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Nonpayment Proceedings: The So-Called Spiegel Defense—Part II

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Nonpayment Proceedings: The So-Called Spiegel Defense

by Gerald Lebovits, Esq.

Editors' Note: This is the second of a two-part article. In Part I, which appeared in our May 2001 issue, the author examined the history and purpose of the Spiegel Law and the ongoing debate over who may invoke its benefits. Part II of the article, below, looks at whether a nonpayment proceeding should be stayed when the defense is raised, and discusses the elements of the affirmative defense.

Is the Spiegel Defense a Complete Defense? To Stay or Not to Stay

Among the controversies Social Services Law ("SSL") § 143-b, the so-called Spiegel Defense, has generated is whether the defense--if it benefits tenants at all--is a defense that leads to dismissal, with or without prejudice. In the pretrial, reported *142 South Realty Corp. v. Maldonado*, the Housing Part found that the Spiegel defense "provides for a complete abatement of rent" if its conditions are met.[1] The court further found that if the summary-judgment papers raise no triable issue of fact, summary judgment should be granted, and if the papers do raise issues of fact, there should be a trial at which the Spiegel defense may be interposed and defended against. That is the substantive law this article commends, and that is the best procedure to follow. *142 South Realty* might best have adjourned not for trial but for a Spiegel hearing to narrow the issues and get a quick resolution for all sides. If facts are disputed, the Spiegel defense contemplates a pretrial Spiegel hearing. As the Court of Appeals wrote in *Farrell*, "the statute 'import[s] a hearing,'" a Spiegel hearing.[2] Only if no summary-judgment motion is made should *(continued on page 2)*

New York City Civil Court: New Housing Court Judge Appointed

Chief Administrative Judge Jonathan Lippman has announced that Maria Ressos has been appointed a Judge of the New York City Housing Court, effective May 4, 2001.

Ms. Ressos has served as a court attorney since 1994, most recently for Judge Ernest Cavallo, the Supervising Judge of the Housing Court, New York County. Previously, she was an associate attorney in the private firm of Cristal and Lipsky. She received her law degree from New York Law School in 1992, after having graduated from Marymount Manhattan College and Taylor Business Institute. ◆

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the Spiegel affirmative defense be reserved for trial, assuming that Spiegel is raised in the tenant's preanswer motion or answer to the landlord's nonpayment petition.[3]

A series of unreported cases hold that the Spiegel defense requires dismissal with prejudice.[4] But a few reported cases hold that a landlord may reinstate a case dismissed or stayed on Spiegel grounds when violations have been corrected. These cases, respectfully, are wrong. They suggest, without saying so, and sometimes by saying just the opposite, that either HRA/DSS or tenants have no right to withhold rent. Under § 143-b(6), however, HRA/DSS may, but need not, pay rent if there is a violation, and HRA/DSS has the option to pay back rent whether or not the landlord corrects the violation. These cases further suggest, without saying so, that tenants do not have the authority to withhold rent. But the Spiegel Law protects tenants, not merely the welfare agency.

In *Lalita, LLC v. Milon*,[5] for example, the Suffolk County District Court noted that the Spiegel defense is "a complete defense" but, without citing a case for its holding, paradoxically dismissed the petition "without prejudice to the institution of new proceedings after all violations reported to DSS have been cleared and dismissed of record." In *Podsiadlo v. Ramos*,[6] the Civil Court, Kings County, without citing a case or articulating its reasoning, wrote that "the Court finds that the better procedure to follow is to stay this proceeding until the petitioner repairs the conditions . . . . As required by the Spiegel Law, no judgment of possession or for money will be issued by the Court until the Court is satisfied that the respondents' apartment has been repaired and the violations placed against the building have been removed." Relying on *Schaeffer*, which, as we learned earlier, was decided before the Spiegel Law was amended in 1965 to eliminate a landlord's right to reinstate proceedings to collect back rent from a welfare agency,[7] the Housing Part, in *Dearie v. Hunter*, a case reversed on other grounds,[8] wrote that "[t]he Spiegel Act operates as a complete defense to a nonpayment proceeding, and once invoked the proceeding is stayed until the repairs are completed."[9] For that proposition the court also cited Andrew Scherer, *Residential Landlord-Tenant Law in New York* § 12:124 (1997).

Similarly, in *Crystal Apartments Group v. Hubbard*, again relying on *Schaeffer*, the Housing Part wrote that violations "provide a basis to withhold rent" but, again paradoxically, that "nothing in the statute or case law mandat[es] dismissal with prejudice."[10] The *Crystal Apts.* court then stayed the proceeding for a trial after "the vio-

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lations are corrected,"[11] quoting Scherer, *supra*, at § 12:124, that "the 'Spiegel Law operates as a *complete defense to a nonpayment eviction* proceeding until repairs are done.'"[12]

Lalita, *Podsiadlo*, *Dearie*, and *Crystal Apts.* are internally inconsistent. A defense cannot be both "complete" or allow rent to be "withheld" if there is a hazardous violation and also allow a landlord to recover rent, minus a portion abated under some other defense, once the violation is corrected. They also rely on no authority or incorrect authority. *Dearie* and *Crystal Apts.*, for example, rely not only on *Schaeffer* but also on an old misstatement from Professor Scherer for the view that a landlord may reinstate proceedings after it corrects all violations. The *Dearie* and *Crystal Apts.* courts indeed quote Professor Scherer's 1997 text, but he has since changed his mind, and rightly so. His 2000 revision entirely deletes any suggestion that the Spiegel Law leads to a stay that terminates when "repairs are done." He now explains that "[t]he Spiegel Law operates as a complete defense to a nonpayment eviction proceeding"[13] and, ironically citing *Dearie* and *Crystal Apts.*, which of course said the opposite because they relied on his previous view, that "[t]he landlord may not obtain a possessory or money judgment against the tenant for the period the hazardous violations were outstanding."[14] The citations notwithstanding, Professor Scherer's 2000 revision is precisely right.

