

[32] *See Skala v. Edlich*, 2002 N.Y. Slip Op. 50129(U), *5, 2002 WL 576089, at *5-6, 2002 N.Y. Misc. LEXIS 577, at * 4 (Civ. Ct. Richmond Co. Feb. 4, 2002) (finding that tenant's assertion that premises was illegal multiple dwelling established meritorious defense to stay execution of warrant).

[33] N.Y. L.J., June 29, 2000, at 28, col. 4 (Hous. Part Civ. Ct. N.Y. Co.).

[34] *See Green v. Resch*, 114 Misc. 2d 780, 783-84, 452 N.Y.S.2d 314, 317 (Hous. Part Civ. Ct. Kings Co. 1982); Edward Josephson, *Post-Judgment Relief*, NYCLA—Jack Newton Lerner Lecture Series, Landlord/Tenant Litigation 7-8 (2003) (unpublished CLE manuscript) (noting special protection courts give incompetent tenants).

[35] 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342, 151 N.E.2d 887, 890 (1958).

[36] *See Palaganas v. D.R.C. Indust., Inc.*, 64 A.D.2d 594, 594, 407 N.Y.S.2d 170, 171 (1st Dep't 1978) (mem.).

[37] *Vinokur v. Balzaretti*, 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).

[38] *See, e.g., Strassman v. Estate of Eggena*, 151 Misc. 2d 638, 639, 582 N.Y.S.2d 899, 900 (App. Term 1st Dep't 1992) (per curiam) (vacating stipulation because, after signing it, tenant qualified for "noneviction protection" under Court of Appeals's newly expanded succession rights established in *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1981)).

[39] *1420 Concourse Corp. v. Cruz*, 135 A.D.2d 371, 373, 521 N.Y.S.2d 429, 432 (1st Dep't 1987) (mem.), *appeal dismissed mem.*, 73 N.Y.2d 868, 537 N.Y.S.2d 487, 534 N.E.2d 325 (1989).

[40] 5 Misc. 3d 8, 13, 783 N.Y.S.2d 192, 196 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

41. *See generally In re Estate of Frutiger v. Frutiger*, 29 N.Y.2d 143, 149-50, 324 N.Y.S.2d 36, 40, 272 N.E.2d 543, 546 (1971) (establishing good cause as test for relief from stipulations); Finkelstein & Ferrara, *supra* at note 8, at § 14:418, at 14-211

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(noting that good-cause standard is test to vacate stipulations).

[42] *Cabbad v. Melendez*, 81 A.D.2d 626, 626, 438 N.Y.S.2d 120, 120 (2d Dep't 1981) (mem.) (quoting *Frutiger*, 29 N.Y.2d at 159, 324 N.Y.S.2d at 40, 272 N.E.2d at 546) (quoting—but really misquoting—*Van Nuys v. Fitsworth*, 10 N.Y.S. 507, 508 (Sup. Ct. Gen. Term 5th Dep't)).

[43] *See Hallock v. New York*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512, 474 N.E.2d 1178, 1181 (1984) (analogizing test for vacating stipulations to test for rescinding contracts when both sides are represented by counsel).

[44] *See 1420 Concourse*, 175 A.D.2d 747, 750, 573 N.Y.S.2d 669, 672 (1st Dep't 1991) (mem.) (refusing to vacate stipulation and noting that parties' attorneys negotiated stipulation).

[45] *See Genesis Holding LLC v. Watson*, 5 Misc. 3d 127(A), 2004 N.Y. Slip Op. 51218(U), *1, 2004 WL 2360008, at *1, 2004 N.Y. Misc. LEXIS 1804, at *2-3 (App. Term 1st Dep't Oct. 15, 2004) (per curiam) (vacating default because lawyer who signed stipulation for tenant was never retained).

[46] *See N.Y.C. Hous. Auth. v. Soto*, N.Y.L.J. Apr. 16, 1993, at 25, col. 5 (App. Term 1st Dep't) (per curiam) (declining to vacate stipulation because counsel represented tenant when stipulation was signed); *but cf.*, *Dep't of Hous. Pres. & Develop. v. Maccarone*, N.Y. L.J., Oct. 16, 2002, at 24, col. 4 (Hous. Part Civ. Ct. Richmond Co. 2002) (Gerald Lebovits, J.) (vacating two-attorney stipulation while explaining difference between *Hallock* and *Frutiger* line of cases), *rev'd on other grounds mem.*, N.Y. L.J., May 25, 2005, at 19, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.).

