TRYING AND WINNING

a Rent Increase Case

by Michael Mirne

MICHALE MIRNE *is a solo practitioner in Ocean Township. He is the co-chair of Monmouth County's Special Civil Part Committee, and his office represents landlords and property managers in eviction actions throughout New Jersey. He regularly teaches the New Jersey State Bar Association's courses on landlord/tenant law, and he has authored numerous articles on that subject.*

New Jersey's landlords are faced with the difficult challenge of managing constantly increasing operating expenses, including real estate taxes, insurance, utilities and replacements and labor. In order to compensate for these escalating costs, landlords must periodically request rent increases from their tenants. While rent increases are a necessary part of doing business as a landlord, requests for increases are often met with resistance from tenants, who either cannot afford to pay a rent increase or object to the amount of the increase, based on the tenant's own opinion regarding how much of an increase would be reasonable.

Alternatively, some tenants in rent increase trials have argued that the requests for rent increases are really just pretexts by their landlords to remove them without a valid cause. To fully understand this argument, one needs to consider New Jersey's Anti-Eviction Act, which was codified in 1974 for the stated purpose of protecting tenants against "unfortunate attempts [by landlords] to displace tenants employing pretexts."[1] Consequently, in the matter of *447 Associates. V. Carmen Miranda,*[2] the court concluded that the act was "designed to limit the eviction of tenants to `reasonable grounds' and to provide for `suitable notice' of tenants in the event of an eviction proceeding."[3]

Accordingly, the vast majority of residential tenants[4] in New Jersey are protected by the act, which sets forth, in part, that "no lessee or tenant may be removed…from any house, building, mobile home or land in a mobile home park or tenement leased for residential purposes…except upon establishment of one of the following grounds as good cause…" The act then sets forth a list of 18 specific causes for eviction.[5]

For purposes of the topic of rent increases, this article will focus only on subpart (f) of the act,[6] which provides for the filing of an eviction in cases where the tenant "has failed pay rent after a valid notice to quit and notice of increase of said rent, provided the increase in rent is *not unconscionable* [emphasis added] and complies with any and all other laws or municipal ordinances governing rent increases." Because this ground for eviction is one of the few causes under the act that does not require fault on the part of the tenant, it is conceivable that some landlords will wrongfully attempt to use rent increases as a ploy to remove an innocent tenant who would be otherwise protected by the act. A full analysis of this argument will follow later in this article.

Defining Unconscionable Rent Increase

Since the act does not specifically define the term 'not unconscionable,' clarification is needed from case law. In the matter of *Fromet Properties, Inc. v. Beul,*[7] the landlord, Fromet Properties, Inc., was seeking to increase the rent for 16 mobile home tenants. The tenants objected to the proposed rent increase, arguing that it was unconscionable under N.J.S.A. 2A:18-61.1(f) and retaliatory under N.J.S.A. 2A:42-10.12.

In this matter, the plaintiff provided written notices of rent increase to each of its tenants, increasing the rent for each tenant from $195 per month to $250 per month. At the time of trial in this matter, the trial judge, relying, in part, on the matter of *Calhabeu v. Rivera,*[8] concluded the defendants bore the burden of proving their defense of "unconscionability."[9]

However, on appeal, the court disagreed with the *Calhabeu* decision, citing the matter of *Hill Manor Apartments v. Brome,*[10] which noted that since landlord-tenant proceedings do not typically permit discovery, the landlord is in a better position to know the expenses of the building and other factors relating to the rent increase. Relying also upon the plain language of the act, which clearly places the burden of proof on the landlord, the *Hill Manor Apartments* court furthermore concluded that since it is the landlord who has brought the action seeking relief before the court, the landlord has the burden of proving each element of the cause of action.[11]

Next, the *Fromet Properties* court[12] looked at the matter of *Edgemere at Somerset v. Johnson,*[13] which involved a large rent increase. The *Edgemere at Somerset* court stated, "[u]nconscionableness… has been defined in terms of actions which would not be acceptable to any fair and honest man, or conduct which is monstrously harsh and shocking to the conscience."[14] The *Edgemere at Somerset* court further elaborated:

> In the context of such definitions and the general knowledge of the court as to prevailing rents in the area of plaintiff's project, we cannot say that the rent increases…are unconscionable….Although the percentage of the increase is large, the determinative factors are whether the resulting rent is so great as to shock the conscience of a reasonable person and was effected for the purpose of compelling the tenant to vacate.[15]

Relying in part on the *Edgemere at Somerset* decision, the *Fromet Properties* court concluded that the court should consider the following factors when determining whether a rent increase is unconscionable:

> (1) the size of the increase in rent; (2) the landlord's expenses and profitability; (3) how the existing and proposed rents compare to those charged at other similar rental properties in the area; (4) the relative bargaining position of the parties; and (5) based on the judge's general knowledge, whether the rent increase would 'shock the conscience of a reasonable person.'[16]

Proving the Rent Increase is Not Retaliatory

In addition to an analysis as to whether the rent increase being sought was unconscionable, the *Fromet Properties* court also needed to address the defendant's allegation that the rent increase being sought was retaliatory within the meaning of N.J.S.A. 2A:42-10.10, which sets forth:

> No landlord of premises or units to which this act is applicable shall serve a notice to quit upon any tenant or institute any action against a tenant to recover possession of premises, whether by summary dispossess proceedings, civil action for the

> possession of land, or otherwise: (a) As a reprisal for the tenant's efforts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey or its governmental subdivisions, or of the United States; or (b) As a reprisal for the tenant's good faith complaint to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code or ordinance, or State law or regulation which has as its objective the regulation of premises used for dwelling purposes; or (c) As a reprisal for the tenant's being an organizer of, a member of, or involved in any activities of, any lawful organization; or (d) On account of the tenant's failure or refusal to comply with the terms of the tenancy as altered by the landlord, if the landlord shall have altered substantially the terms of the tenancy as a reprisal for any actions of the tenant set forth in subsection a, b, and c of section 1 of this act. Substantial alteration shall include the refusal to renew a lease or to continue a tenancy of the tenant without cause.[17]

Under N.J.S.A. 2A:42-10.12, a presumption of a retaliatory eviction arises when the landlord serves upon the tenant a "Notice to Quit…or any substantial alteration of the terms of the tenancy without cause after…[t]he tenant attempts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey, or its governmental subdivisions."[18] With regard to the inquiry as to whether the rent increases being sought were retaliatory, however, the court in *Fromet Properties* offered little analysis, noting only that the rent increases sought in that matter could not be considered retaliatory because it was clear the landlord's request for the rent increases predated the complaints from the tenants.[19]

As a practical matter, since each claim of retaliatory eviction is unique to the facts alleged, landlords should become familiar with the four factors set forth in N.J.S.A. 2A:42-10.10[20] and make sure they can adequately prove that each of these factors can be answered in the negative. Additionally, in advance of trial, attorneys should be aware that landlords sometimes want to discuss ancillary issues, which have no relation to the reason why a rent increase should be sought. Accordingly, in order to prevent the appearance that the rent increase is being sought for any reason other than a purely financial one, attorneys for landlords should caution their clients to avoid any discussion or inadvertent mention of these issues during a rent increase trial.

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Procedural Requirements

N.J.S.A. 2A:18-61.2, which sets forth the timing and manner of service for notices to quit, reads, in part:

> No judgment of possession shall be entered for any premises covered by section 2 of this act, except in the nonpayment of rent under subsection a. or f. of section 2, unless the landlord has made written demand and given written notice for delivery of possession of the premises.