The *Crystal Apts.* court wrote that "nothing in the statute or case law mandat[es] dismissal with prejudice."[15] But the Court of Appeals's decision in *Farrell* mandates just that. Lower courts may not ignore it or wish it away. And the statute mandates dismissal with prejudice in two places. First, SSL § 143-b(5), added in 1965, provides that a "landlord shall not be entitled to . . . judgment awarding him possession of the premises . . . or to a money judgment against the tenant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law relating to dangerous or hazardous conditions or conditions detrimental to life or health." Significantly, the text forbids eviction or a money judgment "for any period" there are violations, not merely "during any period."

Second, the 1965 amendment to SSL § 143-b(6), on which *Farrell* relied in dismissing with prejudice,[16] gives the welfare department the discretion not to pay rent after a landlord repairs the violation. That amendment gives tenants a concurrent right not to pay after a violation is corrected. That concurrent right is not stated in the statute in so many words. And some might argue that the point of the Spiegel Law is to protect tenants whose rent is paid out of public funds directly to a landlord because, unlike tenants not on public assistance, a welfare recipient cannot withhold rent paid by HRA/DSS. But as the *Kouletas* court noted, the Legislature amended the Spiegel Law to eliminate a potential iniquity: "If the welfare department determined not to pay the rent after the violation had been cleared, the landlord was entitled to an order evicting the tenant."[17]

Whether a tenant is evicted cannot depend on the whim of HRA/DSS to pay or not after case begins anew or a stay expires. The Legislature designed the 1965 amendment to foreclose that possibility.

After all, DSS need not obtain a tenant's permission to stop sending direct-vendor checks to a landlord or to continue paying rent subsidies. A tenant's CPLR Art. 78 action to compel DSS to pay or not pay does not lie under the Spiegel Law.[18] Nor may DSS be forced to deposit money into escrow to prevent eviction, if the tenant loses the nonpayment proceeding.[19] Some courts hold that tenants sued for not paying rent may implead DSS to get it to represent them and to hold DSS liable for any judgment a landlord recovers.[20] In reality, though, the current HRA/DSS rarely stops direct-vendor checks when it knows about violations,[21] no longer represents those on public assistance sued for nonpayment of rent, has not capped rent allowances since 1975, and provided "individually constructed assistance grants" only until 1969.[22] For that reason *Crystal Apts.* appropriately held that the Spiegel defense applies even if a tenant withholds her portion of the rent while DSS pays its portion, because the Spiegel Law defense hinges on the tenant's status as a public-assistance recipient, not on whether DSS actually withheld the rent.[23]

SSL § 143-b provides that the defense is valid "in any action or summary proceeding against a welfare recipient." Thus, under *Crystal Apts.*, a public-assistance tenant may interpose the defense even if DSS continues to pay. If the Legislature had intended the Spiegel Law to apply only to the DSS portion, the *Crystal Apts.* court wrote, "it would not have used inclusive language, such as a *valid defense* to all welfare recipients for nonpayment proceedings if there are violations in a building and not necessarily in the apartment."[24] To even stronger effect on this point is the brief opinion in *Portnoy v. Hill*, in which the Binghamton City Court found that a tenant has a complete defense in a nonpayment proceeding not to pay rent "for that period that the Social Services Department might have withheld it"[25] but did not.

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On this issue, *Notre Dame Leasing L.L.C. v. Rosario*,[26] discussed in Part I of this article, held that tenants may invoke the Spiegel defense only if HRA/DSS withholds shelter payments. Randolph Petsche, Esq., of the Queens Legal Services Corp. is currently seeking reargument or leave to the Appellate Division, Second Department, on numerous grounds, including, in Point I of his brief, that the Appellate Term decided the case on an issue never raised below, in the appellate briefs, or at oral argument. That the issue calls for appellate clarification is evident from the split in unpublished Housing Part opinions. As reported to the author by Matthew Chachère, Esq., of the Northern Manhattan Improvement Corp. Legal Services, at least four unreported decisions have held that Spiegel applies regardless whether HRA/DSS has withheld rent,[27] at least four unreported decisions have held that Spiegel applies only if HRA/DSS has withheld rent,[28] and at least one unreported decision has held that Spiegel applies to the HRA/DSS portion but not to the tenant's portion.[29] Given this split, staying the course is an unsatisfactory option.

Moreover, the Spiegel Law does not contemplate stays. That is another nail in the coffin against allowing a Spiegel defense to offer tenants a mere stay with the landlord being entitled to recommence after a compliance hearing devoted to establishing whether it corrected the violation. Nothing in SSL § 143-b uses the term "stay," a court order that suspends an action or proceeding until the parties are directed otherwise. Additionally, although CPLR 2201 provides that "except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just," granting a stay before trial removes the "summary" nature of the proceeding and should not be granted absent good cause.[30] In the end it is a code-violating, dilatory landlord who benefits from a stay. In that time the landlord may repair the violations with an eye toward suing for back rent. That should be forbidden. The only thing "summary" about granting a stay for compliance is that a case that should be dismissed with prejudice in the summer may continue a year later and be disposed of without prejudice only the next summer.

