

## Complaining about a rent overcharge in New York City By Kenneth B. Hawco, Esq.

This article explains the three options available to rent stabilized tenants in New York City who want to complain that the rent they pay is more than the law allows under the rent regulated systems in New York City and suggests that having such complaints decided by a judge is almost always a better option for tenants instead of filing a rent overcharge complaint with the New York State Division of Housing and Community Renewal (DHCR), the state agency that processes and decides such complaints, which, it is suggested, is the least favorable option for tenants.

The law allows tenants three legal options to complain about a possible overcharge in rent. The three options are: (1) starting a lawsuit in court, either in Supreme Court (if the amount in controversy is over \$25,000.00), or in Civil Court (if the amount in controversy is under \$25,000.00); or (2) withholding rent, thereby forcing the landlord to start a non-payment proceeding in Housing Court, then raising a rent overcharge complaint as a counterclaim (suing the other party who sued you in the same lawsuit is called a counterclaim); or (3) filing a rent overcharge complaint with DHCR.

### Supreme Court or Civil Court

The option of starting a lawsuit is a good option (and possibly the best) because the rules of procedure in Supreme Court and Civil Court are much better from a tenant's perspective, than being involved in a lawsuit in Housing Court, because discovery is available in a Supreme Court and Civil Court case, but only available with permission in a Housing Court case, and hard to get in rent overcharge situations. (Discovery is the process whereby one party to a lawsuit can obtain information from another party to that lawsuit before trial.)

### Housing Court

The option of withholding rent and forcing a landlord to sue the tenant for non-payment of rent, so that the tenant can raise a rent overcharge complaint as a counterclaim, is a good option. The slight disadvantage of this option is that a tenant counterclaiming in a Housing Court case will be in a defensive posture, rather than an offensive posture, if suing in Supreme Court or Civil Court.

Most residential leases contain a provision that will allow a tenant to recover from the landlord all of the attorney's fees the tenant incurred (but not necessarily paid) in prosecuting a rent overcharge complaint in a Supreme Court or Civil Court lawsuit or winning a non-payment case in Housing Court with a successfully rent overcharge counterclaim. If a residential lease contains a provision that states that only a landlord can be reimbursed its attorney's fees if it is involved in any lawsuit with a tenant, the law in New York implies a reciprocal provision in the lease so that the tenant will be able to recover from the landlord his or her attorney's fees. In other words, if the tenant wins a lawsuit, wherein the tenant successfully raised a rent overcharge complaint, the tenant will likely have his or her attorney's fees paid for by the landlord.

### DHCR

The option of filing a rent overcharge complaint with DHCR is the less desirable option, but perhaps because of their unawareness of the pitfalls of filing a rent overcharge complaint with DHCR, it is the option tenants seem to select the most. A rent overcharge complaint filed with DHCR is less desirable because it takes a very long time to have DHCR decide a rent overcharge complaint (literally years), and in the event the tenant wins, the landlord can file an administrative appeal with DHCR for free, because the landlord does not have to put up the overcharge award amount. Also, the administrative appeal will likely take a few more years. In contrast, in a Supreme Court or Civil Court case, the case will probably be resolved in weeks or maybe months. If the landlord loses and wants to appeal, it will have to put up the judgment amount, or post a bond ?? the equivalent of the full money amount awarded to the tenant. Having to put up the full judgment amount as a condition of appealing is certainly a disincentive for a landlord to appeal.

Filing a rent overcharge complaint with DHCR seems like a good option because it can be done for free and without the assistance of a lawyer. This option, however, is actually penny wise and pound foolish, because almost every landlord uses sophisticated lawyers to respond to rent overcharge complaints and DHCR does not give unrepresented tenants any help or special guidance.

Furthermore, tenants should be aware that many tenants who at first win rent overcharge complaints at DHCR at the first level (known as the Rent Administrator level), invariably find out that they ultimately lose after the landlord files an administrative appeal with DHCR (called a Petition for Administrative Review commonly referred to as a PAR). This common result occurs because DHCR, which is a very pro?landlord government agency, strategically put pro?landlord people in the PAR units, so they can overrule the rent overcharge complaints that are decided in a tenant's favor at the Rent Administrator's level.

If a tenant loses at the PAR level, the next step in the appeal process is the tenant can challenge DHCR's unfavorable decision by bringing a lawsuit in Supreme Court called an Article 78 proceeding (which is different from the rent overcharge lawsuit that a tenant can start in Supreme Court ?? which was discussed above as one of the three options for complaining about a possible rent overcharge).

Unfortunately, an unrepresented tenant having lost at the PAR level usually seeks the help of a lawyer for the first time. By then it may be too late to salvage the case, because the Supreme Court judge can only review the evidence and arguments put before DHCR by the parties. If the tenant did not have the help of a lawyer while the rent overcharge complaint was pending before DHCR, it is likely that the record will have been inadequately developed. (All the documents and arguments put before DHCR by the parties is collectively referred to as the record.) Thus, if a lawyer is consulted too late in the case, more time and money might be spent fighting a case that well might have had merit, but because of the tenant's inexperience, the landlords experienced lawyers may have been able to turn into a loser.

Consequently, filing a complaint with DHCR is a cheap way to go, but it will take far longer than the other two options (and the tenant must pay the rent that is believed to be too high while DHCR ponders the rent overcharge complaint for years). Also, the tenant (likely inexperienced in these kinds of matters) will be up against sophisticated lawyers who know how to deal with DHCR very well, which may result in a losing decision for the tenant.

#### Conclusion

It is suggested that any tenant considering raising a rent overcharge complaint avoid the option of filing such complaint with DHCR. Instead, consult a pro?tenant lawyer, who should be able to determine the potential merits of the case and if it is determined that the case has merit, explain the advantages and disadvantages of either starting a lawsuit in Supreme Court or Civil Court, or withholding rent, so the rent overcharge issue can be raised as a counterclaim in a non?payment proceeding in Housing Court, or filing a rent overcharge complaint with DHCR. (If the lawyer you consult with quickly suggests you file your rent overcharge complaint with DHCR, perhaps that lawyer is unfamiliar with this area of the law and the tenant should seek the advice of a lawyer who has more expertise with this specialized area of the law.)

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Kenneth B. Hawco is a Tenant Attorney practicing in New York City. He may be reached at (212) 874-7717, email: [kbhawco@msn.com](mailto:kbhawco@msn.com) and web page: <http://www.kbhawco.com>