Notwithstanding the fact that rent increase matters are seemingly excepted from the notice requirements of the act, the matter of *Prospect Point Gardens, Inc. v. Timoshenko*[21] makes it clear that in all rent increase matters, the landlord must first serve upon the tenant a notice to quit, which must "terminate" the tenancy while also offering the tenant a "new tenancy" at the increased rent.[22] While the recommended wording of the notice of rent increase may be confusing to both landlords and tenants, attorneys who represent landlords should caution their clients to use the proper format for their rent increase notices in order to ensure they will be enforceable. Furthermore, since the notice of rent increase is akin to a notice to quit, it is essential to serve the notice of rent increase in the same manner set forth in N.J.S.A. 2A:18-61.2, which requires service by hand delivery or by certified mail.

Evidence Supporting a Rent Increase

Rent increase cases are qualitatively different than most other landlord/tenant matters since they do not involve facts that can be easily proven. Rather, they are exceedingly dependent on the judge's opinion of what is considered reasonable. Therefore, landlords who come to court with a rent increase case must be extremely well prepared to convince the judge that the increase being sought is not unreasonable. The most ideal scenario for a landlord exists in cases where the subject rental is part of a building or complex with other units that are substantially similar. In these cases, fair market rent can be easily established by showing the court a rent roll of the similar units within the complex.

However, in cases where the subject rental is a stand-alone unit, the proofs can be much more difficult. In these cases, the landlord should be prepared with listings and photographs of comparable rental units (*i.e.*, dwellings of similar size and amenities, and in similar neighborhoods). Litigants and their attorneys should also remember to review the listings in advance of trial to make sure the rent amounts for the comparable properties being presented include the same utilities as the subject property. Furthermore, the listings presented should only include units that have already been rented. Commercial listing services refer to these as 'closed listings.' Units that are still available for rent are not persuasive, because of the uncertainty that they will actually rent for the price being sought. In cases where the rent increase being sought is substantial, it may be worthwhile for the landlord to retain an expert witness to testify. These expert witnesses may include real estate appraisers or real

estate brokers with sufficient knowledge of the rental market in which the subject property is located.

The most difficult rent increase case occurs when a landlord purchases an entire building or complex with below-market rents and then seeks to increase the rent amounts for all or most of the tenants. In these cases, since the landlord cannot rely upon rents within the building to establish fair market rent, the most prudent strategy may be to require the landlord to first increase the rents of a few units as they become vacant, thus establishing a new baseline for rents. Then, once a few tenants have signed leases for the increased rental rates, the landlord will have enough evidence of fair market rent to begin increasing the rents for the remainder of the tenants.

In all cases, the landlord should be prepared with other documentation to support a rent increase, including income and expenses of the property during the present year as well as prior years. While increased expenses are not dispositive as to whether a rent increase is reasonable, they are a good secondary argument, especially in cases where the fair market rent argument is less persuasive.

How Habitability Arguments May Affect a Rent Increase Case

Landlords should also take note of habitability concerns that might be raised by a tenant during a rent increase trial. The significance of habitability arguments is that they may tend to create a doubt as to whether the subject rental is really equivalent to the other 'comparable' rentals being offered as evidence by the landlord. Tenants in rent increase trials often bring photographs, depicting inferior living conditions. The tenants in these cases will then attempt to argue that the comparable listings being offered by the landlord are superior to the subject rental because comparable listings may not have the habitability problems that are affecting the subject rental. These arguments can be even more persuasive when the tenant has been living in the subject rental for several years without repairs or upgrades. Therefore, in the interest of caution, if the landlord is aware of a habitability issue affecting the subject rental, the landlord should address and correct the issue prior to the trial, if not prior to serving the notice of rent increase.

Rent Control Exceptions

Finally, note that N.J.S.A. 2A:18-61.1(f) also provides for limitations on rent increases in municipalities where rent control ordinances are in effect. Municipal rent-leveling ordinances vary in scope from a very restrictive consumer price index (CPI) limitation to less restrictive 'percentage based' limitations. In the matter of *Salem Mgmt. Co. v. Twp. of Lopatcong*,[23] the court noted that rent control ordinances should allow efficient landlords to obtain reasonable returns on their investments.[24] The matter of *Hutton Park Gardens v. Town Council of West Orange*[25] further sets forth that rent control ordinances that fail to allow the owners to realize a profit "must be deemed to intend, and will be so read, to permit property owners to apply to the local administrative agency for relief on the ground that the regulation entitles the owner to a just and reasonable rate of return."