Aside from CPLR 2201, RPAPL § 755 provides that a tenant constructively evicted or living with "conditions dangerous to life, health, or safety" may obtain a stay if the tenant deposits the rent monies with the court clerk. But RPAPL § 755 does not apply to Spiegel cases. RPAPL § 745(2)(a)(iii) already exempts those who raise the Spiegel defense from depositing rent, and, according to *Schaeffer*, the Spiegel Law is an "additional remedy" to anything in the CPLR, the RPL, and the RPAPL.[31] Allowing a stay to give a landlord the right to begin anew for back rent after correcting the violation helps a tenant correct the violation. But a remedy to correct violations already exists: the HP proceeding in the Housing Part. An HP remedy is no "additional remedy."[32] It suggests that the Legislature spoke for naught in enacting the Spiegel Law. The Spiegel Law was not enacted to be superfluous.[33]

Instead of adjourning for compliance or granting a stay, the court should dismiss with prejudice and issue injunctive relief to order the landlord to correct the violation. Every court in the Housing Part has HP jurisdiction under Civil Court Act § 110(c). If the landlord does not correct, the tenant may restore by order to show cause.

Nor do appellate courts approve Spiegel stays. In *Dearie*, for example, the Housing Part concluded that the Spiegel Law operates as a "complete defense to a nonpayment proceeding" and requires the court to stay the proceeding until the repairs are completed.[34] In modifying the Housing Part's Spiegel stay order, the Appellate Term, First Department, remanded for trial without any stay provision.[35] Noting what happened on appeal in *Dearie*, the Housing Part in *Vanderveer Estates Holding, LLC v. Nelson*[36] denied a stay and ordered a trial in another Spiegel case. That cannot be the solution either, for doing so impacts on the nature of summary proceedings. Holding a trial instead of granting summary judgment, if appropriate, is like abolishing summary-judgment motions because they waste time. The whole purpose of summary judgment is to save time. Even if a trial were to come speedily, it seems a waste to force landlords to prove their prima facie cases and tenants to defend on grounds in addition to Spiegel if the case can be resolved on Spiegel alone.

Who Has the Burden to Prove What?

The Spiegel defense is an affirmative defense. The burden to prove any affirmative defense is on the party who raises it.[37] To win a Spiegel defense, tenants must prove two things, and maybe three.

A. Public Assistance

To prevail on Spiegel, tenants must first prove that they, or a lawful member of their household, were on public assistance during the period covered by the Spiegel defense.[38] It is not enough that the tenant is an applicant for public assistance.

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B. Hazardous Violation

Second, tenants must prove that the building in which they live has one or more housing-code violations hazardous to life or health. The Spiegel Law does not define what constitutes a hazardous condition, but by definition the term includes any class "B" "hazardous"[39] or class "C" "immediately hazardous" violation under the HMC,[40] but not a class "A" violation or a violation in the making.[41] The violation may be anywhere in the building—in the welfare recipient's apartment, in a public area, or even, as *Farrell* teaches, in a nonwelfare tenant's apartment.[42] If an appropriate code-enforcement agency, such as the Department of Housing Preservation and Development ("HPD"), has not labeled the condition that way by issuing a notice of violation, the defense must fail, because it will not fulfill the third (supposed, as explained below) prerequisite: that HPD report the violation to HRA/DSS. Thus, it was error, respectfully, for the court in *Urban Holding, Inc. v. Brevard*[43] to vacate a stipulation consenting to final judgment when the tenant cited no violations and simply requested an HPD inspection in a possible fishing expedition. A condition dangerous to life or health not yet posted as a violation may lead to myriad defenses, notably the warranty-of-habitability defense, but a Spiegel defense is not one of them. A landlord must have an opportunity to correct the violation, and the HMC gives landlords thirty days from HPD's notice of violation to correct a class "B" violation and twenty-four hours to correct a class "C" violation.[44]

Thus, if it seems draconian to deny a landlord rent for a single "B" violation anywhere in the building, landlords will not suffer a Spiegel fate worse than loss of rent if they correct within the time limits proscribed by law, for we must face the truth: One "B" violation does not a slumlord make. As the *Anthony v. Beamon* court found, a tenant must show "that the petitioner violated the building laws for the DSS to stop rental payments under Social Services Law § 143-b."[45] It is not enough that HRA/DSS simply withheld rent, if it does so without a real violation.[46] Whether a condition is dangerous and hazardous to the life and health of a building's occupants is a factual determination for the court of first instance.[47]

To prove hazardous conditions, a tenant may rely on MDL § 328(3)(b), which provides that a "printed computerized violation files of the department responsible for maintaining such files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards . . . shall be prima facie evidence of any matter stated therein and the courts shall take judicial notice thereof . . . ." The computer in each Housing Part suffices. Computerized enforcement information from the HPD database, to which the Housing Part has immediate access, is a public document of which a court must take judicial notice without further authentication or foundation.[48] As the *First Time Realty Co. v. Payton* court noted, however, MDL § 328(3) creates a rebuttable presumption a landlord may overcome.[49]

Tenants may also rely on HPD inspection reports, which are admissible under CPLR 4518(c) and are prima facie proof of the facts they contain.[50]

Once the tenant proves the hazardous violation, the burden falls to the landlord to disprove it. The *Shy* court was not too timid to explain that under the Spiegel Law, "[t]he landlord as the petitioner in a summary proceeding also has the burden to disprove the alleged violation and prove the correction or repair."[51] The Spiegel defense fails if "violations occur as the result of the tenant's misuse, rather than mere use, of the premises."[52] A tenant absent from her apartment on two court-ordered inspections and who fails to give the landlord access to repair may not succeed on a Spiegel defense.[53]

C. Notification to HRA/DSS

A host of cases in recent years have found that tenants may succeed on a Spiegel defense only if they prove a third element: that HPD told HRA/DSS about the violation.[54] To understand why a landlord or any other private person has standing to complain that one city agency did not notify another about anything, you have to understand that the Spiegel defense is a so-called defense.