[47] *See, e.g.*, *Thelma Realty v. Harvey*, 190 Misc. 2d 303, 307, 737 N.Y.S.2d 500, 503 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.) (affirming Civil Court's vacatur because tenant signed stipulation without counsel and waived defenses in stipulation).

[48] *Harbor View Ctr., Inc. v. Berichi*, N.Y.L.J., Apr. 1, 1993, at 26, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

[49] *City of New York v. Hicks*, N.Y.L.J., Feb. 3, 1992, at 24, col. 4 (App. Term 1st Dep't) (per curiam) (relieving tenant from stipulation because she was ill and mistook landlord's attorney for court-appointed attorney).

[50] *Holding v. Lambert*, N.Y. L.J., Nov. 27, 2002, at 20, col. 3 (Hous. Part Civ. Ct. Bronx Co.) (granting APS's motion to appoint guardian ad litem for tenant and stating that guardian could move later to vacate stipulation).

[51] RPAPL 749(3); Finkelstein & Ferrara, *supra* note 8, at § 15:625, at 15-360.

[52] *Third City Corp. v. Lee*, 41 A.D.2d 611, 612, 340 N.Y.S.2d 654, 655 (1st Dep't 1973) (per curiam) (entitling dispossessed tenant to relief but finding that his failure to join new party in possession leaves him only with his already-commenced action for damages); *In re Joseph v. Cheeseboro*, 42 Misc. 2d 917, 919, 248 N.Y.S.2d 969, 971 (Civ. Ct. N.Y. Co. 1964) (noting that RPAPL 749 does not rob court of power to act when warrant issues improperly), *rev'd on other grounds*, 43 Misc. 2d 702, 251 N.Y.S.2d 975 (App. Term 1st Dep't 1964) (per curiam); 3 Joseph Rasch, *Landlord Tenant—Including Summary Proceedings* § 46:7, at 196 (Robert F. Dolan ed., 4th ed. 1998).

[53] *Torres*, 61 A.D.2d at 682 n.1, 403 N.Y.S.2d at 528 n.1; *Albany*, 46 Misc. 2d at 917, 261 N.Y.S.2d at 363.

[54] *See Sorkin v. Salazar*, N.Y.L.J., Oct. 24, 2000, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (finding tenant's default excusable as attributable to DSS's delay); *Fisher v. Nugent*, N.Y.L.J., Sept. 28, 1995, at 30, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1995) (mem.) (finding good cause to stay warrant because tenant's defaults were attributable to DSS).

[55] *See Marcus v. Boonsompornkul*, 2002 N.Y. Slip Op. 40266(U), *1, 2002 WL 1414095, at *1, 2002 N.Y. Misc. LEXIS 752, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 1, 2002) (mem.) (remanding for hearing on whether landlord engaged in misconduct or fraud by telling tenant she had 12 days to pay when she was evicted in two days); *Unity Assocs. LP v. Spicer*, N.Y.L.J., June 6, 2000, at 30, col. 1 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (noting that tenant was unaware of problem with subsidy while landlord knew that subsidy checks were not coming in).

[56] *1635 Union St. Realty LLC v. Tannis*, 2002 N.Y. Slip Op. 50683(U), *1, 2002 N.Y. Misc. LEXIS 1938, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. Dec. 20, 2002 (mem.) (noting that landlord failed to credit tenant $680 in stipulation).

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[57] *See 467 42nd St., Inc. v. Decker*, 186 Misc. 2d 439, 440, 719 N.Y.S.2d 798, 799 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.) (finding that landlord's right to evict was vitiated by its accepting rent and refusing to reimburse tenant after judgment was satisfied).

[58] *See Sutter Houses v. Diaz*, N.Y.L.J., June 1, 1990, at 25, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (stating that landlord's fraud or misconduct in facilitating warrant's execution are grounds to restore tenant to possession).