Notwithstanding the landlord's right to seek redress with the municipal rent-leveling board for harsh and unfair rent increase restrictions, the landlord shall not, without obtaining the necessary authorization from the rent-leveling board, attempt to increase a rent amount in excess of what the municipal rent control ordinance will allow. Doing so would constitute consumer fraud.[26] Accordingly, it is essential to check with the municipality in which the property is located to ensure there is not an applicable rent-leveling ordinance before sending a rent increase notice. ⚖

Endnotes

1. N.J.S.A. 2A:18-61.1A (setting forth the legislative findings in support of the act).
2. *447 Associates v. Carmen Miranda,* 115 N.J. at 527, 559 A.2d 1362 (*citing A.P. Dev. Corp. v. Band, supra,* 113 N.J. at 492, 550 A.2d 1220 (1988).
3. Relying, in part, on the following statement attached to the act when it was presented to the Assembly:

   > At present, there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant. As a result, residential tenants frequently have been unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems. This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey. This act shall limit the eviction of tenants by landlords to reasonable grounds and provide that suitable notice shall be given to tenants when an action for eviction is instituted by the landlord.

4. Specifically excepted from the act are tenants of owner-occupied properties of two or fewer rental units and tenants in seasonal leases. *See* N.J.S.A. 2A:18-61.1.
5. N.J.S.A. 2A:18-61.1.
6. N.J.S.A. 2A:18-61.1 enumerates 18 separate causes for eviction, which are lettered "a" through "r." Unfortunately, these causes for eviction are followed by additional subparts to the act, which use some of the same letters. For purposes of this article, the term "subpart f" refers

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only to the subpart dealing with rent increases, and not the portion which is entitled "Local Ordinances Permitted."

7. *Fromet Properties, Inc. v. Beul*, 294 N.J. Super. 601 (App. Div. 1996).
8. *Calhabeu v. Rivera,* 217 N.J. Super. 552, 526 A.2d 295 (Law Div. 1987).
9. *Id.* at 559.
10. *Hill Manor Apartments v. Brome* 164 N.J. Super. 295, 395 A.2d 1307 (Essex County Dist. Ct. 1978).
11. *Fromet Properties, Id. at 610, referencing Hill Manor Apartments, Id.* at 308-10.
12. *Id.* at 613.
13. 143 N.J. Super. 222, 362 *A*.2d 1250 (Somerset County Dist. Ct. 1976).
14. *Id.* at 229.
15. *Ibid.*
16. *Fromet Properties* at 614.
17. *Id.* at 616.
18. N.J.S.A. 2A:42-10.12.
19. *Fromet Properties* at 618.
20. N.J.S.A. 2A:42-10.10 *supra.*
21. *Prospect Point Gardens, Inc. v. Timoshenko,* 293 N.J. Super. 459, 464, 681 A.2d 125 (Law Div. 1996).
22. *See Id.* (*citing Harry's Village, Inc. v. Egg Harbor Township,* 89 N.J. 576, 583, 446 A.2d 862 (1982)).
23. *Salem Mgmt. Co. v. Twp. of Lopatcong*, 387 N.J. Super. 573, 582 (App. Div. 2006).
24. *See Helmsley v. Borough of Fort Lee,* 78 N.J. 200, 210, 394 A.2d 65 (1978); *Brunetti, supra,* 68 N.J. at 589-90, 350 A.2d 19; *see also Santa Monica Beach, Ltd. v. Superior Court,* 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993 (1999).
25. *Hutton Park Gardens v. Town Council of West Orange*, 68 N.J. 543, 572 (1975).
26. *See Wozniak v. Pennella*, 373 N.J. Super. 445 (App. Div. 2004).