The supposed reporting requirement comes from a hyperliteral reading of SSL § 143-b(5)(c), which provides that "[t]he defenses provided herein in relation to an action or proceeding against a welfare recipient for nonpayment of rent shall apply only with respect to viola-

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tions reported to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations."

Talk about poor legislative drafting. That provision makes no sense, not merely because it lacks common sense if read literally, but also because of SSL § 143-b(2), which requires reporting to "the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations": "A report of each such violation shall be made to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations." Case law has interpreted SSL § 143-b(2) to mean exactly what it says: "The statute . . . requires the appropriate department to report any such . . . violations in buildings where welfare recipients reside which relate to conditions which are dangerous, hazardous or detrimental ro life or health."[55] If HPD *shall* report to HRA/DSS, how can the Spiegel defense arise only *if* HPD reports to HRS/DSS?

No reported case or secondary authority has remarked on this legislative contradiction, a contradiction that by itself eliminates the supposed third-element requirement that a tenant may prevail on Spiegel only if HPD reports violations to HRA/DSS. As the Court of Appeals has long held, "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, . . . or other objectionable results."[56] The hardship and injustice here is that tenants with legitimate Spiegel defenses have been evicted over the years, and violations have gone uncorrected, and taxpayers have supported code violators, because tenants have been unable to prove that HPD reported serious, uncorrected violations to HRA/DSS.

Ultimately, the only purpose for SSL § 143-b(5)(c) is practical. HRA/DSS cannot raise the Spiegel defense if it does not know about a violation, and it may not raise the defense if a violation does not exist. The Legislature did not enact SSL § 143-b(5)(c) to protect a landlord's rights, to offer a landlord a counter-defense to the Spiegel defense, or to erect a roadblock to Spiegel Law enforcement. The Legislature enacted SSL § 143-b(5)(c) to encourage welfare agencies to get records from code-enforcement agencies. And the Housing Part itself has interpreted the Spiegel Law to allow a tenant to prevail whether or not HPD reports a hazardous violation to HRA/DSS. On the answer form for the self-represented, used for those who answer orally, the Spiegel defense is under the heading "Apartment." The form reads that "the Respondent receives Public Assistance and there are Housing Code violations in the apartment or the building." Conspicuously absent is any reporting requirement.

Every court that has engrafted a reporting requirement has set up a roadblock to enforcing the Spiegel Law. Roadblocks are inappropriate. The Court of Appeals in *Farrell* has termed the Spiegel Law "remedial legislation"[57] that must be interpreted liberally to fight slumlordism, to protect our housing stock, and to prevent public money from supporting housing-code violators. The reporting engraftment is a roadblock because in our technologically rich computer age "[t]he Department of Social Services is notified via the Department of Housing Preservation and Development of all violations of record in multiple dwellings."[58] The reporting engraftment is a roadblock because, currently, HRA/DSS will typically forward direct-vendor checks even to the most egregious Spiegel offenders and then decline to represent tenants under the Spiegel Law, as it did years ago, when it understood that it was in interest to do so. And the reporting engraftment is a roadblock because those most in need of Spiegel protection—the poor, the victims of real slumlords, the unrepresented, all rolled into one—cannot secure independent proof that HPD reported a violation to HRA/DSS, a report utterly beyond their control anyway.

What is the unrepresented on public assistance, who has never even heard of Judge Spiegel let alone the defense that bears his name, expected to do? Subpoena an HRA/DSS official to testify at a pretrial Spiegel hearing—the ones current courts put off until trial—to testify that HPD notified HRA/DSS? The self-represented do not have an attorney's subpoena power. And as likely as not, the HRA/DSS official would testify that when HRA/DSS got that computer notification, it reacted as one might react on getting a card to the New York Public Library system and being told, "Look it up," without being told what to look up.

Two examples. In *Vanderveer Estates Holding*,[59] the Housing Part, in dictum because the court took pains to consider in advance of trial an evidentiary issue it reserved for the trial judge, discussed a certified business-record exhibit from DSS that "purports to be an admission that 'it [DSS] has received notice of the specific violations that exist at the subject premises.'" Let us not haggle over the court's use of "purports" and "admission," although DSS's certification was hardly a confession to a crime. The court might have expressed amazement that a tenant on public assistance actually got HRA/DSS to cough up a certified letter to prove that it was notified. Instead, the court posited that the certifica-

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tion is inadmissible because it did not come from HPD.

In *Pentalis v. Archer*, the Suffolk County District Court went even further: It did not merely posit the inadmissibility of a letter from DSS asking the landlord to correct violations, thus confirming that DSS knew about the violations; the court held the letter outright insufficient to prove that DSS was notified.[60]

These two cases may prove that some are never satisfied until the chain of custody becomes a ball and chain. What they really prove is that the Spiegel defense is a so-called defense, that Spiegel's Law is an example of Murphy's Law. Just because the current HRA/DSS almost always sends landlords direct-vendor checks in spite of violations does not mean it is unaware of the violations.

The debate over this nonexistent, wholly impossible, reporting requirement has centered on something awfully peculiar. This debate teaches yet again that once you start down the wrong path, you can get distracted along the way and never reach your destination. On October 14, 1997, the Commissioner of HPD proudly wrote the Commissioner of HRA to "confirm that, pursuant to New York State's Social Services Law Section 143-b, [HPD] has notified and will continue to notify . . . [HRA] of all HPD-issued violations outstanding against multiple dwellings in NYC . . . . HPD has provided electronic access to its violations database." The Civil Court's Administrative Judge mentioned that letter to the judges of the Civil Court and the Housing Part in a memorandum dated October 20, 1997, and passed it along in another memorandum entitled "Spiegel Law" three days later. To satisfy the perceived condition precedent to winning a Spiegel case, tenants, who instantly secured these internal memorandums, then tried to use them to prove that HPD was finally doing what SSL § 143-b(2) has required it to do since 1965. That was not to be.

