Settlement Tips from Experienced NYC Housing Court Judges

Hon. Gary Marton, "Six Thoughts on Settling Cases"

- **Start without preconceptions:** Each case must be approached on its own terms. Yes, most cases and most settlements fall into familiar patterns, but nonetheless with each case, it is essential to take the time to start at the beginning without preconception as to how it should turn out.
- **Should this case settle?**: Always keep in mind that not every case should settle. The judge should be sizing up the case regularly, frequently asking himself/herself: should the case settle or should it be tried? Some cases shouldn't settle.
    - Sometimes there's an important principle that needs to addressed - this is especially so when one or more of the parties are institutional litigants.
    - Sometimes the parties' positions are reasonable but nonetheless just too far apart, either in terms of how they conceive of the case or in terms of what they will accept.
    - And of course, sometimes one side (or more) is not negotiating in good faith.
    - As a corollary: **if it seems that the parties want to settle, keep them talking! Keep them talking to you and/or to each other**.
- **Consider Alternatives to Settlement -Advantages and Disadvantages of Trial:** if one or more of the parties don't want to settle, then it is useful, especially with pro se litigants, to ask them repeatedly to consider the alternative and to ask themselves:
    - If there is a trial, what is the result likely to be?
    - Will that result be better than what they can achieve with a settlement? Doing this, I find, often makes litigants realize that they may get a very bad result if the case is tried.
    - It may be useful to point out that what can be accomplished with a stipulation may not be available even with a "win" at trial.
- **Team up with Court Attorney**: judges should use their court attorneys. They may be able to play something akin to "good cop/bad cop" to settle the case. A judge may see things that the court attorney hasn't and vice-versa!
- **Distinguish between wants and needs:** sometimes what litigants ask for is different from what they actually want. Sometimes what litigants want is different from what they need. Sometimes litigants are unaware of these distinctions. If these distinctions may be drawn and revealed to one or more of the litigants, settlements may fall into place.
- **Encourage mini-agreements and believe in the process**: a settlement need not be all-encompassing and take place all at once. The settlement process may be dynamic, i.e., if the parties can agree on part of the case now, the rest may fall into place later, either later that day or perhaps on an adjourned date. Get the parties to agree on something!

Hon. David Harris

- **Reframe to empower parties to take control**: In dealing with unrepresented litigants, I have found that reframing the way parties think about trial and settlement has been very useful. I characterize trial as failure – failure to communicate and negotiate, and as a surrender of decision-making power to a third party, and settlement as the maintenance of control over the outcome.
- **Focus parties on best case and worst-case scenarios:** When parties are on the verge of trial, I find laying out the best and worst-cases scenarios for them and asking them to honestly assess their responses to the worst-case scenario.
- **Keep pressure on parties to proceed:** whether it's declining to further adjourn a proceeding, or marking it final against one or against both sides, proceed so that pressure towards trial is steady.
- **Separate positions from underlying interests**: look past what a party is saying to get at **why** it's being said. Parties take positions to address concerns and to advance agendas. When parties are pushing back and forth over the same point, there can often be different ways to address the same concern, approaches the parties haven't considered.
- **Narrow the focus:** sometimes the most effective way to settle what is before me is to narrow the focus to the motion or order to show cause before me, rather than to attempt to have the parties reach a global settlement. Keeping the focus narrow sometimes is the only way for the parties to reach an accord on anything.
- **Consider if global resolution is required:** sometimes the only way to resolve that narrow issue is in the context of a global resolution. Knowing whether to broaden or narrow the scope of discussion is usually fairly obvious in the context in which you're having the discussion.

Hon. Bryant Tovar

Tips for Two-Attorney Cases

- **Focus on goals**: for two attorney cases (specifically motions), I ask what would the outcome be if the relief sought was granted? Does it help them reach their goal? If its dismissed on a technicality how does that resolve the underlying issue?
- **Highlight points of agreement**: try to get both sides to acknowledge what they agree on, try to isolate what issues are in dispute.
- **Assess the evidence:** I discuss what evidence both sides have and the weight of that evidence. Often attorneys believe their evidence holds more weight than it actually does.
- **Focus attorneys on settlement:** allow both sides to argue their points and then require both sides to make a settlement offer. Saying " even if you believe it is a ridiculous offer make it" I then challenge both sides to " reduce the gap."

- **Praise the attorneys for their efforts and creativity:** positively praising both attorneys for their creativity.
- **Ask hostile parties to take a break:** I often will ask two hostile parties to go outside to take a seat or go outside and come back when you're ready to talk. I find this works best with attorney who are hostile with each other and making personal attacks. I find that when they have cooled off we can have meaningful conversations.

