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WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

# Writs of assistance resurrected

Do we Americans have the right to privacy from our government? If you think that we do, you would be wrong. A Rochester law allows the city to search rented houses against the wishes of the occupant even where there is no suspicion of crime or wrongdoing of any sort.

Shocked? You're in good company; the founders of our great nation would be too.

By MICHAEL BURGER
Daily Record Columnist

Let's begin with three sentences of Revolutionary War-era history: In 1761, the Colonial Court of the Commonwealth of Massachusetts issued a writ of assistance to Charles Paxton, a British customs officer. The writ allowed its bearer "to enter and go into any Vaults, Cellars, Warehouse, Shops or other Places to search and see whether any Goods, Wares or Merchandise" were concealed in violation of English tax laws.

The U.S. Supreme Court has described the issuance of that writ as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country," *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

Flash-forward 250 years. Present day Rochester. On Dec. 23, 2011, an intermediate appellate court, called the Supreme Court, Appellate Division, Fourth Department, upheld two "inspection warrants" issued to City of Rochester officers that allow their bearers "to make a search of the interior and exterior" of two private homes "to ascertain whether there exist violations" of any "federal, state, county or city law, ordinance, rule or regulation relating to ... a premises located within the City," Matter of City of Rochester, www.courts.state.ny.us/reporter/3dseries/2011/2011_09367.htm

The subjects in these two cases were the people who rent and live in the targeted homes. The facts were straightforward: The City of Rochester has enacted local laws requiring "inspections" of the insides of rented homes every six years (bedrooms, bathrooms, closets, cabinets — in short, everywhere).

Rochester's law also authorized courts to issue "judicial warrants for inspections" where the tenants exercise their rights to privacy and refuse "to allow the city's inspectors to access the properties." The Fourth Department held that no further showing is required to obtain a warrant. For tenants in Rochester, refusing to allow a search without a warrant is sufficient cause for a warrant.

For the first time in the history of New York, an appellate court has held that:

• A court may issue a warrant without any showing of illegal activity, compare *People v. Hickey*, 40 N.Y.2d 761, 763 (1976) (a warrant application must "allege that an offense was committed within the jurisdictional purview of the issuing court.")

• A warrant may be issued without a description of any things to be seized, compare *Groh v. Ramirez*, 540 U.S. 551, 557-558 (2004) (a warrant that does "not describe the items to be seized at all" is "plainly invalid.")

• A municipality dissatisfied with the standards set by the Legislature for search warrants may, by local law, set new standards that make warrants easier to obtain, compare *People v. PJ Video*, 68 N.Y.2d 296, 30-307 (1986) (CPL article 690 "is the standard that should be applied to protect the rights of New York citizens.")

• Searches for "violations" of property codes are not subject to the Criminal Procedure Law because they are not "criminal investigations," but see *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 634 (2010) ("the filing of a search warrant application commences a criminal proceeding"); *Shirley v. Schulman*, 78 N.Y.2d 915, 916 (1991) ("a charge under the zoning ordinance necessarily presupposes a criminal action"); Rochester Municipal Code § 52-3 (code violations are punishable by "a fine not exceeding $500 or by imprisonment for a term not exceeding 15 days").

The Fourth Department held that Rochester's "inspection warrants" conform to "the principles enunciated in Camara v. Municipal Ct. of City & County of San Francisco (387 U.S. 523, 537-538)." At least one other court has recognized that a local law authorizing inspections of rented homes but not the homes of landowners "is not justified by reasonable legislative and administrative standards" as defined in *Camara*, *Black v. Village of Park Forest*, 20 F. Supp.2d 1218, 1227 (N.D Ill. 1998).

The Fourth Department held that Rochester's law is not preempted by New York's Criminal Procedure Law because that law contains no provisions "expressly governing administrative search warrants." That makes sense; why would a state law expressly govern a type of warrant that state law has never authorized in the first place? New York's Family Court Act doesn't expressly prohibit local curfews either, yet the Court of Appeals

*Continued ...*

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*Continued ...*

held Rochester's curfew law to be pre-empted. Labeling the warrants as "administrative" cannot and does not validate them, since "application of the preemption doctrine does not turn on semantics," *Matter of Lansdown Ent. Corp. v. NYC Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764 (1989).

The Fourth Department found "no basis for imposing a higher standard with respect to the rights in question under the New York State Constitution," citing *Sokolov v Village of Freeport*, 52 N.Y.2d 341, 348 n 2. In fact, this question was not addressed or resolved in *Sokolov. Wisoff v. City of Schenectady*, 1:07-CV-34 (NDNY 2009). The *Sokolov* case involved warrantless inspections of vacant buildings, not occupied homes, and the decision makes no mention of the New York Constitution, which historically affords greater protections to New Yorkers than does the U.S. Constitution.

For example, while the Supreme Court has approved "administrative" searches of junkyards (*New York v. Burger*, 482 U.S. 691, 698 [1987]), the New York Constitution prohibits such searches. *People v. Scott*, 79 N.Y.2d 474, 498 (1992). It's difficult to believe that the New York Constitution provides greater protection to the owners of junkyards in New York, but provides no incremental protection for private citizens in their rented homes.

Lastly, the Fourth Department held that there is "a valid public policy basis" for a "statutory discrimination" between landowners and nonlandowners, without telling us what this basis might be. New York's highest court, in contrast, has forbidden "discrimination against nonlandowners" where fundamental rights are involved, *Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 420 (1967).

The Fourth Amendment often gets a bad rap. Its terms sometimes result in "letting guilty and possibly dangerous defendants go free" under the exclusionary rule, *Herring v. United States*, 129 S. Ct. 695, 701 (2009). Under the Fourth Department's ruling, that will be the amendment's only effect: It will continue to impede the police in the investigation of crime, but those not even suspected of wrongdoing may be searched at the whim of any city council or town or village board.

In a recent *Daily Record* article, a city attorney admitted that Rochester is "the first city in New York to adopt inspection warrant legislation". It won't be the last. The Town of Huron has already proposed a local law that is substantially identical to Rochester's, but is not limited to only rented homes. If this decision stands, beware: inspectors will soon be coming to your home with an "inspection warrant".

These "inspection warrants" allow the government to enter your home multiple times for up to 45 days. They allow photographing and videotaping, and all information gathered will be available to the public. The danger of public access to traditionally private information in the digital age counsels extreme caution. (Want to know where someone's 12 year-old daughter sleeps? Or which doors or windows are the best points of entry?)

Under this ruling, hardened criminals will have the right to keep the government out of their dwellings absent probable cause to believe that proof of an offense will be found, but innocent tenants will not.

For 220 years, New Yorkers have enjoyed a broad "right to be let alone" by their government. But under the Fourth Department's decision, we will have only a right to demand a rubber-stamped warrant. We no longer have any right not to be searched.

New York's highest court, the Court of Appeals, has described administrative searches as "the 20th-century equivalent of colonial writs of assistance," *People v. Scott*, 79 N.Y.2d 474, 497-98 (1992). Writs of assistance were general warrants issued without particularized suspicion of any offense.

Ending the 18th century writs required a Revolutionary War. Let us hope that the Court of Appeals will reverse this decision, proving the wisdom of the American Revolution and our way of life. In the meantime, don't rent a home in the City of Rochester.

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