Only one reported decision, *Dearie*, modified on other grounds, accepted these letters to prove the facts asserted in them.[61] Some, such as *2326 Grand Ass'n*,[62] decided in March 1998, cite two cases decided before HPD's computer interfaced with HRA/DSS's, *Mid Island Collision, Inc. v. Fiore*[63] and *Pantalis v. Archer*,[64] Suffolk County cases that predate New York City's HPD-HRA/DSS computer linkage. Another, *Crystal Apts.*, wrote in one sentence that "[t]his Court may take judicial notice of these documents" and in the next that "[t]hese documents are not accepted by this Court to establish that notice was in fact provided."[65] Still others, such as *142 South Realty*[66] and *First Time Realty*,[67] found that the 1997 letter showing interface and the Administrative Judge's 1997 memorandums giving notice of that are unreliable hearsay that, moreover, do not prove that HRA/DSS has actual notice of a particular violation.

142 South Realty and *First Time Realty*, relying on the unpublished *Cannova v. Christ*,[68] are questionable. The three cases provide, in *Cannova*'s words, that "respondent must prove that DSS had actual notice of the violations." But SSL § 143-b(5)(c) simply says that "[a] report of each such violation shall be made . . . ." Requiring that HRA/DSS have "actual notice" when the statute requires, at most, that HPD "report" gives meaning to the phrase "so called" Spiegel defense. But even that is not what is so peculiar.

Here is what is so peculiar. "Unreliable hearsay" cannot come from a document reciting facts known to be true, denied by none, confirmed by the Administrative Judge, and nearly impossible to prove any other way. And when one governmental agency forwards another agency *all* violation records, records available to the public and which pop up on every Housing Part computer screen at the touch of a button, notice is necessarily given about one *particular* violation. Nor is it as if HPD's database contains only its own records. Under MDL § 328(1), HPD is required to and does maintain violation records of every New York City municipal agency that has jurisdiction over multiple dwellings.

This peculiarity has led to the unreported *Sosa v. Orta*,[69] in which the court, in March 2001, complained that the 1997 letter from HPD "is over three and a half years old. The Court has no way of knowing from a 1997 letter whether the two agencies (HPD &HRA) still follow this notification policy . . . . The evidence . . . is hearsay and needed either the original 1997 letter or an updated one to be certified by the appropriate agency." It is, however, a bit much to expect everyone who asserts the Spiegel defense to knock on HPD's door, and the Administrative Judge's chambers, to get the original 1997 letters or updated, certified ones. To comply with *Sosa*, HPD will have to staff "Spiegel Certification Offices" in every borough, complete with a Spiegel toll-free "800" number.

Assuming that HPD's letter is hearsay, should the courts take judicial notice that HPD notifies HRA of housing violations? "Judicial notice" entitles judges to accept, and relieves litigants from proving, easily accessible facts of indisputable accuracy.[70] HPD's letter is a matter of public record, admissible like all other, similar letters.[71] Assuming that a condition precedent to the Spiegel Law is that a code-enforcement agency must notify the welfare agency about a violation, courts should accept HPD's letter under the doctrine of judicial notice

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and dismantle the unfair roadblock. A few unreported decisions have taken judicial notice that HPD reports violations to HRA/DSS.[72] Courts should not resort to applying judicial notice when the Spiegel Law may not have a true reporting requirement at all. But if there is to be a reporting requirement, the reasoning in these cases should be followed.

Conclusion

Few defenses in landlord-tenant law have been so mangled and maligned as the Spiegel defense. Meant to defeat slumlords, it ensnares even New York City.[73] The Spiegel defense has been misunderstood. Some disagree with it. The Court of Appeals opinion in *Farrell* and a 1965 amendment have been forgotten. The Spiegel defense suffered from disuse since the Housing Part began until the rent-deposit exception rejuvenated it. But the Spiegel defense is on the books and, agree or disagree with it, it has much to commend it. It is "one of the means the Legislature has made available to ensure the maintenance of decent housing."[74] While safeguarding the due-process rights of landlords, and limiting economic sanctions against landlords who correct violations quickly, the Spiegel Law, as the Legislature envisioned it and as the Court of Appeals analyzed it, safeguards the public, the poor, us all. Courts should call the defense, mostly interpreted unfairly against landlords, tenants, and the public alike, as it was meant to be called, and call it "so called" no longer.

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Endnotes:

1. N.Y.L.J., Dec. 15, 1999, at 30, col. 1 (Housing Pt., Kings Co.).

2. 19 N.Y.2d at 493, 281 N.Y.S.2d at 6 (quoting *In re Department of Bldgs. of City of N.Y. (Philco Realty Corp.)*, 14 N.Y.2d 291, 302, 251 N.Y.S.2d 441, 450 (1964)).