Tips for Pro Se Litigants:

- **Stress the uncertainty of trials**: no one knows what a judge will believe when its someone's word over another.

<u>Vanessa Fang, Esq.</u> (Court Attorney)

Please see below for suggestions based on my observations during settlement conferences concerning holdover proceedings involving non-primary residence, rent overcharge, and sublet claims:

- **Recognize:** each case is different
- **Listen:** hear each parties' positions to ascertain the strength of their arguments, and to assess the proof they can provide before determining how to further proceed with the conference.
- **Assess:** facilitate assessment of the strengths and weaknesses of each case
- **Present options:** offer various alternatives to settle the case to allow them to make an informed decision as to whether or not to settle or go to trial.
- **Look out for opportunities for broader settlements:** Parties may agree to withdraw any other related pending actions before other courts (typically Supreme Court) and city agencies, including DHCR for rent overcharge complaints and renewal or succession lease offerings. Parties may also agree to withdraw or waive their rights to seek attorney's fees from opposing parties or otherwise agree to a lesser sum for damages and/or fees.

Non-primary Residence

- **Provide documents:** encourage the potential successor-in-interest to provide appropriate documents as early as possible to the landlord to establish his or her succession rights.
- **Encourage acknowledgments:** once those documents are provided to the landlord for review, encouraging landlords to acknowledge a family member's succession rights soon thereafter
- **Move forward and next steps:** where appropriate, allows both parties to move forward with the new tenancy and the signing of the leases.

- **Understand and highlight consequences and options:** Without a renewal lease in effect, landlords cannot collect rent (but can seek use and occupancy) from the occupant seeking succession. However, it may be helpful in persuading the landlord to keep the occupant as a tenant if the tenant demonstrates an ability to pay the ongoing use and occupancy and continues to voluntarily pay the use and occupancy during the pendency of the proceeding. Nonetheless, at times, the potential successor cannot afford to take over the apartment on their own without financial assistance (ie: public assistance). In these situations, a lease in that person's name is required to obtain financial assistance. A landlord's withholding of that succession lease prevents the landlord from receiving rent/use and occupancy because the occupant has no other means to make rental payments. This lack of payment may help in convincing the landlord to accept the successor so that the rent can be paid. A successor-in-interest can also offer to pay the prior tenant's arrears which they are not legally obligated to do (since there is no privity of contract to pay rent) to help settle a case as well and start the tenancy with a clean slate.

  On the other hand, if the potential successor is eligible to succeed to the apartment but does not have the financial ability to pay the rent and is not eligible for any financial assistance, sometimes it may be a better option for occupant to move out of the apartment. In consideration, a request can be made to the landlord to waive a considerable sum of arrears and/or ongoing use and occupancy for a timely vacatur.

Rent Overcharge

Most times, landlords are resistant to providing documents to a tenant which may aid the tenant in proving any potential rent overcharge. Landlords also find it burdensome to provide documents, let alone documents spanning back beyond four years of the date of the rent overcharge complaint. Considering all the exceptions to the four-year rule may give tenants additional options to explore other legal means to obtain disclosure from the landlord.

One settlement discussion on a potential rent overcharge claim involved the landlord agreeing to charge the tenant a preferential rent for the duration of that tenant's occupancy at a rate that increased the preferential rent according the percentages set by the Rent Guidelines Board each year. To satisfy the landlord, the legal regulated rent would remain at an agreed upon amount or at the amount the landlord believed to be the correct legal regulated rent. This legal regulated rent could increase accordingly, and the landlord will continue to properly register the rents with DHCR.

In order to convince the landlord to provide discovery documents for a rent overcharge complaint, the tenant can agree to not seek treble damages or agree to a lesser damages amount in the event there is a rent overcharge finding. The tenant can still recoup any overcharge amounts already paid to the landlord.

If the landlord refuses to provide documents or is unable to provide documents, the parties can agree that the landlord has submitted all the documents in its possession and is precluded from submitting any other documents at trial.

Sublet

Stipulations settling sublet proceedings often include a probationary period in which the landlord can conduct regular inspections of the apartment to ensure that the tenant is continuing to reside at the apartment. The tenant can also attest that certain individuals currently reside at the apartment and that only those individuals will reside at the apartment. If there is an allegation of a breach of this probation, the landlord can restore the proceeding for a hearing to determine if there was a breach and seek a judgment of possession.