[59] *101 Maiden Lane Realty Co., LLC. v. Han Ho*, 1 Misc. 3d 908(A), 2004 N.Y. Slip Op. 50002(U), *2, 781 N.Y.S.2d 628(A), 2004 WL 190076, at *2, 2004 N.Y. Misc. LEXIS 15, at *3-4 (Civ. Ct. N.Y. Co. Jan. 12, 2004) (noting that controlling factor is landlord's intent when accepting rent arrears).

[60] *See J. A. R. Mgt. Corp. v. Foster*, 109 Misc. 2d 693, 694, 442 N.Y.S.2d 723, 724 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1980) (mem.) (stating that revival is not automatic upon landlord's accepting rent).

[61] *Kew Gardens Assocs. LLC v. Camacho*, 3 Misc. 3d 135(A), 2004 N.Y. Slip Op. 50473(U), *1, 2004 WL 1243415, at *1, 2004 N.Y. Misc. LEXIS 693, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 3, 2004) (mem.) (restoring tenant to possession because landlord ratified renewal lease after warrant issued).

[62] *See 2785 Ocean Pkwy. Assocs. v. Stern*, N.Y.L.J., Jan. 11, 1995, at 31, col. 4 (Hous. Part Civ. Ct. Kings Co.) (noting split between First and Second Departments); Lawrence Schirro, *Orders to Show Cause in Housing Court*, 25 Westchester B.J. 71, 75-80 (1998) (noting departments' different approaches to granting stay and restoration motions).

[63] *See Pomeroy Co. v. Thompson*, 5 Misc. 3d 51, 51, 784 N.Y.S.2d 278, 278 (App. Term 1st Dep't 2003) (per curiam) (citing *Brusco*, 84 N.Y.2d at 682, 621 N.Y.S.2d at 294 (stating that "Civil Court may, in appropriate circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed")); *Central Brooklyn Urban Dev. Corp. v. Copeland*, 122 Misc. 2d 726, 729, 471 N.Y.S.2d 989, 993 (Hous. Part Civ. Ct. Kings Co. 1984) (citing *Oppenheim v. Spike*, 107 Misc. 2d 55, 56, 437 N.Y.S.2d 826, 828 (App. Term 1st Dep't 1980) (per curiam)).

[64] 1 Misc. 3d 833, 837, 766 N.Y.S.2d 540, 542-43 (Hous. Part Civ. Ct. Bronx County 2003).

[65] *See id.*, 766 N.Y.S.2d. at 542-43.

[66] *See Allerton Assocs. v. Torres*, N.Y. L.J., Oct. 4, 2004, at 18, col. 3 (Hous. Part Civ. Ct. Bronx Co.) (restoring tenant to possession because DSS caused her default).

[67] *E.g., Kohl v. Fusco*, 164 Misc. 2d 431, 439, 624 N.Y.S.2d 509, 513 (Hous. Part Civ. Ct. Bronx Co. 1994); Andrew Scherer, *Residential Landlord-Tenant Law in New York* § 17:39, at 925 (2007 ed.).

[68] *E.g., Sherman/Nagle Realty Corp. v. Garcia*, 2003 N.Y. Slip Op. 50631(U), *1, 2003 WL 1701519, at*1, 2003 N.Y. Misc. LEXIS 223, at *1 (App. Term 1st Dep't Mar. 12, 2003) (per curiam) (holding that RPAPL 749(3) does not prevent Civil Court from restoring tenant to possession, assuming that tenant tenders landlord all rent arrears).

When Your Adversary May Be A Few Cards Short Of A Complete Deck, What's the Deal?

By Carolyn Z. Rualo[1]

How often it is observed that a lawyer who represents himself has a fool for a client! Yet wise as that aphorism is, it is all the more striking when the lawyer is not only self-representing, but perhaps sufficiently mentally ill as to be "an adult incapable of adequately prosecuting or defending his rights."[2] This illness will, in the context of landlord-tenant law, most often first show up in the cause of action that is being prosecuted against this unfortunate person. It will most typically be some species of nuisance proceeding. However, in the case of the pro se attorney, the illness will also show up in

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