3. Either side may move for summary judgment. CPLR 3212(a). Summary judgment is warranted if there is no triable issue as a matter of fact. The movant must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. NYU Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317 (1985) (mem.). Then, "[t]o defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient." *Mallad Construction Corp. v. County Fed. Savings & Loan Ass'n*, 32 N.Y.2d 185, 290, 344 N.Y.S.2d 925, 929-30 (1973). In light of that, it is respectfully suggested that *Cannova v. Christ*, 110040/98, July 8, 1999 (Housing Pt., Kings County) (Wendt, J.) (unpublished opinion), on which such cases as *First Time Realty Co. v. Payton*, N.Y.L.J., Sept. 15, 1999, at 31, col. 3 (Housing Pt., Kings County), rely, is wrong. Both *Cannova* and *First Time Realty* acknowledged that the landlord did not dispute the existence of hazardous violations, presumptively reliable and of which the court must take notice under MDL § 328(c). Yet both cases denied summary judgment to give the landlord "an opportunity at trial to overcome the recorded findings of the building inspector."

4. *See, e.g.*, *Sosa v. Orta*, 77577/00, Nov. 3, 2000 (Housing Pt., Kings County) (Thomas, J.) ("Any claim for rent by a petitioner for the period violations existed in the premises would require dismissal of these claims with prejudice provided respondent is a PA recipient."); *Geomar Realty Inc. v. Morales*, 99130/98, July 16, 1999 (Housing Pt., Kings County) (Thomas, J.) ("[T]he Court agrees with respondent that any claim for rent for the entire period violations existed in the premises would require dismissal with prejudice."); *Crystal Apts. Group v. Gil*, 76420/98, Nov. 5, 1998 (Housing Pt., Queens County) (Grayshaw, J.) (dismissing with prejudice because of what SSL "clearly states").

5. N.Y.L.J., Feb. 10, 1999, at 30, col. 3 (Dist. Ct., Suffolk Co.).

6. N.Y.L.J., Jan. 17, 2001, at 30, col. 1 (Civ. Ct., Kings Co.).

7. *See also Manz Realty Corp. v. Herrera*, 90331/97, Feb 9, 1998 (Housing Pt., Kings County) (Wendt, J.) (unpublished opinion). Citing *Schaeffer*, the *Manz Realty* court wrote that "[t]his decision indicates that the Spiegel Law is not an absolute defense to a nonpayment proceeding, as the landlord would, apparently, be permitted to seek all arrears due, now subject to the defense of breach of the warranty of habitability (Real Property Law § 235-b), after the proven violations were cleared." Were it not for the Spiegel Law's 1965 amendment, the *Manz Realty* court would be right.

8. 183 Misc. 2d 336, 705 N.Y.S.2d 519 (App. T. 1st Dep't 2000) (per curiam).

9. 177 Misc. 2d 525, 527, 676 N.Y.S.2d 896, 897 (Housing Pt., N.Y. Co., 1998).

10. 178 Misc. 2d 333, 336-37, 679 N.Y.S.2d 262, 264 (Housing Pt., Queens Co., 1998).

11. *Id.* at 337, 679 N.Y.S.2d at 264.

12. *Id.* at 336, 679 N.Y.S.2d at 264 (emphasis added in *Crystal* Apts.).

13. Andrew Scherer, *Residential Landlord-Tenant Law in New York* § 12:125, at 12-46 (2000 supp.).

14. *Id.*

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15. 178 Misc. 2d at 336, 679 N.Y.S.2d at 264.

16. 19 N.Y.2d 491 n.2, 281 N.Y.S.2d at 4 n.2.

17. *Id.* (citing Memorandum for Hon. Sol N. Corbin, Apr. 15, 1965, Bill Jacket, L. 1965).

18. *In re Clark v. Richardson*, 136 Misc. 2d 715, *passim*, 519 N.Y.S.2d 298 (Sup. Ct., Monroe Co., 1987), *aff'd without opinion*, 151 A.D.2d 1052, 544 N.Y.S.2d 404 (4th Dep't 1989); *In re Fidler v. Kurtis*, 40 Misc. 2d 905, 907, 244 N.Y.S.2d 77, 79 (Sup. Ct., Westchester Co., 1963); *contra Williams*, 64 Misc. 2d at 958, 317 N.Y.S.2d at 111 (enjoining DSS under Spiegel Law from paying rent subsidies to landlords with violations).

19. *Estate of Wegner*, 88 Misc. 2d 418, 419, 388 N.Y.S.2d 258, 259 (Sur. Ct., Nassau Co., 1976).

20. *See, e.g.*, *Sessa v. Blakney*, 71 Misc. 2d 432, 435, 336 N.Y.S.2d 149, 152 (Yonkers City Ct. 1972); *Blackman v. Walker*, 65 Misc. 2d 138, 139, 316 N.Y.S.2d 930, 931 (Dist. Ct., Nassau Co., 1970);

21. Scherer, *supra* note 52, at § 12:124, at 12-46 (2000 supp.) ("View from the Bench" by Hon. Fern Fisher-Brandveen) ("The Spiegel Law is rarely used by the Department of Social Services."). Nor does HPD always fill in the gap. As one agency found, "because HPD does not have the resources to initiate litigation against most building owners for uncorrected violations, it is not likely that owners will be penalized for ignoring [notices of violation] from HPD." Office of the NYC Controller, Bureau of Audit, *Audit Report on the Department of Housing Preservation and Development's Enforcement of the Housing Maintenance Code*, No. MJ95- 0981, at 21 (June 10, 1995). Thus, 43% of class "C" violations exist a year after HPD inspectors certify them. *Id.* at 15.

22. *In re Bernstein v. Toia*, 43 N.Y.2d 437, 444 402 N.Y.S.2d 342, 345 (1977)

23. *Crystal Apts. Group*, 178 Misc.2d at 336, 679 N.Y.S.2d at 264. Of historical interest is *Trozze v. Drooney*, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghamton City Ct. 1962), which found the Spiegel defense unconstitutional because it may not inure to a welfare agency. The Court of Appeals rejected that argument in *In re Farrell*, but even the *Trozze* court agreed that tenants benefit from the Spiegel Law regardless what a welfare agency may do. As the court wrote, "To be sure, Section 143-b of the Social Welfare Law nowhere expressly states who, other than by implication, the tenant, can interpose the defense therein." *Id.* at 1062, 232 N.Y.S.2d at 141.

24. *Id.*, 679 N.Y.S.2d at 264.

25. *Portnoy v. Hill*, 57 Misc. 2d 1097, 1100, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968).

26. N.Y.L.J., Apr. 18, 2001, at 22, col. 1.

27. *Urban Holding, Inc. v. Brevard*, 52250/00, June 30, 2000 (Housing Pt., N.Y. County) (Rodriguez, J.); *Crystal Apts. Group v. Price*, 65987/98, Nov. 13, 1998 (Housing Pt., Queens County) (Katz, J.); *Crystal Apts. Group v. Gil*, 76420/98, Nov. 5, 1998 (Housing Pt., Queens County) (Grayshaw, J.); *Tudy Inc. v. Vargas*, 61968/98, Aug. 6, 1998 (Housing Pt., Kings County) (Callender, J.). To that group may be added *Tockwotten Assoc., Inc. v. Velez*, 50666/98 (Civ. Ct., N.Y. County) (Shulman, J.), which granted leave to amend an answer to defend on Spiegel, because the tenant, a DSS recipient, "has standing to assert this defense": "In addition to a tenant, this Spiegel defense also enables the HRA Commissioner, in effect, to assert a 'breach of warranty' defense, vis-a-vis, the cited violations against the building."

28. *Nealis v. Gebka*, 101039/99, Dec. 4, 2000 (Housing Pt., Kings County) (Birnbaum, J.); *Rutland Road Assoc. v. Deans*, 67078/99, Dec. 7, 1999 (Housing Pt., Kings County) (Birnbaum, J.); *427 Realty L.L.C. v. Olivares*, 79922/98, Oct. 15, 1998 (Housing Pt., N.Y. County) (Chin, J.); *Ambiance Realty v. Artilles*, 076764/99, Oct. 4, 1999 (Housing Pt., N.Y. County) (Schachner, J.) (handwritten opinion).

29. *Costiara v. Griffen*, 66290/00, Oct. 16, 2000 (Housing Pt., Queens County) (Badillo, J.)

30. *See Helping Out People Everywhere, Inc. v. Deich*, 160 Misc. 2d 1052, 1055, 615 N.Y.S.2d 215, 217 (App. T. 2d Dep't 1994) (mem.).

31. *Schaeffer*, 37 Misc.2d at 730, 233 N.Y.S.2d at 452.

32. The brief *Berkel v. McClendon*, 92992/98, July 2, 1999 (Housing Pt., Kings County) (Alterman, J.) (unpublished opinion), denied summary judgment, without prejudice to allowing the Spiegel defense to be raised at trial, on the basis that a concurrent HP proceeding was pending. But the Spiegel defense and HP proceedings are separate remedies that may be brought concurrently.

33. *See generally Mabie v. Fuller*, 255 N.Y. 194, 201, 174 N.E. 450, 453 (1931) ("We must assume that the Legislature in enacting the section intended that it should effect some change in the existing law and accomplish some useful purpose.").

34. *See* 177 Misc. 2d at 527, 676 N.Y.S.2d at 897.

35. *See* 183 Misc. 2d at 337, 705 N.Y.S.2d at 519.

36. N.Y.L.J., Jan. 10, 2001, at 30, col. 5 (Housing Pt., Kings Co.).

37. Jerome Prince, *Richardson on Evidence* § 3-211, at 121 (Richard T. Farrell 11th ed. 1995).

38. *Eastern Estates, LLC v. McPherson*, N.Y.L.J., May 19, 1999, at 30, col. 2 (Housing Pt., Kings Co.). Even though the tenant in *Eastern Estates* acknowledged that she was a welfare applicant, and not, as required, a welfare recipient, the court nonetheless vacated the stipulation and adjourned for a trial at which the tenant could raise a Spiegel defense.

39. Numerous cases hold, without contradiction, that a single class "B" violation suffices to invoke this aspect of the Spiegel defense. *See, e.g.*, *142 South Realty*, N.Y.L.J., Dec. 15, 1999, at 30, col. 1; *Kouletas Real Est.*, N.Y.L.J., Oct. 14, 1998, at 26, col. 6;

40. N.Y.C. Admin Code § 27-2115(c)(2) (class "B" hazardous violation); Admin. Code § 27-2115(c)(3) (class "C" immediately hazardous violation).

41. A mere complaint that a condition is dangerous or hazardous is insufficient absent a confirmed violation. *2326 Grand Ass'n*, 176 Misc.2d at 789, 673 N.Y.S.2d at 849.

42. *Schaeffer*, 37 Misc. 2d at 729, 233 N.Y.S.2d at 451 ("The language of the statute is crystal clear. The violations need not be lodged against the apartment or housing accommodations of the welfare recipient, but against the building, or any part thereof.") (citing SSL § 143-b(2) & (5)).

43. 52250/00, June 30, 2000 (Housing Pt., N.Y. County) (Rodriguez, J.).

44. N.Y.C. Admin., *supra*, note 79.

45. N.Y.L.J., Apr. 18, 1990, at 25, col. 5 (Dist. Ct., Nassau Co.).

46. *Id.*

47. *Farrell*, 19 N.Y.2d at 490 n.1, 281 N.Y.S.2d at 3 n.1.

48. E.g., Hoya *Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 178, 180 (App. T. 1st Dep't 1991) (per curiam).

49. N.Y.L.J., Sept. 15, 1999, at 31, col. 3. The *First Time Realty* court adjourned the case for trial to allow the landlord to rebut the MDL presumption. The more expeditious practice, however, is to require a landlord in response to a summary-judgment motion to raise nonconclusory issues of fact asserting corrections, and if the landlord does so to hold a Spiegel hearing, not to go straight to trial.

50. *DHPD v. Gottlieb*, 136 Misc. 2d 370, 376, 518 N.Y.S.2d 575, 580 (Civ. Ct., N.Y. Co., 1987) (citing *Milchman*, 39 Misc. 2d at 350, 240 N.Y.S.2d at 863-64 (discussing predecessor provision to CPLR in Spiegel context)).

51. *People v. Shy*, 70 Misc. 2d 92, 96, 332 N.Y.S.2d 561, 566 (Vill. of Spring Valley Just. Ct. 1972).

52. *In re Caravetto v. Springfield*, 54 Misc. 2d 759, 761, 283 N.Y.S.2d 298, 300 (Dist. Ct., Suffolk Co., 1967).

53. *2326 Grand Ass'n*, 176 Misc. 2d at 790, 673 N.Y.S.2d at 849.

54. *See* Daniel Finkelstein & Lucas A. Ferrara, *Landlord and Tenant Practice in New York* § 14:387, at 14-149 (1999 supp.) (collecting cases about reporting requirement).

55. *Amodeo v. County of Orange*, 94 Misc. 2d 53, 54, 404 N.Y.S.2d 221, 222 (Sup. Ct., Orange Co., 1977).

56. *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44, 80 N.E.2d 322, 325 (1948).

57. *See* 19 N.Y.2d at 493, 281 N.Y.S.2d at 7.

58. Scherer, *supra* note 52, at § 12:124, at 12-46 ("View from the Bench" by Hon. Fern Fisher- Brandveen).

59. N.Y.L.J., Jan. 1, 2001, at 30, col. 5.

60. 87 Misc. 2d 205, 207-09, 384 N.Y.S.2d 678, 679-80 (Dist. Ct, Suffolk Co., 1976).

61. 177 Misc. 2d at 527, 676 N.Y.S.2d at 898.

62. 176 Misc 2d at 790, 673 N.Y.S.2d at 849.

63. 56 Misc. 2d 963, 964, 290 N.Y.S.2d 857, 858 (Dist. Ct., Nassau Co., 1968).

64. 87 Misc. 2d at 207-09, 384 N.Y.S.2d at 679-80.

65. 178 Misc. 2d at 335, 679 N.Y.S.2d 263.

66. N.Y.L.J., Dec 15, 1999, at 30, col. 1. The post-motion *142 South Realty Corp. v. Maldonado* opinion, discussing that HPD's chief information officer testified, is unpublished. *See* 69381/99, Aug. 28, 2000 (Housing Pt., Kings County) (Chin, J.). The information officer was unable to say whether HRA/DSS accessed HPD's reports, but that is irrelevant because, as explained above, SSL § 143-b(5)(c) requires, at most, that HPD report violations to HRA/DSS, not that a tenant prove that HRA/DSS had actual notice of a violation.

67. N.Y.L.J., Sept. 15, 1999, at 31, col. 2.

68. *Cannova v. Christ*, 110040/98, July 8, 1999 (Housing Pt., Kings County) (Wendt, J.).

69. 77577/00, Mar. 9, 2001 (Housing Pt., Kings County) (Thomas, J.) (on reconsideration).

70. Prince, *supra* note 76, at § 2-201, at 29.

71. *See, e.g., Rex Paving Corp. v. White*, 139 A.D.2d 176, 183 n.2, 531 N.Y.S.2d 831, 836 n. 2 (3d Dep't 1988) (taking judicial notice of letter of public record from Governor to state departments to interpret facts) (citing *Hunter v. New York, Ont. & W. R.R. Co.*, 116 N.Y. 615, 621-22, 23 N.E. 9, 10-11 (1889)).

72. *See, e.g., Costiara v. Griffen*, 66290/00, Oct. 16, 2000 (Housing Pt., Queens County) (Badillo, J.); *Crystal Apts. Group v. Wright*, 73126/98, Mar. 16, 1999 (Housing Pt., Queens County) (Brown, J.) (amplifying on *Crystal Apts. Group v. Hubbard* and not including language that HPD may not have provided notice to HRA/DSS about a particular violation); *Crystal Apts. Group v. Price*, 65987/98, Nov. 13, 1998 (Housing Pt., Queens County) (Katz, J.) (rejecting as "spurious" petitioner's argument that the court should reject the HPD-HRA-Administrative Judge letters as hearsay); *Crystal Apts. Group v. Gil*, 76420/98, Nov. 5, 1998 (Housing Pt., Queens County) (Grayshaw, J.).

73. *See City of New York v. Cordero*, N.Y.L.J., Apr. 14, 1999, at 29, col. 4 (Housing Pt., Kings Co.), and City *of New York v. Rodriguez*, 117 Misc. 2d 986, 978-88, 461 N.Y.S.2d 149, 151 (App. T. 1st Dep't 1983) (per curiam) (comparing itself to *Salzman v. Brown*, 67 Misc. 2d 101, 324 N.Y.S.2d 358 (Civ. Ct., Kings Co., 1971), which found that Spiegel defense may not be raised against Art. 7A administrator).

74. *Ten West 28th St. Realty Corp. v. Moerdler*, 52 Misc. 2d 109. 110, 275 N.Y.S.2d 145-46 (Sup. Ct., N.Y. Co., 1966). ◆